

*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**

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**Child's Name:**

P. C.

CLOSED HEARING  
**ODR Case #21969-18-19**

**Date of Hearing:**

April 9, 2019

**Parents:**

[redacted]

Daniel Fennick, Esquire  
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*Counsel for Parents*

**School District:**

Hempfield School District  
200 Church Street – Landisville, PA – 17538

Mark Walz, Esquire  
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**Date of Decision:**

April 25, 2019

**Hearing Officer:**

Michael J. McElligott, Esquire

## **INTRODUCTION**

Student (“student”)<sup>1</sup> is a high school student who resides in the 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”)<sup>2</sup>. 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 January 11, 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.

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 it did not know, nor should it have known, that the student should be

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<sup>1</sup> 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.

<sup>2</sup> 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.

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 January 11<sup>th</sup> disciplinary incident.

For the reasons set forth below, I find that prior to January 11, 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 January 11, 2019, should the student have been considered by the District as a thought-to-be-eligible student?

### **FINDINGS OF FACT**

1. The student has attended District schools since kindergarten.  
(Notes of Testimony [“NT”] at 18-86).
2. [redacted]
3. In the elementary grades, on every report card over the student’s 1<sup>st</sup> – 5<sup>th</sup> grade years, areas for improvement consistently included being “attentive during instruction”, “(organizing) materials and possessions”, “staying on task”, and “follows directions”. The student did markedly better in these areas in 6<sup>th</sup> grade. (P-2 at pages 10-22).

4. The student's 3<sup>rd</sup> grade year was described as particularly challenging for the student. (P-11, P-12 at page 11).
5. In March 2012, the spring of the student's 4<sup>th</sup> grade year, the student was evaluated privately by a community mental health provider. The evaluation noted the reasons that the family sought the evaluation were: forgetfulness about homework, misplacing things, messy desk, and tardiness. Other notes indicated additional concerns which, to an objective reader, cannot be easily deciphered. (P-12, generally, and at page 12).
6. The evaluator made a provisional diagnosis of adjustment disorder, with indications for further rule-out for attention-deficit hyperactivity disorder ("ADHD"), adjustment disorder, anxiety disorder, and mood disorder. The evaluation was not shared with the District at that time, and the evaluator did not testify at the hearing. (P-12 at page 12; NT at 18-86).
7. In middle school, multiple teachers noted incomplete assignments, lack of organizational skills, and unsatisfactory homework completion. (P-2 at pages 6-9; School District Exhibit ["S"]-9 at pages 6-9).
8. Throughout elementary school and middle school, the student performed well academically. (P-2 at pages 6-22; S-9 at pages 6-9).

9. In December 2016, in the midst of the student's 9<sup>th</sup> grade year, the student was given detention for unexcused tardiness, an academic infraction, and a class-cut. (S-11 at page 2).
10. In January 2017, parents presented to the District a diagnosis of ADHD by a community mental health provider (different from the individual who evaluated the student in 4<sup>th</sup> grade), along with a request for a Section 504 accommodation plan. (P-8, P-13; S-1).
11. At that time, parents also presented to the District, for the first time, the March 2012 evaluation. (P-6 at page 6; S-1).
12. In March 2017, the District developed a Section 504 plan. (P-6 at pages 6-8; S-2).
13. The March 2017 Section 504 plan contained accommodations to address focus, attention, organization, and assignment-completion. (P-6 at pages 6-7; S-2).
14. After the December 2016 detentions, the student did not engage in any behavior that required discipline. (S-11 at page 2).
15. In 9<sup>th</sup> grade, the student continued to perform well academically. (P-2 at pages 4-5; S-9 at pages 1, 4-5; S-10 at pages 1-2).
16. In August 2017, a psychologist, dually licensed as a clinical psychologist and certified as a school psychologist, privately

evaluated the student (different from the individuals who evaluated the student in 4<sup>th</sup> grade and earlier in 2017). (S-3).

