

*This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.*

## **Pennsylvania**

# **Special Education Hearing Officer**

### DECISION

Child's Name: Student

Date of Birth: xx/xx/xx

ODR No. 01141-0910 KE

### CLOSED HEARING

Parties to the Hearing:

Representative:

York Suburban School District  
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York, PA 17403-4256

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Date of Resolution Session

June 7, 2010

Dates of Hearing:

July 29, 2010, August 13, 2010

Record Closed:

August 20, 2010

Date of Decision: August 31, 2010

Hearing Officer: William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student (Student) is a teen-aged student of the York Suburban School District (District), who was in ninth grade during the 2009-2010 school year. (NT 7-16 to 8-24.) Student is not identified as a child with a disability under either the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA), or the Rehabilitation Act of 1973, section 504, 29 U.S.C. §794 (section 504). Ibid. The Student was expelled after the District determined that Student's violation of the District Code of Student Conduct was not a manifestation of any disability. (P- 7.)

(Parents) requested this due process proceeding, asserting that the Student was thought to be a child with a disability under IDEA and section 504, and that the District had determined inappropriately that the Student's violation of the Code of Student Conduct was not a manifestation of Student's disability, which they alleged to be a Serious Emotional Disturbance. (S-18.) The District denies any prior notice that the Student was thought to be eligible, and asserts that the Student's behavior was not the product of a disability.

The hearing was conducted and concluded in two sessions on July 29, 2010 and August 13, 2010. Written summations were received on August 20, 2010, whereupon the record closed.

ISSUES

1. As defined in the IDEA and its implementing regulations, did the District know or is it deemed to have known that the Student was a child with a disability?
2. Was the Student's conduct in violation of the District's Code of Student Conduct a manifestation of such disability?
3. On or before March 29, 2010, was the Student disabled within the meaning of section 504 and was Student protected from disciplinary expulsion for Student's violation of the District's Code of Student conduct?

### FINDINGS OF FACT

#### THE STUDENT'S DISABILITY AND ITS IMPACT UPON SCHOOL PERFORMANCE

1. In April 2008, a certified school psychologist and clinical neuropsychologist retained by the Parents diagnosed the Student with Attention Deficit Disorder and noted a "rule out" diagnosis of Mood Disorder NOS. (S-1 p. 5.)
2. The Student has exhibited symptoms of mood disorder for at least six years. There is a family history of mood disorder. The Student received prescriptions for Wellbutrin, which is used to treat depression. The Student exhibited symptoms of depression and unhappiness for several years. (NT 86-20 to 87-18, 91-6 to 10, 289-14 to 290-1; P-1 p. 5 to 7, P-2, P-17 p. 6, S-15 p. 2.)
3. The Student has a history of psychiatric treatment with medication for symptoms of mood disorder. When Student was in fifth grade, the Student experienced agitation, as a result of the administration of Wellbutrin for symptoms of mood disorder. (NT 69-3 to 24; S-15 p. 3, 4.)
4. On March 24, 2010, the Student's physician discontinued the prescription for Concerta, reduced the dosage of Celexa, and re-introduced administration of Wellbutrin. (NT 72-18 to 74-20; P-6, S-15 p. 4.)
5. During the 2009-2010 school year, the Student was experiencing serious emotional illness, with symptoms of unhappiness or depression, limited ability to learn, and difficulty with establishing interpersonal relationships. (NT 294-25 to 295-20.)
6. In the 2009-2010 school year, the Student was experiencing increasing isolation at home and at school and increasing sadness at home. (P-17, 25.)

