



Wyoming Department of Education

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WYOMING DEPARTMENT OF EDUCATION
SPECIAL PROGRAMS DIVISION
SPECIAL EDUCATION COMPLAINT INVESTIGATION

Complainant:

Respondents:

Date of Decision: September 7, 2012

Case #: C-0152-12

**COMPLAINT DECISION
AND ORDER FOR
CORRECTIVE ACTION**

On July 11, 2012 the Wyoming Department of Education (WDE) received a complaint and supporting documentation filed by _____ (hereinafter "Complainant") alleging violations of special education law with respect to _____ (hereinafter "Student"), attending _____ (hereinafter "District").

Pursuant to 34 C.F.R. §§300.151 through 300.153 of the Federal Regulations implementing the Individuals With Disabilities Education Act (IDEA), WDE conducted an investigation into the allegations raised in the complaint. Pursuant to the IDEA, Federal Regulations, and the Wyoming Department of Education Chapter 7 Rules, WDE issues the following Findings of Fact, Conclusions, Decision and Order for Corrective Action.

Complaint Issues:

Issue #1

Whether the District violated its child find responsibility, which is the ongoing responsibility to identify and evaluate the Student consistent with 34 C.F.R. §300.111 if the District had reason to suspect an IDEA disability and the need for special education.

Issue #2

Whether the Student is entitled to protections for children not determined eligible for special education and related services pursuant to 34 C.F.R. §300.534.

If WDE finds the District violated its child find obligation in Issue #1, and as a result, the Student is entitled to protections under the IDEA, then WDE shall investigate the following:

Issue #3

Pursuant to WDE's authority to investigate violations of Wyoming Law granted by WDE Chapter 7 Rules, Section 7(b), WDE shall investigate whether removing the Student from the learning environment as a disciplinary measure constituted the use of a regulated procedure in violation of W.S. §21-3-110(a)(xxxi) or the Department of Education Chapter 42 Rules, Seclusion and Restraint in Schools.

Issue #4

Whether the District violated its duty to maintain the confidentiality of personally identifiable information regarding the Student in violation of 34 C.F.R. §§300.123 and 300.610 through 300.625.

Investigatory Process:

- Review of records consisting of the following:
 - Original letter of complaint and supporting documents;
 - The District's response to the allegations;
 - The Student's education records, including behavioral reports and data; and
 - The Student's special education records from the previous school of enrollment.
- Follow up inquiries with the District.
- Interviews with District staff.
- Classroom Teacher Questionnaire
- The Complainant's additional submissions regarding the Student.
- The District and Complainant were given the opportunity to submit additional information to WDE for consideration throughout the investigation of this complaint.

Applicable Federal Regulations, State Statutes or Rules:

- 34 C.F.R. §300.8 Child with a Disability
- 34 C.F.R. §300.111 Child Find
- 34 C.F.R. §300.123 Confidentiality of Personally Identifiable Information
- 34 C.F.R. §300.301 Initial Evaluations
- 34 C.F.R. §300.304 Evaluation Procedures
- 34 C.F.R. §300.503 Prior Written Notice
- 34 C.F.R. §300.534 Protections for Children Not Determined Eligible for Special Education and Related Services
- 34 C.F.R. §§300.610 through 300.625 Confidentiality
- Wyoming Statutes, Title 21
- Wyoming Department of Education Rules, Chapter 7
- Wyoming Department of Education Rules, Chapter 42

Relevant Time Period:

Pursuant to 34 C.F.R. §300.153(c), WDE has the authority to investigate alleged violations of law that occurred not more than one year prior to the date the complaint was received. In light of this limitation, the investigation and any findings of noncompliance will be limited to the period commencing July 12, 2011 to July 11, 2012. However, the Student's earlier educational records were reviewed as part of this investigation and are referenced when deemed relevant to provide additional context.

Findings of Fact:

1. The Student was previously identified as a learner eligible for services under the IDEA in the category of Developmental Delay while attending a regional developmental preschool program prior to his enrollment in the District.
2. The Student entered a developmental kindergarten in the fall of 2008 at a school within the District, but a different elementary school than the one the Student was attending at the time this complaint was filed. The Student was receiving special education and related services pursuant to an IEP at this time.

3. During the 2009-2010 school year, the Student participated in a kindergarten class. His kindergarten report card indicates that the Student made good academic gains. Comments from the report card include, in relevant part:
 - Q1: [Student] is doing much better controlling his temper. It is something that we work on daily. I am concerned about him not focusing during academic group work. I can see that he is starting to fall behind because of his unwillingness to pay attention and work hard during this time. I will continue to work with him and encourage him to pay attention during group time.
 - Q2: [Student] has been working hard and is making great progress.
 - Q3: [Student] is doing well academically. He has made a nice transition into our classroom and he has had success in this room. We still struggle with his behaviors some – but not as greatly as in the past. [Student] has been working very hard to make the right choices in school and is learning to get along with his peers.
 - Q4: [Student] continued to do well in my class this nine weeks.
4. An IEP drafted on April 27, 2010 documents that the Student's behavior impeded his learning or the learning of others. Under the Consideration of Special Factors, the IEP states:

