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

EXPEDITED DECISION

ODR File No.
27332-22-23

CLOSED HEARING

Child's Name:
M.B.

Date of Birth:
[redacted]

Parent:
[redacted]

Counsel for the Parent:
Drew Christian, Esq.
PO Box 166,
Waverly, PA 18471

Local Education Agency:
Western Wayne School District
Easton Turnpike,
Lake Ariel, PA 18436

Counsel for the LEA:
Rebecca A Young, Esq.
King Spry Herman Freund & Faul, LLC,
One West Broad Street, Suite 700,
Bethlehem, PA 18018

Hearing Officer:
Charles W. Jelley, Esq.

Date of Decision:
1/20/2023

INTRODUCTION

On or about December 4, 2023, the Parent requested this special education due process hearing on behalf of their child (Student) against the School District (District).[1] This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 USC § 1400 *et seq.* and Section 504 of the Rehabilitation Act.

The Parent's Complaint includes two distinct claims. Claim one is an appeal from the District's imposition of discipline; this claim forms the basis of the request for the expedited hearing. The expedited designation requires me to issue a rapid Decision.

The second claim alleges multiple non-expedited child-find and a denial of a free appropriate public education for the two years before the filing date.[2] In coordination with this hearing officer, the Office for Dispute Resolution will schedule this matter for a hearing at a later date.

The expedited claim alleges that the Student is otherwise eligible for IDEA and Section 504 protections as a "thought-to-be eligible" student. The phrase "thought-to-be eligible" is a jargon-loaded term of art which, if proven, extends IDEA and Section 504 protections to not yet eligible students facing disciplinary actions under 20 USC § 1415(k).

[1] Except for the cover page, identifying information is omitted to the extent practicable. The Parents' claims arise under 20 USC §§ 1400-1482 and Section 504, 29 USC §794. The federal regulations implementing the IDEA are codified in 34 CFR §§ 300.1-300.818; while the Section 504 regulations are found at 34 CFR § 104. *et seq.* The applicable Pennsylvania regulations, implementing the IDEA are set forth in 22 Pa. Code §§ 14.101-14.163 (Chapter 14). References to the record throughout this decision will be to the Notes of Testimony (N.T.,), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number.

[2] The time to conclude the proceedings on the second claim is different; therefore, after I issue this Decision, the Office for Dispute Resolution (ODR) will issue a new file number with a new decision due date for the second claim. Scheduling details about the non-expedited claim will follow from ODR after this Decision.

Section 504 does not have a parallel provision; therefore, I will apply the specific requirements of the IDEA in deciding the Section 504 claim.
At the center of this dispute, the Parties disagree over the meaning of the phrase "pattern of behavior" and the scope of the concerns that staff must communicate to trigger a basis of "deemed" "knowledge" under 20 USC § 1415(k)(5)(B), and 34 CFR § 300.534(iii). Very little case law guides the hearing officer on either point. After hearing a full day of testimony, the pleadings, and reviewing the exhibits, I am ready to rule. For all the reasons and conclusions that follow, I now find in favor of the Parent and against the District.

Issues

1. Was the Student "thought to be eligible" prior to the disciplinary removals? If the answer is yes, what relief, if any, is required?

FINDINGS OF FACT

All evidence was carefully and thoughtfully considered; I make findings only as necessary to resolve the expedited issue presented. Some evidence - both testimony and documents- substantiated and contextualized the findings. I decline to catalog any evidence in detail here that relates to the non-expedited claims to follow.

1. For ease of reading, the Student was enrolled in the District during the following years:
    a. 2020-2021 School Year - [redacted] Grade - Middle School
    b. 2021-2022 School Year - [redacted] Grade - High School
    c. 2022-2023 School Year - [redacted] Grade - High school.
2. On January 15, 2021, the District provided the Parent with a copy of a completed evaluation report. (P-1). The District team members concluded, and the Parent agreed the Student was no longer IDEA eligible. (P-1).

Although the report referenced a previous behavioral health diagnosis, the District did not complete a Section 504 evaluation. (P-1. p.2). The individual listed as the local education agency representative (LEA) in the report did not receive or review the report. (P-12, NT pp.216-218). The psychologist has no recollection of who attended the meeting to review the reevaluation but recalls an email invite. (NT pp.148.150). Another administrator issued the Notice of Recommended Educational Placement existing the Student from IDEA services. (P-2, S-3).

