

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

## **Pennsylvania Special Education Due Process Hearing Officer**

### **Final Decision and Order**

#### **CLOSED HEARING**

**ODR No. 28746-23-24**

**Child's Name:**

D.S.

**Date of Birth:**

[redacted]

**Parent:**

[redacted]

**Counsel for Parent**

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**Local Education Agency**

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**Hearing Officer:**

Charles W. Jelley Esq.

**Decision Date:**

December 6, 2023

## OVERVIEW OF THE DISPUTE

On November 2, 2023, the Parent filed a two-count "expedited" discipline-based special education due process hearing Complaint under the Individuals with Disabilities Education Act (IDEA), 20 USC § 1400 *et seq.* and Section 504 of the Rehabilitation Act.<sup>1</sup> Applying IDEA jargon, Count One is technically an appeal from the District's imposition of discipline; this claim forms the basis for the "expedited" count. 20 USC § 1415(k)(5) *et seq.* The "expedited" designation limits the scope of the hearing to the specific rights and protections found at 20 USC 1415(k) and 34 CFR § 300.534.

Relying on the District's October 2023 "expedited evaluation results," the Parent now alleges the Student is IDEA eligible as a person with either an Emotional Disturbance, a Specific Learning Disability, or an Other Health Impairment. They further contend that the Student's expulsion should be reversed and the Student should return to the high school with an Individual Education Program (IEP). Finally, the Parent seeks compensatory education and an independent educational evaluation. Count Two alleges "non-expedited" IDEA and Section 504 "child find" and denial of free appropriate public education (FAPE) claims.

The District seeks a declaratory ruling that the eligibility determinations made by the team are correct, the expulsion was proper, and that at all

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<sup>1</sup> 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 (NT p.#), 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. Except for the cover page, identifying information is omitted to the extent practicable.

times relevant, they procedurally and substantively complied with the IDEA, Section 504, and all applicable state discipline restrictions.

After carefully reviewing the record and closing statements, I am now ready to rule. For all the reasons and conclusions that follow, I now find in favor of the District as the expulsion was otherwise proper. At the same time, I now find for the Parent that while the evaluation was insufficient, they failed to prove the Student was disabled at the time of the expulsion.

### **ISSUE**

1. Based on the "expedited evaluation," is the Student now eligible for IDEA? If yes, should the District provide the Student with an Individual Education Program (IEP) at the high school?
2. Do the IDEA or the Section 504 discipline restrictions prohibit the District from expelling the Student in May 2023 for one school year? If the answer is yes, what relief, if any relief, is required? (NT pp.6-7).<sup>2</sup>

### **FINDINGS OF FACT**

All evidence was carefully and thoughtfully considered; I will now make Findings of Fact and Conclusions of Law as necessary to resolve the "expedited" disciplinary issues presented. The evidence - testimony and documents- substantiated and contextualized the Findings of Fact. I decline to catalog or make Findings of Facts or Conclusions of Law on any evidence related to the "non-expedited" denial of FAPE. I will, however, reference certain events for context.

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<sup>2</sup> The statement is found at NT pp.15-21. Section 504 and its implementing regulation do not include discipline specific regulations; therefore, consistent with the Office of Civil Rights generally accepted practices the hearing officer will apply the applicable IDEA standards.

## **THE STUDENT WAS EXPELLED ON TWO OCCASIONS**

1. For ease of reading, the Student was expelled, for cause, from the District for some part of the following years:
  - a. 2021-2022 School Year [redacted]
  - b. 2022-2023 School Year [redacted]
  - c. 2023-2024 School Year [redacted]
2. During the [redacted] Grade – the 2020-2021 school year - the Students' disciplinary referrals increased from one referral per year to five (5) referrals. (P-3).
3. During the 2021-2222 academic year, the disciplinary referrals increased to 23. (P-3).
4. The Mother reports that in 2021, the Student participated in counseling sessions. She did not report why the student was in counseling. She also reports that in the past, the Student expressed suicidal ideations. (P-3).
5. On May 16, 2022, during [redacted] Grade, the Student was expelled for one year for making terroristic threats. (P-3; S-3).
6. On October 17, 2022, the Student returned to the District's high school. (P-3).
7. In April and May 2023, the Student accumulated four disciplinary referrals. (P-3; S-9, 10, 11).
8. On May 19, 2023, the Student was expelled by the School Board for the entire 2023-2024 school year. The School Board, after a full-blown hearing, found that the student had threatened a school official. (P-3; S-9, 10, 11).
9. Before the hearing, the District staff completed an "Expulsion Checklist." The "Checklist" notes that someone in the District concluded that the Student was not disabled and did not have an Individual Education Program (IEP). The "Checklist" further notes that the District did not complete a manifestation determination or conduct a functional behavioral assessment

