*This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code § 16.63 regarding closed hearings.*

**HEARING OFFICER DECISION/ORDER**
**CHILD'S NAME: C.S.**
**FILE 6323/05-06 LS**

**BETHEL PARK SCHOOL DISTRICT**

**Date of Birth:** xx/xx/xx
**Type of Hearing**: CLOSED
**Date of Hearing**: March 21, 2006

## I. PARTIES TO THE HEARING

**PARENTS:**

**DATE TRANSCRIPT RECEIVED:**
March 24, 2006

**PARENT REPRESENTATIVE:**
Lilian Akin, Esquire
428 Connor Street
Pittsburgh, PA 15207
412-422-4383
laakin@bellatlantic.net

**HEARING OFFICER:**
Dorothy J. O'Shea, Ph.D.

_____
**Signature: Hearing Officer**

**DISTRICT CONTACT:**
Ms. Idessa Hiriscak
Special Education Supervisor
Bethel Park School District
301 Church Road
Bethel Park, PA 15102
412-854-8410
hiriscak.idessa@bpsd.org

April 3, 2006
**Date of Decision/Order**

**DISTRICT REPRESENTATIVE:**
Michael Brungo, Esquire
Maiello, Brungo, & Maiello
1 Churchill Road
3301 McCrady Road
Pittsburgh, PA 15235-5137
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## II. BACKGROUND INFORMATION

Student, a resident of the Bethel Park School District (i.e., the District), was a xx year-old sixth grade student attending the District's *Middle School* during the 2005-2006 school year. Pursuant to 22 Pennsylvania Code, Student received a Chapter 15 *Service Agreement* in February 2005. In February 2006, Student participated in an incident involving a weapons violation. The District conducted a "*Manifestation Determination*" review, determining that Student's conduct in bringing the weapon to school was a manifestation of his disability (i.e., *Attention Deficit with Hyperactivity Disorder*: ADHD).

## III. FINDINGS OF FACT

1. Student, born xx/xx/xx, attended District schools since kindergarten (District Exhibit 16, page 1: D 16, page 1; D18, page 1).
2. Throughout his academic career as a District student, Student received above average grades (D18, pages 1-10).
3. During the 2002-2003 school year, as a 3rd grader, Student displayed problems in focusing and attention difficulties (D18, page 10).
4. On April 16, 2003, Student's 3rd grade teacher completed a *McCarney School Version Rating Form* that summarized Student's "i*nattentive*" and "*hyperactive-impulsive*" behavioral ratings (P7, pages 1-3).
5. Although Student received satisfactory subject area reports during the 2003-2004 school year, his 4th grade teacher reported that Student's attention deficit symptoms caused inconsistent demonstration of Student's intellectual strengths within the classroom setting (D16, page 5; D18, pages 26, 32).
6. On September 16, 2003, Student's 4th grade teacher sought the help of an Instructional Support Team (IST) (Parents' Exhibit 5: P5, page 1).
7. On September 16, 2003, while in 4th grade, Student received an"*Initial Action Plan*" offered by Student's IST (P6, pages 1-2).
8. Student received a number of recommended strategies on his *Initial Action Plan*. Student's 4th grade goals were to help Student adjust to the classroom setting, locating and using strategies to find consistency, organization, and structure for his day (D16, page 5; P6, pages 1-2).
9. On September 17, 2003, Student's 4th grade teacher completed a *McCarney School Version Rating Form* that summarized Student's "i*nattentive*" and "*hyperactive-impulsive*" behavioral ratings (P22, pages 1-3).
10. Mother, Student's mother, testified that District personnel advised her to seek the services of a psychiatrist to help with Student's attention difficulties, when Student was in the 4th grade (Notes of Transcript, pages 95-96: NT 95-96).
11. Student's mother stated she sought the psychiatrist's help as recommended by the District's school psychologist and teacher, Ms. D (NT 95-96).
12. On October 25, 2003, Dr. L, Student's treating psychiatrist, wrote a letter to the District naming Student's treatment for ADHD. Dr. L named Student's medication, "*Adderal XR*" to be taken at noon each day (P8, page 1; NT 173-176).
13. During the 2003-2004 school year, Student's 4th grade teacher and psychiatrist cooperated to develop a medication plan that allowed Student to concentrate on instruction (D16, page 5).