3. The evaluation included an assessment of general ability and achievement testing. The assessments indicate the Student had average ability and ability achievement. The report did not include measures of executive functioning, behavioral, or social-emotional skills. (P-2, S-3). Recent report cards indicate that the Student earned average grades in most classes. The evaluation report notes the Student was, however, failing social studies and technical education. (P-2, p.4 S-3, p.4).
4. Beginning on or about December 15, 2022, the Student began to earn in-school and after-school detentions for violations of the Student Code of Conduct.
    a. On December 22, 2021, the Student received lunch detention for arriving two (2) minutes late for class on November 30, 2021, and three minutes late on December 15, 2021. (P-3, pp.9-10).
    b. On February 1, 2022, the Student received lunch detention for not being quiet in Study Hall when others were working. (P-3 p.8).
    c. On February 9, 2021, the Student earned after-school detention for arriving late to class wearing earbuds in class on January 25, 2022, report. The communication history notes the Mother

expressed concerns about in-home behavioral troubles. (P-3 p.8).

d. On February 16, 2022, the Student earned after-school detention for acts of disrespect and [destruction of property] on February 2, 2022. (P-3 p.8).

e. On February 16, 2022, the Student earned after-school detention for not having a hall pass and arriving late to class. (P-3, p.7).

f. On February 16, 2022, the Student earned after-school detention [inappropriate behavior] on February 14, 2022. (P-3 p.7).

g. On February 16, 2022, the Student earned after-school detention for possessing a phone in class. The District called the Mother, who picked up the phone the next day. (P-3 pp.6-7).

h. On February 17, 2022, the Student earned after-school detention for arriving late without a hall pass on February 16, 2022. (P-3.6).

i. On February 28, 2022, the Student received lunch detention for arriving late to class. (P-3 p.6).

j. On March 9, 2022, the Student received after-school detention for being "consistently" late to class. (P-3 p.5).

k. On March 15, 2022, the Student received a three-day out-of-school suspension for [inappropriate language] in Study Hall on March 11, 2022. (P-1, p.5).

l. On April 6, 2022, the Student earned a three-day out-of-school suspension for [inappropriate behavior]. Also, on April 6, 2022, the Student earned a three-day out-of-school suspension for making inappropriate comments[redacted]. The two violations were combined into one punishment. (P-3 p.4)

m. Sometime between December 2021 to April 2022, the guidance counselor arranged for the Student to see a counselor. (NT pp.173-180, NT pp.193-198). The District paid for the counselor. The Student met with the counselor on two occasions. The sessions ended because the Student was antagonistic. *Id.* The guidance counselor did not know the Student was previously diagnosed as a person with an oppositional defiant disorder. (NT p.200-201).

n. In early April 2022, the building Principal contacted the Mother about the Student's ongoing discipline referrals. The Principal came up with two options. (NT p.159, N.T. p.179). Option one, the Student could leave the District and attend a drug and alcohol program. Option two, the Student could leave the high school and attend the District run cyber-school. No other options were discussed. Because the Student previously struggled during online instruction, the Mother was initially interested in the in-person drug and alcohol program. After thinking it through, the Mother picked the cyber placement. The removal from school is not noted on the report cards or the discipline file. (P-3, S-2, P-4, S-5, NT. pp.154-160).

o. On September 7, 2022, when the Student returned to in-person instruction for [redacted] grade, the Student earned lunch detention for making inappropriate comments [redacted]. (P-3 p.4).

p. Sometime between December 2021 and April 2022, an administrator made a referral to a drug and alcohol program about a possible placement. (NT p.202-203). The guidance counselor did not understand the basis for the referral to the drug and alcohol program. (NT pp.201-202).

q. On September 14, 2022, the Student earned a one day out of school suspension to be served on September 22, 2022. (P-3 p.4).

r. On September 14, 2022, the Student was also disciplined for continuing to wear torn jeans after multiple warnings. The Student received an after-school suspension to be served on September 22, 2022. (P-3 p.4).

On September 14, 2022, the Student was disciplined for wearing earbuds in class a third time. The teacher asked, and the Student agreed to take them out and then put the earbuds back in later. (P-3 p.4). The Student was given a three-day out-of-school suspension. *Id.*

s. On November 4, 2022, the Student was disciplined for going into the bathroom 5 minutes after the late bell. When questioned, the Student responded that [redacted] was late for class and walked away. The Student was given a three-day out-of-school suspension. (P-3 p.4).

t. On November 4, 2022, the Student was disciplined for getting Gatorade and walking in the hall. The Student was later found in the art room. The Student was given a three-day out-of-school suspension to be severed at the same time as the previous infraction above. (P-3 p.4).

u. On November 7, 2022, while walking down the hall, the Student twisted the top off another Student's water bottle, which then caused the bottle to fly up and hit the ceiling. On November 4, 2022, the Student was disciplined for going into the bathroom 5 minutes after the late bell. When questioned, the Student responded that [redacted] was late for class and walked away.