7. During the 2008-2009 and 2009-2010 school year, the Student's disruptive and oppositional behavior led to a number of disciplinary actions, but none rose above the level of detention except for the Student's March 29, 2010 behavior that led to expulsion. (P-9, P-24 p. 32, 45, S-7.)
8. The Student is capable of superior performance in all subjects. (P-12, 13, 20, 21, 22, S-10, S-15 p. 8.)
9. During the 2008-2009 and 2009-2010 school years, the Student's grades have varied from superior to near failing. (NT 78-5 to 8; P-11, S-9.)
10. The Student's teachers reported that the Student repeatedly failed to hand in homework and assignments on time and exhibited minimal effort. Student's teachers often reported that the Student was not performing at a level consistent with Student's potential. (P-13, 19, 20, 21, P-24 p. 61, S-15 p. 4.)
11. The Student was referred to an after school program to help Student complete Student's homework when due. (P-13.)
12. The Student's school performance was deteriorating substantially by October 2009. (P-24 p. 46, 41.)
13. The Student's deteriorating performance, and in particular Student's repeated failure to produce homework and assignments on time, was causally related to Student's clinical depression and attention deficit disorder, which interfered with Student's ability to complete homework and assignments. (NT 59-9 to 25, 295-21 to 297-7, 298-23 to 299-3.)
14. Even when supervised in the school setting for the purpose of homework and assignment completion, the Student continued to fail to complete homework and assignments on time. (NT 234-11 to 16.)
15. The Student was undergoing outpatient treatment on March 29, 2010, with a diagnosis of depression. (P-3, 7.)
16. In adolescents, major depression often presents as irritability, agitation and acting out behavior, rather than inactivity, sadness or sleep disturbance. (NT 327-24 to 328—19.)

#### KNOWLEDGE OF THE DISTRICT

17. The Parent (Parent) responded to teacher reports by trying to control the Student's failure to perform homework and assignments at home and by disciplining the Student repeatedly for failure to perform appropriately at school. (P-24.)

18. The Parent believed that it was her obligation to provide an evaluation identifying a disability, because District staff told her that they needed an evaluation in writing. (NT 50-16 to 51-19, 104-17 to 105-18, 121-17 to 122-2, 130-7 to 15.)
19. The Parent expressed her concerns repeatedly about the Student's organizational problems to teachers and administrators. (NT 46-20 to 48-21; 50-16 to 51-19; P-17, 24 p. 7, 59, S-15 p. 1, 2.)
20. During a [redacted] meeting in April 2009, the Parent provided to the team, including teachers and administrators, an excerpt of an April 2008 neuropsychological evaluation. The excerpted pages repeatedly stated the evaluator's opinion that the Student was suffering from a mood disorder, had a history of psychiatric treatment, and was in need of psychiatric care for symptoms of a mood disorder, including medication, and psychotherapy. The excerpt also indicated the evaluator's opinion that the Student's mood disorder was impacting Student's performance in school. (NT 51-20 to 55-5, 77-24 to 78-15; P-19, S-12 p. 2, 3.)
21. One teacher noted in the District's Behavior Detail Report that the Parent desired "office support discipline" to address the Student's repeated problems with being unprepared for class. (S-7 p. 1.)
22. The Parent expressed her concerns about the Student's emotional problems with the school guidance counselor and indicated that the Student had "emotional concerns" in an email message on April 20, 2009. She sometimes referred to this as "personality disorders" and "demons within." (NT 68-3 to 6, 61-24 to 62-15; P-24 p. 49, 60.)
23. On March 18, 2009, the school nurse noted on the cumulative school health record that the Student was in therapy and receiving Celexa, selective serotonin reuptake inhibitor, used in the treatment of depression. On September 4, 2009, the nurse noted that the Student was receiving Celexa and Concerta. These medications were prescribed continuously for the Student until March 24, 2010. (NT 334-12 to 18; P-16 p. 1, 3, S-15 p. 4.)
24. In December 2009, the Parent informed a teacher in writing that the Student may have been "more troubled by the divorce than Student is showing" and that it may have been affecting Student's performance in school. (P-24 p. 37.)
25. In January 2010, the Student's German teacher expressed concern about the Student's work habits and preparation. The Parent responded by informing the teacher that the Student had repeatedly made suicidal statements when Student failed to succeed in school, had inherited "mood disorders", and impliedly needed treatment for mood disorders. (P-24 p. 34.)