(FBA). (S-11). The "Checklist" was emailed to the Superintendent, the Special Education Director, and the School Board Secretary. (S-11). The record does not include documentation that the Parents were notified of the IDEA determination or if the District provided the Parents with their IDEA or Section 504 "procedural due process safeguards." (NT *passim*)

10. During each expulsion period, the Student participated in the District's "Virtual Academy." The "Virtual Academy" teachers did not provide in-person or live online instruction. The record indicates that the teachers assign work, and the Student returns the completed work for grades. (P-3).
11. In late August 2023, during the expulsion and before the start of [redacted] Grade, the Parent requested, and the District agreed to complete a comprehensive IDEA evaluation. The Parent input notes the following concerns: "Student is struggling with reading, writing, and emotional disturbance." A comprehensive evaluation answers two questions: (1) does the Student have a qualifying disability, and (2) does the Student otherwise need specially-designed instruction? (P-3).

### **THE AUGUST 23, 2023, EXPEDITED EVALUATION**

12. Sometime in late August 2023, the Mother requested, and the District agreed to evaluate the Student for IDEA eligibility. The Mother did not request it, and the District did not consider if the Student was also a protected handicapped Student under Section 504. (P-3).
13. The IDEA evaluation included the following tests, measures, and assessments: the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-V)- an assessment of intelligence), - the Wechsler Individual Achievement Test –Third Edition (WIAT-III)- an assessment of individual academic achievement, - the Behavior Assessment System for Children, Third Edition (BASC-3) - an assessment of social, behavioral and executive functioning, - and the Scales for Assessing Emotional Disturbance – Second

Edition (SAED-2)- a second assessment of social, emotional and behavioral functioning. The psychologist also reviewed the Student's records, including prior statewide assessments and discipline history. (P-3). Although the psychologist states that she completed a functional behavioral assessment (FBA), the report lacks a statement identifying the name of the assessment tool used, the date of the assessment, what records were reviewed, or a summary of the FBA conclusions. Finally, the psychologist states that she also considered the Student's "motivation," surrounding "environmental factors," and history of drug use. Like the FBA results, neither the record nor the report identifies the name of the assessment instrument(s). (P-3, NT *passim*).

14. According to results from the WISC-V, the Student's Full Scale IQ fell within the Low Average range with a Standard Score of 83 and a Percentile Rank of 13. The Student's Verbal Comprehension fell within the Average range, with a Standard Score of 100 and a percentile Rank of 50. The Student's visual-spatial skills fell within the "w average" range with a standard score (SS) of 86. The Student's Working Memory fell within the Low Average range with a Standard Score of 85 and a Percentile Rank of 16. The Student's Processing Speed fell within the Low Average range with a Standard Score of 80 and a Percentile Rank of 9. (P-3). The difference between the standard scores is considered significant. (NT pp.41-46).
15. A [redacted] grade teacher and three [redacted] grade teachers expressed concerns that the Student may be using marijuana. (P-3).<sup>3</sup>
16. As a consequence of previous disciplinary incidents and the suspected drug use, the Student was referred to the Student Assistance Program (SAP) for mental health support. Neither the record nor the report described the frequency, intensity, or what, if any, SAP services were provided. (P-3).

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<sup>3</sup> [redacted]

17. The evaluation report also noted that three barriers interfered with the learning: "motivation," "environmental factors," and "drug use". (P-3). The report does not describe what Multi-Tiered System of Services (MTSS) the Student received as part of the SAP support. The report does not describe how the evaluator assessed motivation or the environmental factors. Furthermore, the report does not identify how the psychologist determined the environmental factors were the "primary" factor in deciding the Student was not IDEA eligible. (P-3).
18. The Parent did not provide documentation of any mental health diagnoses. (P-3).
19. The Parent input includes scores from the Scale for Assessing Emotional Disturbance - Second Edition (SAED-2). (P-3).
20. The SAED-2 includes a series of seven reliable, standardized, norm-referenced scales measuring the (A) Inability to Learn, (B) Relationship Problems, (C) Inappropriate Behavior, (D) Unhappiness or Depression, (E) Physical Symptoms or Fears, (F) Social Maladjusted, and (G) the Adverse Effect social deficits on overall educational performance. Second, it includes a supplemental Developmental/Educational Questionnaire designed to gather information from the Student's Parent or other primary caregiver. Third, it includes observation forms as an additional supplemental assessment tool that relies on observational methods to assess target behaviors, classroom behavior, and student-specific. (P-3).
21. The Student earned the following SAED-2-2 scores: "Non-Indicative" for "Inability to Learn," "Non-Indicative" for "Relationship Problems," and an "Indicative" score for "Unhappiness or Depression." The Mother also ranked "Inappropriate Behaviors" as "Highly Indicative" and "Physical Symptoms of Fears" as "Indicative. (P-3). Although the psychologist talked about indicators of "socially maladjusted" behaviors, during her testimony, she

