

<b>STATE OF COLORADO</b> <b>OFFICE OF ADMINISTRATIVE COURTS</b> 1525 Sherman Street, 4 <sup>th</sup> Floor, Denver, Colorado 80203	<p style="text-align: center;">▲ <b>COURT USE ONLY</b> ▲</p>
<p><b>[FATHER] AND [MOTHER],</b> Complainants,</p> <p>vs.</p> <p><b>DOUGLAS COUNTY SCHOOL DISTRICT RE-1,</b> Respondent.</p>	
<b>DECISION</b>	

The evidentiary hearing in this matter was convened before the undersigned Administrative Law Judge (“ALJ”) on March 28, 2022, at the offices of the Court. Complainants [Father] and [Mother] (“Complainants”) appeared through their counsel of record, Ms. Claire Poundstone and Ms. Miriam Kerler, on behalf of their child, the Student. Respondent Douglas County School District RE-1 (the “District”) appeared through its counsel, Mr. Robert Montgomery. The following documentary exhibits were offered and admitted into evidence: Hearing Exhibits No. 1 through No. 3,<sup>1</sup> No. 7, No. 25,<sup>2</sup> No. 26, No. 33, No. 34, No. 38, No. 40, No. 42 through No. 51, No. 53, and No. 57 through No. 59 from Complainants’ set, and A, B, H, P, S, T, X, TT, UU, CCC, DDD, HHH, MMM, NNN, and TTT from the District’s set.<sup>3</sup> The hearing was electronically recorded.

### ISSUE PRESENTED

As confirmed in a Prehearing Procedural Order issued in this matter on December 20, 2021, the substantive issues framed by the Amended Due Process Complaint herein are as follows: Whether the District violated the rights of the Student pursuant to the federal Individuals with Disabilities Education Act and/or the Colorado Exceptional Children’s Education Act by failing to evaluate whether the Student met the criteria to be identified as a child with a disability (“Child Find”); assuming the Student did qualify for special education and related services, whether the District failed to develop and implement an individualized

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1 As to Hearing Exhibit No. 1, only the following pages were admitted: 1 through 20, 25 through 31, 34, 37, 39 through 46, 49 through 51, 55 through 61, 65 through 68, 71 through 73, 86 through 99, 115 through 170, 173 through 175, 180 through 305, and 311 through 397.

2 Pages 3 and 4, only.

3 No. 60 was offered and rejected.

education program (“IEP”) for the Student; whether the Student was materially deprived of a free appropriate public education; whether the District properly followed procedures for disciplining the Student if [Student] was, in fact, a child with a disability; and whether the District committed any other procedural violations that may or may not have caused substantive educational harm.<sup>4</sup>

## FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ finds the following:

1. At the time of the events relevant to the issues here, the Student resided with Complainants in the [City], Colorado, area. Their residence was outside of the jurisdictional boundaries of the District.
2. The Student attended elementary schools in the Jefferson County District, with the exception of second grade when [Student] attended a Montessori program. For the 2016-17 academic year, at the beginning of fifth grade, the Student was permitted to enroll in [School] within the Respondent District. [Student] continued to attend [School] through sixth, seventh, and most of eighth grade.
3. Various witnesses, including the Student’s parents, District personnel and others all described the Student as a person who was intelligent, kind, politically engaged, and highly interested in computer technology. The Student enjoyed online gaming and social interactions. During middle school, [Mother] established that the Student wanted to do well academically, but found organization and completion of tasks to be challenging. [Student] liked to form friendships, but occasionally perseverated on a topic beyond the interest boundaries of [Student’s] peers. [Mother] stated that [Student] was not good at reading the nuances of social situations, which made it difficult to keep friends. [Father] noted that the Student did not really have friends at [School] through seventh grade, but did have some friends during eighth grade that shared interest in online gaming and conversations.
4. The Student demonstrated an ability to excel in standardized testing, performing above the 90<sup>th</sup> percentile of [Student’s] peers. [Student’s] grades however were described as a “roller coaster.” Without intervention by [Student’s] parents, [Student] would fall behind and grades would suffer. The Student considered much of [School] curriculum to be “busy work.” Only when Complainants were on top of what assignments were due and keeping the Student on task for hours at home could [Student] complete work and be rewarded by higher grades. This was less of an issue in classes the Student preferred such as computer technology and Social Studies. The Student did not have trouble understanding or comprehending the school curriculum according to [Father].
5. The Student participated in a gifted and talented program at [School] during fifth

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grade. However, [Student] struggled to organize school materials, often stuffing them in the bottom of [Student's] backpack. Upon transitioning to sixth grade, [Mother] communicated with [School Counselor], a counselor at [School], for assistance. [School Counselor] invited the Student to participate in a voluntary [ ] group with other kids. [Father] established that the Student had a hard time understanding [Student's] body signals; [Student] could become emotionally dysregulated to the point where [School Counselor] asked [Father] to come pick the Student up early from school. Those incidents happened prior to eighth grade and [Father] confirmed that they did not amount to discipline problems for which the Student was "in trouble."

6. The Student earned grades ranging from B to F during sixth grade. Complainants and staff at [School] corresponded frequently about problems with grades and organization. These problems continued into seventh grade and led the Student to be moved from an advanced Social Studies class to a standard curriculum. [School] staff also recommended that the Student repeat Algebra I.

7. In February, 2019, the Student's seventh grade team opted to implement "RTI" measures as a way to mitigate issues they noticed with completing assignments on time. Hearing Exhibit No. 25 at page 4. The acronym refers to "response to intervention" which is understood to mean research-based strategies that can be attempted in a general education setting in order to improve student performance. [Special Education Coordinator], a special education and Section 504 coordinator for the District, established that the same program of strategies can be referred to as MTSS, or multi-tier system of supports.

8. [Mother] did not notice any marked improvement in the Student's performance following the attempt at RTI. According to [Special Education Coordinator], although RTI or MTSS are not prerequisites for special education eligibility, a failure to improve in response to implementation of the strategies will often lead to a special education evaluation.

9. On [date], 2019, [an incident occurred]. The Student was at [School] that day and was in a room across the hall from where the [incident] occurred. The Student took time off from school, participated in therapy after the incident, and [Mother] established that the family made sure that [Student] was not left alone. The Student seemed to not want to address the emotional effects of the [incident] directly, but began to demonstrate anxiety over the Summer of 2019. Complainants also established that the Student had sensory issues, particularly around bad smells. As a result, [Student] tended to avoid bowel movements which, in turn, led to health concerns over holding stool inside.

10. In June or July, 2019, Complainants contacted an organization in Westminster, Colorado, focused on gifted children because of [Student's] struggles at school. Based on reports by the parents over the telephone, the organization advised that multiple possible disabilities could be affecting the Student's performance and recommended that Complainants consult with another resource, Able Kids Foundation. In August, 2019, Able Kids performed assessments that led to diagnosis of a central auditory processing disorder,

discovery of issues with vision, and indications of possible autism spectrum disorder (“ASD”). Hearing Exhibit No. 1 at page 3. With regard to the auditory processing disorder, Able Kids described the Student’s difficulty to process sounds in a way that caused background noise to be experienced as garble. On August 21, 2019, Able Kids provided Complainants with a list of recommendations to mitigate the effects of the auditory processing disorder at school. *Id* at pages 4 to 5. These included ear filters, preferential placement away from classroom doors, presentation of information using visual means, checks for understanding, and taking exams in a quiet environment. Complainants passed these recommendations on to [School] on August 30, 2019. Hearing Exhibit No. 1 at page 1.