26. On February 4, 2010, the Parent reported in an email message to the Student's science teacher that the Student was suffering from "mood/personality disorders" and she requested "suggestions." (P-24 p. 32.)
27. On March 2, 2010, the Student's teacher reported to Student's Mother that she was "concerned about Student's emotional well-being." The Parent responded in an email message by suggesting that the school counselor be involved. (P-24 p. 29.)
28. On March 5, 2010, the Parent informed the Student's biology teacher by email message that she considered the Student's repeated failure to turn in assignments and homework to be a "manifestation of Student's "ODD." (P-24 p. 28.)
29. On March 9, 2010, the Parent informed the Student's counselor that she intended to request a change in the Student's medication regime. She added that "there is a lot going on with" the Student and asked for the counselor's "thoughts." The counselor responded that "it is a good idea to keep the family doctor involved." (P-24 p. 23, 26.)
30. On March 10, 2010, the Parent stated in an email message to the Student's counselor: "I am quickly growing convinced that Student's meds are not at the level they should be." The counselor responded that a "med check" would be a "good opportunity to share with Student's physician some of what we are seeing at home and/or school." The Parent expressed a need for help and expressed hope that the counselor's "intervention" would help the Student. (P-24 p. 14, 19, 21.)
31. On March 29, 2010, the Student's English teacher told the Parent: "At this point I am concerned about Student's emotional health and feel that the administration should also be involved in trying to figure out some way to help Student. They may know about some available resources of which we are unaware." The Parent responded that there needed to be "other means" than what had been tried unsuccessfully in the past, and that the Student was not taking Student's medications regularly. The teacher speculated that "Student's defiance is a way of asking for help" and suggested again a meeting with administrators to obtain their "suggestions." (P-24 p. 7, 8.)

#### VIOLETION OF STUDENT CODE OF CONDUCT, CAUSATION AND SUBSEQUENT PROCEEDINGS

32. On March 29, 2010, the Student [committed a serious violation of the code of student conduct]. (P-3, 23.)
33. This behavior on March 29, 2010, was causally related to the Student's major depression, recurrent type. (NT 297-8 to 298-22.)

34. The behavior on March 29, 2010, was causally related to the fact that Student's medications were being changed, including the introduction of Wellbutrin about one week before the behavior. (NT 299-7 to 300-9.)
35. On March 30, 2010, the Student entered an inpatient psychiatric hospital unit and was diagnosed with Depression NOS. (P-3, 4.)
36. The Student was discharged to outpatient care on April 5, 2010, with a diagnosis of Adjustment Disorder with Mixed Emotional Features. (P-5.)
37. On April 13, 2010, the District convened a manifestation determination meeting after receiving a letter from the Parents' attorney suggesting that the Student was "thought to be" a child with a disability. (S-3, 4, 5.)
38. The District found that the Student's behavior was not a manifestation of a disability, recording as reasons that the Student had not been identified, Student's behavior had not been a problem in school, and Student's school performance problems were caused by failure to complete work. The manifestation conclusion relied heavily upon teacher reports. (NT 352-20 to 354-2; S-5.)
39. Although the Student's behavior of March 29, 2010, is not similar to the Student's previous inappropriate behavior, the behavior was not an aberration or isolated event, but was causally related to the Student's major depression. (NT 328-20 to 3329-17.)
40. On May 6, 2010, the District issued an evaluation report finding that the Student is not a child with a disability. (S-15.)
41. The Student was guarded with the District evaluator; such behavior is typical of adolescents when dealing with school personnel. (NT 268-15 to 270-8; S-15.)
42. On May 20, 2010, a committee of the District Board of School Directors found the Student in violation of the District's Code of Student Conduct and recommended permanent expulsion. On May 24, the Student was expelled. (S-2.)

## DISCUSSION AND CONCLUSIONS OF LAW

### BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the

risk of failing to convince the finder of fact.<sup>1</sup> The United States Supreme Court has addressed this issue in the case of an administrative hearing challenging a special education IEP. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). There, the Court held that the IDEA does not alter the traditional rule that allocates the burden of persuasion to the party that requests relief from the tribunal.

The Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed “equipoise” – that is, where neither party has introduced a preponderance of evidence<sup>2</sup> to support its contentions. In such unusual circumstances, the burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other hand, whenever the evidence is clearly preponderant in favor of one party, that party will prevail. Schaffer, above. Therefore, the burden of proof, and more specifically the burden of persuasion, in this case rests upon Student’s Parents, who initiated the due process proceeding. If the evidence is in “equipoise”, the Parent will not prevail.

## PROCEDURAL PROTECTIONS FOR STUDENTS SUBJECTED TO DISCIPLINARY EXPULSION

The IDEA, 20 U.S.C. § 1415(k) and its implementing regulations, 34 C.F.R. §300.530 - 534, provide specific protections to eligible students who are facing a change in placement for disciplinary reasons. A child who has not been determined to be eligible

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<sup>1</sup> The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

<sup>2</sup> A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.



for special education and related services may assert the same protections afforded to children with disabilities under certain circumstances. 20 U.S.C. §1415(k)(5); 34 C.F.R. §300.534(a). Such protections apply if the school district had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred. 20 U.S.C. §1415(k)(5)(A); 34 C.F.R. §300.534(a).