The Student was given a three-day out-of-school suspension to be severed at the same time as the infraction above. (P-3 p.3).

v. On November 8, 2022, the Student received a three-day out-of-school suspension for possessing a vape pen. The suspension was served on the same days as the November 7, 2022, punishment. (P-3 p.3).

w. On November 9, 2022, the Student was in the hallway talking to others when the bell rang. A staff person escorted the Student to the next class. The Student arrived two minutes late for class. The Student received a three-day out-of-school suspension to be served with the previous violation. (P-3 p.3).

x. On November 14, 2022, the Student was in the hallway three minutes after the bell. When the teacher called out to the Student, the Student walked away. The Student earned a three-day suspension to be served with the November 8, 2022, removals. (P-3 p.2).

y. On November 15, 2022, the Student was disciplined for using a cell phone in class and texting another. The Mother was contacted about the incident. The Student earned a three-day suspension to be served at the same time as the November 14, 2022, punishment. (P-3 p.2).

z. On November 15, 2022, the Student was seen in a Snapchat video posted [redacted]. When the video became public, after questioning, the Student admitted to [redacted]. The Principal suspended the Student for ten (10) days. (P-3 p.1). When the Student returned to school after the suspension, the Student got into a fistfight. (NT pp.61-64).

aa. The District then informed the Student that the administrators would move forward with an expulsion charge. (N.T. pp.).

bb. Sometime during [redacted] grade, before the expulsion hearing, the guidance counselor made a referral to a local community behavioral treatment program. (NT pp.194-195).

5. On or about December 4, 2022, the Parent filed an expedited due process Complaint. The complaint seeks multiple forms of relief, like an independent education evaluation, compensatory education, an immediate return to school, and any other appropriate relief. (P-5).
6. Before the expulsion hearing, the Principal contacted the Parent to review an Expulsion Waiver Form. The Waiver suggested that if the Student agreed to waive all regular education due process rights, the District would pay for the Student to attend a drug and alcohol program. Provided the Student complied with all treatment recommendations and maintained passing grades, the District agreed to consider an early return to the District. (P-6). If executed, the Parties would not proceed to a formal hearing. The Parent refused to sign the Waiver. (NT p.170).
7. The Board met on or about December 19, 2022, and voted to expel the Student. (NT p.70). Unaware of the Board's vote, the Student returned to the high school. When the Student returned, the Principal told the Parent the Student was expelled. The Student then left the building. *Id.*
8. At the time of the expedited due process hearing, the Board had not yet issued a written decision or served a notice of appeal. (NT p.70).
9. As of January 6, 2023, the date of the due process hearing, the Student has not attended school since early December 2022. (N.T. *passim*).
10. On or about December 6, 2022, the District filed a Motion to Dismiss, suggesting that the Student had no IDEA or Section 504 due process rights. The Parent filed a Response, and the hearing officer denied the District's Motion on or about December 13, 2022. (H.O. #2).
11. On or about December 19, 2022, the District filed an Answer/Response to the expedited complaint denying all claims. The District denied the request

for the independent educational evaluation and asserted multiple affirmative defenses. (S-6, S-7).

12. The District's expulsion policy states, "Students who are facing an expulsion hearing must be placed in their normal classes if the formal expulsion hearing is not held within the ten-day school suspension window. (H.O. #3 p.3 The policy goes on to state, "The hearing shall be held within fifteen days (15) days of notice of charges, unless a delay is mutually agreed to by both parties or is delayed by an: "(b) evaluation or other court or administrative proceedings are pending due to a student invoking his/her rights under the Individual with Disabilities Education Act (D.E.A.)." (H.O. #3 p.3).

APPLICABLE LEGAL PRINCIPLES

Generally, the burden of proof consists of two elements: the burden of production and persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief.[3] The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise.[4] In this case, the Parent is the party seeking relief and must always bear the burden of persuasion. While credibility was not a concern, several witnesses did not provide a clear, persuasive, or compelling explanation of the events and circumstances surrounding the Student's various removals and the decision-making process that led to each removal from the regular education setting.

Sometimes, certain witnesses did not seem to have a working knowledge of the IDEA discipline rules or District policy implementing the IDEA or Section 504 discipline protections.

THOUGHT-TO-BE EXCEPTIONAL STATUS UNDER CHAPTER 14

[3] *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

[4] *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed. Appx. 920, 922 (3rd Cir. 2010).

Pennsylvania general child find regulations require districts to locate and identify "thought-to-be-eligible" students.[5] Chapter 14 further provides that school districts should use various screening techniques, including behavioral observations, to locate, identify, evaluate and educate students who may need special services and programs as prescribed by IDEA. 22 P.A. Code §14.122.