11. [Mother] described the Student’s academic struggles at the time. The Student was having a lot of difficulty with simply going to school. Early in the 2019-20 year, [School Counselor] met with the Student in her office before school on approximately three occasions, and then would check in with [Student] informally on campus during the day. [School Counselor] described the informal check as eliciting a “thumbs up or down” from the Student to see how [Student] was doing. She believed that the Student was doing well with school once [Student] arrived as a result of these interactions but also said that the Student knew [Student] could meet privately with her any time [Student] felt it was necessary. [School Counselor] acknowledged that the Student did not have many social relationships and found it hard to make connections with others. She noted that the Student’s affect could be flat at times, but [Student] also laughed and smiled at school and commonly maintained consistent eye contact.

12. In response to the Able Kids information, [School] proposed an evaluation of the Student for purposes of determining eligibility for Section 504 accommodations.<sup>5</sup> [School Counselor] coordinated the school’s initial response. She scheduled a meeting with Complainants to gain information and obtain consent to evaluate the Student; she scheduled a second meeting with the Student’s teachers to discuss the issue on October 3, 2019. [Mother] tried to attend the meeting, but was stuck in traffic. Nor was the Student included in the meeting.

13. On October 3, 2019, prior to the school day, [School] staff discussed aspects of potential disability and need for accommodations, but concluded the meeting before [Mother] could arrive. [School Counselor] did meet with [Mother] and briefed her on the substance of the meeting with teachers. Hearing Exhibit A. Although teachers expressed concerns about the Student’s organization, project completion, and ability to follow instructions, they noted that grades had improved and that [School Counselor]’s assistance was less necessary. Hearing Exhibit No. 1 at pages 27 and 28. The school personnel unanimously concluded that the Student did not experience significant enough effects of

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<sup>5</sup> Section 504 of the Rehabilitation Act of 1973 provides that no “qualified person with a disability shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance.” Hearing Exhibit No. 1 at page 17.

central auditory processing disorder to warrant Section 504 interventions. Written notice of the decision was given to Complainants.

14. [Mother] testified that she was surprised by the result of the October meeting and did not believe that the [School] staff considered the diagnosis of auditory processing disorder. Rather, she believed that the teachers based their assessment on recent grades, which had improved slightly for the Student. Even so, [Mother] communicated to the school that she felt the Student was on the “right path” at that point. Hearing Exhibit No. 1 at page 25. [Mother] understood from [School Counselor] that the issue of potential Section 504 eligibility would be revisited by the school in November after additional assessment of the Student. In her testimony, [School Counselor] confirmed that she had communicated as much to [Mother]. Hearing Exhibit No. 1 at page 30. However, the school performed no additional assessments and did not initiate contact with Complainants regarding the Section 504 issue at any time prior to the Spring of 2020.

15. The Student’s academic performance in eighth grade declined after October, 2019. [Student] was failing [Student’s] French language class and Complainants were emailing other teachers about struggles with classwork. The Student expressed to [Student’s] parents and to [School Counselor] that [Student] did not want to go to school and wanted to be removed. Hearing Exhibit No. 40 at page 48. Socially, [Mother] testified that the Student had few friends that were more like acquaintances. [Student] did not participate in out-of-school activities with other [School] kids, but did join a club at school and went to a school dance in March, 2020.

16. In November, 2019, [School Counselor] became aware that the Student would undergo surgery in December to address a problem with [Student’s] foot. She assisted with coordinating ways in which the Student would be able to keep up with assignments while recovering at home. These efforts triggered multiple conversations between [School Counselor] and Complainants. Complainants did not raise any issue with disability determinations related to Section 504 or special education during those interactions.

17. Prior to the start of the Spring, 2020, semester, [Father] reached out to [School] seeking ideas that would help the Student get off to a better start. [School Counselor] responded that she would continue to be involved with the Student, but offered no detailed plan. [School Counselor] also identified a list of applications that might help with problems associated with ADD, though she did not say that she suspected the Student had ADD.

18. [Mother] established that the Student began therapy with [Therapist] in response to comments that [Student] was depressed. [Therapist] is a licensed professional counselor in Colorado with a master’s level education. She documented that she began seeing the Student on February 26, 2020, and continued working with [Student] through June of 2021. She described the Student as being overly intelligent but having problems with communication. She felt [Student] was not as emotionally expressive as most children, and more logical than emotional. The Student seemed happy but bored by things [Student] was not interested in. [Student] had a short attention span, was disorganized and impulsive,

and strayed off task especially when subject to distractions.

19. After instituting a number of informal “screens” with the Student, [Therapist] testified that she noted indications of attention deficit disorder (“ADD”), executive functioning disorder, and anxiety in the Student. She expressed concerns regarding the effects of distractions, backpack disorganization, missing social cues, task management, and operating within time limits for assignments. [Therapist] emphasized that she is not a doctor, did not perform formal evaluations, and did not determine that the Student had any specific mental health or developmental diagnoses. She merely noted symptoms that aligned to impair the Student’s ability to function in the educational setting.

20. Additionally, [Therapist] emphasized that a child’s brain changes over time. Traumatic events like the [incident] in [ ], 2019, can also affect a child’s functioning. Such life experiences are material to consideration of ADD, anxiety, and/or depression because they can magnify the symptoms of such disorders.

21. [Social Studies Teacher] testified in her capacity as the Student’s Social Studies teacher for eighth grade. [Social Studies Teacher] also provided information for the Student’s special education evaluation discussed below. She characterized the Student as a “typical [School] kid.” She knew that [Student] was interested in computers and political issues; [Student] could be outspoken or not, depending on [Student’s] level of interest in the subject at hand. [Social Studies Teacher] stated that the Student was a nice kid, but struggled to complete work and turn it in per instructions. Socially, she noticed that the Student had a few friends; [Student] did not seek out everyone but did not seem to struggle particularly with the social aspect of school. Some of [Student’s] peers didn’t understand [Student’s] humor. Much of the classwork was done in groups. [Social Studies Teacher] stated the Student did “okay” in that setting, especially if [Student] was with other students [Student] liked. Some other students in [Student’s] group expressed concern about the Student completing [Student’s] parts of assignments.

22. [Social Studies Teacher] characterized the Student’s academic work as average to below average. [Student’s] ability to turn in work was below that of [Student’s] peers and it was often incomplete. [Student’s] writing skills were average. She believed that [Student] understood the materials and often engaged enthusiastically. [Student] paid attention well most times, but could be distracted by what was on [Student’s] computer. This was similar to other students in her class. [Social Studies Teacher] described the Student’s executive functioning as typical for an eighth grader. If she found the Student distracted or off task, [Social Studies Teacher] could give a quick redirection to remedy the situation; the Student always responded positively and got back on task. [Social Studies Teacher] established that [Student’s] work product did not seem to reflect [Student’s] understanding of concepts the Student contributed in class discussions. She felt that [Student] could do better on assignments and talked to [Student] about how to improve. The Student received a grade of “D” for the Fall semester of 2019 and a Spring semester grade of 73.81 percent.

23. [Social Studies Teacher] stated that the Student was politically aware and had no

trouble expressing [themselves] about [Student's] ideas. Sometimes when [Student] was reading aloud, [Student] would pause for a breath. [Student] was not at all self-conscious about this habit and never hesitated to volunteer to read in class. [Social Studies Teacher] could not recall any other children making any comment about the Student's speech or reading. She also could not recall any negative self-talk by the Student or other signs of depression or sadness. On cross-examination, [Social Studies Teacher] could not recall any problems with the Student's ability to regulate [Student's] emotions during eighth grade.