The law specifies that a school district can be deemed to have had such knowledge under certain defined circumstances. The school district is deemed to have had such knowledge if: 1) the student's parent expressed to the teacher or to supervisory or administrative personnel, a written concern that the child was in need of special education and related services; 2) the student's parent requested an evaluation; or 3) the child's teacher or other school district personnel expressed specific concerns about a pattern of behavior demonstrated by the child, either directly to the director of special education or to other supervisory personnel of the agency. 20 U.S.C. §1415(k)(5)(B); 34 C.F.R. §300.534(b).

If a child is eligible, or the district has knowledge of a disability as defined above, the school district cannot impose discipline unless it first holds a meeting and determines that the student's conduct in violation of the code of conduct was not a "manifestation" of a disability. 20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e). Conduct is a "manifestation" of a disability under the following circumstances:

(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.

20 U.S.C. § 1415(k)(E)(i)(I), (II); 34 C.F.R. § 300.530(e)(1)(i), (ii).

If it is determined that the conduct in question had a causal relationship with the disability or was a result of the failure to implement the child's IEP, the conduct "shall be determined to be a manifestation of the child's disability." 20 U.S.C. § 1415(k)(E)(ii). Additionally, if the conduct is determined to be a manifestation of the child's disability, the District must take certain other steps, which include returning the child to the placement from which Student or she was removed. 20 U.S.C. § 1415(k)(3)(B); 34 C.F.R. §532(b).

**DID THE DISTRICT HAVE KNOWLEDGE THAT THE STUDENT WAS A CHILD WITH A DISABILITY?**

The regulation implementing IDEA, at 34 C.F.R. §300.534, provides that a child subject to discipline may obtain the protections of the IDEA if the school district "had knowledge ... that the child was a child with a disability" before the behavior subjecting the child to discipline. Contrary to the Parents' argument, I do not read this regulation to provide hearing officers with discretion to determine for themselves what "knowledge" means within the meaning of the regulation. Rather, the regulation expressly mandates that "knowledge" be found to have existed if the evidence establishes the existence of any of the three tests set forth in subsection (b) of that regulation. 34 C.F.R. §300.534(a), (b). Thus, my decision in this matter turns on whether or not one of these tests is established in this record. I find that the first test is met: that the Parent expressed written concern to a teacher and to administrative personnel that the Student was in need of special education and related services. 34 C.F.R. §300.534(b)(1).

Here, the Parent repeatedly communicated to teachers that the Student was failing to do Student's homework and school projects, was failing to submit such work when Student did complete it, was failing to process directions, and resisted any education or

parental guidance when Student was home. (FF 19 to 31.) The Parent also repeatedly asked teachers for assistance. (FF 17, 18, 20, 21, 26, 27, 29, 30, 31.) Lest there be any doubt that the Parent was trying to communicate that her child was disabled, she specifically related to teachers that Student had a history of mood disorder and attention deficit disorder; that Student displayed numerous symptoms of depression at home; that Student's homework non-compliance was the product of an attention deficit disorder; that Student was diagnosed with serious mental illness and was under psychiatric care; that physicians had prescribed medications to control these symptoms; and that the medications were not working. (FF 18, 20, 22, 23, 24, 25, 26, 28, 29.)

In addition to her email requests and statements to teachers, the Parent also provided to the District a three page excerpt of an evaluation by a school psychologist. She provided this in April 2009. (FF 20.) This document plainly and unmistakably stated the evaluator's opinion that the Student was suffering from a mood disorder and indicated that addressing the mood disorder was reasonably calculated to help the Student with the problems that Student was experiencing at school. (FF 1, 20.) The Parent provided this information after she was advised by school staff that she would need to obtain a written evaluation in order to get more services from the District for her child. (FF 18.) I find that this written information also met the statutory test for deeming the District to have known that the Student was a child with a disability.

