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

Final Decision and Order

Closed HEARING
ODR File Number: 21078-18-19

Child's Name: F. B. **Date of Birth:** [redacted]

Dates of Hearing:
09/24/2018

Parent/Guardian:
[redacted]

Counsel for Parent
Michael Raffaele Esq.
Kershenbaum & Raffaele, LLC
1230 County Line Road
Bryn Mawr, PA 19010

Local Education Agency:
Bensalem Township School District
3000 Donallen Drive
Bensalem, PA 19020

Counsel for the LEA
David Painter Esq.
Sweet, Stevens, Katz, & Williams
331 East Butler Ave.
New Britain, PA 18901

Hearing Officer: Charles W. Jelley Esq. **Date of Decision:** 10/05/2018

Introduction and Procedural History

This special education due process hearing was requested by the Guardian, on behalf of the child (the Student) against the School District (District).[1] This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et. seq*. and Section 504 of the Rehabilitation Act. The Guardian disputes the District's imposition of discipline, following an incident in which the Student assaulted a peer after a verbal disagreement earlier in the day. The Guardian claims that the Student is a "thought-to-be eligible" Student — an IDEA term of art discussed below — at the time of the incident and currently.[2]

The Guardian, represented by counsel, did not request an expedited hearing. The Complaint was filed on August 23, 2018, and was originally scheduled for September 11, 2018; however, due to a religious holiday, the District was closed on September 11, 2018. The single-day hearing was convened and completed on September 24, 2018. On October 2, 2018, the Parties provided written closing statements.

The Guardian seeks four forms of appropriate relief. First, she seeks an Order, finding the Student is a "yet to identified" aka "thought-to-be eligible" Student. Second, believing the Student is IDEA and/or Section 504 eligible, she seeks an Order directing the District to conduct a manifestation determination. The main purpose of the manifestation determination is to determine if the assault was a manifestation of a "yet to be identified" disability, Third, the Guardian contends the IDEA and/or Section 504 "stay put" requirement requires that the Student be returned back to the pre-discipline middle school, while all of the above transpires. Fourth, the Guardian argues for a finding that the Superintendent's August 2018

---

[1] 20 U.S.C. §§1400-1482. The federal regulations implementing the IDEA are set forth in 34 C.F.R. §§300.1 – 300.818. The Section 504 regulation are found at 34 C.F.R. §§ 104.31-36. References to the record throughout this decision will be to the Notes of Testimony (N.T.), Guardian's Exhibits (G-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number. The Parties asked and the hearing officer granted the Parties' request to file written closing statements.

[2] In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. The identifying information appearing on the cover page or elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

administrative transfer of the Student to another middle school continues to violate the IDEA and/or Section 504's substantive and procedural due process requirements, in particular, the "stay put" mandate.

The District, on the other hand, denies any and all IDEA or Section 504 violations. The District further contends the transfer to another middle school is not otherwise reviewable here as the Guardian failed to file a timely regular education appeal, *i.e.* exhaust her regular education administrative relief pursuant to 22 Pa Code Chapter 12.

The District's Prehearing Motions to Dismiss

Between the filing of the Complaint and the hearing, the District moved on two occasions to dismiss the action. The Guardian filed timely Responses. On September 4, 2018, after reviewing the initial Motion via conference call, this hearing officer denied the District's Motion and advised the Parties that a genuine issue of material fact existed. Subsequently, after receiving the Guardian's written statement of the issues, the District refiled the Motion. After reviewing the Guardian's Response, this hearing officer denied the District's Second Motion to Dismiss.[3]

Having reviewed all the evidence before me, including the Parties' written arguments, I now find for the Guardian in part and for the District in part.

Issues

1. Was the Student "thought-to-be eligible" within the meaning of 34 C.F.R. 300.534 *et seq.* at the time of the disciplinary incident?

2. If yes, is the District required to conduct a manifestation determination and restore the Student's pre-incident placement?

[3] The District's Motions, the Responses and the Interim Rulings were confirmed in writing and are found in the record as Hearing Officer Exhibits. To facilitate the hearing process the Guardian submitted a written statement of the issues, the District submitted a counter statement of the issues, and based on these pleadings this hearing officer then simplified the Guardian's Statement of the Issue and the District's Counter Statement above. The statements will be made part of the record as a Hearing Officer exhibit.