14. On November 13, 2003, Student's "*IST 30 Day Progress Review"* noted, *"We will continue to monitor the behaviors... Student's degree of need can be met in regular education at this time*" (P20, page 1).
15. On February 19, 2004, Student's "*IST 60 Day Progress Review"* stressed, while Student's teachers revised Student's "*behavior management chart…Student's degree of need can be met in regular education at this time… Exit IST Services*" (P20, pages 2-3).
16. On June 2, 2004, at his Parents' request, Student received a [redacted] form (P23, page 1).
17. Student's June 2, 2004 [redacted] form stated, "*He is very bright but due to ADHD demonstrates these skills with inconsistency*" (P23, page 3).
18. [Redacted].
19. [Redacted].
20. Group achievement testing results (i.e., obtained during 1st, 2nd, and 4th grades) reflected the following national percentile rank ranges: *Reading Composite* 83-90*, Language Composite* 49-95, and *Mathematics Composite* 89-94 (D16, page 4).
21. During his assessment for [redacted] consideration, Student also received the *Woodcock-Johnson III Tests of Achievement* (WJ III), an individually administered, nationally standardized test to assess his reading, writing, and math skills. Student's WJ III standard scores ranged from 112 (*Applied Problems*) to 125 (*Letter-Word Identification*), and an *Academic Applications* cluster score of 117 (D16, pages 3-4).
22. [Redacted].
23. [Redacted].
24. Student's mother stated Student's 5th grade "*didn't go well*." His mother went to Student's teacher, Ms. O, and expressed concerns to the teacher (NT 110-11).
25. On February 1, 2005, Student received a Chapter 15 *Service Agreement* (P10, pages 1-2).
26. The District instituted the February 1, 2005 Chapter 15 *Service Agreement* providing for the following accommodations: "(*a) preferential seating; (b) break down tasks into smaller segments; (c) provide extended time on tests needed;(d) use proximity cues and physical cues to redirect Student's attention; (e) use graph paper for math homework and tests, highlight directions as needed; (f) repeat directions and instruction and check Student for understanding; (g) using a binder for organization support; (h) opportunity for retesting at teacher's discretion if attention seems to be an interfering factor on the student's success; (i) teacher and parents' signature in planner; (j) state and achievement testing in a small group testing environment*"(P10, pages 1-2).
27. Student's mother approved Student's Chapter 15 *Service Agreement* (P10, page 2).
28. On January 31, 2006, Student' received a revised Chapter 15 *Service Agreement*, with services set to begin February 1, 2006 and end January 31, 2007 (P11, pages 1-2).
29. The January 31, 2006 modified Chapter 15 *Service Agreement* included the following accommodations: "(*a) preferential seating, close to source of instruction and away from distracting stimuli; (b) simplify more complex directions and instructions with breaking tasks down into smaller segments; (c) provide extended time on tests as needed; (d) use proximity cues and physical cues to redirect Student's attention; (e) use of graph paper for math homework and tests is beneficial to Student; (f) highlight directions as needed; (g) repeat directions and instruction and check Student for understanding; (h) opportunity for retesting at teacher's discretion if attention seems to be an interfering factor on student's success;(i) state and achievement testing in a small group desk environment;(j) extra set of books at home*" (P11, pages 1-2).
30. Student's mother approved Student's revised Chapter 15 *Service Agreement* (P11, page 2).
31. On February 1, 2006, Student used profanity/vulgarity and "*passed an inappropriate note to a girl*" (P13).