A simple behavior reward system has been implemented since Jan. [Student] earns rewards for positive behaviors. When he earns 15 tallies he earns a reward. He gets to have input and choice into his rewards. The tally sheet is sent home on Fridays with comments to parent. Also included in IEP is (sic) behavior goals and a functional behavior assessment.
5. A functional behavioral assessment dated April 5, 2010 and updated April 27, 2010 indicates that interventions in place at that time helped to reduce the Student's noncompliance from a rate of 70% to a rate of 55%.
6. A specific goal in the April 27, 2010 IEP addressed improving the Student's compliant behaviors. Further, the related services of Social Work and Counseling were provided to address the Student's maladaptive behaviors. The IEP indicates that the Student was to receive counseling services during Extended School Year provided during the summer.
7. The IEP also provided specialized instruction in the area of academic support, primarily in written language.
8. A three-year reevaluation of the Student's special education eligibility and need was conducted in the fall of 2010. Academically, the Student's skills were measured to be Proficient and Advanced. His behavior was observed to be a concern, with listening and following directions as the most problematic. The Student was described as very

“wriggly.” His behaviors were noted to be off task and disruptive to the other students. Socially, the Student was reported to have few friends. It was noted that he “deliberately annoys classmates.” “He is argumentative and blurts out answers in class.” Peers do not want to play with the Student. One teacher reported “One concern I have is that [Student’s] behavior during reading can be so disruptive at times that neither he nor his peers are able to learn what [Teacher] is trying to teach.” The Student’s physician reported that although she saw some evidence of Attention Deficit Hyperactivity Disorder, there was a discrepancy between parent checklists and teacher checklists. Further evaluation was recommended.

9. The November 10, 2010 Evaluation Report concludes:

The team discussed the results and determined that criteria is not met for Specific Learning Disability, and [Doctor] did not complete the Other Health Disability criteria, pending a social emotional evaluation. After discussion, mother indicated that she will not give consent for a social emotional evaluation. Also, given academic testing results of classroom assessments, there is evidence that he does not meet the “requires specialized instruction” eligibility. [Student] will no longer qualify for an Individualized Education Plan. The team discussed ways [Student’s] needs will be met outside of special education. Within two weeks’ time a team will schedule to develop a behavioral plan to address his needs through general education.

10. The Complainant did not want to pursue testing for Emotional Disability (ED) at this time, and would not offer her consent for assessments to determine eligibility in that disability category.

11. Special education services were discontinued, and the Student was exited from special education eligibility in April 2010.

12. The District provided a detailed, written response to the allegations in this complaint. In describing the Student’s termination from special education, the District stated, in relevant part:

Without confirmed diagnosis from the pediatrician, [Student] was dismissed as not meeting criteria as having a disability. It was noted that he was making satisfactory progress in academic skills beyond passing from grade to grade.

13. The following 2010-2011 school year, the Student entered first grade. The report card indicates that the Student met academic expectations, and earned “Proficient” ratings in most academic areas. However, his behavior was rated as “N” for all four quarters, indicating that it “Needs Improvement.” Comments from this reporting period include, in relevant part:

- Q1: [Student] has made excellent academic progress. He needs to improve on listening and following directions.

- Q2: [Student] has made academic growth this quarter. He has shown improvement on his listening and following directions skills.
 - Q3: [Student] is making great academic progress and he has also shown improvement with his social skills. He needs reminders to think before he decides on his choice of behavior.
 - Q4: [Student] has made academic progress this quarter. His work ethics have improved. He has satisfactory work ethics. He has made better choices with his classroom behavior. He needs to think about making better choices during his recess time.
14. The Student continued to experience behavioral difficulties during first grade. The records from first grade indicate that the Student had a Behavior Intervention Plan addressing the behaviors of keeping his hands and feet to self, and for not shouting out answers during class.
 15. A January 24, 2011 incident report indicates that the Student was involved in an altercation with another student, resulting in pushing and punching. It was not clear which student was responsible. Both students received consequences, including lunch in the office and walking 10 laps on the playground in place of recess.
 16. The Student started the 2011-2012 school year at the same school within the District he had been attending since entering the developmental kindergarten. However, behavioral difficulties were documented near the beginning of the school year.
 17. On October 6, 2011 the Student participated in a field trip to a museum where he was involved in an altercation with another student described as a “shoving match.” The Student was removed from the group and remained with a teacher.
 18. An October 9, 2011 District email between teachers and the Director of Special Education discussing the incident confirms that a doctor in another community recently diagnosed the Student with Asperger’s Syndrome. The District staff person noted her concern that the doctor was “coaching” the parent regarding terminology to use with the District.
 19. On October 11, 2011 the Student was suspended from school for one day for “behavior detrimental to the safety of others and willful disobedience as documented in a Notice of Suspension. While coming in from recess, the Student remained at the end of the line, “holding the door, refusing to allow another student to enter.”
 20. The following day, October 12, 2011, the Complainant transferred the Student to another school within the District. This is the school the Student was attending at the time the complaint was filed. It is a K-12 building.