24. On March 4, 2020, [Mother] corresponded with the Student's Language Arts teacher, [Language Arts Teacher], by email. The Student's grade had been adversely affected by the failure to complete an important project. [Language Arts Teacher] responded that the Student would be granted additional time to turn in the project.

25. On March 10, 2020, the Student was suspended from [School] school for ten days arising out of an anonymous tip that [Student] was making jokes about [violence]. Hearing Exhibit No. 26. The school reported that other students were aware that the Student had made references online between [themselves] and circumstances of the [ ], 2019 [incident], and shared a meme of a [ ]. *Id.* However, neither party presented evidence about the specifics of what was said, how it was said, who heard any type of threat, or how any such statements did or did not represent a manifestation of any disability.

26. On March 13, 2020, [Mother] formally requested that the Student be evaluated for special education eligibility. Hearing Exhibit No. 1 at page 34. Complainants had made no other such request prior to that date. That request was received by [District Staff]. [District Staff] responded that the request would be forwarded to [Special Education Coordinator 2], the special education coordinator. [Mother] established that the school sent her a health questionnaire for the Student, and that she submitted the Able Kids report and information from [Therapist] in support of her request. Complainants provided consent for the Student to be evaluated on April 2, 2020. Hearing Exhibit No. 34.

27. [Special Education Coordinator] established the procedures followed by the District regarding a referral and evaluation for special education eligibility. Typically, the District first convenes a referral meeting to get information about the child, understand concerns, explain the special education process, discuss any prior evaluations, and obtain parental consent for a new evaluation. Next, the District moves forward with evaluation to assess all areas of concern using a comprehensive suite of instruments, historical data, and interviews. Finally, the District convenes an eligibility meeting with all members of the child's IEP Team including parents, their invitees, and District personnel such as counselors, administrators, teachers, and those who conducted aspects of the evaluation. The IEP Team members review the extent to which the subject child has a disability that adversely impacts the ability to benefit from education. If the answer is "yes" and the child would benefit from specialized instruction and services, then the child is identified as eligible. At that point the Team works to develop an IEP if the child's parents give consent. A determination that the child does not qualify for special education is communicated to the

parents in written notice.

28. [Special Education Coordinator] was advised that the Student's parents had requested evaluation. She was not involved in the disciplinary process and strove to make sure that the special education referral and evaluation followed the District's procedures on a separate and distinct path from any disciplinary measures. [Special Education Coordinator] established that March 13, 2020, was the last day students attended [School] before the Spring break recess. Remote learning triggered by COVID-19 health protocols started on March 23. The same protocols prevented the District from conducting much of the evaluation in-person and dictated that IEP Team meetings were convened via videoconference.

29. On March 26, 2020, [School] notified Complainants of the Student's suspension through March 31, 2020,<sup>6</sup> and that the District was pursuing expulsion based on the investigation of [Student's] actions. Hearing Exhibit No. 26 at page 2. On April 1, 2020, the District advised that the suspension was being extended a further ten days to April 14, 2020, and that an expulsion determination would take place. *Id* at page 4. The Student never returned to [School] school after March 10, 2020.

30. On April 10, 2020, Complainants met with representatives of the District and [School] as part of an IEP team related to the Student's potential eligibility for special education. [Mother] contributed general information about the Student's background and indications about possible disabilities connected to symptoms of central auditory processing disorder, attention deficit disorder, executive functioning disorder, and anxiety. She understood that the IEP process would take time and depend upon completion of formal assessments.

31. [Therapist] testified that she was contacted by [School Psychologist] as part of the IEP process after the Student was involved in the disciplinary incident. The two of them discussed the Student and possible Section 504 eligibility. [Therapist] recalled [School Psychologist] expressing that she ([School Psychologist]) was sure that the Student had done was alleged in the disciplinary report. In her testimony, [School Psychologist] maintained that she did not make any such judgment or statement. [School Psychologist] documented the interaction on May 14, 2020, from her point of view on page 47 of Hearing Exhibit No. 40.<sup>7</sup> The narrative does not contain any reference to the disciplinary incident. In her testimony, [School Psychologist] recalled [Therapist]'s concerns regarding executive function as well as [Therapist]'s determination that the Student had made great strides overcoming depression.

32. As the Student's disciplinary removal from [School] and the IEP process continued, [Student] continued to work on completing assignments for classes at home. The District gave the Student a certificate of completion for eighth grade. [School] staff had no

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<sup>6</sup> The spring break occurred within this period.

<sup>7</sup> The parties stipulated that Complainants executed a release of information that authorized disclosures by [Therapist] to the District as of May 11, 2020.

opportunity to observe the Student during this period.

33. [School Psychologist] testified in her capacity as a school psychologist with the District assigned to [School]. She has an Education Specialist degree and over ten years' experience at [School]. [School Psychologist] first became aware of the Student in the Spring of 2020 when she was asked to interview the Student regarding a threat assessment. She determined that the Student was not a threat and was safe to return to class. [School Psychologist] also participated in the Student's special education evaluation process which was entirely separate from the disciplinary actions.

34. [School Psychologist] established that the Student had a diagnosis of central auditory processing disorder as well as concerns in the areas of ADD and executive functioning. Complainants had also raised questions about ASD. [School Psychologist] established that District guidelines identify which assessment measures should be employed where ASD is suspected. These include interviews with the Student, parents, and teachers, in addition to instruments such as the Childhood Autism Rating Scale (CARS) and Behavior Assessment System for Children (BASC). Speech language and occupational therapy specialists also evaluate a student with possible ASD impacts. [School Psychologist] established that because autism presents as a spectrum of symptoms, the IEP team is looking for indications that the child being evaluated experiences a significant impact on education. If there is no impact from the symptoms, the child will not be eligible in the category of ASD.

35. [School Psychologist] testified that COVID protocols in the Spring of 2020 prevented in-person meetings with [School] staff or the ability to observe the Student on campus. For this reason, she solicited input from teachers about the Student's seating, abilities to attend and follow directions, and social experience throughout the eighth grade year. She felt that this information gave her an accurate idea of how the Student functioned in class. She also understood that the Student's parents had concerns regarding social/emotional issues, including depression, attention, executive functioning, and social skills. No person expressed any concern regarding the Student's cognitive abilities or intellect.

36. With regard to the social/emotional area, [School Psychologist] inquired regarding the Student's ability to initiate interactions, understand humor, understand non-verbal communication, and maintain friendships. She also explored sensory concerns and the extent to which the Student perseverated on things that fascinated [Student]. Complainants advised that the Student had one good friend at the time, as well as several acquaintances. The Student reported having friends at school and interactions on-line. The parents expressed no concerns with the Student's ability to recognize perspectives or to approach and interact with strangers. The Student understood non-verbal cues, had a good sense of humor, maintained eye contact, and was generally appropriate in social situations. These factors led [School Psychologist] to conclude that the Student did not have any real impacts in the area of social skills.

37. [School Psychologist] administered the BASC-3 on April 29, 2020. Hearing Exhibit

No. 40 at page 28. This instrument is based on reports by the Student's parents and teachers in the areas of acting out, anxiety, depression, adaptive skills, and attention. The averaged ratings in each of the composite areas were all "typical" for the Student. Any individual response that rated the Student's symptoms as "clinically significant" or "at risk" were investigated further. [School Psychologist] received a "clinically significant" response from the Student's social studies teacher in the area of atypicality, or the tendency to say things that do not make sense or appear disconnected. As no other respondent expressed concern in that area, [School Psychologist] concluded that the symptom may be an outlier affected by the Student's level of interest with the subject, teacher, or time when the class was held. [School Psychologist] established that is not unusual for children to act differently in different classes. The Student's counselor also rated the Student "clinically significant" for somatization. As the Student expressed either antipathy or apathy regarding school and attendance, [School Psychologist] did not conclude that the single report was significant. Other individual responses in the "at risk" category are noted on page 30 of Hearing Exhibit No. 40. However, the vast majority of responses are in the "typical" range, resulting in the average noted above.