I find these written email assertions sufficient to meet the first test of the regulation. The District invites me to read the regulation to require that the parent expressly state a need for special education and related services. While the regulation can be read to say this, and I am reluctant to depart from a rigid strict construction of the

plain language, I cannot accept this reading of the regulation. Such a construction would lead to absurd results – especially in this case. Here, the Parent manifestly was asking for special help and assistance for her child. She was unrepresented at the time in question. She was naïve as to the requirements of the law, because she testified that she believed that she was obligated to obtain a private evaluation in order to form a basis for additional help for her child. (FF 18.) Under these circumstances, to require her to request help in any more explicit fashion than she managed to utter would negate the very protections of the law for any parent who is not steeped in IDEA terminology or represented by counsel. I cannot conclude that the IDEA contemplates placing such a field of land mines in the way of a parent trying to get help for her child. On the contrary, I read the regulation as requiring the parent to request special or extraordinary services from the school district – not that the parent must request “special education” in its meaning as a term of art. The Parent in this matter did so. In sum, I find that the Parent’s communications here fulfilled the statutory requirement by requesting special – that is, extraordinary and individualized - educational help and services for her child and conveying her belief that the Student was a child with a disability.

The above decision - that the Parent in this matter can invoke the protections of the IDEA – does not resolve the matter, because the Parent further requests that I find that the manifestation determination was incorrect. This requires that I first determine whether or not the Student was a child with a disability. If I find that the Student was a child with a disability, then I must determine whether or not the behavior of March 29, 2010 was caused by, or had a direct and substantial relationship to, the child's disability. 20 U.S.C. § 1415(k)(E)(i)(I), (II); 34 C.F.R. § 300.530(e)(1)(i), (ii).

WAS THE STUDENT A CHILD WITH A DISABILITY WHICH CAUSED THE BEHAVIOR IN QUESTION?

The IDEA, through its implementing regulations, 34 C.F.R. 300.8 §(c)(4) defines a “Child with a Disability” to include a child who suffers from “ a serious emotional disturbance” and needs special education and related services because of such disability. 34 C.F.R. 300.8 §(a)(1). A “serious emotional disturbance” is defined as a “condition exhibiting [certain listed] characteristics over a long period of time and to a marked degree that adversely affects the child’s educational performance.” 34 C.F.R. 300.8 §(c)(4). The regulation lists five characteristics, and it must be shown that any one of these characteristics has been exhibited. 34 C.F.R. 300.8 §(c)(4)(i)(A) through (E).

Based upon the preponderance of the evidence in this record, I find that the Student did exhibit one of the characteristics set forth in the regulation: “A general pervasive mood of unhappiness or depression”, 34 C.F.R. 300.8 §(c)(4)(i)(D). The student’s current therapist, a clinical psychologist with extensive experience in treating children with major mental illnesses, testified unequivocally that the Student suffers from Major Depression, Recurrent Type. (FF 1,2.) He added that this condition had persisted for years and was present before and on March 29, 2010; the record supports this judgment. (FF 1 to 5.) He further stated that the condition had for some time adversely affected the Student’s educational performance (FF 13); again, the record supports this judgment. (FF 1 to 16.) I find that this evidence is well founded and I base my finding upon it, supported as it is by the record as a whole.

The District countered this evidence with an educational evaluation, conducted by its school psychologist, and dated May 6, 2010, and a manifestation determination on April 13, 2010, that reached almost identical conclusions, based upon almost identical reasoning. (FF 37 to 40.) The psychologist found in her report that the Student's educational performance was not impacted by a mood disorder. (NT 384-24 to 385-25; S-15 p. 11.) Moreover, the psychologist testified that there was nothing in the record before her to indicate a mood disorder. (NT 370-24 to 25.) The psychologist based this upon questionnaires that teachers and the Student filled out as part of the Behavior Assessment System for Children, Second Edition. (P-27.) Interpreting these questionnaire returns, the psychologist emphasized that only one of the responding teachers indicated observations consistent with depression, and that the Student in Student's questionnaire responses did not rate [ ]self as suffering from symptoms of depression. (S-15 p. 7 to 8.) The teacher also relied upon achievement testing to conclude that the Student was not a child with Serious Emotional Disorder. (NT 368-22 to 23.)

This conclusion thus directly contradicts the testimony of the Student's clinical psychologist, in that it discounts the gravity of the Student's symptoms of mood disorder. I must therefore weigh the contradictory expert and other related evidence. I find that the clinical psychologist's testimony has more weight, when considered in light of the record as a whole.