21. On October 12, 2011, a District staff person communicated via email with the Student's Principal at his new elementary school, in salient part:

[Prior elementary school] has a little more than 2 year history with this student. He has some problems, but, in my opinion his greatest problem is mom and grandma. He is very bright and last year told the truth until the last month of school when he started denying everything he was involved in.

22. The District immediately began charting the Student's behavior throughout the school day utilizing "+" or "-" to indicate if his behavior was "ok" or if "concerns" were present. During the time the chart was in use from October 12, 2011 through November 18, 2011, the Student experienced two days with no concerns noted.

23. The teacher completed rating scales of the Student's behavior at the request of the Student's physician. On October 11, 2011, the teacher indicated the following behaviors were present "Very Often" on the rating scales (summarized in relevant part):

- Is easily distracted by noises or other stimuli
- Fidgets with hands or feet or squirms in seat
- Leaves seat when remaining seated is expected
- Runs about or climbs too much when remaining seated is expected
- Is "on the go" or often acts as if "driven by a motor"
- Blurts out answers before questions have been completed
- Has difficulty waiting his turn
- Interrupts or intrudes in on others' conversations and or activities
- Restless in the "squirmy" sense
- Feelings easily hurt
- Temper outbursts; explosive, unpredictable behavior
- Is always "on the go"
- Is an emotional child
- Everything must be just so
- Restless or overactive
- Has difficulty organizing tasks or activities
- Sensitive to criticism
- Fidgeting
- Disturbs other children
- Talks excessively
- Argues with adults

- Cannot remain still
 - Runs about or climbs excessively
 - Has difficulty playing
 - Fidgets with hands
 - Demands must be met immediately – easily frustrated
 - Blurts out answers
 - Short attention span
 - Only pays attention to things he is really interested in
 - Mood changes quickly and drastically
 - Easily distracted by extraneous stimuli
 - Restless
24. Various teachers, all with similar concerns noted, completed several other rating scales during December 2011 and January 2012. Teacher comments included, in part:
- Absolutely cannot correct or reprimand him without tears, eye rolling, arguing, defiance, and/or trying to shift blame to others.
 - I don't see any changes from week to week. I see no effort on his part to change. His issues are not problems beyond his control in my opinion. They are consistent decisions designed to try and put himself in control and avoid activities or situations he desires not to participate in.
 - Decreased interaction with peers because others don't want to play with him because he is bossy, demanding and everything has to be his way – no compromise.
 - He continues to interrupt me, his peers. Chewing his nails has gotten worse. [Student] wants that control – final say – and [Teacher] and I are standing firm. Hallway is working as a quiet time for him now.
 - He is ready to let loose at the smallest thing. I constantly have to remind [Student] to keep his hands out of his mouth.
25. A referral was made to the Building Intervention Team in November 2011. However, the records do not contain any documentation regarding specific interventions attempted or the Student's response to interventions.
26. The Student began taking medication for ADHD on November 19, 2011.
27. Behavior charting utilizing the "+" and "-" system was documented from November 21, 2011 through January 13, 2012. It resumed on a slightly modified basis, with more check

points throughout the Student's day, from March 26, 2012 through May 18, 2012. During this timeframe, 8 days were documented to have no concerns.

28. A disciplinary referral was made on December 13, 2011 resulting in an office visit for "back-talking teachers, refusals, lack of cooperation, rude, discourteous, hurt teacher's hand – unintentional, behavior detrimental to education, welfare and morals of others." It resulted in a warning that the next violation of rules would result in an out of school suspension.
29. Other assessments in January 2012 from private evaluators express concerns for the Student's ability to utilize social language and also his sensation seeking behavior from a sensory input perspective.
30. A Developmental Pediatric Evaluation was completed on February 2, 2012 by a pediatrician. The results were shared with the District. Diagnoses and impressions included:
 - Attention deficit hyperactivity disorder, combined type.
 - Deficits in social responsiveness and social communication with limited interests and problem with changes in routine. Perseverative behaviors and rigid patterns of behavior. Mild to moderate autism – Asperger Syndrome.
 - Below average adaptive behavior with weaknesses in social and conceptual skills (communication, functional academics and self-direction) and strengths in practical skills, community use, home living, health and safety and self-care.
 - Average receptive language skills but with pragmatic language deficits.
 - Disruptive behavior with aggression toward peers at school.
31. The record is replete with staff emails describing the Student's behaviors of concern. These emails were typically reciprocal communications between the Student's teachers, support staff supervising the Student during nonacademic times, and the Principal.
32. An email dated March 6, 2012 documents that the Student was not able to go ice skating with the other students "because grandma can't go along and nobody can get [Student] to listen from here."
33. The Building Intervention Team developed a Behavior Intervention Plan dated March 28, 2012 was developed for the Student. Problem behaviors included:
 - Lack of pragmatic language skills
 - Lack of empathy and social awareness
 - Egocentric thinking and learned behavior

Positive consequences included verbal praise and positive calls or notes home. The behavior plan was to be implemented for 90 days.