STUDENT DISCIPLINE UNDER THE IDEA DEEMING AND *"THOUGHT-TO-BE ELIGIBLE" STATUS*

The IDEA includes specific disciplinary protections for students with disabilities who receive special education services. 20 USC § 1415(k). The IDEA's federal implementing regulations also extend those protections to "thought-to-be eligible" children. 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.[6] The protections at 34 CFR § 300.534 are triggered when the local educational agency (LEA) — the District in this case — has a basis of knowledge "that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred." 34 CFR § 300.534(a). Accordingly, if the LEA had no basis of knowledge, it could impose the same discipline that it would on any other student.

The IDEA regulations explain when any of three conditions occur. Districts are "deemed to have knowledge that a child is a child with a disability…" 34 CFR § 300.534(b). 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;

[5] 22 P.A. Code §14.121.
[6] 20 USC § 1415(k)(5), 34 CFR § 300.534Chapter 14 at 22 PA. Code 14.102 (xxxii) incorporate the IDEA thought-to-be discipline standards found at 34 CFR § 300.534.

(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 CFR § 300.534(b).

The District now argues that under 34 CFR § 300.534(c) or (d), they are otherwise excused from the "deeming" rule because a 2021 IDEA reevaluation determined the Student was not eligible. Even if the exception applies, a district must, if requested, provide an expedited evaluation in discipline disputes.[7] Furthermore, "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*.

OTHER IDEA STUDENT DISCIPLINE PROVISIONS

If a disciplinary action changes an eligible student's 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."[8] If the behavior is a manifestation of a disability, 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."[9]

[7] 34 CFR § 300.534(d).
[8] 20 USC § 1415(k)(1)(E)(i)(I),(II).
[9] 20 USC § 1415(k)(1)(F).

Even if there is no IEP or eligibility paperwork to consider, a district must conduct a manifestation determination within ten (10) school days of its decision to remove a student for more than ten (10) school days. In *Letter to Nathan,* 73 IDELR 240 (OSEP 2019), the Office of Special Education Programs explained that the District must complete the manifestation timeline requirements before completing an expedited evaluation for a "thought-to-be eligible" pupil.

PROCEDURAL HISTORY AND INTERIM RULING

THE DETAILS FOUND IN THE EXPEDITED COMPLAINT

The Parent first argues that the Student is a "thought-to-be eligible" pupil and, as such, the District should have completed a manifestation determination review prior to a significant change in placement. The Parent further asserts that filing the expedited complaint also triggered "stay put" protections, which then created a right to continued schooling pending a final decision on the merits. Stated another way, once the complaint was filed by operation of law, the Student had vested procedural and substantive due process protections under disciplinary provisions at 20 USC § 1415(k)(5)(B), 34 CFR § 300.534(d)(2)(ii) and the "stay put" provisions at 20 USC § 1415 (j), and 34 C.F.R 34 § 300.518. The Parent now asks me to return the Student to the high school immediately. They next ask for a District funded expedited independent educational evaluation and compensatory education.

THE DISTRICT'S MOTION TO DISMISS, ANSWER, AND AFFIRMATIVE DEFENSES

Initially, the District filed a global Motion to Dismiss, alleging that non-eligible students do not have either IDEA or Section 504 protections. The Parent filed a Response. I denied the Motion finding that a genuine issue of

material fact existed, suggesting the Student was otherwise protected by the IDEA or Section 504.

The District then filed an Answer generally denying all allegations. The Answer next asserts that at all times relevant, the District fully complied with the IDEA and Section 504 disciplinary rules. Although the District's Answer denied the request for the independent evaluation, the District did not file a due process Complaint, defending its previous 2021 evaluation. Instead, they issued a permission to reevaluate, which the Parent signed and returned. Finally, they assert the recently completed evaluation affirmative defense at 34 CFR 300.534(c)(2); if correct, the District is otherwise excused from the "deeming" rules at 34 CFR 300.534(b).

Both Parties filed one-page closing statements. The Parent's statement argues that I should blend the "child find" standards with the "deeming" standards to identify a "pattern of behavior." The District argues that I should apply the specific disciplinary rules at 34 CFR §300.534 and reject the blended approach. I agree with the District.[10]

DISCUSSION AND CONCLUSIONS OF LAW

BASIS OF KNOWLEDGE

The Parent combines events during the 2021-2022- [redacted] grade and the 2022-2023 - [redacted] grade school year to amass evidence of the District's "basis of knowledge." The Parent argues that errors in the 2021 evaluation make out child find violations, which foster a "basis of

[10] The District suggests that three hearing officer Decisions reviewing 34 CFR § 300.534 and "thought to be eligible" status are controlling; they are not. Neither ODR #19036 nor ODR #21918 called on the hearing officer to determine the scope of the concerns the staff must communicate to trigger a basis of "deemed" knowledge under 20 USC § 1415(k)(5)(B), and 34 CFR § 300.534(iii) or when those communications describe a "pattern of behavior." While in ODR #21078-1819 (2019) this hearing officer applied the specific discipline rules at 34 CFR § 300.534(iii), I was not required to parse the scope of the teacher communications to the administration or the "pattern of removal rules"; therefore, while I agree with the District that the specific discipline rules apply the issues answered and the facts at play in each hearing officer decision are distinguishable.

knowledge." I disagree. Child find is triggered when "reasonable suspicions" exist that a child may have a disability.[11] On the other hand, a school district's knowledge in a "thought to be eligible" disciplinary appeal is confined to three precise circumstances. 34 CFR § 300.534. As a matter of statutory interpretation, the specific controls the general; therefore, the Parent's blended approach is rejected.[12] While I must not conflate the "child find" and the discipline provisions, I will not lose sight of the rules limiting serial and long-term removals in understanding when a "pattern of behavior" exists.