32. On February 2, 2006, the District sent to Student's Parents notification that Student received a serious "*Student Discipline Report*" (P12, page 1).
33. Student had no record of serious "*Student Discipline*" incidents reported at his school prior to February 2, 2006 (P17, page 1).
34. Previous to February 2006, Student's mother received a copy of the District's handbook containing a *Code of Student Conduct* that makes it clear that possession of a weapon or look-alike weapon is against the District's policy of children bringing weapons or look-alike weapons on school grounds (NT 163).
35. The District published a written policy entitled, "*Weapons and Dangerous Instruments*" (D19, pages 1-3).
36. On February 3, 2006, Student was found to be in possession of a weapon on school property, including the school bus, while traveling to and from school (P13, page 1).
37. While at school, Student carried the weapon in his backpack, but on several occasions removed the weapon from the backpack and brandished the weapon while on the bus (P15, pages 2-3).
38. On February 3, 2006, Student received a "*weapons violation, 5 day out of school suspension, possible extension pending outcome of informal hearing on 2/10/06 at 9 AM*" (P13, page 1).
39. On February 3, 2006, the District sent to Student's Parents notification that Student received a second serious "*Student Discipline Report*" (P14, page 1).
40. On February 8, 2006, Student's treating psychiatrist, Dr. L, wrote a summary report of Dr. L's February 7, 2006 psychiatric evaluation conducted on Student (P15, page 1).
41. The February 8, 2006 psychiatric evaluation contained a summary of Dr. L's interview with Student, in which Student described, "*he felt that he should take his … [weapon] and protect himself*" (P15, pages 1-2).
42. The February 8, 2006 psychiatric evaluation report found that Student brought the [weapon] to school for three days. "*On the first day Student asked his mother if it was okay if he brought his [weapon]…. Student's mother gave approval.*" On the third day, District authorities found out about the weapon and approached and searched Student (P15, pages 2-3; NT 187, 222).
43. On February 10, 2006, the District held an informal hearing procedure, as per the District's "*Weapons and Dangerous Instruments*" and the *Code of Student Conduct* policies (D 19, page 2; P17, page2).
44. Student was suspended out of school for ten days from February 3, 2006 to February 16, 2006 (P17, page 2; NT 220-221; 224-227).
45. On February 15, 2006, the District conducted a "*Manifestation Determination*" review (P17, pages 1-5).
46. Student's parents were both in attendance during the February 15, 2006 meeting (P17, page 1).
47. Dr. L was a member of the February 15, 2006 "*Manifestation Determination*" review team (P17, page 1; NT 173-180).
48. Student's principal, assistant principal, counselor, regular education teacher, and special services representative were members of the February 15, 2006 "*Manifestation Determination*" review team (P17, page 1).
49. The February 15, 2006 team conducting the "*Manifestation Determination*" review considered all relevant information and concluded that Student's conduct in bringing the weapon to school was a manifestation of his disability: ADHD (P-17, page 5).
50. Dr L agreed with the February 15, 2006 team's determination that Student's behaviors were a manifestation of the ADHD (NT 173-180).

51. As a result of the violation of the District's "*Weapons and Dangerous Instruments*" and the *Code of Student Conduct* policies, the District recommended Student's placement in an alternative education program for 45 school days (NT 227-228).
52. The District did not move forward with a formal hearing for Student's expulsion under the District's "*Weapons and Dangerous Instruments*" and the *Code of Student Conduct* policies (NT 161-162; 227-228).
53. Although the District did not move forward with expulsion proceedings, the District discussed an alternative placement with the Parents seeking consent to have Student receive his educational program at *Middle School* after school hours through one-on-one instruction, for a period of 45 school days. In the alternative, and absent parent agreement, the District sought to have Student placed in an Alternative Education Program pursuant to the Pennsylvania Public School Code provisions applicable to "*Disruptive Students*." The parents rejected either option (NT 161-162; 227-228).
54. Student was returned to the regular educational program that he was in prior to the incident, with the accommodations in the Chapter 15 *Service Agreement* continuing (NT 228).
55. On February 15, 2006, the District offered to Student's parents a *Permission to Evaluate* form for special education consideration "*to assess current academic or learning difficulties and emotional or behavioral adjustment difficulties*" (P19, pages 1-2).
56. Prior to Student's February 2006 "*Student Discipline*" incidents, neither Student's Parents, nor the District, specifically requested Student's evaluation for special education (NT 142; 144-148).
57. Student's mother stated that prior to Student's writing of the note to a girl in the 2005-2006 school year, Student hadn't had any discipline problems in school (NT 153-154 ).
58. On February 28, 2006, the Hearing Officer sent the parties a letter noting the availability of a prehearing telephone conference and the *Notice of Hearing* scheduled for March 22, 2006 (Hearing Officer Exhibit 1: HO 1).
59. On March 3, 2006, at the parties' request, the Hearing Officer rescheduled the hearing for March 21, 2006 (HO 2).
60. On March 21, 2006, the parties stipulated that Student's weapon is [redacted] *P-226* (NT 17, 36).
61. On March 21, 2006, Student's mother testified she purchased the [weapon] for Student, (NT 143 ).
62. On March 21, 2006, Dr. B opined concerning the weapon's [characteristics] (P1, pages 1-4; NT 33-44, 73).
63. On March 21, 2006, Dr. B stated, [redacted] (NT 36).
64. Dr. B did not inspect the [weapon] that was in Student's possession [redacted] (NT 66).
65. [Redacted].
66. [Redacted].
67. Student's weapon has [printed information] that states, "*misuse can cause serious bodily injury or death*" (NT47).
68. Dr. B opined the statement [redacted] was erroneously [included] (NT 81).
69. [Redacted].
70. [Redacted].
71. [Redacted].
72. [Redacted].
73. [Redacted].
74. Student's mother was aware that Student was bringing the [weapon] to school (NT 157-160).