38. The Student's self-reported BASC results are set forth on page 33 of Hearing Exhibit No. 40. The Student's ratings related to [Student's] attitude toward school and teachers appeared to be consistent with other interviews and fell within the "clinically significant" range. The Student also reported feeling a sense of inadequacy in that [Student] was not reaching [Student's] goals.

39. [School Psychologist] completed the Behavior Rating Inventory of Executive Function based on information provided by two of the Student's teachers. The results were typical for all three of the component indices and for the composite as well. One teacher did identify two mild concerns with organization, but the other did not. From this, [School Psychologist] concluded that the Student had the skill to be organized, but was inconsistent in demonstrating it.

40. On cross-examination, [School Psychologist] was asked about central auditory processing disorder. She confirmed that the District had an audiologist review the results from Able Kids. Hearing Exhibit 40 at page 50. That person, [Audiologist], determined that the Student's ears were not working in good synchrony to make speech intelligible, and that [Student] may have difficulty listening and understanding when background noise was present. She recommended further testing in one to two years.

41. [Learning Specialist] testified in her capacity as a learning specialist at [School]. She was aware of the Student beginning in [Student's] sixth grade year and was asked to evaluate abilities with reading, writing, and mathematics in the Spring of 2020. Although COVID protocols were in place, [Learning Specialist] agreed to conduct an in-person assessment of the Student on the Complainants' front porch. She also reviewed information related to standardized test results from prior years. As to the latter, [Learning Specialist] established that the Student had performed well in terms of percentile results, i.e. ranking [Student] among other test takers. [Student] was also achieving advanced-level

results in reading in both seventh and eighth grades. [Learning Specialist] administered the Wechsler Individual Achievement Test- Third Edition on May 6, 2020. *Id* at page 19. The Student attained average to above-average results in all areas.

42. [Occupational Therapist] testified in her capacity as an occupational therapist employed at [School]. She first became aware of the Student in March, 2020, although she looked into [Student's] history to see if anyone had expressed any concern for motor and/or sensory issues. She identified a past report had referenced the possibility of ASD, and so that became an area of inquiry for the team. Like other witnesses, [Occupational Therapist] established that COVID protocols affected her work with the Student in that she interacted with [Student] and [Student's] teachers using remote technology.

43. [Occupational Therapist] established that children with ASD often experience motor and sensory delays. She noted a mild impact in the Student which she characterized as a sensory registration greater than most people based on a profile completed on April 13, 2020. The Student was assessed in four categories as follows: low registration,<sup>8</sup> sensory seeking, sensory sensitivity, and sensory avoiding. The Student did not score in a way that [Student] was much less or much more sensitive than most of the population; [Occupational Therapist] saw no basis for determining that sensory issues could present a significant problem for [Student's] functioning in class. The Student was aware of [Student's] own issues with background noise being a possible distraction, but knew that devices like headphones could mitigate the problem.

44. [Occupational Therapist] performed informal (non-standardized) assessments of the Student's motor abilities in the area of typing, handwriting, and gross motor. As to the latter, she was aware of past foot problems that had caused an irregular gait, but the Student had had surgery and physical therapy to address the issue prior to [Occupational Therapist]'s assessment. In feedback she received from six of the Student's teachers, none identified any concern with motor ability.

45. On cross-examination, [Occupational Therapist] distinguished the issue of distractibility from sensory seeking. The former could be a product of a central auditory processing disorder, while the latter is often a characteristic of ASD.

46. [Speech Language Pathologist] testified in her capacity as a speech and language pathologist with sixteen years' experience. [Speech Language Pathologist] was employed by the District at [School] during the Student's eighth grade year and evaluated [Student] during the Spring of 2020. [Speech Language Pathologist] understood that the Student had been referred for possible identification as a child with ASD and so focused her assessments in the areas of articulation, pragmatic or social language, expressive and receptive language, and fluency. The assessments were conducted using video conferencing due to the COVID-19 "stay at home" protocols in place at the time. [Speech Language Pathologist] acknowledged that this format did not feature any substantial

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<sup>8</sup> Explained as the possibility of missing sensory information like an auditory cue.

background noise or other distractions. She described the Student as being comfortable and articulate during their video conference interactions.

47. [Speech Language Pathologist] obtained information about the Student's language skills from each of [Student's] eighth grade teachers as she was unable to observe [Student] in class. On May 4, 2020, [Speech Language Pathologist] administered the Clinical Evaluation of Language Fundamentals- 5<sup>th</sup> Edition (CELF-5) in conversation with the Student. The Student provided 24/26 correct responses related to expressive and receptive language which correlated to an age appropriate ability. The Student also rated as age appropriate in the area of comprehension. [Speech Language Pathologist] established that these results were consistent with ratings she had received from Complainants.

48. [Speech Language Pathologist] also administered the Social Responsiveness Scale-2<sup>nd</sup> Edition (SRS-2) to assess the Student's social awareness, social cognition, social motivation, social motivation, and level of restricted interests and repetitive behaviors. The SRS-2 reflected responses to a 65 item questionnaire from two of the Student's teachers and the parents. These respondents rated the Student within normal limits for all subscales other than social awareness; one teacher rated the Student as having moderate impairment and [Student's] parents rated [Student] as having mild impairment in this area. [Speech Language Pathologist] testified that these results did not necessarily indicate disability. The Student was noted to occasionally walk between other people and to not mind being out of step socially with others. [Speech Language Pathologist] established that those behaviors were not necessarily an impairment to the Student's ability to benefit from education.

49. [Speech Language Pathologist] administered the Social Language Development Test- Adolescent (SLDT-A) which assessed the Student's ability to interpret verbal and non-verbal social language, make inferences, problem solve, respond to social interaction, and interpret ironic statements. The test consisted of a discussion between the Student and [Speech Language Pathologist] of pictures and descriptions of social scenarios, as well as statements that she read to [Student] related to interpreting ironic statements. The Student scored in the average to above average ranges for all subtests indicating [Student's] ability to properly respond in social situations.

50. [Speech Language Pathologist] administered Pragmatic Language Checklists by querying three other teachers and the Student's parents.<sup>9</sup> This instrument assessed the Student's ability to use social language to communicate in class in terms of initiation, eye contact, body language, and questioning. [Speech Language Pathologist] interpreted the results to mean that the Student had the ability to demonstrate these skills, although whether the topic or teacher was non-preferred could impact the extent to which [Student] did so. In the area of language fluency, [Speech Language Pathologist] documented

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<sup>9</sup> [Speech Language Pathologist] obtained input from all five of the Student's teachers between the SRS-2 and Pragmatic Language Checklists.

stuttering and non-stuttering disfluencies in less than ten percent of opportunities while reading two separate passages. The Student occasionally hesitated and exhaled air during a word, but [Speech Language Pathologist] characterized these instances as “fleeting.” Neither the Student’s teachers nor [Student’s] parents reported that this pattern represented any problem for [Student] in the educational setting.