Findings of Fact

The 6th Grade 2016-2017 School Year

1. The guidance counselor first met the Student in 6th grade (N.T. 24).

2. In September 2016, the assistant principal directed the staff to conduct a home visit. The record is unclear as to why the assistant principal directed the staff to conduct the home visit. When the staff visited the house, the mother was not home. No follow-up actions were undertaken to revisit the home. (S-42, N.T. 56-58)[4]

3. On October 16, 2016, the guidance counselor completed Student's first mental health evaluation. The guidance counselor received a report that the Student threatened to kill a peer after a dispute that occurred at a sleepover (N.T. 57-59, S-42).

4. On October 21, 2016, the guidance counselor completed a second mental health evaluation. The guidance counselor could not recall what concern prompted the second mental health evaluation (N.T. 57-59, S-42).

5. By November 2016 of 6th grade, the Student missed school seven (7) out of forty three (43) days. The Student's end of the year report card states the Student missed 48 days. The building principal was aware of the Student's attendance problems (N.T. 27, 34-35, S-12, S-18, and JE #12).

6. Out of great concern, in December 2016, the guidance counselor, after receiving reports from other students, made a ChildLine Report of Suspected Child Abuse and Neglect alleging the "Student has a history of cutting []self, and [redacted] may want (sic) to cut again." (S-13, N.T. 36-38). The guidance counselor reported the cutting to the "higher-ups." When the Student returned to school, the guidance counselor did a follow-up mental health assessment and included a step in the plan that required the Student to visit one-on-one with a staff person during the day to gauge the Student's emotional regulation (N.T. 36-38).

7. At the end of the school day on January 10, 2017, the Student's friends brought the Student to the guidance office, after which the guidance

[4] The Student was not living with the Guardian at the time of the home visit.

counselor found Student had two bottles of antibiotics (S-14, S-15, and N.T. 39-40).

8. The guidance counselor expressed a concern to her supervisor that the Student was a danger to self when the Student wrote a note to another student stating that the Student wanted to take pills upon returning home and "no one could stop" the Student (N.T. 39).

9. In response to the suicide note, the guidance counselor and the assistant principal completed a mental health assessment indicating the Student was an "Imminent/high risk (defined as doing something that he/she believes will cause death; having a conscious intent to die; having a plan, available means; and making a threat)." (S-15).

10. The mother was contacted and then directed to take the Student to a local "Crisis Center." (S-15).

11. The guidance counselor called the police about Student's bringing the antibiotics into the school (N.T. 50-51).

12. The mental health assessment included a "Follow-up" plan that called for the building principal and a caseworker to contact the mother when the Student was discharged from the hospital. As a condition of reinstatement, the mother and the Student were required to meet with the staff after discharge from the hospital (N.T. 42-43).

13. Upon Student's discharge from the Crisis Center, the psychiatrist diagnosed the Student with the following mental health disorders: (1) anxiety disorder; (2) depression; (3) an eating disorder; (4) hyperventilation syndrome; (5) personality disorder, and (6) schizophrenia. The hospital report noted visible signs of scars from cutting. The school nurse received a copy of the hospital record and the discharge summary (S-14, S-42, and N.T. 58-59).

14. The guidance counselor discussed the Student's cutting and the suicide note with the Child Study Team. The Child Study Team suggested various interventions to address the Student's difficulties (N.T. 99-101).

15. On April 13, 2017, the guidance counselor called Children and Youth Services to report the Student was not yet attending private counseling to address the cutting behavior (S-42 N.T. 60-63).

16. The guidance counselor reported her concerns about the second cutting incident to the "Supervisor of Pupil Services" (N.T.47-50).

17. On April 14, 2017, the guidance counselor conducted a mental health assessment based upon learning the Student had another incident of cutting. Like the other mental health assessments the evaluation included a monitoring provision. In this instance the plan called for the staff to meet with Student one-on-one, for the next three (3) days. The purpose of the check-ins was to gauge the Student's behavior (S-16, N.T. 44-47).

18. After completing the mental health assessment, the guidance counselor did not know why the Student engaged in the repeated cutting behavior; the counselor did however notice visible scarring on the Student's arms (N.T. 49-50).