While the first two circumstances - 34 CFR § 300.534(b)(1)-(2) are not at issue, the third circumstance at 34 CFR § 300.534(b)(3) is. I am now called on to make a plain language analysis of the "pattern of behavior" and the scope of the "expressed specific concerns" necessary to "deem" "knowledge" that the Student is "thought to be eligible."

THE FIRST PATTERN OF BEHAVIOR IN [redacted] GRADE

A pattern is ordinarily construed as a recurrent, similar, or related series of events.[13] When teachers report to administrators that a pupil disrupts class, is disrespectful, and then continues, after repeated removals, to re-offend, the resulting string of communications creates the beginnings of a communicated "pattern of behavior." *Id.* Case law next suggests that a pattern can emerge without using magic words like "suspected disability," "handicapped," "pattern," or "evaluation."[14]

[11] *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 280 Ed.Law Rep. 37 (3d Cir. 2012) (focusing on the reasonable time after a previous evaluation that determined non-eligibility before reasonable suspicion again arises).

[12] *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 384, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992) ('[I]t is a commonplace of statutory construction that the specific governs the general.'). *Doe v. Nat'l Bd. of Med. Exam'rs*, 199 F.3d 146 (3d Cir. 1999), *S.C. Dep't of Educ. v. Duncan*, 714 F.3d 249 (4th Cir. 2013).

[13] *Anaheim Union High Sch. Dist. v. J.E.*, 2013 U.S. Dist. LEXIS 72031 (C.D. Cal. May 21, 2013)(expedited IDEA discipline decision).

[14] *Jackson v. Northwest Local School District,* (S.D. Ohio 2010) 55 IDELR 104, 110 LRP 49939. In *Jackson,* the court determined that the school district had knowledge of the child's

Parents argue that the detentions, suspensions, and removals constitute a pattern of behavior. This explanation overly combines the IDEA pattern of school "removal" restrictions with the discipline-specific "basis of knowledge" requirements necessary to form a "pattern of behaviors." Let me explain.

In this District, the Principal and the Assistant Principal (hereinafter "administrators") handle discipline referrals. By April 2022, in [redacted]grade, the Student stockpiled 18 discipline incidents. A review of the Student discipline profile reveals that the Student earned at least ten (10) out-of-school suspensions, six (6) plus lunch detentions, and five (5) or more after-school detentions. The record notes that the Student was absent on 36 occasions. (P-3). The teachers' communications to the administrators note a range of behaviors like failure to follow the rules, defiance, disrespect, insubornation, and harassment were commonly reported. The upward trend line from December to April is a problem.

By April 2022, the teachers' repeated communications caused the Principal to change the Student's placement for the last quarter of the school year. This removal caused the Student to miss some 30 to 60 school days. The administrator unilaterally came up with two options. The first was an out-of-

potential disability because the district had determined that the child should be referred to an outside agency for a mental health evaluation. In *Anaheim UHSD* (OAH 5-9-12) 2012031076, the ALJ found that LEA was "deemed" to have a "basis of knowledge" when student exhibited aspects of ADHD, lack of focus, disorganization, and anxiety in his classes, which was also discussed at a Section 504 meeting by the student's teachers. The misbehavior in *Anaheim* was attempting to buy cannabis at school. The court later found the teachers' reports and the administrator's action made out a "pattern of behavior" *Anaheim Union High Sch. Dist. v. J.E.* 2013 WL 2359651 *6, (C.D. Cal. May 21, 2013), *affirmed,* A*naheim Union High Sch. Dist. v. JE*, 637 Fed. Appx. 380 (9th Cir 2016), *Voyageur Academy, Michigan State Education Agency,* 114 LRP 34791, (March 21, 2014) (district held to have a basis of knowledge that a student may have a disability after teachers documented a series of aggressive, defiant and disruptive behavior), *Fairfield-Suisun USD* (OAH 5-25-12) 2012030917. (ALJ found that LEA was "deemed" to have a "basis of knowledge" when student exhibited "negative patterns of behavior" at a SST meeting), *Cf.*, *Spring Branch Indep. Sch. Dist. v. O.W.,* 76 IDELR 234 (5th Cir. 2020), *cert. denied*, 121 LRP 7003 , 141 S. Ct. 1389 (2021) (finding that while a district may attempt interventions to address age-typical behaviors; when however, the ineffectiveness of interventions become apparent, district is then prompted to evaluate sooner).