neither calculated nor reported the SAED-2 measures for "socially maladjusted" behavior. (P-3, NT *passim*).<sup>4</sup>

### **THE BASC-3 RESULTS INDICATE AN EMOTIONAL DISTURBANCE**

22. The BASC-3 ratings are based on T scores. T-scale scores in the Clinically Significant range suggest a high level of dysfunction. Scores in the At-Risk range may identify a significant problem that may not be severe enough to require formal treatment or may identify the potential of developing a problem that needs careful monitoring. (P-3).
23. The Student considers the teacher(s) unfair, uncaring, and/or overly demanding. (P-3).
24. The Student reports a preference for engaging in behaviors that are generally considered by others as risky and can be hazardous. (P-3).
25. The Student reports having some unusual thoughts and perceptions. Student's T score on Locus of Control is 67, with a percentile rank of 93. This T score falls in the At-Risk classification range, and follow-up may be necessary. (P-3).
26. The Student reports difficulty establishing and maintaining close relationships with others and sometimes being isolated and lonely. The Student next reports having little to no control over life events and sometimes being blamed for things they did not do. (P-3).
27. The Student's T score for Anxiety is 74, with a percentile rank of 97. This T score falls in the Clinically Significant classification range and usually warrants follow-up. (P-3).
28. The Student reports excessive worrying, nervousness, and/or an inability to relax. (P-3).

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<sup>4</sup> Persons diagnosed with a "Social Maladjustment" are not considered IDEA eligible. They may however, be persons with a disability for Section 504 purposes.

29. The Student's T score on the Depression Index is 84 and has a percentile rank 99. This T score falls in the Clinically Significant range. Scores in this range usually warrant follow-up. (P-3).
30. The student reports feeling sad and misunderstood and that life is worsening. Suicidal tendencies should also be explored. (P-3).
31. The Student also reports sometimes being dissatisfied with the ability to perform various tasks even when putting forth substantial effort. (P-3).
32. The Student's Inattention/Hyperactivity composite T score is 73, which falls in the Clinically Significant classification range. (P-3).
33. The Student's T score for Attention Problems is 74 and has a percentile rank of 98. This T score falls in the Clinically Significant classification range and usually warrants follow-up. (P-3).
34. The Student reports having significant difficulty maintaining necessary levels of attention. These problems are probably interfering with academic performance and functioning in other areas. The Student's T score for Hyperactivity is 69, with a percentile rank of 95. This T score falls in the At-Risk classification range, and follow-up may be necessary. (P-3).
35. The Student reports engaging in restless and disruptive behaviors. The Student's T score on this composite scale falls in the Clinically Significant classification range. (P-3).
36. The Student's Personal Adjustment composite scale T score of 28 falls in the Clinically Significant classification range. (P-3).
37. The Student reports having a poor relationship with the Parents. The Student further reports having little trust in the Parents and may feel incidental to family life and decision-making. (P-3).
38. The Student reports having difficulty establishing and maintaining relationships with others. (P-3). The Student's T score on Self-Esteem is 28 and has a percentile rank of 5. This T score falls in the Clinically Significant classification range and usually warrants follow-up. (P-3). The Student

reports a negative self-image in terms of personal and physical attributes. (P-3).

39. The Student's Externalizing Problems composite scale T score is 79, which falls in the Clinically Significant classification range. (P-3).

### **THE MOTHER'S BASC-3 RANKINGS**

40. The Student's Mother reports that the Student displays a moderately high number of disruptive, impulsive, and uncontrolled behaviors. Such behaviors are not considered severe but may warrant further follow-up, particularly if other scales are elevated. (P-3).

41. The Mother reports that the Student displays many aggressive behaviors and may be reported as being argumentative, defiant, and/or threatening to others. (P-3).