19. The Student participated in the "What I Need" (WIN) group counseling sessions, run by the guidance counselor, for seven (7) months). The group session focused on issues such as emotional regulation, behavioral and social needs. The guidance counselor also provided the Student a standing hall pass to go to the guidance counselor as needed. To resolve peer to peer disputes the teaching staff facilitated multiple peer mediations (N.T. 105).

20. The guidance counselor made the members of the Student Assistance Program (SAP) team and supervisory personnel aware of the Student's cutting and suicidal ideations (N.T. 105-106).

21. Although the cutting behavior and the suicidal ideations caused a disruption in the school, the guidance counselor did not recommend the Student for an IDEA evaluation because the cutting occurred outside of the school building (N.T. 125-128)

.

The 2017-2018 7th Grade School Year

22. On September 8, 2017, the Student had a meeting with the guidance counselor who confirmed the Student was meeting out of school with a private counselor (S-42).

23. On September 11, 2017, after the classroom teacher read an essay written by Student, she recommended that the guidance counselor meet with the

Student to discuss concerns about the Student's emotional wellbeing (N.T. 222 S-42).

24. In December 2017 and January 2018, after numerous school absences, the guidance counselor met with the Student and called the mother to develop a School Attendance Improvement Plan (SAIP) (N.T. 224).

25. In January 2018, the Student was referred to an in-school counseling group for Students who are experiencing family conflicts (N.T. 237-238, S-63).

26. The classroom teacher told the guidance counselor and the assistant principal that she had concerns that the Student was acting like a bully in class and in the hallways (N.T. 223-225, S-69).

27. On January 13, 2018, the District prepared a three (3) step School Safety Plan (S-42, N.T. 84-85).

28. In February 2018 and in March 2018, the mother told the guidance counselor that the Student was refusing to go to school (N.T. 263-264).

29. In February 2018 and March 2018, both the guidance counselor and the chorus teacher expressed concerns that the Student would push other students in the hallway and in chorus class (N.T. 286-290).

30. On January 19, 2018, the Student and the guidance counselor met to complete a Student Attendance Improvement Plan and talk about the Student participating in District sponsored counselling sessions (S-42 3).

31. On March 8, 2018, the Student had a verbal disagreement with another student in [redacted] class. Later in the day, at lunch, the Student assaulted the same peer (N.T. 293-296).

32. Initially, the Student was suspended for five (5) days. After a meeting with the building principal, at the informal hearing, the principal tacked on an additional ten (10) days of out of school suspension, for a total of 15 days (N.T. 295-297).

33. Sometime later in March 2018, the mother, the Student, and the assistant principal met with the Superintendent in a pre-expulsion meeting. After listening to the Student, the mother and the building principal, rather than

recommend a one-year expulsion to the Board, the Superintendent considered several other disciplinary options including a transfer to another middle school in the District which was across the street from the Student's then current middle school or placement in the District's online cyber school (N.T. 299-301).

34. Ultimately, after taking into consideration the Student's emotional health and troubles in the home, the Superintendent decided to place the Student in the District's online cyber school. After numerous delays, the computer hardware arrived and the Student began online school (N.T. 301-303, N.T. 338-342).

35. After an incident in the home, the Student's mother, at the insistence of Children and Youth Services, executed a document that gave the current Guardian the right to make all educational and medical decisions on behalf of the Student. As a result of the delays and the change in the living environment, the Student was absent a total of 71 days and tardy 16 days (N.T. 277-279, S-20, S-26, and S-32).

36. At the time of the pre-expulsion informal hearing, the 7th grade guidance counselor, the staff on the 7th grade Child Study Team and the 7th grade assistant principal were not aware of the Student's cutting, suicidal ideation or hospitalization (N.T. 251-254, N.T. 271-271).

The 8th Grade 2018-2019 School Year

37. Over the summer, prior to the start of 2018-2019 school year, the assistant principal learned the Student would be returning to the original 2017-2018 middle school. The assistant principal "painstakingly" put together the Student's 8th grade schedule (N.T. 301).

38. In early August 2018, the Guardian, the Student and the Superintendent met to discuss the Student's 2018-2019 education. During the meeting, the Superintendent learned how the Student came to live with the Guardian, and how the Student's participation in private community based counseling improved the Student's emotional, behavioral and social health. (N.T. 339-342).