district placement at a drug and alcohol treatment operated by a private vendor. It is common knowledge in the District that the off-campus drug and alcohol options included some form of behavioral health, social work, or counseling services. I now conclude that because the Student's behaviors caused the Principal to change the placement, it is axiomatic that the cyber placement, like the other removals, was a disguised informal suspension. *Id.* This removal without prior written notice hindered the Student's and the Parent's procedural rights.

Furthermore, the guidance counselor's testimony that before the cyber placement, she arranged for the Student to meet with a District funded counselor is revealing. After participating in two sessions, the counselor discontinued counseling due to the Student's nonparticipation. Taken as a whole, the teachers' comments, the guidance counselor's, and the administrator's outside referrals support a conclusion that a "pattern of behavior" existed prior to the cyber placement.

Accordingly, applying the "pattern of behavior" and "basis of knowledge" standards, I now find that by April 2022, during the [redacted] grade school year, the Student should have been identified as a "thought to be eligible" pupil. *Id.* I also find that the Principal's actions and the inactions of others substantially impeded the Student's and the Parent's IDEA and Section 504 participation rights. This cluster of violations substantially limited access to important procedural safeguards like prior written notice, timely evaluations, and the right to file a due process complaint.

A SECOND PATTERN OF BEHAVIOR REOCCURRED IN [redacted] GRADE

The record is clear that during [redacted] grade, a second reoccurring series of teacher communications about a repeated series of misbehavior was properly communicated to an administrator. Acting on those

communications, the administrator removed the Student from school or class multiple times. The formal and informal removal pattern, coupled with the communications from the guidance counselor and the Principal to outside sources, created a second "basis of knowledge" and established a second "pattern of behavior." Failing to act on this otherwise observable pattern interfered with the Student's protected status under the IDEA and Section 504. The record is also preponderant that the Parent was not offered basic procedural safeguards, which would have triggered "stay put" and an expedited IDEA evaluation. These violations had a knock-on rippling effect until today.

From August 2022 to November 2022, in [redacted] grade, the Student was disciplined for numerous misbehaviors on multiple occasions (FOF #4 r-aa). By my calculation, from September 2022 through mid-November 2022, the Student was removed from school for upwards of 23 plus days. After that, in December, the Student was removed for upwards of 12 days. Before the December removal, the Principal asked the guidance counselor to refer the Student to a different outside agency. This series of 35 removals out of the 81 or so school days and repeated referrals to outside behavioral health entities form the basis for a second "pattern of behavior." Accordingly, "prior to" the expulsion hearing, the District had a "basis of knowledge" that the Student had substantive and procedural rights.

PROCEDURAL ERRORS HINDERED THE PARENT'S AND THE STUDENT'S FOLLOW ALONG STAY PUT AND PARTICIPATION RIGHTS

After the Parent filed a request for an expedited due process hearing, the District administrators, and by extension, the Board, either knew or should have known, before the expulsion hearing, that the Student had substantive and procedural rights. The filing of the expedited complaint should have triggered the IDEA's "stay put" protections, which, in turn, would have

allowed the Student to stay in school, but it did not.[15] Had the District followed the Board's suspension and expulsion practices, the expulsion hearing would have been delayed. Instead, the Board voted to expel the Student. Had the Board followed District policy, the Student would have received an education while awaiting this Decision. (FOF #12, H.O. ##3-4, and 34 CFR §300.518). This procedural violation caused substantive harm.

The demand in the Parent's complaint for the independent educational evaluation should have triggered prior written notice, but it did not.[16] Rather than issue prior notice and file a complaint to defend its 2021 evaluation, the District denied the IEE request in its Answer and then issued a permission to reevaluate. It is black letter law that the District must file a complaint when it denies an IEE request, but it did not.[17] Simply put, the full merits of the prior evaluation defense were lost when the District did not file a due process complaint, defending its 2021 reevaluation.[18]

The record is preponderant that by November 2022, the Student was a "thought to be eligible" pupil. The record is also preponderant that by December 19, 2022, the Board should have known about the expedited due process complaint and the Student's thought to be eligible" status.

[15] OSEP in *Letter to Anonymous,* 72 IDELR 163 (OSERS 2018) stated that the district would be required to maintain the student's current educational placement only if the parent or district filed a due process complaint concerning the IEE request or when making eligibility decisions.