42. The Student Mother's T score for Conduct Problems is 86, which falls in the Clinically Significant classification range and usually warrants follow-up. (P-3).

43. The Student's Mother reports that the Student frequently engages in rule-breaking. (P-3). The Mother also reports that the Student is withdrawn, pessimistic, sad, and has suicidal thoughts. (P-3).

44. The Student's Behavioral Symptoms Index (BSI.) composite scale T score is 78 and falls in the Clinically Significant classification range. (P-3).

45. The Student's T score for Withdrawal behavior is 69 and falls in the At-Risk classification range. Scores in this range indicate that follow-up may be necessary. The Student's Mother further reports that the Student is seemingly alone, has difficulty making friends, and/or is sometimes unwilling to join group activities. (P-3).

46. The Student's Mother reports that the Student has difficulty adapting to changing situations and takes longer to recover from difficult situations than most others of the same age. The Student's T score falls in the At-Risk classification range, and follow-up may be necessary. (P-3).

47. The Student's Mother reports that the Student sometimes has difficulty making decisions and lacks creativity. The Student's T score is significant. (P-3).
48. The Student's Mother reports that the Student can perform simple daily tasks safely and efficiently. The Student's T score on Functional Communication falls in the At-Risk classification range, indicating that follow-up may be necessary. (P-3).
49. The Student's Mother's BASC-3 Executive Functioning Index Score Student's Problem Solving Index score was 19 in the Elevated range. Students with this scoring pattern have problems with planning, decision-making, and organizational skills. (P-3).
50. The Student's Attentional Control Index was 17 in the Elevated classification. This score indicated that the Student has trouble concentrating and following directions and may make careless mistakes. (P-3).
51. The Student's Behavioral Control Index score was 12. The Student's Behavior Control score falls in the Elevated classification. This Index score indicates difficulty in maintaining self-control and regulating impulsive behavior. The Student's Emotional Control Index is in the Extremely Elevated classification. This score indicates that the Student displays outbursts, sudden or frequent mood changes, or excessive periods of emotional instability. (P-3).
52. The Student's Mother reports that the Student has difficulty adapting to changing situations, indicating that the Student takes longer to recover from difficult situations than most others of the same age. (P-3).
53. The evaluation report notes that the Mother's overall F-Index Raw Score ranking may be somewhat overly negative. An overly negative score may indicate an exaggeration of behaviors. At the same time, when viewed in context, they may confirm the reporter's overall perception of the circumstances. (P-3).

## **THE STUDENT'S SCORES ON STATEWIDE TESTING**

54. The Students' Pennsylvania System of School Assessment (PSSA) English Language Arts scores from 2018 to 2023 dropped from "Proficient" to "Basic." (P-3).
55. The Student's PSSA Math scores from 2018 to 2023 dropped from "Advanced" to "Basic." (P-3).
56. The Student's PSSA Science scores in 2019 and 2023 remained in the "Advanced" range. (P-3).

## **THE STUDENT'S WIAT ACADEMIC ACHIEVEMENT SCORES**

57. Except for the Student's "Oral Reading Fluency" and "Orthographic Processing, Extended" scores on the Wechsler Individual Achievement Test (WIAT) fell in the "Below Average" range, the remaining 32 sub-scores are in the "Average" Range. (P-3).

## **THE EXPEDITED EVALUATION DOES NOT INCLUDE INPUT FROM THE CURRENT TEACHERS**

58. Because the Student was expelled, neither the current online teachers nor the psychologist completed the required classroom observation. (P-3).
59. Rather than have the current teacher provide input, the psychologist decided to have three 8th-grade teachers provide input into the evaluation report. (P-3). One of the 8<sup>th</sup>-grade teachers previously served as the Student's 6<sup>th</sup>-grade teacher. (NT p.31; P-3).
60. Neither the "Virtual Academy" teachers nor the 6<sup>th</sup> or 8<sup>th</sup> Grade teachers completed behavioral rating scales. (P-3).
61. The psychologist states that the WISC-V, the WIAT, the BASC-3, and the SAED-2 assessment data and behavioral rankings should be interpreted with "caution." (NT p.48; p.93; p.94; pp.101-104). When asked to comment about the "expedited evaluation," the psychologist states that "her hands were tied" and the "expedited evaluation" was flawed in many ways." (NT

p.108, line 5); NT p.108, line 5 and NT pp.110, lines 23-25 and p.111, lines 1-3).