39. Despite the change in living conditions and progress in developing coping skills, rather than allow the Student to return to the previous middle school,

the Superintendent continued the disciplinary sanctions into the 2018-2019 school year. Although the assistant principal developed an 8th grade schedule at the old school, the Superintendent administratively transferred the Student to the other middle (N.T. 339-342).

Legal Principles

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing S*hore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Guardian on behalf of the Student is the party seeking relief and must bear the burden of persuasion. For all the reasons that follow the testimony of several of the District's witnesses, in particular, the 7th grade guidance counselor and the 7th grade assistant principal will be given less persuasive weight.

Student Discipline Under the IDEA and Thought-to-Be Eligible Students

The IDEA includes disciplinary protections for students with disabilities. 20 U.S.C. § 1415(k). The IDEA's federal implementing regulations extend those protections to "thought-to-be eligible" children. More specifically, in certain circumstances, the IDEA protects children who have "not been determined to be eligible for special education and related services" in school discipline matters. 20 U.S.C. § 1415(k)(5), 34 C.F.R. § 300.534.[3] Those protections are triggered when the local educational agency (LEA) — the District in this case — had knowledge "that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred." 34 C.F.R. § 300.534(a). If the LEA had no basis of knowledge, it can impose the same discipline that it would on any other student. The regulations explain when LEAs "must be deemed to have knowledge that a child is a child with a disability…" 34 C.F.R. § 300.534(b). If any of three conditions occur before "the behavior that precipitated the disciplinary action," the LEA had knowledge. *Id.*

Those conditions are:

(1) The parent of the child 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;

(2) The parent of the child requested an evaluation of the child pursuant to §§ 300.300 through 300.311; or

(3) The teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency. 34 C.F.R. § 300.534(b).

The regulations also provide two exceptions which, if applicable, result in a determination that the LEA did not have knowledge. *See* 34 C.F.R. § 300.534(c). Neither are applicable in this case. However, even if the LEA had no basis of knowledge, there are additional rules that apply when a request for a special education evaluation is made while a child is subject to discipline. In such cases, the LEA must expedite the evaluation and, if the evaluation concludes the student is eligible, the LEA must provide special education. *See* 34 C.F.R. § 300.534(d). However, "until the evaluation is completed, the child must remain in the educational placement determined by school authorities, which can include suspension or expulsion without educational services." *Id*. In this case neither Party requested an expedited evaluation.

Student Discipline Under the IDEA General Provisions

Regarding the IDEA's general disciplinary provisions, LEAs must continue to provide appropriate special education to IDEA-eligible children during disciplinary placements. *See* 20 U.S.C. § 1415(k)(1)(D). Further, if a disciplinary action constitutes a change in placement, the child's IEP Team must conduct a manifestation determination. The function of a manifestation determination is to determine "if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or … 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)(1)(E)(i)(I)-(II). If the behavior was a manifestation, the LEA must conduct a functional behavioral assessment or revise the child's behavior intervention plan. Moreover, if the behavior was a manifestation, the LEA must "return the child to the placement from which the child was removed, unless the

parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan." 20 U.S.C. § 1415(k)(1)(F).

Discussion and Analysis

The District's Basis of Knowledge

If the District had a basis of knowledge that the Student had a disability prior to the March 8, 2018 assault and discipline, the Student is protected. If the Student is protected, the District cannot suspend the Student, *aka* change the Student's placement, unless the District concludes that the Student's behaviors were not a manifestation of the Student's disability.[5] Such a conclusion, however, can only happen via a manifestation determination. As indicated herein the District cannot make that determination before the Student is evaluated.

If the District had no basis of knowledge, the Student is not protected and the District may impose discipline. However, if the Guardian requests an evaluation during the disciplinary process, the District must expedite the Student's evaluation and, if the Student is found eligible, must provide appropriate special education. However, the District may impose discipline until the evaluation is complete. The Guardian looks to various events during the 2016-17 school year (6th grade) as evidence of the District's basis of knowledge. Although the issue is not before me, the facts established in reference to the 6th grade year and following strongly suggest that the District was remiss in not completing an initial evaluation to fulfill its child find obligations.[6]

While child find is triggered by signals, so called "red flags" that a child may have a disability, the basis of a school district's knowledge in a disciplinary appeal is limited to three, relatively precise, circumstances found at 34 C.F.R. § 300.534 *et seq*.