75. Student's mother rejected the District's offer to place Student at "*after school hours through one-on-one instruction*" and at an alternative education program (NT 161-162).
76. Dr. L didn't agree with the alternative placement at *[Redacted]* (another alternative educational setting proposed by the District) (NT 184).
77. Officer M, school resource officer assigned to the District, is a police officer with full arrest power as any other municipality police officer (NT 207).
78. [Redacted].
79. [Redacted].
80. Mr. P, the District's Assistant Principal, stated that on the day of Student's weapons violation, Mr. P went to the guidance counselor and walked up to Student's locker area. Student was by his locker preparing to go into his classroom. Student had the [weapon] in his backpack (NT 222).
81. Student informed District officials he brought the [weapon] to school because a boy was picking on him that attended the District's middle school (NT 222).
82. Mr. P explained that Student was not expelled. At the conclusion of his tenth day of suspension, Student came back to his regular education program with the Section 504 *Service Agreement* in place for Student (NT 227-228).
83. Student did not pose problems behaviorally in Ms. R's 6th grade homeroom, or in reading class, during the course of the 2005-2006 school year (NT 236-246).
84. Ms. C, the District's School Psychologist, never met Student (NT 281).
85. Ms. C conducted a review of Student's school records (NT 291-297).
86. Ms. C was unaware of how Student received a Chapter 15 *Service Agreement* (NT 281, 291-297).
87. As of March 21, 2006, the District had not completed Student's expedited special education evaluation (NT 123; P19).

## IV. ISSUES

The parties agreed to two hearing issues during a pre-hearing telephone conference (HO 2) and stipulated to a third issue on the record (NT pages 18-20). The agreed upon hearing issues are:

- Is Student eligible for the *Individuals with Disabilities Education Act*'s (IDEA 2004) protections as a "*thought to be*" student under the IDEA 2004, thereby prohibiting a placement in an Alternative Education Program under Article XIX-C of the Pennsylvania Public School Code without parental consent?

- Is the weapon that Student brought to school a "*dangerous weapon*" under the IDEA 2004, thereby permitting the District to place him into an interim alternative education program for up to 45 school days?

- Does Student meet the definition of a "*disruptive student*" as defined under Article XIX-C of the Public School Code?

## V. DISCUSSION AND CONCLUSIONS OF LAW

**Is Student eligible for the *Individuals with Disabilities Education Act*'s (IDEA 2004) protections as a "*thought to be*" student under the IDEA 2004, thereby prohibiting a placement in an Alternative Education Program under Article XIX-C of the Pennsylvania Public School Code without parental consent?**

The IDEA provides that if certain criteria are met, a child who has not yet been identified as eligible for special education can assert any of the protections available to those children who are eligible for special education. The IDEA, 20 U.S.C. §1415(k)(5)(A), provides:

> *A child who has not been determined to be eligible for special education and related services under this subchapter and who has engaged in behavior that violates a code of student conduct, may assert any of the protections provided for in this subchapter if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.*

Paragraph (B) of Section 1415(k)(5) specifically articulates what criteria must exist in order for a local educational agency (LEA) to be considered as having knowledge that the child is "*a child with a disability*." There are three circumstances:

> *… shall be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred –*
>
> *(i) the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;*
>
> *(ii) the parent of the child has requested an evaluation of the child pursuant to section 1414(a)(1)(B) of this title; or*

*(iii) the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.*

An "*eligible*" child is defined in the IDEA as requiring a two-prong test. The definition requires that the child needs special education as a result of the disability.

Federal special education regulations also require all school districts to evaluate and identify all eligible children regardless of whether the parents have requested an evaluation (20 U.S.C. §1412(a)(3)(A)), and that they do so "*within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability*" (See *W.B. v. Matula*, 67 F.3d 484, 501 (3rd Cir.1995)).

It must be kept in mind that the determination that must be made in Student's due process proceeding is **not whether Student is in fact eligible for special education** but whether he is **"*thought to be eligible*"** and, therefore, **entitled to IDEA protections**. As a child with an existing Chapter 15 *Service Agreement* (*22 Pennsylvania Code, Chapter 15)*, Student's case requires careful scrutiny regarding his "*thought to be eligible*" status for federal special education protections.