34. On May 10, 2012 the Principal sent an email to several staff members regarding the Student. Staff was instructed to “keep a more vigilant eye on [Student] in all areas, especially in limited supervised areas. The complaint is that he is threatening kids, spitting on kids in the Library, and physically hurting kids.” A list of recipients included:

- Several elementary school teachers
- Superintendent
- Student’s Grandmother
- 7-12 Math Teacher
- Custodians (2)
- 7-12 Language Arts Teacher
- Paraprofessional
- 7-12 Business Teacher
- School Resource Officer (A county employee assigned to the District)
- 7-12 Science Teacher
- School bus paraprofessional
- Special Education Teacher
- Title 1 Teacher
- 7-12 Social Studies Teacher
- 7-12 Vocational Education Teacher
- Library Assistant
- K-12 Art Teacher
- Food Service personnel
- K-12 Foreign Language Teacher
- K-12 Physical Education Teacher
- K-12 Music Teacher

35. On May 17, 2012, the Principal sent an email to the Complainant through the Grandmother’s email address. The email states, in salient part:

As of today, [Student] will be sent home if he is disrespectful or irresponsible. He will not be given multiple chances. He has not made appropriate progress in his behavior since he started coming to [School] and we have given too many chances with no positive results.

I will be calling you if his actions and behavior negatively affects anyone to come to the school and take him home.

36. The Complainant responded to the email on the same date, stating:

I understand that you are frustrated and I'm also struggling because I have asked for him to be on a 504 or an IEP for behavior as he is diagnosed as Asperger and ADHD. My understanding was that the team met and discussed this possibility but you wanted to make sure everything was followed through on first.
37. Also on May 17, 2012 the Principal replied, in part: "Due to [Student's] academic ability and his proven academic performance, I still do not see how he qualifies for a 504 or IEP."
38. On May 18, 2012, the Principal wrote in an email to the Complainant and two teachers that "Yesterday's incident was just the 'straw that broke the camel's back.'" I should have addressed the ongoing tension early, but I didn't and that was not good for anyone. It was just a cumulative event in a toxic environment."
39. Also on May 18, 2012, the school secretary received a copy of the email chain between the Complainant and the Principal.
40. The Student's records reflect that he was sent home for inappropriate behavior, but the dates and times are not documented. No disciplinary referral was located.
41. The Principal was interviewed as part of this complaint investigation. Salient points include:
 - The Principal recalled sending the Student home two or three times. The Principal considers sending the Student home from school for disciplinary purposes an out of school suspension. He indicated that disciplinary referrals should have documented the dates and times of the suspensions.
 - The school was "heavy into the RTI process for academics and behavior." A student would only be referred for special education if they were not successful at Tier 3 interventions. Pertaining to this Student, a referral was never made because he hadn't failed at Tier 3 yet.
 - It is very rare for a second grade student to receive an out of school suspension.
 - The Principal wanted replication of the interventions at home, and the parent was not following through with behavior at home.
 - Strict compliance with disciplinary sanctions consistent with the Student Handbook was implemented.
42. The Special Education Director was also interviewed as part of this investigation. Salient points include:

- Intervention teams don't refer a student prior to the end of an intervention. Parents might refer sooner, but intervention teams do not.
 - In order to be eligible for special education, a student must have some academic need. "If they are progressing well academically, what will specialized instruction look like?"
 - The District has never turned down a parent referral. The Parent was provided a copy of the referral form, but she did not submit it. "I didn't stay after her to turn it in, but I had a witness when I gave it to her."
 - The teacher "bent over backwards" to help this Student.
 - The real concerns regard the Student's life in total. "Things that are out of our reach." The Director is not sure that special education can get at the problems that are most worrisome.
43. The Classroom Teacher provided written responses to questions as part of this investigation. Salient points include:
- Referral for special education would only take place after completion of the RTI process. "The process cannot be 'rushed.'"
 - The Student was not referred because the Tier 3 intervention process was not completed.
 - The Student was sent out of the classroom when the "quiet area" within the classroom was ineffective. The Student was monitored in the hallway, and was returned to the classroom "when his attitude allowed him to participate."
44. The Student's second grade report card, dated May 31, 2012, documents that the Student received Basic, Proficient, and Advanced ratings in academic areas. Basic skills were noted as proficient by the end of the school year. However, the Student continued to receive "N" in behavior, indicating that it needs improvement. Comments from the report card include, in relevant part:
- Q1: We are keeping a daily log of activities/how the day went for him and then share with mom at the end of the day.
 - Q2: The second quarter performance and attitude is below average and is becoming detrimental to their education and their fellow students.
 - Q3: [Student] has not shown growth in the following: Good manners, positive behavior, purpose for learning. We will continue to work with him on making positive choices with role modeling.