The clinical psychologist is well qualified by training and experience to make such a clinical diagnosis. (P-26.) He has a doctorate and Pennsylvania license in clinical psychology and has been treating children with major mental disorders for approximately

twenty-five years. (NT 282-15 to 284-13.) While the clinical psychologist is not qualified as a school psychologist, (NT 285-20 to 22), his clinical work often addresses a child's performance in school. (NT 284-14 to 24). In addition to documented history, his diagnosis was based upon eight to ten therapy sessions of one hour each over the course of more than two months, and I find that this quantity of face to face time with the Student was sufficient basis for a diagnosis of major depression recurrent type. (NT 285-20 to 286-8, 288-2 to 17, 310-19 to 311-25.) The Parent's depiction of events and her statements to teachers, giving detail on the Student's symptoms of depression and more than once mentioning suicide threats, furnish substantial corroboration of the factual underpinnings of the clinical psychologist's diagnosis.

The school psychologist is well qualified in educational psychology, with a master's degree and state certification in school psychology, with sixteen years doing over a thousand educational evaluations in school settings. (NT 339-3 to 25.) The school psychologist is not licensed or experienced in the diagnosis or treatment of mood disorders in children, and I conclude that the school psychologist was not qualified to rule out a diagnosis of major mental disorder. Moreover, the school psychologist's report was not based upon the diagnosis of the Parents' clinical psychologist, because that clinician did not provide a report. (NT 365-12 to 20.)<sup>3</sup>

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<sup>3</sup> I have considered the absence of a written report and weighed it negatively against the clinical psychologist's testimony; however, I do not give this determinative weight, because I find that the testimony itself was well founded, reliable and thoroughly tested by the cross examination of the District's counsel. I also have considered the important factor of the timing of each of the experts' evaluations in relation to the manifestation meeting. Neither of these evaluations was available to the participants in that meeting. Thus, each of those evaluations is presented as raising an inference as to the effect of the Student's depression and/or ADHD upon Student's actions on March 29, 2010. Yet each evaluation is retrospective, thus attenuating the weight to be accorded to it. Moreover, each was produced in anticipation of litigation, since the parties were both represented at that point and due process was looming. I find that the weight of each evaluation is further attenuated in light of this looming litigation; however, this effect is equally negative to both parties.

In determining that there was no emotional disturbance, the school psychologist relied heavily upon the reports of the high school teachers and the Student [ ]self, who minimized Student's symptoms in the written BASC questionnaire. (FF 41.) I find this to be one of two flaws in her methodology that substantially reduce the weight of her findings. The BASC is designed to be a screening instrument – an aid to detecting areas of concern in the child's functioning, whether in school or at home. (NT 402-20 to 403-5.) In and of itself, it does not diagnose or rule out major mental disorder. Ibid. Thus, this instrument is not sufficient to determine the initial question in this case: on March 29, 2010, was the Student suffering from depression?

As to this question, having heard all the evidence, I conclude that the school psychologist reliance upon the BASC was almost exclusive, and that she did not have critical information that strongly indicated the existence of a disability that impacted school performance and was displayed in the school setting. It is important that the BASC forms were returned by only five teachers, (P-27), not including the teacher who had expressed the most serious concern with the Student's emotional health, (NT 394-1 to 396-4).<sup>4</sup> The school psychologist did not review the Parent's emails to teachers, with their many references to symptoms of depression, including suicidal statements. (NT 394-20 to 397-12, 400-19 to 403-9.) The school psychologist did not observe the Student in the classroom, because Student was suspended pending disciplinary action to expel Student. (S-15 p. 15.) The school psychologist did not administer any inventories or tests, such as projective tests, that are specifically designed to detect depression. (NT

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<sup>4</sup> Thus, the school psychologist's characterization of the depression issue as a "minor" concern, (NT 374-18 to 378-4), based largely upon the percentage of teachers who reported such concerns, further undermines her ultimate conclusion, because it was based upon the accident of who was asked to fill out the form, and significant teacher observations were thus ignored through the BASC process.



414-21 to 24.) The evaluation report specifically – and, I find, erroneously - concludes that additional information, for example a psychiatric evaluation, is not necessary. (S-15 p. 15.) The evaluation expressly rules out Serious Emotional Disturbance because the Student has not indicated [redacted] concerns at school, and most teachers did not see evidence of depressive symptoms at school. (S-15 p. 16.)