Pennsylvania children with disabilities having a Chapter 15 *Service Agreement* are protected from discrimination on the basis of their disabilities by *Section 504 of the Rehabilitation Act of 1973*, 20 U.S.C. §794 ("Section 504"), and its implementing regulations, 34 C.F.R., Part 104. Section 504 protects children who are not IDEA-eligible, but who have a physical or mental impairment that substantially limits one or more major life activity. 29 U.S.C. §705(2)(B)(i). Although prior to the IDEA 2004 reauthorization, the Department of Education has expressly said that federal special education discipline provisions are also applicable to students protected by Section 504, unless otherwise noted by the Department of Education. (See e.g., *OSEP Memorandum 95-16*, 22 IDELR 531(OSEP 1995)).

THE FOLLOWING POINTS ARE RELEVANT BASED ON THE FACTUAL EVIDENCE OF RECORD:

- **Student's teachers expressed specific concerns about a pattern of behavior demonstrated by Student, resulting in Student's IST and Chapter 15 *Service Agreement*, before the occurrence of the weapons violation that precipitated Student's disciplinary action.** District personnel testified that Student's parents had not expressed to them, either verbally or in writing prior to the date of the February 2006 weapons incident, Student's need for special education. During the hearing, District staff testified that the staff was observing Student as an academically successful student, who did not demonstrate behavioral issues of any significance (NT 219-220; 237-246). The District knew that Student had received the diagnosis of ADHD. On October 25, 2003, Dr. L, Student's treating psychiatrist, wrote a letter to the District indicating Student's ADHD treatment and need for medication (P8, page 1). In 3rd grade, Student displayed "*difficulty staying focused…focusing attention on seatwork and monitoring himself*" (D18, page 10). Student's 4th grade teacher reported that Student's attention deficit symptoms caused "*inconsistent demonstration of Student's intellectual strengths within the classroom setting*" (D16, page 5; D18, pages 26, 32). She sought the help of an IST for Student's "*academic/learning difficulties-sustained" and "behavioral difficulties, problems in attention and focusing*," finding, "*Student has an extremely difficult time attending to his work. He is off task numerous times/subjects*" (P5, page 1). Student's identified problems included, "*sustained focus, lack of attention to details, written expression (regarding school assignments and compared to verbal skills), some tardiness lately, and school attitude*" (D16, page 5; P6, pages 1-2). By 2005, District personnel determined that Student had a physical or mental impairment that substantially limits one or more of his major life activities. Obviously,

Student had been viewed as a student with a disability requiring a *Service Agreement*. 29 U.S.C. §705(2)(B)(i).

- **The District offered no proof that the District had evaluated Student based on Student's behavior or learning needs prior to Student's receipt of a Chapter 15 *Service Agreement*.** The District did not offer evidence that the District ever provided an educational evaluation to Student in order to determine his needs concerning his physical or mental impairment that substantially limits one or more of his major life activities, resulting in his Chapter 15 *Service Agreement*. 34 CFR §104 35 (a). However, the Chapter 15 *Service Agreement* was put in place during Student's 5th grade year to provide accommodations for Student's disability. The District did not explain adequately what Student's disability entailed, and how his Section 504 *Service Agreement* addressed identified needs. (The request for evaluation that the District made was in connection with the Parents' belief that Student was [redacted] and eligible for [redacted]. (See P23; D16.)

Federal special education mandates provide:

*The LEA is not deemed to have knowledge that the child is a child with a disability if the parent refused to allow an evaluation of the child, if the parent has refused services, or if the child was already evaluated and determined not to be eligible . 20 U.S.C. § 1415(k)(5)(c). If the LEA does not have "knowledge" that the child is a child with a disability, the school may subject the child to the same discipline applied to children without disabilities. 20 U.S.C. § 1415(k)(5)(D)(i). If the parent of a child requests an evaluation during the time period in which the child is being disciplined, however, the LEA is required to conduct an expedited evaluation and provide discipline procedural protections to the child if he is eligible. The child must remain in the disciplinary placement pending the result of evaluation. 20 U.S.C. 1415(k)(5)(D)(ii).*