- Q4: [Student] has been trying to work on his demonstrated awareness and social problem solve (sic) and cooperate with others. [Student] has made marginal progress in pragmatic language, correct body language, and proximity. Overall, [Student] has demonstrated the ability to make good choices in all areas; however, his learned behaviors prevent him from any positive growth or development.
45. The Student ceased attending school after May 18, 2012, one week prior to the end of the school year.

Conclusions:

Issue #1

1. The Student was previously identified as a learner with a disability under the Individuals with Disabilities Education Act (IDEA).
2. The Student's eligibility under the IDEA was terminated after a reevaluation in the fall of 2010.
3. The District did not consider the Student as eligible under Other Health Impaired (OHI) due to the fact that the Student's pediatrician did not complete the eligibility criteria.
4. The District continued to suspect that the Student might be a learner with a disability under the eligibility category of Emotional Disability. However, the District did not formally propose a special education evaluation regarding the Student's social and emotional needs, but instead terminated the Student from special education based on the fact that the Student did not qualify as a learner with specific learning disability, and insufficient information existed to determine eligibility for either OHI or ED.
5. The District continued to have ongoing responsibility for child find activities pursuant to 34 C.F.R. §300.111.
6. Child find remains the ongoing obligation of the District for all students who are suspected of having an IDEA disability and the need for special education, even if they are advancing from grade to grade. *See 34 C.F.R. §300.111(c)*. A child suspected of having a disability but who has not failed, is making academic progress, and is passing from grade to grade must be considered in the child find process as any other child suspected of having a disability. The child does not have to fail or be retained in a course or grade in order to be considered for special education and related services. *See 71 Federal Register 46584*.
7. Although the request for initial evaluation to determine whether a student is a child with a disability can be made by either the parent or the school district (*See 34 C.F.R.*

§300.301(b)), because the child find obligation is an affirmative one, a parent is not required to request that a district identify and evaluate a child. *Robertson County Sch. System v. King*, 24 IDELR 1036 (6th Cir. 1996). The fact that the Director of Special Education provided the Complainant with a copy of the special education referral form to complete and return does not alter or modify the District's affirmative child find obligation. The clear language of the IDEA and federal regulations places that duty squarely on a district, and the parent need not ever ask for an evaluation.

8. When the District continued to have unanswered questions regarding the Student's eligibility for OHI by virtue of whether he was diagnosed with ADHD, it was incumbent upon the District to propose and obtain an evaluation from a qualified provider in order to be able to exhaust its eligibility questions. District cannot use a parent's failure to submit an ADHD diagnosis from a licensed physician to justify its failure to determine eligibility. See *M.J.C. v. Special Sch. Dist. No. 1*, 58 IDELR 288 (D. Minn. 2012). Rather, a school district must arrange for a medical evaluation by a licensed physician if such an evaluation is necessary to determine the student's IDEA eligibility. *Letter to Anonymous*, 34 IDELR 35 (OSEP 2000). Although the evaluation occurred outside of the one-year limitations period relevant to this complaint, the District continued to operate under this mistaken belief during the 2011-2012 school year.
9. The affirmative child find obligation co-exists with any response to intervention or behavioral intervention model. When there is reason to suspect the student may have a disability and need special education and related services as a result, the IDEA's initial evaluation provisions control, regardless of whether the district plans to or is currently utilizing RTI strategies with the student. See *Memorandum to State Directors of Special Education*, 56 IDELR 50 (OSEP 2011).
10. "School personnel should refer children for evaluation through the agency's child find or special education referral system when the child's behavior or performance indicates that they may have a disability covered under the [IDEA]." *71 Federal Register 46727*.
11. It is important to note that although the Principal and Classroom Teacher describe the Student as participating in an RTI process, no specific progress monitoring data is available to describe the specific interventions utilized or the Student's progress monitoring data in response to those interventions. Even if the Student was participating in an RTI process for behavior, sufficient evidence exists to conclude that the interventions were not successful when the Principal made the determination to send the Student home for any future acts of misbehavior.

12. Sending a student home from school for rule infractions adversely affects a child's education. This strategy represents the ultimate adverse effect because the child receives no education during the periods of removal.
13. As applied to the Student in this complaint, the District amassed a large quantity of anecdotal behavioral information regarding the Student in a relatively short period of enrollment. This information, in addition to the records received from the preceding school, should have caused the District to suspect an IDEA disability and the need for special education. Factors weighing heavily toward suspecting an IDEA disability and a need for special education include:
 - a. The Student's continued behavioral difficulties on a near daily during the 2011-2012 school year, escalating out of school suspension on two to three occasions, admittedly a very rare intervention for a second grader.
 - b. The Principal's communication to the Complainant that the last incident was the "straw that broke the camel's back," necessitating that the Complainant remove the Student from school for any future rule infractions.
 - c. The Student's report cards that repeatedly express concern regarding the Student's behavior, as evidenced by the following statements:
 - i. The second quarter performance and attitude is below average and is becoming detrimental to their education and their fellow students.
 - ii. [Student] has not shown growth in the following: Good manners, positive behavior, purpose for learning.
 - iii. [Student] has made marginal progress in pragmatic language, correct body language, and proximity.
 - d. The Complainant's repeated expressions of concern regarding the Student's behavior and learning opportunities, and her requests for a "504 plan or IEP."
 - e. The District's completion of behavior rating scales for the Student on multiple occasions evidenced significant behavior concerns on a frequent basis.
14. Based on the totality of the factors noted above, the District should have suspected an IDEA disability and the need for special education, prompting the District to undertake an initial comprehensive evaluation of the Student's academic and functional performance, including behavior, to determine if the Student was eligible under the IDEA as a child with a disability pursuant to 34 C.F.R. §300.8.
15. Further, based on the fact that the Student's concerns were primarily behavioral in nature, the District cannot avoid its child find obligation based solely on the fact that the Student

