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

Child's Name:

S. A.

CLOSED HEARING

ODR Case #21918-18-19

Date of Hearing:

March 28, 2019

Parents:

[redacted]

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School District:

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Date of Decision:

April 11, 2019

Hearing Officer:

Michael J. McElligott, Esquire

INTRODUCTION

Student ("student")[1] is a high school student who resides in the School District ("District").

The parties dispute whether the student is a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA")[2]. The student's potential identification as a student with a disability under IDEIA is at issue in a separate special education due process proceeding. The parents assert, however, that the student should have been so identified prior to February 12, 2019, the date of a disciplinary incident involving the student. This disciplinary incident may have consequences for the student's continued enrollment in the District school which the student currently attends.

Because parents claim that the student should have been identified as a student with a disability, they assert under 34 C.F.R. §300.534 ("Section 534") (*see also* 22 PA Code §14.101(a)(2)(xxxii)) that the student should have been considered as a thought-to-be-eligible student and, consequently, that the provisions of IDEIA regarding discipline of an eligible-student should apply. The District counters that

[1] To protect the confidentiality of the student, the generic use of "student", rather than a name or gender-specific pronouns, will be employed and will be substituted in direct quotes throughout the decision.
[2] It is this hearing officer's preference to cite to the implementing regulation of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-162.

it did not know, nor should it have known, that the student should be considered as a thought-to-be-eligible student and, pursuant to Section 534, the student may be treated as a regular education student as a result of the February 12th disciplinary incident.

For the reasons set forth below, I find that prior to February 12, 2019 the District did not know, nor should it have known, that the student should have been considered thought-to-be-eligible.

ISSUE

Prior to February 12, 2019, should the student have been considered by the District as a thought-to-be-eligible student?

FINDINGS OF FACT

1. The student enrolled in the District in the 2017-2018 school year, the student's 9th grade year. (School District Exhibit ["S"]-4).
2. The student attends an academically-oriented District high school with high academic expectations. (Notes of Testimony ["NT"] at 152-230).
3. The high school is viewed by staff as a college preparatory school attended by high-achieving students. As part of its practices, students are given a high level of trust and a certain degree of

autonomy in conducting themselves during the school day. (NT at 28-230, 281-338).

4. While students are expected to be in classes at the start of instruction, part of this trust/autonomy includes a class attendance policy that includes a degree of flexibility in how staff account for students during class time. (Parents Exhibit ["P"]-14 at page 23; NT at 28-230, 281-338).
5. Any unexcused absence from a class is considered a "class cut". While this would include an unexcused absence for the entire class period, at times—but not every time— a student who is late to class (i.e., entering class after instruction has begun), may be considered as having an unexcused absence from the class. The judgement of whether a student is assigned an unexcused absence as the result of a class cut, whether from non-attendance or late-arrival, is at the discretion of the classroom teacher. (P-14 at page 23; NT at 28-230, 281-338).
6. In 9th grade, the student's attendance records were not made part of the evidentiary record.
7. In 9th grade, the student's health records, in the form of visits to the school nurse, were not made part of the evidentiary record.
8. In 9th grade, the student received one A, two Bs, and two Cs in core academic courses and in [foreign language class]. (P-6).

9. In 9th grade, the student was not involved in any disciplinary incidents. (NT 28-71).

10. In the 2018-2019 school year, the student entered 10th grade. (P-4; S-4, S-5).

11. In 10th grade, prior to February 12, 2019, the student was reported with an unexcused absence, or class cut, 33 times. (P-4, S-5).

12. Of these 33 unexcused class absences, approximately half were in the student's [foreign language] class. The other approximate half were scattered across other classes totaling five or fewer unexcused absences in each class. (P-4, S-5).

13. The District's attendance record does not record whether these reported unexcused absences were the result of non-attendance or late-arrival. (P-4, S-5).

14. The student's [foreign language class] teacher testified credibly that the student's unexcused absences in her class were the result of late-arrival and not non-attendance. (S-6; NT at 73-114).

15. In 10th grade, prior to February 12, 2019, the student's health records indicate that the student was treated in November 2018 for stomach upset and in January 2019 for a headache. Additionally, in October 2019, the student's mother completed health/medical paperwork to be eligible for athletics. (S-7, S-8).

16. In the first quarter of 10th grade, prior to February 12, 2019, the student received one A and five Bs in core academic courses and in [foreign language class]. (S-4).

17. In the second quarter of 10th grade, prior to February 12, 2019, the student received one A, one B, and four Cs in core academic courses and in [foreign language class]. (S-4).