I find that the school psychologist’s finding is incorrect in terms of the relevant legal test. The report and testimony rely heavily upon the rationale that the Student did not exhibit symptoms of depression at school, and that the Student’s performance at school was not adversely impacted by depression. While I find that both of these assertions are factually incorrect, as noted above, I also find that they are misplaced with regard to the legal standard. The definition of “child with a disability” requires a finding of adverse impact upon “educational performance.” There is no requirement that such impact be at school. Yet the school psychologist relied heavily upon the (incorrect) assertion that the Student’s manifestations of disability did not occur in school.

In this case, the District found that the violation of the Student Code of Conduct was sufficiently related to education – both because it affected another student and because it implicated school security – even though the behavior occurred at home, not at school. Thus, the District recognizes that some behaviors at home are relevant to the District’s educational program. I find contradictory its insistence that misbehavior with regard to homework completion cannot be similarly school related. The record here shows that is can be – and was. (FF 8 to 14, 17, 18, 19, 25, 27, 31 to 34.)

The school psychologist did interview the Student for about 15 or 20 minutes. (NT 403-10 to 404-1.) The psychologist admitted that the Student was somewhat

guarded during that interview, that the discussion steered completely clear of the events of March 29, 2010, and that the discussion included “brainstorming” about how the Student could improve Student’s behavior regarding producing homework and assignments on time. Ibid. This is not an adequate basis to rule out major mental disorder, and indeed, the school psychologist did not contradict the findings of the Parents’ clinical psychologist in that respect.

The psychologist apparently gave weight to the Student’s denial of symptoms in the BASC form. Ibid. However, the Parent’s reports to staff predated the threat of expulsion, so they were not tainted by possible self interest. (FF 19 to 30.) The Student’s denial, on the other hand, is questionable on two grounds. First, it was made under the threat of expulsion; thus it may have been a product of the same guardedness that the school psychologist observed during her brief interview of the Student. (FF 41.) Second, denial is a well known concomitant of mental illness.

In addition, it is clear that the District’s school psychologist gave little weight to the Parent’s reports of depressive symptoms. (S-15 p. 16.) In contrast, I find that the Parent was credible. She demonstrated a balanced view of the history, frequently confessing what she considered to be her own errors in handling the situation. She was careful about what her memory could yield, and was precise about her assertions. I find that her testimony was truthful and reliable. I specifically decline to accept the implication raised by the District that the Parent had concocted the Student’s depression for purposes of extricating Student from disciplinary consequences; the record clearly counters such a suggestion. (FF 8 to 14, 17, 18, 19, 25, 27, 31 to 34.)

In sum, I give greater weight to the clinical psychologist's diagnosis, and to the conclusion that flows from this diagnosis – that the Student was on March 29, 2010, suffering from a serious psychiatric disorder that is both life threatening and potentially debilitating. (FF 5, 13, 16, 23, 24, 25, 26, 28 to 31.) Based on training and experience, as well as access to crucially necessary information, the clinical psychologist was better qualified to both diagnose and characterize the severity of the Student's disorder.

The second flaw in the school psychologist's findings is that they are premised primarily upon the assumption that there was no impact of a disability upon the Student's ability to benefit from education. The preponderance of the evidence shows that the Student's depression did impact upon Student's school performance. Student had a demonstrative problem of not producing Student's assignments on time, thus leading to frequent bad grades and jeopardy of failure. (FF 6 to 14.) Student's last year's marks were especially bad. (FF 9, 12.) I assess the degree of these performance failures in light of the Student's potential, which was unquestionably superior. (FF 8.) This evidence is of greater weight than the school psychologist's repeated reference to the inaccurate statement that depression was not seen in school – even if not seen there, the failure to complete homework was a significant detriment to this Student's progress in school, and led to performance that was significantly below Student's potential. (FF 8 to 10.)

I also find it hard to understand how one could argue, as the school psychologist did, that failure to produce assigned homework in a timely fashion is not in itself a failure to benefit from educational services. I assume that homework is not assigned frivolously – that there is an educational reason for assigning it. Indeed, the record shows that timely production of homework and assignments was given substantial weight by nearly every

teacher to whom the Student was assigned. I must conclude that there is an educational reason for requiring it to be completed on a deadline. It seems apparent to me that doing work independently and on time creates the opportunity to learn to organize one's work, to think independently (that is, to reduce reliance on the instructor's prompting and support that is available in class), and to gain the behavioral trait of reliability and faithfulness to an agreed task. Thus, I give little weight to the school psychologist's suggestion that poor grades due to failure to produce independent work are somehow irrelevant to the determination of educational progress, and that the Student's achievement scores prove progress, even though Student's grades are poor. Rather, I give preponderant weight to the Parent's assertion that the Student's school progress was adversely and significantly impacted by Student's inability to produce Student's homework and assignments on time.