made academic gains. IDEA eligibility is much broader than academic performance, and child find obligations remain ongoing even if the Student advances from grade to grade. See 34 C.F.R. §300.111(c). The group determining the eligibility of a child for special education and related services must make an individual determination as to whether, **notwithstanding the child's progress in a course or grade**, he or she needs or continues to need special education and related services. (Emphasis added.) 71 Federal Register 46580. As the District notes in the Student's fourth quarter second grade report card, the Student made marginal progress in pragmatic language, correct body language, and proximity. Marginal progress is sufficient to trigger the child find obligation.

16. Once the child find obligation was triggered, the District had an obligation to propose a comprehensive initial evaluation consistent with 34 C.F.R. §300.301.
17. A comprehensive evaluation for eligibility purposes must include assessments "in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities." 34 C.F.R. §300.304(c)(4). The District cannot require the parents to obtain their own evaluation. See *N.B. v. Hellgate Elementary Sch. Dist.*, 50 IDELR 241 (9th Cir. 2008). Districts cannot shift their evaluation responsibilities to parents. Rather, a district must arrange for a medical evaluation by a licensed physician if such an evaluation is necessary to determine the Student's IDEA eligibility. See *M.J.C. v. Special Sch. Dist. No. 1*, 58 IDELR 288 (D. Minn. 2012).
18. The conclusion that the District violated its child find obligation does not mean, in and of itself, that the Student ultimately would have been determined eligible for special education. That decision is left to the team of qualified professionals, including the parents, after a comprehensive initial evaluation. See 34 C.F.R. §§300.301 through 300.306. A district cannot be liable for compensatory education for a child find violation unless the student is ultimately determined to have a need for special education. See *Ridley Sch. Dist. v. M.R.*, 59 IDELR 271 (3rd Cir. 2012).

Issue #2

19. Based on the conclusion above that the District should have suspected an IDEA disability and the need for special education, thereby violating its child find obligation, the question now turns to whether the Student was entitled to protections for children not yet determined eligible under the IDEA.

20. Pursuant to 34 C.F.R. §300.534, a child who has not been determined eligible and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in Part B of the IDEA if the public agency had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.
21. The District must be deemed to have knowledge that the child was a child with a disability if, in relevant part:
 - a. The Complainant expressed concern in writing to supervisory or administrative personnel of the District, or to the Student's teacher, that the Student was in need of special education and related services;
 - b. The Complainant requested an evaluation; or
 - c. The Student's teacher, or other personnel of the District, expressed specific concerns about a pattern of behavior demonstrated by the Student directly to the Director of Special Education or other supervisory personnel of the District. See 34 C.F.R. §300.534(b).
22. As applied to this Student, the District continued to have reasons for concern regarding the Student's potential eligibility in the categories of Other Health Impairment and Emotional Disability at the time the Student was exited from special education and throughout the time of his enrollment in the current school. The Complainant repeatedly expressed concern and communicated her belief that the Student was in need of "a 504 plan or an IEP" to the Student's teacher and the Principal. The Complainant's expression of concern and requests for evaluation continued throughout the time of the Student's enrollment in the current school within the District from October 2011 through May 2012, during the same period of time the Student was subjected to repeated discipline for violations of the District's and school's code of conduct, and experienced poor peer relationships and limited social success.
23. The requirements of 34 C.F.R. §300.534(b) are met, and the Student should have been entitled to the protections of the IDEA. This conclusion speaks only to the Student's entitlement to the protections of the IDEA, not to the Student's actual eligibility under the IDEA. As noted above, the eligibility decision is reserved for the team of qualified professionals, including the parents, after a comprehensive initial evaluation. See 34 C.F.R. §§300.301 through 300.306.