18. On February 7, 2019, due to the number of unexcused absences in [foreign language class], the student's [foreign language class] teacher submitted a "cut slip", resulting in two periods of detention with the school's dean of students. (S-9; NT at 73-146).

19. On February 12, 2019, at the metal detectors of the school during morning arrival, a student ("double-ID student") purportedly scanned his own ID and that of another student ("tardy student"). Later in the morning, administrators from the school interviewed the tardy student to see why he had given his ID to the double-ID student for scanning. The tardy student purportedly indicated that he knew he would be late for school after meeting with the student in this matter to "buy some snacks". (S-10 at page 1).[3]

[3] The term "purportedly" is used because another fact-finding process related to the incident may take place. Where that process may find different facts related to the incident, this hearing officer does not wish to have factually competing records. Because the establishment, or not, of factual elements related to the incident is not material to this hearing—the only material factual element for this hearing is what the District may or may not have known prior to February

20. In the incident report, the school administrator completing the report indicated that the tardy student appeared to be under the influence of drugs. In testimony at the hearing, the administrator testified that he had concerns about the excuse that the tardy student had provided for providing his ID to the double-ID student. (S-10; NT at 28-71).

21. The administrator summoned the student in this matter to see what the student could add to the double-ID investigation. A search purportedly found three cannabis vape devices and an inordinate amount of cash in the possession of the student in this matter. (S-10; NT at 28-71, 152-230).

22. The student purportedly admitted to buying the vape devices in school from another student in school with the intention of re-selling the devices to others outside of school and off school property. The student also purportedly related a story about having been involved in a prior transaction outside of school and off school property where the prospective buyer punched the student and took the vape devices intended for sale in that transaction. (S-10; NT at 28-71, 152-230).

12, 2019 and what it did in response to the purported events— fact-finding utilizing the word "purportedly" is being employed in a circumspect way so that fact-finding here does not cross over into another fact-finding process where the factual elements related to the incident are material to the other process.

23. The student was suspended three days, through February 15, 2019, for the possession of the cannabis vape devices in school. (S-10 at page 5).

24. On February 19, 2019, due to the nature of the disciplinary incident, the District employs a policy of holding a "reinstatement meeting". A reinstatement meeting allows for review of the student's records, and advises parents of the nature of the infraction and potential consequences. (S-11; NT at 152-230, 338-370).

25. Prior to the February 19, 2019 reinstatement meeting a school-based team, including a school administrator, a teacher, and a school counselor, performed a behavior/performance review ("BPR") of academic, behavioral, attendance, and health information to see if there was any indication that the student might have a disability. The BPR team indicated that it felt the student was not thought to have a disability. The BPR was shared with parents at the reinstatement meeting. (S-13; 152-230, 250-274).

26. At the February 19, 2019 reinstatement meeting, a school counselor explained a free outside counseling service with which the District partners to make available to students/families an outside counselor for issues of drug use, addiction, and/or other social/emotional/mental health concerns. The student's family

took the information under advisement but ultimately did not act on the referral. (S-12; NT at 250-274).

27. The student and the school counselor met twice thereafter for check-in and general support, once in late February and once in early March. The school counselor reported that the student did not request further services, nor did she have any concerns that the student required further services. (NT at 250-274).

28. As a result of the filing of the complaint on March 12, 2019, and allegations of bullying in the complaint, the school counselor met with the student a third time, two days prior to the hearing, to discuss bullying. The student indicated that bullying had occurred the previous school year, in 9th grade, but that the student did not report it to anyone. (NT at 250-274).

29. On March 7, 2019, the parents, through counsel, contacted the District to request an independent evaluation of the student. (P-13, P-15).

30. On March 12, 2019, the parents filed the special education complaint that led to these proceedings and the affiliated hearing process regarding child-find/eligibility issues. (Hearing Officer Exhibit ["HO"]-1).

31. The parents' complaint alleges that the District did not respond to social/emotional/behavioral needs of the student. The complaint alleges, *inter alia*, that the student has experienced

difficulties with socialization at the school, that the student has been the target of bullying, that the student experiences anxiety in school, and that the school has ignored executive functioning and impulsivity on the part of the student. (HO-1).

32. On March 25, 2019, as a result of parents' complaint, the District requested permission to evaluate the student. (S-14).

33. At the hearing, questioning by parents' counsel intimated that in addition to the issues related in the parents' complaint, the student has also engaged in the self-injurious behavior of cutting and that the student struggles with an eating disorder. (NT at 28-370).