The first circumstance for a disciplinary removal is triggered if the parents "expressed concern in writing" that the Student "is in need of special education and

[5] The Guardian on behalf of the Student has the right to appeal such a determination.

[6] "Child Find" is a term of art describing a school's obligations under 34 U.S.C. § 300.111 and 22 Pa. Code § 14.121. Those regulations require LEAs to have in place procedures for locating all children with disabilities, including those suspected of having a disability and needing special education services although they may be "advancing from grade to grade." 34 U.S.C. §300.111(c)(1). The Child Find regulations require districts to evaluate children suspected of having a disability. *See* 34 C.F.R. § 300.111(a)(1)(i).

related services" before the discipline-triggering incident. 34 C.F.R. § 300.534(b)(1). In this case, the mother or the Guardian did not express any concerns in writing or verbally that the Student was in need of special education prior to the discipline.

The second circumstance is triggered if parents requested a special education evaluation prior to the disciplinary incident. 34 C.F.R. § 300.534(b)(2). Both parties agree that no such request was made.

The third circumstance is triggered if school personnel "expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency." 34 C.F.R. § 300.534(b)(3). In this case, the third circumstance clearly applies.

The Staff Expressed Concerns to Supervisors about a Pattern of Behavior

The Court in *Jackson v. Northwest Local School District*, 55 IDELR 71 (S.D. Ohio 2010), *magistrate's report and recommendation adopted at* 55 IDELR 104 (S.D. Ohio 2010) found a sufficient basis to impute to the district the requisite knowledge of a pattern of behavior such that the student should have been provided all of the substantive and procedural due protection afforded to a "yet to be identified" student with a possible disability. In *Jackson*, the district provided the student with interventions such as one-on-one instruction, small group instruction, and classroom modifications. By third grade, the teachers became increasingly concerned about the impact of the student's escalating behavior on her academic performance. The district's intervention assistance team reconvened and recommended that the student undergo a mental health evaluation, but it did not initiate a special education evaluation at that time. The following month, the district suspended and expelled the student for threatening behavior. When the parent filed for due process, the district argued that a manifestation determination review was not required because the student had not yet been found eligible under the IDEA.

The *Jackson* court pointed out that the IDEA protects students who have not been determined to be eligible when staff report concerns that indicate that a district should have suspected that the student had a disability. In *Jackson*, when the district expelled the student, it had provided her with intervention services for approximately two years, yet she had made few gains.

Additionally, in the *Jackson* case, the behavioral concerns expressed by the teachers about the pattern of behavior and others warranted a referral to an outside mental health agency. The *Jackson* court found this collection of facts/circumstances made out a pattern of behavior and provided a "sufficient reason for [the district] to suspect that [the student] might be a child with a disability." 20 U.S.C. § 1415(k)(5)(B); 34 C.F.R. §300.534(b)(3).

In the instant action, beginning in 6th grade and continuing through 7th grade, the following pattern of behavior emerged prior to the assault: (1) multiple peer complaints about the Student's repeated self-cutting behavior; (2) peer complaints about Student's in-school threat of suicide; (3) psychiatric hospitalization and the diagnosis of multiple disorders following the suicide threat; (4) the threat to harm another student after a dispute that occurred during a sleep over; (5) ongoing significant attendance issues; (6) verbal and physical bullying/pushing other Students in the hallway and in chorus class; (7) the 7th grade guidance counselor's meeting about the concerning essay; (8) the ongoing in-school counseling sessions during the 6th and 7th grade; (9) the multiple District-administered mental health assessments; and (10) the multiple Children and Youth Services referrals related to the ongoing mental health issues. All of the above were reported to a supervisor within the meaning of the IDEA.

Additionally, the Student's psychiatric hospitalization, prompted by the 6th grade guidance counselor's referral to the community hospital, like the student in *Jackson,* led to multiple diagnoses: anxiety, depression, eating disorder, hyperventilation syndrome, personality disorder, and schizophrenia. The nurse, the guidance counselor and members of the 6th grade Child Study Team were aware of the diagnoses, the suicidal ideation and the cutting behavior. These disorders/diagnoses, after a comprehensive evaluation, can very likely result in a student being identified as an IDEA-eligible or Section 504 student.