- **The District conducted Student's February 15, 2006 "Manifestation Determination" review and found that Student's weapons violation was caused by or had a direct relationship to his disability.** A district must conduct a "*Manifestation Determination*" review before suspending a Chapter 15 student with a disability for more than 10 days. Such a disciplinary action is considered a significant change in placement, and therefore triggers a **reevaluation** requirement of 34 CFR §104 35 (a) (d) (emphasis added). Student's February 15, 2006 "*Manifestation Determination*" review team sought consent for a special education evaluation pursuant to the IDEA 2004 (P19, pages 1-2). As of March 21, 2006, the District had not completed an expedited evaluation (NT 123; P19) and did not remove Student to a disciplinary placement pending the result of an expedited evaluation. Rather, the District allowed Student to continue in his regular program following his 10-day suspension (NT 227-228). Because the District did not provide evidence that an initial Section 504 evaluation ever took place, the District was not responding to the reevaluation requirement of 34 CFR 104 35(a)(d). The District had knowledge of Student's behavioral and learning difficulties in order to make a determination that Student's conduct in bringing the weapon to school was a manifestation of a disability (P-17, pages 4-5). Prior to the weapons violation, the District never ruled out the possibility of Student's eligibility determination pursuant to the *Child Find* provisions of 20 U.S.C. §1412(a)(3)(A). The District did not provide evidence of evaluating Student's behavioral and learning difficulties appropriately, pursuant to 20 U.S.C. 1412(a)(3)(A) or 20 U.S.C. 104.35. Because he demonstrated behaviors that did affect his learning (D16, page 5; D 18, pages 10, 26, 32; P6, pages 1-2) and did not receive an appropriate evaluation based on those behavioral and learning difficulties prior to his misconduct, Student should be afforded federal special education disciplinary provisions as a "*thought to be*" eligible student under the IDEA.

For the reasons set forth above, the criteria as set forth in 1415(k)(5)(A) have been demonstrated to exist. Student is "*thought to be*" eligible for special education evaluation under the IDEA 2004. IDEA 2004 protections apply to Student.

**IS THE WEAPON THAT STUDENT BROUGHT TO SCHOOL A "*DANGEROUS WEAPON*" UNDER THE IDEA 2004, THEREBY PERMITTING THE DISTRICT TO PLACE HIM INTO AN INTERIM ALTERNATIVE EDUCATION PROGRAM FOR UP TO 45 SCHOOL DAYS?**

The District contended that the weapon that was brought to school is a "*dangerous weapon*" permitting the District to place Student in an Alternative Education Program for 45 school days even if Student were found to be eligible under the IDEA 2004.

20 U.S.C. §1415(k)(1)(G) provides in pertinent part:

> *School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where the child –*
>
> *(i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;*
>
> * * *

Section 1415(k)(7)(C) states: *The term weapon has the meaning given the term "dangerous weapon" under section 930 (g)(2) of Title 18*. That section states in relevant part:

> (2) *the term "dangerous weapon" means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury. . .*

The term "*serious bodily injury*" as used in 20 U.S.C. §1415(k)(7)D), derives its meaning from 18 U.S.C. §1365(h)(3) and (4):

(3) *the term "serious bodily injury" means bodily injury, which involves –*

> *(A) a substantial risk of death;*
> *(B) extreme physical pain;*
> *(C) protracted and obvious disfigurement; or*
> *(D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty; and*

*(4) the term "bodily injury" means –*

> *(A) a cut, abrasion, bruise, burn, or disfigurement;*
> *(B) physical pain;*
> *(C) illness;*
> *(D) impairment of the function of a bodily member, organ, or mental faculty; or*
> *(E) any other injury to the body, no matter how temporary.*

Under a strict reading of the IDEA, a "*look-alike*" weapon may not fit the definition in IDEA as that is pegged to what absolutely is a weapon. Under that theory, then, anything that does not constitute a "*real*" weapon does not come under the IDEA provisions for dealing with weapons. `However, the flaw in that reasoning is that even though the primary concern of outright safety respecting the weapon is absent, a student with a disability, (i.e., whose weapons violation was caused by or had a direct relationship to his disability, such as Student's "Manifestation Determination" review team found (P17, page 4)), can wreak great havoc with a look-alike weapon and that in itself can create an unsafe school situation. That said, this Hearing Officer believes that Student's weapon can be used for, or is **readily capable of causing** death or serious bodily injury, as put forth in 20 U.S.C. §1415(k)(7)D (emphasis added).