24. With respect to this complaint, the Student and Complainant are free to access all protections afforded under the IDEA and the Federal Regulations, including, but not limited to:
- a. The state complaint provisions in 34 C.F.R. §§300.151 through 300.153;
 - b. The discipline and change of placement provisions in 34 C.F.R. §§300.530 through 300.536; and
 - c. The procedural safeguards in 34 C.F.R. §§300.500 through 300.520.
25. The District may attempt to assert that one of the exceptions to this protection applies consistent with 34 C.F.R. §300.534(c), which states that a public agency would NOT be deemed to have knowledge that the Student was a child with a disability if –
- a. The parent of the child
 - i. Has not allowed an evaluation of the child pursuant to 34 C.F.R. §§300.300 through 300.311; or
 - ii. Has refused services under this part; or
 - b. The child has been evaluated and determined to not be a child with a disability.
26. Because the IDEA requires that proposals for evaluation be in writing in the form of a Prior Written Notice (34 C.F.R. §300.503), any position that the Complainant would not consent to an evaluation for suspected Emotional Disability is incongruous with the District's affirmative duty to propose an evaluation in writing. Consistent with recent Federal court interpretations, the failure to propose evaluations in writing would not satisfy the informed consent requirement that the parent be fully informed of the activity about which her consent was sought. See *Plainville Bd. Of Educ. v. R.N.*, 58 IDELR 257 (D. Conn. 2012), and see 34 C.F.R. §300.9. If the District did not explain exactly what conditions, including academic, behavioral, or medical, that it sought to identify through an evaluation, the Complainant was unable to offer her informed consent. See *M.J.C. v. Special Sch. Dist. No. 1*, 58 IDELR 288 (D. Minn. 2012). Therefore, the District cannot avoid its affirmative duty under the premise that the Complainant had previously refused further evaluation because there was no written, formal proposal for the evaluation developed by the District.
27. Next, any position that the Student had been evaluated and determined to not be a child with a disability is also not persuasive. The reevaluation took place over a year prior to the concerns identified in the current complaint. Further, the Evaluation Report only confirmed that the Student was not eligible in the category of Learning Disability, and also confirmed that the District continued to question eligibility in categories not evaluated.

28. Therefore, the exceptions noted in 34 C.F.R. §300.534(c) are not operative with respect to the Student. WDE concludes that the Student was entitled to the protections of the IDEA.

Issue #3

29. By virtue of WDE's authority to investigate other violations of Wyoming law as granted by WDE Chapter 7 Rules, Section 7(b), WDE must now determine whether the District violated W.S. §21-3-110(a)(xxxi) or the Department of Education Chapter 42 Rules, Seclusion and Restraint in Schools.

30. According to the WDE Chapter 42 Rules, Section 6(n), "Seclusion" means removing a student from a classroom or other school activity and isolating the student in a separate area. Seclusion occurs when a student is placed in a room or location by school personnel, purposefully separated from peers, and prevented from leaving that location. Separation in an area where the student is prevented from leaving is always considered seclusion. There are two distinct categories: i) Seclusion from the Learning Environment, and ii) Isolation Room. The term does not include a student requested break or in-school-suspension, detention or other appropriate disciplinary measure.

31. Seclusion from the learning environment is further defined as visually or auditorally isolating the student from the classroom or other school activity, away from peers in an area that obstructs the student's ability to participate in regular classroom or school activities. The student is prevented from rejoining the learning environment or school activity until directed by staff.

32. Although the Student was removed from the classroom to the hallway on some occasions, was removed from recess, and was not permitted to attend an ice skating trip, all practices that could constitute use of regulated procedure, it remains unclear from the record, interviews, and other materials reviewed as part of this investigation, the frequency or the manner in which the Student may have been removed from the learning environment or other school activity for disciplinary purposes, or if these techniques were part of an appropriate school discipline plan.

33. Therefore, WDE is unable to conclude that the Student was removed from the learning environment in a manner regulated Section 7(d) of WDE Chapter 42 Rules.

Issue #4

34. The District provided information regarding the Student's behavior in an email to a wide range of school employees, including teachers at all age ranges, food service personnel,

paraprofessionals, custodians, and also to the School Resource Officer who is not a District employee.

35. The confidentiality protections of the Family Educational Rights and Privacy Act (FERPA) are incorporated into the IDEA. See 34 C.F.R. §300.612. Confidentiality, consistent with the IDEA, is one of the procedural safeguards identified in 34 C.F.R. §300.504(c) that is afforded to students not yet determined eligible for special education but entitled to the protections by meeting the requirements of 34 C.F.R. §300.534.
36. FERPA provides for the disclosure of personally identifiable, confidential information to other school officials, including teachers, within the agency whom the agency has determined to have a legitimate educational interest. 34 C.F.R. §99.31(a).
37. A *legitimate educational interest* is interpreted by the United States Department of Education to mean: “[A] school official generally has a legitimate educational interest if the official needs to review an education record in order to fulfill his professional responsibility.” *Family Educational Rights and Privacy Act Guidance for Eligible Students* (USDE 2011).
38. Recognizing that the school the Student attended serves students in K-12, it is illogical to conclude that each teacher in grades 7-12 had a legitimate educational interest in the Student’s behavior. Further, a custodian would never have a legitimate educational interest in having access to confidential information regarding any student, as a custodian is not licensed or qualified to have direct student interactions for educational purposes.
39. Regarding the disclosure to the School Resource Officer (SRO), it is possible for the SRO to be considered a school official under FERPA at 34 C.F.R. §99.31(a)(1)(B) if:
 - a. The SRO performs an institutional service or function for which the agency would otherwise use employees;
 - b. Is under the direct control of the agency with respect to the use and maintenance of education records; and
 - c. Is subject to the requirements of FERPA governing the use and redisclosure of personally identifiable information from education records.
40. The SRO would not meet FERPA’s definition of school official, especially since SRO is an employee of the county’s law enforcement unit performing law enforcement duty while in the school. By virtue of the SRO’s employment with the county, he or she would not be “under the direct control” of the District as required by FERPA above.