51. Finally, [Speech Language Pathologist] assessed the Student’s articulation and tone of voice. [Student] read a passage that featured all of the sounds in the English language with zero errors. [Speech Language Pathologist] participated in numerous interviews with Complainants and each of the Student’s teachers relative to concerns regarding possible ASD. She was aware of other concerns in the areas of executive functioning and possible depression, but no specific questions or concerns about [Student’s] ability to engage or meet social milestones. She participated in completion of the Childhood Autism Rating Scale- Second Edition (CARS-2) with other members of the assessment team based on consideration of all results together. [Speech Language Pathologist] had no concerns that ASD represented a significant impairment for the Student and agreed with the determination that the threshold for special education eligibility was not met for the Student. [School Psychologist] established that the CARS-2 involves group responses of fifteen questions. A total score of 15 reveals no impact, while a score of 30 indicates mild symptoms in all areas. The Student was scored as 19.5, correlating to impact between “none” and “mild” on daily functioning.

52. [School Psychologist] was asked about the Student’s grades as a consideration as part of the CARS-2 assessment. While she stated that the CARS-2 addresses the ability to “function” at school, grades have no relevance to the outcome. She offered no explanation of the discrepancy between the Student’s high intelligence and grade performance in the range from A to F.

53. On May 22, 2020, at the conclusion of the evaluation process, the District convened an IEP team meeting by video conference to determine the Student’s eligibility for special education. Hearing Exhibit No. 38. [Therapist] participated in the meeting but acknowledged on cross-examination that she had not read the District’s evaluation report and was unaware that the District had administered the BASC. Although Complainants believed that the Student should qualify for special education, the other members of the IEP Team voted unanimously against eligibility on the basis that the Student did not require specially designed instruction to receive an appropriate education. [Therapist] testified that she was “disgusted” because she felt the Student’s symptoms of central auditory processing disorder, ADD, executive functioning disorder were obviously impairing [Student’s] educational functioning. [Father] believed that Complainants’ voices were not heard and that the IEP process was negatively affected by the concurrent disciplinary actions.

54. [Special Education Coordinator] established that the Student’s challenges with executive functioning and other aspects of ADD were evaluated under the eligibility category of Other Health Impairment. She testified that the Team did not confirm

challenges with organization and attention that represented a significant impairment of the Student's educational functioning. Symptoms of depression were evaluated under the heading of Social Emotional Disability. [Special Education Coordinator] stated that such symptoms must be present in at least two environments to meet criteria for eligibility. There was no evidence that the Student exhibited substantial signs of depression in two settings.

55. [School Psychologist] testified that obtaining information from the parents and teachers with two semesters of experience with the Student in their classrooms was appropriate and produced valid evaluation results. She concluded that the District had performed enough assessments in the correct areas to make the determination that the Student was learning, having [Student's] needs met, was engaging, and could access the school environment. In short, [Student] could receive reasonable educational benefit without special education services and supports.

56. [Learning Specialist] recalled participating in the eligibility meeting. She testified that the IEP Team members agreed that the evaluation was comprehensive. She testified that the members voted that the Student did not qualify for special education because there was no significant impact of a disability on [Student's] education. [Learning Specialist] stated that no member of the IEP Team took the position that the Student needed specialized instruction or additional support to attain specific educational goals.<sup>10</sup> There was agreement that the Student had challenges and could benefit from accommodations which led to the discussion of a Section 504 plan.

57. The District asked Complainants if they were interested in pursuing a Section 504 plan for the Student.

58. On May 26, 2020, the District did find the Student eligible for Section 504 accommodations based on a determination that [Student's] central auditory processing disorder adversely affected [Student's] access to education. Hearing Exhibit No. 44. The effect(s) of ASD symptoms on the Student were considered but deemed to be "none to minimal." *Id* at page 3. [Mother] signed the document confirming Section 504 eligibility for the Student. A Section 504 plan was not implemented for the Student because the Complainants did not give their consent.

59. The District continued to take action regarding its discipline of the Student for the March, 2020 conduct. On April 20, 2020, the District expelled the Student. On July 28, 2020, the District conducted a review and concluded that the Student could be disciplined in the same manner as a non-disabled child because the subject conduct was not a manifestation of [Student's] central auditory processing disorder. Hearing Exhibit No. 46. No other disabilities were considered as part of the manifestation review.

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10 On cross-examination, [Learning Specialist] recalled a lawyer for Complainants stating that the Student could not receive educational benefit from general education alone, and that the same person urged the team to move on to discussion of Section 504.

60. Following the District's offer of a Section 504 accommodation plan, Complainants requested that the District authorize an independent educational evaluation ("IEE"). Complainants did not believe the District's assessment was valid due to the manner in which instruments were administered remotely and due to the involvement of District personnel in both the disciplinary proceeding and the IEP Team.

61. The District agreed to fund an IEE, which was conducted by [Licensed Psychologist]. [Licensed Psychologist] established that the assessments of the Student were conducted in-person in her office over the course of three appointments in July and August, 2020. [Mother] testified that she felt that the atmosphere of the assessments was much improved because everyone was more at ease without the disciplinary process as a backdrop.

62. [Licensed Psychologist] established that she is a licensed psychologist with a doctoral degree in school psychology. She confirmed that she did not have access to the District's data regarding the Student until after she had completed her battery of assessments, but did prior to finalizing her report. Additionally, she did not have the opportunity to observe the Student in the school setting or to consult with school personnel. [Licensed Psychologist] acknowledged that the COVID-19 pandemic made the assessment process unusual at the time when the District conducted its evaluation because characteristics like social interactions and eye contact would be visible only via videoconference.

63. [Licensed Psychologist] conducted the IEE using the following assessment instruments: the Wechsler Intelligence Scale for Children- Fifth Ed (WISC-V), NEPSY-II Social Perception Battery, Wechsler Individual Achievement Test- Third Ed (WIAT-III), Autism Diagnostic Observation Schedule- Second Ed (ADOS-2), Childhood Autism Rating Scale- Second Ed (CARS-2), Behavior Assessment System for Children- Third Ed (BASC-III Patient and Parent Report, and Vanderbilt ADHD Rating Scale. She established that these assessments provide multiple data points to look for confirmation of symptoms and/or conditions that can affect access to education.

64. [Licensed Psychologist] established that the Student exhibited symptoms of ASD in her interactions with [Student] as follows: difficulty with social cues and poor eye contact; reported difficulty with maintaining social relationships; some repetitive speech; sensory concerns; reported difficulty with transitions, and deteriorating conversation regarding non-preferred topics. She testified that ASD negatively affects access to education because all interactions are social in nature; a student cannot benefit from such interactions if [they do not] understand them. The fact that the Student's grades ranged primarily in the C to F range despite [Student's] high intellectual functioning could be an indication of social factors impairing academic achievement. [Licensed Psychologist] testified that the Student's CARS-2 results indicated mild impairment across multiple areas associated with ASD.

65. With regard to ADD, [Licensed Psychologist] established that a student's ability to access information is adversely affected by poor follow-through, lack of organization and

planning, and careless errors. Many of these characteristics can be revealed through the Vanderbilt rating scale, but not through the BASC-III.

66. On August 20, 2020, [Licensed Psychologist] issued a report that confirmed her diagnosis of the Student with ASD at the higher functioning end of the spectrum. Hearing Exhibit No. 50. She also diagnosed the Student with ADD, presenting primarily as inattention, as well as deficits in executive functioning.

67. [Licensed Psychologist] testified that the BASC instrument is inadequate on its own to assess for the inattentive form of ADD because only three of nine symptoms are covered. The presence of six symptoms is necessary for a diagnosis of ADD (inattentive) to be endorsed.