34. At the hearing, District witnesses included five teachers, three administrators, the school counselor, and the school nurse. All testified credibly that none of them were aware of, witnessed, or experienced any social/emotional/behavioral difficulties in the student, or social issues, bullying, anxiety, executive functioning, impulsivity, signs of cutting, or signs of an eating disorder. (NT at 28-370).

35. The student's teachers testified uniformly that the student is bright, engaged in learning, and performs adequately and consistently to academic expectations. (NT at 72-114, 137-150, 279-338).

36. There are a range of potential disciplinary consequences for the student as a result of this incident, including the opportunity to remain at the current school under a behavior contract, or a transfer out of the current school to another District high school, or other potential consequences. (NT at 157-158, 188-191, 227-228).

DISCUSSION AND CONCLUSIONS OF LAW

The provision of special education to students with disabilities is governed by federal and Pennsylvania law. (34 C.F.R. §§300.1-300.818; 22 PA Code §§14.101-14.162). Where a student is identified as a student with a disability, eligible for special education programming, provisions of IDEIA provide that, under certain circumstances, infractions of the student code of conduct trigger procedural requirements before disciplinary consequences may be imposed upon the student. (34 C.F.R. §300.530; 22 PA Code §14.101(a)(2)(xxxii)).

Additionally, IDEIA provides that where "(a) child who has not been determined to be eligible for special education…and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in this part if the (school district) had knowledge (as determined in accordance with paragraph (b) of this section) 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); 22 PA Code §14.101(a)(2)(xxxii)).

The 'section b' provisions noted above where a school district "must be deemed to have knowledge that a child is a child with a disability" include: (1) parents expressing concern in writing to supervisory/administrative personnel of the school district, or a teacher of the child, that the child is in need of special education, (2) parents of the child requesting an evaluation of the child for special education, or (3) a teacher of the child, or other school district personnel, expressing specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education or other supervisory personnel of the school district. (34 C.F.R. §300.534(b); 22 PA Code §14.101(a)(2)(xxxii))).[4] This imputed school district knowledge must be gauged at a time "before the behavior that precipitated the disciplinary action occurred". (*Id.*)

Finally, the language of 34 C.F.R. §300.534(b) speaks to situations where a school district 'must' be determined to have thought-to-be-eligible status. As a result of fact-finding, however, other events may support a finding that a school district had knowledge of a student's

[4] 34 C.F.R. §300.534(c) provides exceptions to the imputed knowledge requirements of §300.534(b), but none of those exceptions (parents refusing to allow an evaluation for special education, or refusing to allow the provision of special education services, or the student having been previously found—prior to the disciplinary incident— ineligible for special education as the result of a special education evaluation) apply in this situation. (*See also* 22 PA Code §14.101(a)(2)(xxxii)).

thought-to-be-eligible status. In short, the situations enumerated in 34 C.F.R. §300.534(b) are not exclusive.

Here, the record in its entirety supports a conclusion that prior to February 12, 2019 the District did not know, nor should it have known, that the student should be considered a thought-to-be-eligible student. First, prior to February 12, 2019, none of the explicit conditions under which a student must be considered to be a thought-to-be-eligible student (parental concerns about the need for special education, parental request for a special education evaluation, or teacher concerns about the need for special education) are any part of this record. (34 C.F.R. §300.534(b); 22 PA Code §14.101(a)(2)(xxxii)). Second, as indicated above, the situations enumerated in 34 C.F.R. §300.534(b) are not necessarily exclusive in terms of imputing knowledge to a school district that a student should be considered as a thought-to-be-eligible student. But this record does not support such a finding.

Accordingly, prior to February 12, 2019, the record taken as a whole does not provide the basis for a finding that the student should have been considered by the District as a thought-to-be-eligible student.

A Final Note. A different process will determine what may occur in the schooling of the student as a result of the disciplinary incident. What follows, then, is simply an observation, but one that this hearing officer feels necessary to share. Having seen the consistent testimony of the

student's teachers about the student's ability and engagement in a competitive learning environment, the deep emotion of the student's mother through her testimony, and considering the flexibility ostensibly afforded in the handling of potential consequences for the disciplinary incident, it is the authentic hope of this hearing officer that while consequences may, understandably, need to be imposed, those consequences can be imposed in the context of the student remaining in the current educational setting.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, prior to February 12, 2019 the School District did not know, nor can knowledge be imputed to it, that the student was a thought-to-be-eligible student under 34 C.F.R. §300.534(b)/22 PA Code §14.101(a)(2)(xxxii).

The affiliated hearing process regarding the District's child-find/identification status presented in the March 12, 2019 complaint is scheduled for May 3, 2019.

Any claim not specifically addressed in this decision and order is denied.

Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

April 11, 2019