Decision:

Issue #1

Whether the District violated its child find responsibility, which is the ongoing responsibility to identify and evaluate the Student consistent with 34 C.F.R. §300.111 if the District had reason to suspect an IDEA disability and the need for special education.

WDE finds that the District had reason to suspect that the Student was a child with an IDEA disability and in need of special education, but it did not propose a comprehensive initial evaluation to determine eligibility for services under the IDEA. Therefore, the District's child find obligation was violated.

Issue #2

Whether the Student is entitled to protections for children not determined eligible for special education and related services pursuant to 34 C.F.R. §300.534.

WDE finds that the Student was entitled to the protections of the IDEA pursuant to 34 C.F.R. §300.534.

Since WDE found the District out of compliance with respect to its child find obligation also concluded the Student is entitled to protections under the IDEA, WDE shall now determine whether violations were present with respect the following two issues:

Issue #3

Pursuant to WDE's authority to investigate violations of Wyoming Law granted by WDE Chapter 7 Rules, Section 7(b), WDE shall investigate whether removing the Student from the learning environment as a disciplinary measure constituted the use of a regulated procedure in violation of W.S. §21-3-110(a)(xxxii) or the Department of Education Chapter 42 Rules, Seclusion and Restraint in Schools.

WDE finds that insufficient information and documentation exists to conclude that the District violated Chapter 42 Rules on Seclusion and Restraint in Schools. Therefore, WDE finds no violation of this Issue.

Issue #4

Whether the District violated its duty to maintain the confidentiality of personally identifiable information regarding the Student in violation of 34 C.F.R. §§300.123 and 300.610 through 300.625.

WDE finds the District in violation as a result of the disclosure of confidential student information to individuals with no legitimate educational interest and to law enforcement.

Corrective Action Plan:

1. The District shall offer to fund an independent expert to conduct a comprehensive evaluation of the Student, including a behavioral evaluation, to assist the District in determining eligibility and potential interventions to be utilized with the Student. This requirement includes:
 - a. The District and Complainant shall jointly choose the expert evaluator to be utilized for the functional evaluation.
 - b. In the event that the Complainant declines to have the Student participate in the comprehensive evaluation the District is relieved of the responsibility for funding the evaluation.
 - c. In the event that the District and Complainant are unable to jointly choose the expert evaluator, the following process shall be utilized:
 - i. District shall submit a list of three (3) independent and appropriate evaluation sources to the Complainant with a copy to WDE within fifteen (15) days of the date of this decision;
 - ii. The Complainant shall choose the evaluator from the list provided by the District within ten (10) days of receipt from the District;
 - iii. The District shall notify WDE within five (5) days of receiving notice of the Complainant's choice and the specific details and dates for the evaluation.
 - d. The evaluation shall be conducted and the Complainant provided with a copy of the results of the evaluation to utilize with the Student's new school district within ninety (90) days of the date of this decision;
 - e. Confirmation of the evaluation completion shall be submitted to WDE within ten (10) days of the conclusion of the evaluation and receipt of the report; and

- f. The Complainant must sign all necessary consents and releases in order to facilitate the evaluation according to the steps above. Failure of the Complainant to sign necessary consents and releases shall constitute a waiver of this expert evaluation requirement.
2. The District shall provide at least eight (8) hours of inservice training to all special education staff and building administrator(s) regarding the child find process, procedural safeguards including prior written notice, and confidentiality. The requirements include:
 - a. The inservice training must be completed by December 1, 2012.
 - b. The District shall provide WDE with the following documentation:
 - i. The date, time, location, agenda and presenters ten (10) days prior to the training; and
 - ii. Copies of any materials or handouts used, in addition to sign-in sheets documenting the attendance of special education staff within ten (10) days of completion of the mandatory inservice training.

All required submissions must be sent to WDE to the attention of Diana Currah, with a copy to the Complainant. Please direct questions regarding this complaint investigation to the Wyoming Department of Education, Special Programs Division at 307-857-9285 or 800-228-6194.

Sincerely,



Stephanie Weaver
Administrator of Operations
Special Programs Division

cc: District Superintendent
, District Board Chair
Cindy Hill, Superintendent of Public Instruction
Samuel Shumway, WDE Legal Counsel
Tiffany Dobler, Special Programs Division Director