62. The following persons reviewed the "expedited evaluation report": 1. the psychologist, 2. the local education agency representative, 3. the Mother, 4. the Father, and 5. the Student. The current teachers, the previous teachers, the guidance counselor, the principal, or a special education teacher reviewed the report. Contrary to the applicable regulations, no one signed the report or checked the box indicating they "Agreed" or "Disagreed" with the report. (P-3).
63. The District members of the team relied on the psychologist's "caution" label and decided to exclude the Mother's BASC-3 and SAED-2 rankings. The District members of the team also concluded that "environmental factors" like drug use, the Parent's divorce, and motivation were additional bases for concluding the Student was not IDEA eligible. (NT p.24; pp.30-31; p.87; p.109).
64. Neither the record nor the exhibits note if the Mother or the Father were provided IDEA or Section 504 procedural safeguards prior to or upon receipt of the "expedited evaluation."
65. The record does include a Notice of Recommended Education Placement (NOREP), indicating the District concluded the Student was not found to have a disability or in need of specially-designed instruction. (P-4). Contrary to accepted practice, neither the Superintendent nor a designee signed the NOREP. (P-4 p.3).
66. The evaluation team did not evaluate or consider if the Student was a person with a disability under Section 504. (P-3; NT p.24:p.27; pp.106-108).

## GENERAL LEGAL PRINCIPLES

### BURDEN OF PROOF AND CREDIBILITY

Generally, the burden of proof 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. In this case, the Parents are the party seeking relief and must bear the burden of persuasion.<sup>5</sup> The party seeking relief must prove entitlement to its demand by preponderant evidence and may not prevail if the evidence rests in equipoise. *Id.*

During a due process hearing, the hearing officer makes express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses."<sup>6</sup> Explicit credibility determinations give courts the information that they need in the event of a judicial review. While no one-factor controls, a combination of factors causes me to pause and comment on the particular testimony of several witnesses.<sup>7</sup>

The Parent called two witnesses, the Mother and the District psychologist. The District called the Assistant Principal and one teacher. On the Parents' side, I found the Mother open, thoughtful, and candid in acknowledging what she knew and did not know.

While I find the testimony of the District's witnesses to be otherwise consistent and clear, I do, however, have reservations about the psychologist's statements.

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<sup>5</sup> *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

<sup>6</sup> *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003).

<sup>7</sup> The fact finder's determination of witness credibility is based on many factors. Clearly, the substance of the testimony, including the detailed description of the relevant events, consistency /corroboration with others recollection, the accuracy of recall of past events when contrasted with written documents, played some part in my credibility determination. Furthermore, when the witness contradicts him or herself or is contradicted by the testimony of other witnesses can play a part in the credibility determination. Finally, non-verbal observable actions like constantly adjusting body movement, eye contact, feigned confusion, and whether the responses are direct or appear to be either evasive, unresponsive or incomplete are otherwise important in determining persuasiveness.

At times, she appeared evasive and held back information. At other times, she went outside the call of the question to add supporting statements beyond the conclusions found in her "expedited evaluation" report. (NT p.83, lines 8-21).

## **APPLICABLE LEGAL PRINCIPLES**

### **THE IDEA PROVIDES ELIGIBLE AND IDENTIFIED STUDENTS WITH A FREE, APPROPRIATE PUBLIC EDUCATION**

The IDEA is a "comprehensive scheme of federal legislation designed to meet the special educational needs of children with disabilities."<sup>8</sup> In exchange for federal funding, states pledge to comply with several substantive and procedural conditions in providing educational services to qualifying disabled students.<sup>9</sup> The IDEA includes a mandate that eligible" students are provided with a "free appropriate public education" ("FAPE") in the least restrictive setting.<sup>10</sup> The IDEA makes clear that a FAPE consists of "specially-designed instruction," "supplemental services," and "related services, along with "accommodations" that meet the Student's unique needs and circumstances.<sup>11</sup> A FAPE is provided through an "individualized education program."<sup>12</sup> "An IEP is a written statement, developed, reviewed, and revised by an IEP Team — a group of knowledgeable school officials and the parents — that spells out how a school will meet an eligible student's educational needs.<sup>13</sup> Hearing officers analyze the appropriateness of the offer of a FAPE – the IEP - at the time it was issued, not at some later date.<sup>14</sup>

### **CHILD-FIND IS AN ONGOING DUTY**

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<sup>8</sup> *M.A. ex rel E.S. v. State-Operated Sch. Dist.*, 344 F.3d 335, 338 (3d Cir. 2003).

<sup>9</sup> *T.R. v. Sch. Dist. of Philadelphia*, 4 F.4th 179, 182-83 (3d Cir. 2021).