Based on this Hearing Officer's authority to assess the credibility of witnesses and weigh evidence (See *Carlisle Area School District v. Scott P.*,62 F.3d 520,524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996)), Student's weapon **is** a "*dangerous weapon*" for purposes of the IDEA 2004. In making this determination in her analysis, this Hearing Officer evaluated the balance between what kind of **"look-alike" weapon** Student possessed on school property, the **context** in which Student made the weapon visible or brandished the weapon, and to what extent that whole situation created a **school safety hazard**.

THE FOLLOWING POINTS ARE RELEVANT BASED ON THE FACTUAL EVIDENCE OF RECORD:

- [Redacted].
- **Student's weapon has … a clear warning that misuse of the device "*could cause serious bodily injury or death*"** (NT 47). Dr. B stated that use of that warning was a mistake (NT 81). However, that explanation assumes that no reason other than importation requirements accounts for the warning. The manufacturer made a determination to place such a warning [which] is in keeping with all of the literature and directions that reiterate that proper safety procedures must be followed [redacted].
- **Student's weapon is a device that can create a school safety hazard, and as such, *is* readily capable of causing death or serious bodily injury merely by its appearance and presence.** If brandished in a setting such as a public school, where people would not expect such a device to be present, Student's weapon could elicit a response not only from law enforcement but also from others seeking to protect themselves and loved-ones. [Redacted.] The [weapon] that Student possessed **is a "*dangerous weapon*"** because he had a device that could have been viewed by another person and sparked a deadly reaction.
- **Based on the record testimony, Student's weapon is readily capable of causing "*serious bodily injury*" in the form of extreme physical pain**. While the Parent's expert explained that there was no way that the device in question could cause "*serious bodily injury*" as defined above, this Hearing Officer [disagrees for redacted reasons]. This Hearing Officer believes there exists a strong possibility that Student's weapon is readily capable of causing "*serious bodily injury."*

For the reasons set forth above, and as based on the Hearing Officer's credibility determinations, Student's weapon is a "*dangerous weapon*" for purposes of the IDEA 2004.

**DOES STUDENT MEET THE DEFINITION OF A "DISRUPTIVE" STUDENT AS DEFINED UNDER ARTICLE XIX-C OF THE PUBLIC SCHOOL CODE?**

Article XIX-C of the Public School Code, 24 P.S. §19-1901-C et. seq., permits districts to establish alternative education programs in which "*disruptive students*" can be alternatively placed to meet their academic needs. These programs are approved by the Pennsylvania Department of Education. Children need not be on suspension or expulsion status to be placed in such a program. A child who is a "*disruptive student*" as defined by the Act can be administratively placed in the program after an informal hearing before the building principal, subject to periodic review to determine whether the student is ready to return to the regular school curriculum.

"*Disruptive Student*" is defined generally as:

> *A student who poses a clear threat to the safety and welfare of other students or the school staff, who creates an unsafe school environment or whose behavior materially interferes with the learning of other students or disrupts the overall educational process. The disruptive student exhibits to a marked degree* ***any*** *or all of the following condition (emphasis added):*
>
> (i) Disregard for school authority, including persistent violation of school policy and rules.
>
> (iii) Violent **or** threatening behavior on school property or during school-affiliated activities.
>
> (iv) Possession of a weapon on school property, as defined under 18 Pa.C.S. §912 (relating to possession of weapon on school property).
>
> * * *
>
> (vi) Misconduct that would merit suspension or expulsion under school policy.

The Act specifically excludes from the definition of "*disruptive student*" a student who is eligible for special education. Paragraph (vii) of the definition delineates "*habitual truancy*" as another factor. But it then states: "*No student who is eligible for special education services pursuant to the Individuals with Disabilities Education Act (Public Law 91-230, 20 USC §1400 et seg.) shall be deemed a disruptive student for the purpose of this act, except as provided for in 22 Pa. Code §14.35 (relating to discipline).*" (The District contended that had the State Legislature intended to also exclude from the definition of "*disruptive student*" a child having a Chapter 15 *Service Agreement*, it would have specifically stated so.)

However, as already noted, the IDEA 2004 provides that if certain criteria are met, a child who has not yet been identified as eligible for special education can assert any of the protections available to those children who are eligible for special education. 20 U.S.C. §1415(k)(5). The significance of this designation for Student is that the District is not able to change his placement to an interim alternative education placement for 45 school days unless his parent agrees to the change or **unless a hearing officer orders it.** 20 U.S.C. §1415(k)(3)(B)(ii).