68. After school was back in session, [Licensed Psychologist] was able to speak to a District psychologist and speech language pathologist on September 3, 2020. They confirmed the Student's tolerance for preferred tasks, and intolerance for non-preferred tasks which [Licensed Psychologist] characterized as "classic" indications of ADD.

69. On cross-examination, [Licensed Psychologist] acknowledged that she received responses regarding the Student that were different from the responses given to the District. With regard to social cues, the Student's parents gave differing impressions of [Student's] abilities. Hearing Exhibit 50 at page 40. [Licensed Psychologist] also noted that Complainants did not report symptoms of depression in the Student. *Id* at page 25. The fact that the Student was out of school at the time of the IEE could have led to lower signs of depression.

70. After conclusion of the IEE, the District considered [Licensed Psychologist]'s findings as well as a report from the Student's medical provider. Hearing Exhibit No. 49. [Mother] acknowledged that the pediatrician noted on August 11, 2020, that the Student maintained appropriate eye contact during a visit. *Id* at page 3. In August, 2020, the District offered to provide tutorial services to the Student.

71. [Mother] established that Complainants withdrew the Student from the District on September 9, 2020, and enrolled [Student] in an online educational program for the ninth grade year. Hearing Exhibits MMM and NNN. That latter decision was partially prompted by the measures in place due to the COVID-19 pandemic that limited in-person learning. [Mother] established that the 2020-21 school year was a struggle for the Student. Hearing Exhibit No. 48.

72. [Special Education Coordinator] testified that the District did not pursue further IEP Team discussions based on the results of the IEE because the Student had been disenrolled from the District.

73. On September 11, 2020, the District finalized the expulsion of the Student following an appeal by Complainants. Hearing Exhibit No. 53. The District gave formal notice of its

action on September 28, 2020.

74. For tenth grade, the Student enrolled at [High School] within the Jefferson County School District. There, [Student] was re-assessed and determined to be eligible for special education as a child with ASD. Hearing Exhibit No. 58. Jefferson County School District developed and implemented an IEP for the Student. Hearing Exhibit No. 59. [Mother] believed that the Jefferson County IEP met the Student's educational needs.

75. [Jeffco School Psychologist] testified in her capacity as school psychologist for the Jefferson County District. She has a doctoral level degree in School Psychology and has worked in the area of special education since 2013. [Jeffco School Psychologist] evaluated the Student in August and September, 2021, and prepared portions of the Student's IEP. Hearing Exhibit No. 57. [Jeffco School Psychologist] reviewed the Student's IEE and other available records; she also interviewed the Student in addition to conducting a range of assessments over the course of approximately six hours. [Jeffco School Psychologist] noted that the Student displayed flat affect and inconsistent eye contact during their interactions. The Student displayed more aspects of social reciprocity during discussions of high-interest or familiar topics.

76. [Jeffco School Psychologist] established that an IEP team should base special education eligibility on a determination that a disability causes a social or educational impact on the child. The team should consider medical data, developmental history, and academic performance. Where, like the Student here, a child has language skills that score high in standardized testing but are incongruent with social ability, such discrepancy may be an indicator of ASD. The Student's IEP Team in Jefferson County concluded that all of the Student's challenges could be attributed to ASD. "Other Health Impairment," which could include ADD, was considered by the Student's IEP Team, but not determined to be a basis for including any services not already indicated under ASD.

77. On cross-examination, [Jeffco School Psychologist] established that she first met the Student in August, 2021. Her assessments of the Student were conducted prior to the first day of classes and were therefore not based on classroom observations. She was asked to compare BASC ratings recorded by the District and by [Licensed Psychologist]. Complainants rated the Student's anxiety and depression within normal limits in both assessments; they rated the Student's attention problems as within normal limits in the District assessment, but "at risk" with [Licensed Psychologist]. [Jeffco School Psychologist] noted that environmental variables may have affected the ratings that changed from one BASC assessment to the next. She stated that differing data is not necessarily incorrect from one response time to another.

78. [Case Manager] testified in her capacity as the case manager for the Student's IEP at [High School]. [Case Manager] also co-teaches in one of the Student's classes. She confirmed that the Student is kind, respectful, and wants to learn. The Student is social in her classes and is willing to share preferences. Academically, [Student] is performing in the average to above-average range. [Case Manager] established that the Student's IEP

includes accommodations to support organization, focus, elimination of distractions, and communication of instructions in smaller pieces. The Student is also able to use digital media to avoid getting “lost in paper.”

79. [Case Manager] observed that the Student struggles with communication. With regard to how people experience the onset of ASD, [Case Manager] testified that every individual is different. On cross-examination [Case Manager] acknowledged that she had not met or observed the Student prior to the 2021-22 academic year.

80. [High School Speech & Language Pathologist] testified in her capacity as a speech and language pathologist at [High School]. [High School Speech & Language Pathologist] was part of the Jefferson County District IEP Team and concurred with the determination of eligibility under ASD. She has provided services to the Student on a weekly basis as specified in the Jefferson County IEP. The services are provided to assist the Student attain social pragmatics and executive functioning goals.

## **CONCLUSIONS OF LAW**

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education (“FAPE”) that provides special education and related services designed to meet their unique needs. 20 U.S.C. § 1400(d)(1)(A). Section 1401(3) defines a “child with a disability” as meaning “a child— (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services.” A school district satisfies the requirement for a FAPE when, through the IEP, it provides a disabled student with a “basic floor of opportunity” that consists of access to specialized instruction and related services that are individually designed to provide educational benefit to the student. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 201 (1982). To meet its obligations under the IDEA, the school district “must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F. v. Douglas County School District RE-1*, 580 U.S. \_\_; 137 S.Ct. 988 (2017). States are empowered to implement statutory and regulatory programs to further the goals of the federal law. *Id* at § 1407. Colorado has adopted the ECEA as well as rules for its administration here. Article 20 of Title 22, C.R.S., and 1 *Code of Colorado Regulations* (“CCR”) 301-8, respectively. The IDEA is also implemented through regulations found at 34 Code of Federal Regulations § 300, *et seq.*

### Burden of Proof

Although the IDEA does not explicitly assign the burden of proof, *Schaffer v. Weast*, 546 U.S. 49, 58 (2005) places the burden of persuasion “where it usually falls, upon the party seeking relief.” *See also Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1148 (10<sup>th</sup> Cir. 2008) (stating that “[t]he burden of proof . . . rests with the party claiming a

deficiency in the school district's efforts"). Complainants therefore bear the burden of proving by a preponderance of the evidence that the District violated its obligations under the IDEA.

### Child Find

34 CFR § 300.111 states, in part:

(a) General.

(1) The State must have in effect policies and procedures to ensure that—

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

Pursuant to 1 CCR 301-8, § 4.02(1)(a), each administrative unit (school district) in Colorado shall develop and implement procedures for locating, identifying, and evaluating all children ages birth to 21 who may have a disability and are eligible for special education services under IDEA Part B (ages 3 to 21).

1 CCR 301-8, § 4.02(1)(a)(ii) provides:

Part B child identification shall include child find, special education referral, initial evaluation, and determination of disability and eligibility for special education. Child identification shall be the responsibility of the administrative unit in which the child attends public or private school or, if (s)he is not enrolled in school, it shall be the responsibility of the administrative unit in which the child resides.

As described in § 4.02(3) of the same rules, a special education referral may be initiated by either an administrative unit (school district) as a result of a building level screening and/or referral process, or the parent of a child. Any other interested person who believes that a child is in need of an initial evaluation must work with the administrative unit or parent of the child.