Because the school psychologist incorrectly concluded that concerns about depression were "minor" in gravity, she was not in a position to – and did not – assess whether or not the Student's depression either caused or was directly related to the Student's behavior on March 29, 2010. The school psychologist admitted that she does not know why the Student did not complete Student's work on time. (NT 413-2 to 13.) Thus, the preponderance of the evidence is that the Student's behavior was caused by, or had a direct and substantial relationship to, the child's disability of serious emotional disturbance. (FF 5, 13, 16, 33, 34, 35.)

SECTION 504

Section 504 also protects students subject to discipline if they are defined as having disabilities or are considered disabled. Generally, section 504 protects such students from discrimination in access to and equal opportunity to benefit from educational services from kindergarten through twelfth grade. 29 U.S.C. §794 ; 34 C.F.R. §104.4. To establish discrimination under Section 504, a student or parent must prove that (1) Student or she is disabled or has a handicap as defined by Section 504; (2) Student or she is “otherwise qualified” to participate in school activities; (3) the school or the board of education received federal financial assistance; (4) Student or she was excluded from participation in, denied the benefits of, or subject to discrimination at the school; and (5) the school or the board of education knew or should be reasonably expected to know of Student’s or her disability. 29 U.S.C. §794; 34 C.F.R. §104.4; Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 253 (3d Cir. 1999); W.B. v. Matula, 67 F.3d 484, 492 (3d Cir. 1995).

Section 504 defines an “individual with a disability” to include a student who has:

- 1) a physical or mental impairment that substantially limits one or more major life activities of such individual; 2) has a record of such impairment; or 3) is being regarded as having such an impairment. 29 U.S.C. §705(20), 42 U.S.C. §12102; 34 C.F.R. §104.3(j). The applicable regulations define “being regarded as having such an impairment” to require agency action on the basis of a perception that the individual has a disability. 34 C.F.R. §104.3(j)(2)(iv).

The Commonwealth of Pennsylvania protects the student’s right to be free from discrimination on the basis of handicap or disability, through Chapter 15 of the Pennsylvania Code, part of the regulations implementing the educational statutes of the Commonwealth. 22 Pa. Code Chapter 15. A “protected handicapped student” under these regulations is entitled to those related aids, services or accommodations which are

needed to afford that student equal opportunity to participate in and obtain the benefits of the school program and extracurricular activities without discrimination and to the maximum extent appropriate to the student's abilities, without cost to the student or Student's or her family. Chapter 15 by its terms is intended to implement students' rights under section 504, and it does not expand or limit those rights. 22 Pa. Code §15.11(c).

In the present matter, there is no evidence that the District subjected the Student to discipline on account of either Student's disability or a belief that the Student had a disability. On the contrary, the gravamen of this matter is that the District failed to treat the Student as a child with a disability. Because section 504 requires that the District's action be due to the Student's disability or perceived disability, section 504 is inapplicable here. Because Chapter 15 of the Pennsylvania Code does not expand section 504 rights, it does not provide any additional basis for applying section 504 to the present matter. Accordingly, I dismiss all of the Parent's claims based upon section 504.

### CONCLUSION

For the reasons set forth above, I find that the Student did suffer from a serious emotional disorder when Student violated the Student Code of Conduct on March 29, 2010. I further find that this disability was caused by, or had a direct and substantial relationship to, the child's disability. Therefore, I will order that the District return the Student to Student's previous placement.

### ORDER

1. The District knew and is deemed to have known that the Student was a child with a disability on or before March 29, 2010.
2. The Student's conduct in violation of the District's Code of Student Conduct was a manifestation of a disability.

3. The Rehabilitation Act of 1973, section 504, 29 U.S.C. §794 does not protect the Student from disciplinary expulsion for Student's violation of the District's Code of Student Conduct.
4. The District will return the Student forthwith to Student's previous placement.

*William F. Culleton, Jr. Esq.*

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WILLIAM F. CULLETON, JR., ESQ.  
HEARING OFFICER

August 31, 2010