<sup>10</sup> *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 390, 137 S. Ct. 988, 197 L. Ed. 2d 335 (2017)

<sup>11</sup> *Bd. Of Educ. Of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. V. Rowley*, 458 U.S. 176, 188-89, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982)

<sup>12</sup> *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988); 20 USC § 1412(a)(4).

<sup>13</sup> *Y.B. ex rel. S.B. v. Howell Twp. Bd. of Educ.*, 4 F.4th 196, 198 (3d Cir. 2021) (quoting 20 USC § 1414(d)(1)(A), (B)).

<sup>14</sup> *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 564- 65 (3d Cir. 2010).

The IDEA and Chapter 14 "child find" regulations require districts to locate, identify, evaluate, and educate eligible students in a reasonable time.<sup>15</sup> Furthermore, Chapter 14 and the IDEA require school districts to use various screening and assessment techniques, including behavioral observations, to evaluate students needing specially-designed instruction and related services. Finally, all testing, screening, and assessments must be valid, reliable, and administered according to the test makers' instructions. 22 P.A. Code §§14.121-125; 34 CFR §§ 300.301-306

### **THE IDEA DISCIPLINE PROTECTIONS**

The IDEA discipline rules protect three classes of children. First, the IDEA discipline rules protect children already identified as IDEA-eligible and have an IEP when the districts make disciplinary changes in placement. Districts may not discipline IDEA-eligible students when the behavior that triggered the disciplinary action is a manifestation of the student's disability. 34 CFR §300.530 (e). If the behavior was a manifestation, the district 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."<sup>16</sup>

Second, provided that the LEA had a "basis of knowledge," as determined by the "deeming" rules, the IDEA protects "children who have not yet been determined "to be eligible" for special education and related services and who have engaged in behavior that violates the student code of conduct."<sup>17</sup>

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<sup>15</sup> 22 Pa. Code §14.121.

<sup>16</sup> 20 USC § 1415(k)(1)(F). 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

<sup>17</sup> Districts are "deemed to have knowledge that a child is a child with a disability..." 34 C.F.R. § 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;

Third and finally, the IDEA protects children "not yet identified" when the LEA has "no basis of knowledge."<sup>18</sup> If the district does not have knowledge that the student is a person with a disability, the district may discipline the student the same way it would discipline a nondisabled student for similar misconduct, as the student would not have IDEA disciplinary protections.<sup>19</sup>

However, the "Limitation" clause at subparagraph 20 USC Section 1415(k)(5)(d)(i) provides that even though the LEA can discipline the student "if a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under this subsection, the evaluation shall be conducted in an expedited manner." The implementing regulations further state, "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."<sup>20</sup> Finally, parents who disagree with the results of the expedited evaluation may file a due process hearing.<sup>21</sup> With these standards in mind, I am now ready to proceed.

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **THE STUDENT IS NOT IDEA OR SECTION 504 ELIGIBLE**

The Parent's IDEA child find, and eligibility claims are denied. Contrary to the Parent's position, the October 2023 evaluation does not preponderantly establish

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(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).

<sup>18</sup> 20 USC § 1415(k)(5); 34 CFR § 300.534 Chapter 14 at 22 PA. Code 14.102 (xxxii) incorporate the IDEA thought-to-be discipline standards found at 34 CFR § 300.534. *et seq.*

<sup>19</sup> 20 USC §1415(k)(5)(d)(i); 34 CFR §300.534 (d). See, e.g., South Bend Cmty. Sch. Corp., 120 LRP 16881 (SEA IN 04/22/20) (finding that two years of troubling behavior did not put a district on notice of a potential disability).

<sup>20</sup> 34 CFR §300.534(d)(2)(ii).

<sup>21</sup> 34 CFR § 300.507-513.

that the Student is a person with a disability.<sup>22</sup> However, I now find the "expedited evaluation" is procedurally and substantively flawed; therefore, appropriate relief is Granted.<sup>23</sup> Next, the Parent's Section 504 eligibility claim is denied. The record is preponderant that the Student was an active drug user and is not otherwise protected under Section 504. Finally, the record does not support a finding that at the time of either expulsion, the District either knew or should have known that the Student was a person with a disability.<sup>24</sup> Absent proof that the Student is disabled, I now conclude that the District did not violate the IDEA or Section 504 discipline protections.