To address the Student's pattern of behavior the District provided the following interventions: (1) a school attendance plan; (2) creation of the safety check-in safety plan; (3) a standing hall pass to go to the guidance counselor as needed; (4) multiple peer mediations, and (5) months of in school group counseling run by the District's guidance counselor. Like *Jackson*, all of these interventions happened over two school years. Accordingly, I now find the 6th guidance counselor's supervisors were aware of the concerns about the pattern of behavior and the concerns that prompted the multiple interventions.

I do not find the testimony of the 7th grade guidance counselor, who met with the Student seven (7) to eight (8) times before the incident, and the 7th grade principal, who met with the mother at the beginning of the school year and interviewed the Student after the assault, credible or cogent. The District's records contradict the witnesses' testimony. For example, the Student's guidance records document cutting discussions about the Student at multiple child study team meetings, and the multiple Children and Youth Services referrals related to the pills/suicidal ideation.[7] The staff entered the behavioral incidents into the online system. The printout from the database clearly shows that multiple behavioral incidents were readily visible when the staff entered the next new behavioral incidents. Therefore, I find the witnesses did not cogently, or convincingly explain how or why they did not know about the Student's behavioral history when they either reviewed the Student's records or prepared the expulsion package. Accordingly, I now find that this combination of Student specific facts and individual circumstances meets the threshold requirements at 34 C.F.R 300.534 (c) to find the Student was a "yet to identified" aka "thought-to-be eligible" Student otherwise protected by the IDEA/Section 504 "before" the discipline.[8]

Section 504 Protections

Section 504 protects students who have a record of having, or are regarded as having, a physical or mental impairment that substantially limits a major life activity from discrimination. Under Section 504 a student "meets the requirements" of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of

---

[7] *See also Eschenasy v. New York City Dep't of Educ.*, 52 IDELR 66 (S.D.N.Y. 2009) (holding that a student's cutting, hair-pulling, and suicide attempts qualified her as a student with an emotional disturbance). *In re: Student with a Disability* New York State Educational Agency 56 IDELR 148, 111 LRP 12772 (January 24, 2011) (cutting behavior and eating disorder were so severe as to require multiple inpatient hospitalizations).

[8] The manifestation determination review process is a key step in the discipline process under both Section 504 and the IDEA. The procedural safeguards found in the manifestation determination regulation impacts the type of discipline the district can impose on the student and whether the district may remove the student from his/her current placement because of a code of conduct violation. Under the IDEA, a student's conduct is a manifestation of a disability if: 1) it was caused by, or had a direct and substantial relationship to, the child's disability; or 2) it was the direct result of the LEA's failure to implement the IEP. OCR interprets Section 504 as requiring the same steps when a student is subjected to a "significant change in placement" under 34 CFR 104.35. The change to the online cyber school and the change from the online cyber school to the middle school were a significant change in placement. 34 C.F.R. §§ 104.35(a), 104.36.

an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." *See Dear Colleague Letter, 58 IDELR 79* (OCR 2012), 28 CFR Part 35.108(f); See also, Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Educ. of Children with Disabilities, 67 IDELR 189 (OCR 2016).

While the IDEA requires the staff to make a supervisor aware of concerns, Section 504 does not have the same requirements. The fact that the guidance counselor filed a Children and Youth Services complaint about the mother's alleged failure to get the Student involved in counseling is evidence that the guidance counselor made a thoughtful decision based on her concerns about the existence of a perceived mental impairment that was otherwise limiting the Student's major life activities.

The same or "substantially similar" pattern of behavior across the school years and the expression of concern about the behaviors now qualifies the Student for the Section 504 procedural safeguard protections.[9] The reports about a pattern of behavior and reports to the supervisors all happened before the assault and before the out of school disciplinary suspension for 15 school days. The multiple expressions of concerns about the perceived impairments to supervisors about the pattern of behavior is clearly documented in the Student's record for all to see. The concerns were expressed "before" the Superintendent's prehearing expulsion discussions and "before" the subsequent two administrative transfers.