17. The private psychologist determined that the student was mis-diagnosed with ADHD. Instead, the private psychologist diagnosed the student with mild Asperger's Syndrome, attributing the student's needs with "procrastination difficulties" and "challenges with mental flexibility" to this diagnosis, rather than ADHD or other diagnoses rooted in attention/concentration disorders. (S-3, *generally*, and at page 16).
18. The private psychologist made recommendations for the home and community settings but not an educational setting. (S-3 at pages 17-18).
19. In November 2017, the fall of the student's 10<sup>th</sup> grade year, the private psychologist communicated by letter with the District, providing the August 2017 evaluation report. (P-9; S-3 at page 1; NT at 86-92).
20. The private psychologist recommended continued implementation of a Section 504 plan. He opined in the letter that his diagnosis of mild Asperger's Syndrome "can adversely impact upon (the student's) ability to interpret social and affective states of others and can result in inappropriate responses to teachers and other individuals in (the student's) social environment. (The student's) responses may not line up with what one would view

typically, the reaction of peers (the student's) same age in similar circumstances." (S-3 at page 1; P-9).

21. The private psychologist's recommendations and accommodations, however, did not include any recommendation or accommodation geared toward social interaction, affect, or response-to-others. The private psychologist's recommendations related only to test-taking: extended time on state, local, and classroom-based assessments/tests and distraction-free test-taking environments. (S-3 at page 1, P-9).
22. In November 2017, based on the private psychologist's report and recommendations, the student's Section 504 plan was revised. (P-6 at pages 4-5; S-4 at pages 1-2).
23. In March 2018, in the spring of the student's 10<sup>th</sup> grade year, at the annual Section 504 team meeting, multiple accommodations in the student's Section 504 plan were revised. (P-6 at pages 1-3; S-5).
24. In 10<sup>th</sup> grade, the student did not engage in any behavior that required discipline. (S-11).
25. In 10<sup>th</sup> grade, the student continued to perform well academically. (P-2 at pages 2-3; S-9 at pages 1-3).
26. In December 2018, in the midst of the student's 11<sup>th</sup> grade year, the student received a detention for a class-cut. (S-11 at page 1).

27. On January 11, 2019, the student was with fellow students, adults, and District employees on [an extracurricular activity]-based overnight stay at a hotel. (S-6).
28. The student allegedly ingested a controlled substance, along with other students who allegedly ingested the same controlled substance. (S-6).<sup>3</sup>
29. Adults and District employees on the trip became aware of the alleged incidents and conducted an investigation, including multiple interviews. (S-6).
30. After the disciplinary incident, the District suspended the student for 10 school days and sought the student's expulsion based on violations of District policy regarding student use/possession of controlled substances. (S-6 at page 1, S-11, S-13).
31. In the days after the incident, parents retained counsel. (P-14).
32. On this record, throughout the student's high school years prior to January 11, 2019, the parents have been diligent and effective communicators regarding the student's education

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<sup>3</sup> The word "alleged" in this finding of fact, and follow-on findings of fact, is used by this fact-finder because other processes/tribunals may be involved in specific, concrete fact-finding regarding the events of January 11, 2019, fact-finding which is not within the authority of this fact-finder to determine definitively. Therefore, the reader should attach no other meaning or connotation to the use of the word "alleged".



generally and, specifically, regarding the student's organization needs. (P-13).

33. In March 2019, the District performed an evaluation of the student and revised the Section 504 plan. Contemporaneously with these March events, parents filed the special education due process complaint which led to these proceedings. (S-7, S-8; Hearing Officer Exhibit ["HO"]-1).<sup>4</sup>

34. In their complaint, parents assert that, based on the private psychologist's report of August 2018, the student "has an inability to interpret social cues and follow rules. When (the student) exercises independent judgment, (the student) is susceptible to peer influence to violate school rules." Parents then go on to allege that the student's alleged involvement in the January 11, 2019 incident was the result of peer influence and that, ultimately, the District failed in its child-find/identification duties under IDEIA and, as a result, the student should be considered as thought-to-be-eligible under 34 C.F.R. §300.534. (HO-1 at pages 5-8).