### **THE DISCIPLINARY REFERRALS ALONE DO NOT ESTABLISH IDEA ELIGIBILITY**

IDEA eligibility requires proof of one of the 13 IDEA-recognized disabilities, and because of the disability, the student requires specially-designed instruction. The record here lacks preponderant proof of disability status and the need for specially designed instruction. The Parent's argument that her statement about the Student's early developmental history and the input from the [redacted] grade teachers establishes IDEA eligibility is not persuasive. The Mother's input, while valuable, is questionable in light of her elevated BASC-3 F-Index rankings. Next, the Parent failed to offer any evidence corroborating her statements about the earlier counseling, disability status, or the reported suicidal ideations.

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<sup>22</sup> See, *EK v. Warwick Sch. Dist.*, 62 IDELR 289 (E.D Pa 2014) (The parents of a teenager with ADHD could not recover the cost of their daughter's placement in a residential treatment facility.). *Letter to Zirkel*, 22 IDELR 667 (OCR 1995); *OCR Memorandum*, 17 IDELR 609 (OC 1991) (OCR 1991); *Portland Pub. Schs.*, 25 IDELR 1274 (SEA ME 1997) (A student's admitted substance abuse made any claim for protection and accommodation under Section 504 during that period inapplicable.).

<sup>23</sup> The group must consider, as part of the evaluation described in 34 CFR 300.306, that the:

1. Data that demonstrates that prior to, or as a part of, the referral process, the child was provided appropriate instruction in regular education settings, delivered by qualified personnel; and
2. Data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child's parents.

Therefore, the record lacks preponderant proof of a disability. The teachers' testimony is similarly limited. The teachers did not complete any behavioral checklists or rankings. The record does not include teacher statements that they suspected a disability or that the Student was not progressing adequately in the regular education classroom. These defects limit the Parent's conclusions and assertions.

While I agree with the Parents that 21 disciplinary referrals in one year is a lot, a similar pattern was not found in the earlier elementary years. Disciplinary referrals alone do not automatically equal IDEA eligibility.<sup>25</sup> The record is, however, preponderant that the sudden uptick in discipline during the 2021-2022 school year was related to the teacher's classroom management practices. I might find otherwise if the record made out higher numbers of disciplinary referrals in the previous years.

Even assuming a disability, the record does not include preponderant proof that the Student needs specially-designed instruction. While there is some fluctuation in the students' PSSA scores, low PSSA scores do not mean the Student is disabled. Despite the disciplinary incidents, the Student was promoted each year, and the [redacted] grade report card grades found in the "expedited evaluation" are in the average range. Absent preponderant proof of poor District and statewide test scores, low individual achievement test scores, discrepant standardized test scores, or low report card grades, the record does not indicate a suspected disability or a need for specially-designed instruction. Finally, the record, as a whole, does not support a finding that the District has overused its discipline practices to remove other students from the classroom, including those not yet eligible for IDEA protections. 20 USC §6312 (b)(11). Accordingly, I now conclude that the Parent failed to produce preponderant proof that the Student

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<sup>25</sup> See, e.g., *South Bend Cmty. Sch. Corp.*, 120 LRP 16881 (SEA IN 04/22/20) (finding that two years of troubling behavior did not put a district on notice of a potential disability).

was either a person with a disability or that the Student needs specially-designed instruction. The procedural and substantive FAPE analysis does not end here.

### **THE RECORD LACKS PROOF OF A QUALIFYING SECTION 504 DISABILITY**

The record as a whole lacks preponderant proof that the Student has a physical or mental impairment that rises to a disability within the meaning of Section 504. The Parent did not prove an alleged disability or that any impairment substantially limits the Student's major life functions like learning, attention, reading, concentrating, thinking, or communicating. While the District made a procedural error in failing to consider Section 504 eligibility, the Parent did not prove the procedural error caused substantive harm. Accordingly, the Section 504 eligibility claim is denied.

### **THE STUDENT'S EXPEDITED EVALUATION IS FUNDAMENTALLY FLAWED**

I agree with the psychologist's statement, "The evaluation was flawed in many ways." I also agree that her "hands were tied in doing a traditional evaluation with observations and checklists (NT p.108 line 5 and NT pp.110 lines 23-25 and p.111 lines 1-3). The record is preponderant that the Student's "expedited evaluation" was not "comprehensive," or procedurally or substantively appropriate when viewed in context. Therefore, I will now Order the District to fund an Independent Educational Evaluation (IEE) to remedy this substantive error for the following reasons.