The out of school suspension for 15-days coupled with the disciplinary reassignments were also a significant change in placement within the meaning of Section 504. These events should have prompted a Section 504 evaluation.[10] Accordingly, while I find the Student is a "yet to be identified" IDEA Student, I also find the Student exhibited a pattern of behavior, for a long period of time, that

[9] Section 504 also states that a district must conduct an evaluation of students "who, because of handicap, need or are believed to need special education or related services." 34 CFR 104.35(a). *See, Valley Oaks (CA) Charter Sch*., 115 LRP 52093 (OCR 06/29/15) (charter school erred when it failed to evaluate the student after the father provided medical documentation about the student's depression).

[10] A determination that a student's pattern of behavior leading to the discipline is "substantially similar" is a subjective determination to be made on a case by case basis after considering any information regarding the child's behaviors in the child's IEP. 71 Fed. Reg. 46,729. OCR takes a similar approach. *See Springfield (MA) Pub. Schs.* 54 IDELR 102 (OCR 2009) (the behavior was substantially similar where the 19 days of removal all were for "physical or verbal altercations and/or name calling.")

otherwise should have caused the District to be on notice of a perceived physical or mental impairment within the meaning of Section 504.[11]

The Manifestation Determination and the Student's Stay Put Placement

After finding the Student is otherwise protected by the IDEA and/or Section 504 procedural and substantive standards, the analysis now shifts to how the District can complete a manifestation determination without an evaluation identifying a disability.

Curiously, neither Party requested an expedited evaluation; absent an evaluation, the manifestation determination team will not have sufficient data/information about a disability to determine if the Student's misbehavior is related to an otherwise protected IDEA and/or Section 504 disability.[12] Therefore, to fill in the gap in the record, I will Order an expedited independent educational evaluation. The evaluation should be completed within 30-calendar days once the evaluator is selected. The timeline and the details of the evaluation are set forth in the Order below. The Order for the evaluation does not, however, end the analysis regarding the Student's request to return to the first middle school.

The Stay Put Placement and the Need for a Comprehensive Evaluation

The Student seeks an immediate return to the pre-discipline middle school as an 8th grader. The Student's request to return to the previous middle school is denied. The IDEA bars the use of the IDEA's stay-put provision when an expedited evaluation, for "yet to be identified" student is pending. More specifically, the regulations provide "Until the evaluation is completed, the child remains in the educational placement determined by school authorities, which can include suspension or expulsion without educational services." 34 CFR 300.534 (d)(2)(ii). In this instance, I will not disturb the Superintendent's decision to transfer the Student to another location in a different building. Contrary to the Guardian's contention, I find any change in classroom location/setting will unduly delay the review of the existing data and the collection of relevant, Student/Guardian and teacher input.

---

[11] *See* also, Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Educ. of Children with Disabilities, 67 IDELR 189 (OCR 2016).

[12] A student's conduct can, at times, be found to be a manifestation of the child's disability if: the conduct in question was caused by or had a direct and substantial relationship to the child's disability; or the conduct in question was the direct result of the district's failure to implement the IEP. *See*, 34 CFR 300.530 (e)(1)

Pursuant to the authority granted to hearing officers at 34 C.F.R. §300.502(d) and 22 PA Code §14.102(a)(2)(xxix), I will Order a comprehensive expedited diagnostic evaluation. The Student should remain in the current setting while the evaluation is pending. The evaluation can be completed without the mother's/Guardian's consent.[13] The independent evaluator, in his or her sole discretion, should seek additional input from any one of the Student's teachers, therapists, principals, assistant principals or guidance counselors in 6th, 7th and 8th grades. Accordingly, an appropriate Final Order follows.

Conclusion

I now find that beginning in 6th grade various employees expressed concerns to their supervisors about a pattern of behavior that rises to the level that by the time of the March 2018 assault the District should have afforded the Student the IDEA/Section 504 protections of a "yet to be identified" Student. Consequently, I now find the Student is a "yet to be identified" Student, otherwise entitled to a manifestation determination before the District imposed discipline.

However, a determination of a disability is a condition precedent to completing the manifestation determination process. Therefore I am Ordering an expedited evaluation to fill a gap in the record to determine the presence of/nature of an IDEA/Section 504 disability.

In summary, I agree with the Guardian that the Student is a "yet to be identified" Student who should receive the procedural due process protections of a manifestation determination. I am, however, denying the Guardian's request to return the Student to the first middle school prior to the completion of an independent evaluation. [14] *See* 34 C.F.R. § 300.534(d).