[16] Parents have the right to an IEE at public expense if they disagree with an evaluation obtained by the district, unless: the district demonstrates in a due process hearing that its own evaluation of the child was appropriate; or the district demonstrates in a due process hearing that the evaluation obtained by the parents did not meet district criteria. 34 CFR §300.502(b)(1)-(b)(2).

[17] 34 CFR § 300.502(b), *Letter to Baus*, 65 IDELR 81 (OSEP 2015), *Letter to Carroll*, 68 IDELR 279 (OSEP 2016).

[18] When a parent seeks an IEE to make up for a missing assessment, the district may not avoid either filing for due process or funding the IEE by simply conducting the missing assessment. *Letter to Carroll,* 68 IDELR 279 (OSEP 2016), *District of Columbia Pub. Schs.*, 121 LRP 36377 (SEA DC 09/20/21). (District of Columbia district failed to address a child's anxiety diagnosis during its initial evaluation, it had to fund an independent psychological evaluation, according to an independent hearing officer).

The above legal conclusions now require me to award appropriate relief.[19]

WHAT TYPE OF APPROPRIATE RELIEF IS DUE AND OWING

THE STUDENT NEEDS A COMPREHENSIVE INDEPENDENT EVALUATION

The record is clear that the Student now needs a comprehensive evaluation in all areas of suspected disability. Although "stay put" requires the Student to return to school, I now find a different, more direct path is needed under these unique circumstances. I reach this conclusion mindful of the fact that within hours of returning to school after serving the November 2022 10-day suspension - the Student was involved in a fistfight. I now find that the Student's behavioral dysregulation level appears to be increasing. Accordingly, I now believe that under these circumstances maintaining the Student's current placement at the high school is substantially likely to result in injury to the Student or other students.[20] To get the Student back on the right path, the District is now **ORDERED** to find and fund a short-term 45-day diagnostic educational placement outside the District and an expedited independent educational evaluation (IEE).[21] The school day provided during the diagnostic placement must provide the Student with access to the regular education [redacted] grade curriculum. Like all other students, the diagnostic placement must allow for peer interaction and classroom

[19] 20 USC § 1415(i)(2)(C)(iii) (2016), 34 CFR § 300.516(c)(3), *Douglas County Sch. Dist.,* 75 IDELR 22 (SEA NV 2019) (district violated the IDEA when it failed to conduct a compliant MDR before expelling a 10th-grader with a other health impairment); and *Thompson Sch. Dist. R2-J*, 70 IDELR 168 (SEA CO 2017) (absence of district MDR team members personally familiar with a student with ADHD led the district to improperly expel the student for statements about the Columbine shooting.).

[20] 34 CFR §300.532(a) and 34 CFR §300.532(b)(2)(ii).

[21] A hearing officer may order a diagnostic evaluation outside the district without the parties' agreement. A diagnostic evaluation is not an educational placement. Therefore, the out of District evaluation will not affect the Student's current stay-put status. 34 CFR §300.300 (a)(3)(i), *East Windsor Bd. of Educ.*, 114 LRP 36178 (SEA CT 05/15/14), *Middletown Bd. of Educ.*, 10 ECLPR 77 (SEA CT 2013), I*n re: Student with a Disability*, 115 LRP 32147 (SEA NM 05/21/15), (hearing office may order a diagnostic placement as appropriate relief), See, Appendix A to the IDEA-Part B regulations, Question 14 (1999 regulations), *In re: Student with a Disability*, 115 LRP 3214 (SEA NM 05/21/15).

participation; otherwise, the independent examiners cannot complete an observation.[22]

THE DISTRICT IS ORDERED TO FUND INDEPENDENT EVALUATION

While at the diagnostic placement, the Student should receive a full individual comprehensive independent educational evaluation in all areas of suspected disability.[23] The District should provide the Parents with a list of independent evaluators from either the intermediate unit, the local university, or private practitioners. The Parent has four school days to select the evaluator(s). Likewise, the District has four school days to identify the diagnostic placement. All independent evaluation reports must be completed within 40 school days.

Assuming the District has completed some assessments, those results should be transferred and incorporated into the independent examiner's evaluation report. The independent examiner should, at a minimum, administer the assessments listed in the permission to reevaluate. If the examiner(s) feels the need to add to the list of assessments, they should do so.

If, after four days, either Party is unable or unwilling to make a selection, the other Party may step in and make the selection. The expedited evaluation should meet all applicable requirements found at 34 CFR 300 *et seq*. and 22 Pa Code Chapter 14 *et seq*. Delays in completing the evaluation or finding the placement should be reported to the Pennsylvania Department of Education for technical assistance.

[22] IDEA authorizes hearing officers to order IEEs. See, *Penn-Delco Sch. Dist*., 11 ECLPR 7 (SEA PA 2013) (hearing officer may order an IEE at public expense), Pennridge Sch. Dist., 12 ECLPR 45 (SEA PA 2014), *Loleta Union School District,* 118 LRP 34026 (OCR November 22, 2017), 34 CFR §300.502(d) and 22 PA Code §14.102(a)(2)(xxix).