THE FOLLOWING POINTS ARE RELEVANT BASED ON THE FACTUAL EVIDENCE OF RECORD:

- **While the record evidence supports a conclusion that Student is "*thought to be*" under the IDEA 2004, the Alternative Education Program under State law is available**

**to the District as long as it meets its requirement of an informal hearing before the building principal.** The District must comply with specific notice and hearing procedures. (For suspensions of three to ten days, the District must inform the student of the reasons for the suspension, give the student an opportunity to respond, and send to the student's parents written notice of the suspension, while offering to hold an informal hearing with the student's parents and the principal. 22 Pa. Code 12.6(b)(1) (iv), 12.8(c). Mr. P testified that such an informal hearing took place at the District (NT255-227).

- **The Pennsylvania School Code defines "*disruptive student*" for purposes of Alternative Education Programs. It is clear that Student does meet that definition because he does exhibit to a marked degree** the following:

*Disregard for school authority, including persistent violation of school policy and rules.*

Student's possession of the weapon clearly is a violation of school policy and is also a violation of Act 26, a state law that mandates a minimum one (1) year expulsion of a student that brings a weapon to school. (Act 26 of 1995, Amended June, 1997, amended the School Code by adding section (24 P.S. §13-1317.2) pertaining to the possession of weapons and an Article entitled *Safe Schools* (Article XIII-A of 24 P.S.). Section 1317.2 requires that *a school district… shall expel, for a period of not less than one year, a student who brought onto or is in possession of any weapon on any school property, at a school or a school-sponsored activity or onto any public conveyance providing transportation to a school or school-sponsored activity. The expulsion should be accomplished pursuant to applicable regulations in 22 Pa. Code, Chapters 12 and 14. The superintendent or administrative director may recommend to the board modifications of such expulsion requirements for a student on a case-by-case basis. Even though expelled, students of compulsory school age must be provided an educational program as required by 22 Pa. Code §12.6(e). School entities may make alternative assignments or provide alternative education services during the period of the expulsion … Every school district… must develop a written policy regarding expulsions for possession of a weapon. In addition, the … school entity shall, in the case of an exceptional student, take all steps necessary to comply with the Individuals with Disabilities Education Act Amendments… 20 U.S.C. Section 1400 et. seq., including but not limited to, 20 U.S.C. Section 1415(k) and 34 C.F.R. Section 300.520*(a)(2)).

❖ The District's policy includes "*look-alike*" weapons because of the danger posed by the mere presence of such devices, and the fact that they are used to threaten and intimidate others (D 19, pages 1-3). Student admitted to Dr. L that Student had the [weapon] in his possession in violation of District policy and law over a period of several days (P 15, pages 1-2). As such, the persistent violation of school policy is clear.

*Violent or* ***threatening behavior*** *on school property or during school-affiliated activities.* (Emphasis added).

❖ There is evidence of record that Student used the [weapon] to threaten other students. In fact, the testimony clearly establishes that Student brought the weapon to school to use against another student who presumably was bullying Student (P15, page 2). If the [weapon] were so harmless, then why was there a need to bring the [weapon] to retaliate against a fellow student?

*(iv)Possession of a weapon on school property, as defined under 18 Pa.C.S. §912 (relating to possession of weapon on school property).*

❖ The gun Student possessed is a weapon. Student's weapon fits the definition because, in this Hearing Officer's determination, the [weapon] in question is "*readily capable of causing serious bodily harm.*"

*(vi)Misconduct that would merit suspension or expulsion under school policy.*

❖ Student was in fact suspended for his misconduct. But for Student's team's determination that the behavior was a manifestation of his disability, he would have been subject to expulsion.

For the reasons set forth above, and as based on the Hearing Officer's credibility determinations, Student meets the definition of a "**disruptive student**" as defined under Article XIX-C of the Public School Code.

**HEARING OFFICER DECISION/ORDER**
**RE: STUDENT, FILE 6323/05-06 LS**

**AND NOW, this 3rd day of April 2006, this Hearing Officer orders the School District to take the following action:**

1. The District shall view Student as a "*thought to be*" eligible student for special education evaluation and protections under the IDEA.
2. The District shall view Student's weapon as a "*dangerous weapon*" for purposes of the IDEA.
3. The District shall view Student as a "*disruptive student,"* as defined under Article XIX-C of the Public School Code.
4. The District must determine an appropriate alternative school setting and immediately must place Student in the alternative school setting for 45 school days.

_____
**Dorothy J. O'Shea, Ph.D.**
**Hearing Officer**

**DECISION DATE: _____**