---

[13] *In East Windsor Bd. of Educ.*, 114 LRP 36178 (SEA CT 05/15/14); *Middletown Bd. of Educ.*, 10 ECLPR 77 (SEA CT 2013) (the student needed to be placed in a self-contained classroom for the duration of the assessment in order to be fully and safely evaluated); *In re: Student With a Disability*, 41 IDELR 143 (SEA CT 2004); *In re: Student with a Disability*, 115 LRP 32147 (SEA NM 05/21/15); Appendix A to the IDEA-Part B regulations, Question 14 (1999 regulations). *See*, 34 CFR 300.300 (a)(3)(i).

[14] Nothing in the IDEA *prevents* the District from maintaining the Student's pre-incident placement.

ORDER

And now this October 5, 2018, I find the Student meets the essential requirement to be considered as a "yet to be identified" or "perceived" Student with a disability who can now take advantage of all of the substantive and procedural due process protections outlined in the IDEA and/or Section 504.

Pursuant to the authority of a hearing officer as granted in 34 C.F.R. §300.502(d)/22 PA Code §14.102(a)(2)(xxix), the District is now Ordered to fund an independent educational evaluation (IEE).

.

Within two (2) school days of this Order, the Student's Guardian shall provide by email to the District's special education liaison for the Student the names and contact information for three independent potential IEE evaluators. The Guardian may contact the IEE evaluators to ensure the evaluator can complete the evaluation as Ordered.

Within one (1) school day of receipt of the list of evaluator(s), the District's special education liaison responsible for the student shall select one of the IEE evaluators to conduct an IEE. The District may research the backgrounds of the potential IEE evaluators and may contact the selected IEE evaluator to confirm that the evaluator can complete the evaluation as Ordered. At the close of business on the day after the list is received the District shall notify the Guardian of the name of the evaluator selected and shall contact the evaluator who shall begin the assessment/evaluation process. The selected evaluator shall be given access to Student's education records and shall determine the scope of the evaluations.

If on the second business day after receiving the list of the evaluator(s) the District has not notified the Student's Guardian of the name of the District selected IEE evaluator, the roles of the parties in determining the independent evaluator shall flip. In such a case, within one (1) school day of the flip, the Student's Guardian must select and notify the District's education liaison responsible for the Student about the selection from the list of names and contact information previously provided to the District. The selected evaluator shall be given access to Student's education records and shall determine the scope of the evaluations.

The cost of the IEE shall be at the IEE evaluator's rate or fee and shall be borne by the District at public expense; communications regarding arrangements between

the District, the Student's guardian, and IEE evaluator shall include all three parties.

The scope of each party's input, the nature of the assessment(s), the scope, scheduling details, findings and recommendations of the independent evaluation report shall be determined solely by the IEE evaluator. Notwithstanding the provisions of this Order, the observations by the IEE evaluator shall be only school-based and shall not take place in the home environment.

After the IEE evaluator has issued the independent evaluation report, the Student's team shall meet within two (2) school days to consider and review the findings of the IEE. For the independent evaluation review meeting, the team shall invite and include the IEE evaluator, making scheduling accommodations for his/her participation as necessary, in person, by phone or virtually. The District shall bear any cost, or rate, for the appearance of the IEE evaluator at the above meeting.

The terms of this order regarding the involvement of the IEE evaluator shall cease after the IEE evaluator has participated in the team meeting, although nothing in this order should be read to limit, or interfere with, the continued involvement of the evaluator as one party, or both parties, see(s) value in such continued involvement and might make arrangements therefor at that party's own expense.

As part of the meeting, the team shall complete the requirements for a manifestation determination. At the conclusion of the meeting, the District shall issue to the Student's Guardian a Notice of Recommend Educational Placement detailing the actions taken and the actions refused.

Nothing in this order should be read to limit or interfere with the ability of the team, by agreement of the Student's Guardian and the District, to alter the explicit directives of this Order related to the IEE evaluator and/or evaluation.

All other claims for appropriate relief or any other affirmative defenses are dismissed with prejudice.

Date: October 5, 2018

s/ Charles W. Jelley, Esq. LL.M.
ODR FILE #21078-1819 KE