Once the independent assessments are concluded, the independent examiner(s) shall prepare and distribute a written report within seven calendar days. The Parties should then meet within six school days to review the report and determine if the Student is otherwise eligible for IDEA or Section 504 services. Assuming the Student is eligible, the Parties should meet and develop an appropriate program in five (5) school days.

COMPENSATORY EDUCATION IS NOT APPROPRIATE RELIEF

When districts fail to provide a FAPE hearing, officers regularly award compensatory education as an equitable make-whole remedy.[24] Case law awarding compensatory education for "thought to be eligible" students based on a "pattern of behavior" is nonexistent; therefore, I decline to do so now absent any precedent. However, if the Student is eligible, the IEP or Chapter 15 team can review the need for compensatory services.[25]

[24] Hearing officer have the authority to "grant such relief as the court determines appropriate." 20 USC 1415 (i)(2)(C)(iii); and 34 CFR 300.516 (c)(3), *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015), *Reid v. Dist. of Columbia,* 43 IDELR 32 (D.C. Cir. 2005) (awards of compensatory education should "aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"),; see also *Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005), *J.K. v. Annville v. Cleona School District,* 39 F.Supp.3d 584 (M.D. Pa. 2014).

[25] Guidance and Answers to FAQs on COVID-19 Compensatory Services, https://www.education.pa.gov/K-12/Special%20Education/FAQContact/Pages/COVID-19-Compensatory-Services.aspx, Questions and Answers on Providing Services To Children With Disabilities During The Coronavirus Disease, 2019 Outbreak (March 12, 2020), See Return to School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment Under the Individuals with Disabilities Act ("Roadmap"), OSEP QA 21- 06 (September 30, 2021).

SUMMARY AND CONCLUSION

I am deeply concerned about what will happen to the Student as we advance. Before [redacted] grade, the Student did not have a prior disciplinary history. It is possible that the Student has or does not have a disability, and it is also possible that the disciplinary incident was or was not a manifestation of the Student's disability. The independent evaluation and the manifestation determination may answer those questions.

Under the unique facts of this case, the District, on more than one occasion, had a "basis of knowledge" that the Student was "thought to be eligible" and otherwise protected prior to the multiple removals. Consequently, the District is now required to do what it should have done long ago, evaluate the Student, collaborate with the Parent, determine eligibility, and then issue prior written notice.

The current circumstances and the equities require the Parties to speed up the decision-making. The independent evaluation combined with the diagnostic placement will allow the Parties to resolve the underlying unanswered questions quickly. Any further delay will deny both Parties important procedural and substantive protections. Time is of the essence.

An **ORDER** consistent with the above follows.

FINAL ORDER

Now, on January 20, 2023, it is hereby **ORDERED** as follows:

1. Applying the IDEA's disciplinary rules, the District is "deemed" to have had a basis of knowledge that the Student was "thought to be eligible" Student prior to the April 2022 cyber school placement. Additionally, under the IDEA's disciplinary rules, the District is "deemed" to have a basis of knowledge that a Student was "thought to be eligible" Student prior to the November 2022 10-day suspension and the December 9, 2022 expulsion. The above violations substantially impaired the Parent's and Student's IDEA and Section 504 participation rights.

2. Subject to the limitations described above, the District is **ORDERED** to fund an independent educational evaluation at the District's expense.
3. The District is further **ORDERED** to fund a 45-day out of District diagnostic placement. The District is next **ORDERED** to provide transportation to and from the diagnostic placement.
4. Subject to the limitations above, the District has four school days to select the diagnostic placement, and the Parent has the same four (4) days to select the evaluator(s). The independent evaluation report should be prepared and in the Parties' hands within 40 days after the Student's placement.
5. Once in possession of the independent evaluation, the Parties should meet within two school days to review the results and prepare an "evaluation report." Assuming the Student is found to have a qualifying disability and is otherwise eligible, the District should prepare an offer of a free appropriate public education as described above.
6. The contract with the evaluators will end when the District issues a Notice of Recommended Educational Placement with procedural safeguards. The evaluators should participate, at their discretion, in all meetings, face-to-face or video conferences.
7. As described above, the District is directed to assemble a team of knowledgeable individuals who will complete a manifestation determination review. After that, the District should issue prior written notice explaining the team's decision.
8. The Parent's claim for compensatory education is **DENIED** for all the above reasons**.**
9. All other claims and affirmative defenses relating to this expedited hearing are exhausted and otherwise dismissed with prejudice.

January 20, 2023 /s/ Charles W. Jelley, Esq. LL.M.
HEARING OFFICER

ODR FILE #27332-22-23