Accordingly, during the time that the Student was enrolled in the District, the District had the responsibility to comply with the requirements of the child find provisions. This meant that the District had a duty to identify and evaluate children who may have had a disability and were eligible for special education supports and services. If a child had an IEP, a parent requested evaluation related to eligibility for special education and related services, or a parent or teacher expressed concern related to eligibility for special education and related services *before* an incident that gave rise to proposed discipline, then the child is entitled to procedural safeguards afforded by the IDEA and ECEA during the disciplinary process. 34 CFR §300.534.

## Procedural Safeguards regarding Discipline (Manifestation Determination)

Pursuant to 20 U.S.C. § 1415(k)(1)(B), school personnel “may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities).” Subsection (1)(C) of the same statute provides, “if school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child’s disability pursuant to subparagraph (E), the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities.”

Finally, Subsection (E) sets forth the manifestation determination process as follows:

(i) In general. Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student’s file, including the child’s IEP, any teacher observations, and any relevant information provided by the parents to determine—

(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability; or

(II) if the conduct in question was the direct result of the local educational agency’s failure to implement the IEP.

(ii) Manifestation. If the local educational agency, the parent, and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child’s disability.

## **DISCUSSION**

The evidence at hearing established that the Student was enrolled within the District and attended [School] for [Student’s] middle school education, including [Student’s] eighth grade year during the 2019-2020 academic year. Accordingly, the District had the legal duty to comply with the IDEA and ECEA regarding the Student’s possible identification as a child with a disability, and any other requirements that obtain if the identification, or eligibility, is confirmed. Those requirements would include the development and implementation of an appropriate IEP, and procedural safeguards such as manifestation determination review arising out of proposed discipline.

Starting with the “child find” responsibility, the record revealed that the Student was highly intelligent and behaviorally appropriate while at [School]. [Student] demonstrated interest in computer technology and political issues, and performed above the 90<sup>th</sup>

percentile on standardized tests. [School] staff described [Student] as kind, respectful, and willing to engage in classroom activities. The Student's grades did not consistently match [Student's] intellectual abilities, however, and ranged from A's to F's. Problems with organization, completion of tasks, and distraction were causes of poor grades. Complainants could and did step in to mitigate these issues at times, but could not produce consistently high academic performance.

The Student's parents initiated steps to investigate the reasons for such problems in 2019, consulting with the Westminster agency and Able Kids. They also communicated with school personnel about these issues and their desire to find solutions throughout the eighth grade year. Additionally, the evidence established that the Student experienced some difficulty with forming and maintaining friendships with [Student's] school peers, although social connections seemed to be less of an issue as [Student] progressed beyond seventh grade and into eighth. [Mother] and [Therapist] established progress in this area and [Social Studies Teacher] characterized the Student as a typical eighth grader in many ways, including socially. Online activities, including gaming, provided the Student with more interactions that [Student] seemed to prefer as time passed. [Student] did express to a number of witnesses [Student's] desire to stop attending school and instead pursue education from home. As the COVID pandemic unfolded, some of that change occurred by necessity.

The issues with distractibility and poor organization were the subject of study by the Able Kids Foundation. In August, 2019, Able Kids diagnosed the Student with a central audio processing disorder that caused [Student] to experience background noise as distracting garble. Able Kids also identified certain indicators related to possible symptoms of ASD. Able Kids produced a list of recommended accommodations that Complainants forwarded to [School]. These actions led to a process where Section 504 eligibility was considered for the Student. In October, 2019, the school determined that the Student did not have a disability that excluded [Student] from participation, or denied [Student] the benefits of education in such a way that Section 504 accommodations were appropriate. While [Mother] testified that she was surprised by that outcome, she nevertheless communicated that the school and parents were on "the right path" at that time. It bears pointing out that the school had given Complainants the understanding that further consideration would be given to Section 504 eligibility going forward at the time [Mother] made that statement. The record established that the District did not do anything else related to Section 504 until after the IEP evaluation process was complete in May, 2020. Complainants did not express further concerns regarding possible effects of disability(ies) prior to March 13, 2020.

Between October, 2019, and March, 2020, the Student continued to experience "roller coaster" academic performance. Although [Student's] grades had seen some improvement right around the time of the Section 504 meeting, [Student] was absent for a time due to a surgery on [Student's] foot and a period of rehabilitation. Foreign language was a particular struggle possibly owing to the auditory processing disorder. Going into the Spring semester in January, 2020, [Father] inquired what steps might be taken to promote

more success going forward. [School Counselor] did respond to the communication but did not offer any accommodations or substantial modification(s) to the Student's educational program. There was little evidence related to specific aspects of the Student's experience at [School] during that Spring semester prior to March 10, 2020. Outside of school, the Student had started counseling appointments with [Therapist]. She established that informal screens that she performed indicated that the Student experienced symptoms of ADD that impaired [Student's] ability to attend.

On March 10, the school determined that the Student had violated the code of conduct related to threat of physical violence and imposed a ten-day suspension. On March 13, 2020, [Mother] formally requested an evaluation for special education eligibility. For all intents and purposes, the District's "child find" obligation was then converted to a duty to follow through with the required comprehensive evaluation in all areas of suspected disability. [Mother] had identified ADD, depression, central auditory processing disorder, and executive functioning as particular concerns. The District was also aware of possible ASD symptoms and impacts from the Able Kids report.

The evaluation performed by the District was comprehensive and appropriate in the assessment of the ALJ. It explored symptoms of ASD, ADD, central auditory processing disorder, and depression and their effects on the Student's ability to access and benefit from education. Given the impact of the COVID pandemic and the attendant public health restrictions on face-to-face interactions, much of the evaluation was performed using remote technology. This was the reality of the time, and the District adequately performed the necessary assessments within these limitations. Although observation of the Student in the classroom was not possible, those performing the assessments obtained input from the Student's teachers who had experienced [Student] throughout the 2019-20 school year. Other aspects of the assessments were conducted using videoconferencing or, in one case, meeting the Student outside on the front porch. By these means the District reasonably obtained results as best it could under the circumstances.

With regard to symptoms of ASD, these were evaluated in the greatest depth. As established through testimony, ASD manifests as a spectrum from minor to significant impacts. Those with more severe presentations have the inability to understand and reciprocate in social situations because they may lack appreciation for the emotions of others, may not engage in eye contact, may struggle with verbal and non-verbal communication skills, may experience extreme sensitivity, may perseverate on idiosyncratic interests or behaviors, or may seek to avoid social interactions altogether. The testing by the District did not reveal this magnitude of symptoms in the Student. Although [Student] was noted by [Student's] teachers and parents to take more interest in preferred activities, this was not in evidence to a degree that suggested disability. As [Social Studies Teacher] characterized the Student and [Student's] peers, eighth graders can demonstrate a narrow range of interests and a degree of awkwardness as they encounter early teen social situations and/or topics that require them to think and react more like adults than children. The testimony and assessment results related to the BASC, the SRS, SLDT-A, and interviews established that the Student functioned in the "typical" or "within normal limits"

ranges of most categories related to language, non-verbal communication, social awareness and cognition, behaviors and emotional control. The very limited number of “clinically significant” and/or “at risk” ratings were far outweighed by the former results such that the averaged results consistently revealed no impact or only minor impact on functioning in these critical areas.<sup>11</sup> The CARS assessment drawing on the broad results of the evaluation team confirmed the determination that ASD did not represent a significant impairment to the Student’s ability to access or benefit from general education in the Spring of 2020.