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<sup>4</sup> The March 2019 evaluation report and Section 504 plan (S-7, S-8) were entered into the record and were given cursory consideration. This hearing officer feels, however, that these documents are deeply material evidence for the issues in the affiliate hearing process at a separate ODR file number. Therefore, those documents will be weighed more deeply as part of that process.

## **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)).<sup>5</sup> 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 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 January 11, 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 January 11, 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,

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<sup>5</sup> 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)).

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)). Granted, in January 2017, the parents communicated about the evaluations and needs that they had privately accumulated to that point, and the student was identified with ADHD. A Section 504 plan was put in place. But neither of these elements support the quite explicit conditions of 34 C.F.R. §300.534(b), which are centered on special education.

A review, especially, of the extensive email exhibit at P-13 shows that over multiple school years, the parents and District discussed the student's needs in attention, organization, and assignment-completion. But neither the parents nor the educators working with the student voiced any indication that the Section 504 plan was inappropriate, or that the student's programming should include special education or an individualized education program ("IEP"). Even in August 2017, when the ADHD diagnosis was found to be inappropriate (and shared with the District in November 2017) and Asperger's Syndrome was identified by that evaluator as the appropriate disability diagnosis, the private psychologist—by training, both a clinical and school psychologist—did not recommend an evaluation for special education, or contemplation of an IEP. That evaluator recommended continued services under a Section 504 plan.

Therefore, on this record, under the explicit conditions set forth in 34 C.F.R. §300.534(b), prior to January 11, 2019, the District did not know, nor should it have known, that the student should be considered a thought-to-be-eligible student.

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.<sup>6</sup> Here, the evidence shows that neither party disputes the student's need for accommodations for attention, organization, and assignment-completion. The District was providing such accommodations through a Section 504 plan.

The parents feel that prior to January 11, 2019 and, going forward, the student may qualify for special education under IDEIA. As indicated above, the student's potential identification as a student with a disability under IDEIA is at issue in a separate special education due process proceeding. But the question of whether the student, ultimately, is a student eligible under the IDEIA is separate and distinct from the question of whether, prior to January 11, 2019, knowledge should have been imputed to the District that the student might qualify as a thought-to-be-eligible student, where disciplinary protections should be in play

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<sup>6</sup> In its closing, the District contests this legal conclusion. While artfully argued, it is the opinion of this hearing officer that a mosaic of fact-finding can, and should, be considered outside of the explicit conditions of 34 C.F.R. §300.534(b) when interrogating the question of a school district's knowledge of a student's thought-to-be-eligible status prior to the date of a disciplinary incident. See NT at 94-101.

for a significant breach of the student code of conduct. The evidence in its entirety does not support the latter assertion.

In their complaint, [parents] assert that the student has needs in socialization and peer-interaction which, prior to January 11, 2019, should have placed the District on notice of the student's thought-to-be-eligible status, especially in light of what allegedly transpired in the January 11, 2019 incident. There is simply no evidence to support that assertion. Most persuasive here is that, after a thorough review of the record, there is no evidence that the student had difficulty with peers, or was potentially swayed by peers, or suffered from undue suggestibility, or—on any level—that the student needed accommodations in social skills/socialization. In the entire record, the only indication in that regard are the two sentences in the private psychologist's November 2017 letter to the District regarding potential socialization issues related to Asperger's Syndrome. But, even there, the private psychologist made no recommendations, or offered any accommodations, related to peer interaction or socialization. (FF 21).

Therefore, even outside of the specific conditions of 34 C.F.R. §300.534(b), the mosaic of evidence in the record does not support a conclusion that can impute to the District purported knowledge of the student's thought-to-be-eligible status prior to January 11, 2019.

Accordingly and in sum, prior to January 11, 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.

**ORDER**

In accord with the findings of fact and conclusions of law as set forth above, prior to January 11, 2019 the District did not know 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), nor can knowledge thereof be imputed to it.

The affiliated hearing process regarding the child-find/identification issues presented in the March 24, 2019 complaint continues at a separate ODR file number.

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 25, 2019