Complainants sought to emphasize the findings by [Licensed Psychologist] that the Student did exhibit ASD in the high-functioning end of the spectrum with mild impacts on functioning, as well as the determination of Jefferson County that the Student’s ASD warranted special education services and supports. The ALJ finds that these later results do not require the conclusion that the District’s assessment and determination were flawed. [Therapist] established that the brains of children change over time and can be affected by external circumstances. Additionally, as explained during the course of the hearing, a fundamental precept of the IDEA is that children with disabilities have unique needs that change over time. That precept is the basis for the requirement that special education services and supports be evaluated at least annually, or as frequently as is necessary, to ensure that changes in the child do not result in an educational program that is no longer appropriate. It was also established through testimony that the same respondents gave differing ratings to the District and to [Licensed Psychologist]. That is not to say that one or the other of the responses was more correct. Rather, it reflected the extent to which the perceptions of the respondents may have changed over time due to differing circumstances or due to having encountered the same instrument as recently as three months prior. Moreover, the IEE by [Licensed Psychologist] and the subsequent evaluation by Jefferson County did not include substantial input from the Student’s teachers of [Student’s] experience in the classroom setting, another distinguishing factor that may account for the differing conclusions.

Turning to the other concerns noted by [Mother] in her request for evaluation, the assessments did not reveal any substantial impact of emotional depression on the Student’s functioning at school. Nor were signs of depression exhibited by the Student in two environments. The teachers who saw the Student regularly during eighth grade did not document substantial signs of depression in their recorded observations.

As far as ADD and executive functioning, the evidence there did establish a basis for concern. Complainants and teachers observed the adverse impact of distractibility, disorganization, and failure to complete tasks in accordance with directions having an impact on the Student’s academic performance. [Therapist] testified that her informal screenings established “classic” signs of attention deficits, but conceded that the findings would need to be confirmed by formal assessment before forming a basis for special

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<sup>11</sup> The one clinically-significant concern with somatization was not endorsed by any other person giving input to the evaluation.

education eligibility. For some of these issues, however, the Student had the ability to demonstrate the task in one setting but not another. This was discussed in Findings of Fact No. 39 and No. 50. Additionally, while [Social Studies Teacher] acknowledged the issues with attention and organization, she did not observe the Student to be functionally different in these areas from [Student's] peers. She also established that the Student could be redirected back on task, frequently with prompting that was relatively subtle. These facts evidence a definite concern with attention and executive functioning, but do not preponderate to establish a disability that created a substantial impact for the Student. The BRIEF assessment administered as part of the District's evaluation confirmed typical results across a range of executive functioning. Finding of Fact No. 39.

Finally, as related to central auditory processing disorder, the District had an audiologist analyze the information from Able Kids. That review confirmed that the Student's ears were not working in good synchrony to make speech intelligible, and that [Student] may have difficulty listening and understanding when background noise was present. [Speech Language Pathologist] found no substantial difficulty in the area of receptive language and [Occupational Therapist] established that the Student was aware of how to mitigate the difficulty of background noise. Thus, if the central auditory processing disorder did represent a barrier to accessing education, it is possible that the barrier could be overcome with accommodations; no witness testified that the Student required specially designed instructions and/or goals related to mitigating the auditory processing disorder.

Based on these facts, the ALJ finds and concludes that the District did not violate its "child find" responsibility. First, Complainants did not establish that the District was bound to initiate a special education evaluation prior to the request by [Mother] on March 13, 2020. The District was aware of the Able Kids report in August, 2019, and conducted a Section 504 review in October. Based on information from the Student's teachers, the District concluded that the Student's access to education was not being impaired by a disability. Afterwards, [Mother] agreed that the school was on the right path, though that could have reflected her understanding that further inquiry related to Section 504 would be undertaken. Even so, these facts did not trigger the need for a special education evaluation in the Fall of 2019. Thereafter, the Student's academic life was affected by surgery, rehabilitation, and the winter break. Complainants remained engaged in trying to find solutions that would smooth out the academic "roller coaster" but the evidence did not establish any other development between January and March, 2020, that reasonably required the District to initiate an evaluation. Only after the disciplinary incident and the formal request by [Mother] was that duty created.

Next, as established above, the evaluation undertaken by the District was comprehensive and adequate. The Student was assessed in areas of concern using appropriate tools administered by competent personnel. The District then convened an IEP Team meeting where the results of the evaluation were presented and discussed in the context of eligibility. These were the proper procedural steps to follow related to evaluation once the need had arisen.

The issues raised by Complainants around deprivation of FAPE and failure to develop and implement an appropriate IEP arise only after a determination that the Student should have been eligible for special education and related services. Based on the results of the evaluation, the members of the IEP Team employed by the District unanimously concluded that the Student did not have a substantial impairment of [Student's] educational functioning due to a recognized disability. Complainants and [Therapist] disagreed. However, Complainants did not present any witness who opined or otherwise established that the Student required specially designed instruction to address issues in the areas of suspected disability, what such a program should include, nor how such services would mitigate what they considered to be substantial impairment. Weighing the entire record, including the results of the evaluation and the testimony regarding the Student's performance in school, the ALJ finds and concludes that if the Student had symptoms of ASD and ADD in May, 2020, they did not present a substantial impediment to [Student's] educational functioning. Additionally, the evidence did not establish that such deficits needed to be addressed by a specific suite of services and supports that the District failed to offer. Complainants did not meet their burden of proving that the Student met the statutory definition of a "child with a disability" who therefore was entitled to development of an IEP and provision of FAPE.

Lastly, looking at the disciplinary procedures instituted by the District after March 10, 2020, because [Student] had not been identified as a child with a disability, the Student was entitled to a manifestation determination review by virtue of the pending special education evaluation only if the parents and/or District personnel had requested evaluation or expressed concerns regarding eligibility for special education and related services prior to the incident in question. Here, Complainants had made requests for determination of eligibility under Section 504 in 2019. However, there was no evidence that the parents or any teacher had requested evaluation, or expressed concerns in writing related to eligibility for special education and related services before the incident on March 10, 2020. Accordingly, to the extent that the District offered a manifestation determination review subsequent to March 10, such process would have followed from Section 504 and not IDEA procedural safeguards. The right of due process conferred under 20 USC §1415 gives the ALJ no jurisdiction to rule on matters arising under Section 504. Accordingly, the ALJ makes no finding related to whether the District followed appropriate procedures for a Section 504 manifestation determination review. Nor was any evidence presented that related to the conduct in question or how, if at all, such conduct amounted to a manifestation of the Student's disability to permit a substantive determination regarding the propriety of the District's conclusion.

No evidence was presented regarding any other specific procedural violation of the IDEA or ECEA. Accordingly, the ALJ finds and concludes that the record does not support any relief for the last issue identified by Complainants.

## **DECISION**

The ALJ concludes that the Complainants did not meet their burden of establishing

that the District should have initiated an evaluation of the Student pursuant to its child find obligation prior to the request by Complainants on March 13, 2020. The District evaluation that followed was comprehensive and adequate. Nor did Complainants establish that the Student met the definition of a child with a disability such that the District was obligated to develop and implement an IEP that provided the Student with FAPE. Because the Student had not been identified as a child with a disability and no request had been made for evaluation for special education eligibility prior to the disciplinary incident on March 10, 2020, the Student was not entitled to procedural safeguards under the IDEA or ECEA during the disciplinary process. Accordingly, Complainants are not entitled to any relief on the issues raised by their Amended Due Process Complaint herein.

This Decision is the final decision except that any party has the right to bring a civil action in an appropriate court of law, either federal or state, pursuant to 34 C.F.R. 300.516.

**DONE AND SIGNED** this 4th day of May, 2022.



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KEITH J. KIRCHUBEL  
Administrative Law Judge