First, the report fails to include the required teacher observation.<sup>26</sup>

Second, the Student's current teachers did not provide input or participate in the review of the report.<sup>27</sup>

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<sup>26</sup> *Cynthia K. v. Portsmouth Sch. Dep't.*, 76 IDELR 214 (N.H. 2020) (the district was obligated to pay for the parent's IEE because the district failed to arrange a classroom observation during a first-grader's evaluation for a learning disability it violated the IDEA).

<sup>27</sup> Pursuant to 300.308 (a), the determination of whether a child suspected of having learning is a child with a disability as defined in 300.8 must be made by the child's parents and a team of qualified professionals, which must include: (1).The child's regular teacher; or (2) If the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his age.

Third, based on the Mother's high F-Index score on the BASC-3, the psychologist believed the Mother's scores were overly pessimistic, meaning that the Mother may be exaggerating the Student's BASC-3 ratings. The Mother's high F-Index score caused the psychologist to throw out her BASC-3 input. Then, relying on the BASC-3 F-Index, the psychologist eliminated the Mother's SAED-2 ratings for the same reason. The net effect of using the BASC-3 F Index to negate the SAED-2 ratings all but wiped out the Mother's input.

Then, believing that the Student's scores were somehow related to "drug use," "addiction," or "environmental" factors, the psychologist again discounted the Student's 14 BASC-3 self-ratings in the "Clinically Significant" range. By discounting the BASC-3 and SAED-2 scores, the psychologist negated the Parent and Student input. These intertwined conclusions, contrary to the assessment regulations, caused the District to produce an "expedited evaluation" that lacked a "variety" of "valid" assessments of the Student's social, emotional, or behavioral functioning.<sup>28</sup>

Furthermore, although several of the WICS subtest scores were significantly discrepant, the psychologist, believing the scores were related to "drug use," interpreted and reported the scores with "caution." The "caution" notation eliminated all of the academic assessments from consideration. This narrow understanding of the Student's profile eliminated all academic assessments and repeated the earlier substantive assessment and evaluation error.

Fourth, even though the evaluation regulations require a team of knowledgeable people to review the evaluation report, that did not happen. School District Exhibit 5 - the "expedited evaluation report" - lists the Mother, the Father, and the Student as team evaluation team members; no other District staff, like the teachers or the principal, the psychologist, or the local education agency representative, are identified in the report as team members. The psychologist,

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<sup>28</sup> See, 34 CFR §§ 300.304-300.306.

however, states that as the report's single evaluator, she and the Director of Special Education met with the Parents to review the report. Again, contrary to the published regulations, no one signed the report or checked the "Agree" or "Disagree" box. No one observed the Student, and a team of knowledgeable people failed to review the report. In short, the record lacks documentation that a team of knowledgeable individuals reviewed a variety of assessments in all areas of need.<sup>29</sup> These errors interfered with the Parent's participation and are substantive in nature.

Fifth, the psychologist, relying on what is described as three exclusionary factors, "motivation," "environmental," and "drug use," concluded that the Student was not IDEA eligible. Neither the IDEA's implementing regulation nor the Chapter 14 regulations identify "motivation" as an exclusionary factor.<sup>30</sup>

While the IDEA allows districts to discipline IDEA-eligible students who possess drugs in school, it does not allow districts to revoke IDEA eligibility or deny IDEA eligibility when students use drugs.

Furthermore, although "environmental" factors are a consideration in identifying a learning disability, it is not an exclusionary factor in identifying a student as

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<sup>29</sup> See *Timothy O. v. Paso Robles Unified Sch. Dist.*, 67 IDELR 227, 115 (9th Cir. 2016) (relying on a staffer's casual observations to decide that a student did not have autism and to decide against evaluating the preschooler for autism denied the student FAPE.); *Encinitas Union Sch. Dist.*, 60 IDELR 82 (SEA CA 2012) (evaluation was appropriate because the district used 12 different assessments to gauge the student's expressive and receptive speech and language abilities, to determine if he had any pragmatic language deficits, and to determine if he was articulating his speech at a developmentally appropriate level); *Wentzville R-IV Sch. Dist.*, 61 IDELR 101 (SEA MO 2013) (concluding that the district complied with the IDEA by using a variety of assessment tools to evaluate a third-grader, including standardized tests, behavior rating scales, classroom observations, and parent and teacher interviews).

<sup>30</sup> *Manchester Sch. Dist.*, 18 IDELR 425 (SEA NH 1990) (finding that a district could not exclude students from eligibility on the basis of lack of motivation; only if the district could devise objective criteria for determining when "lack of motivation" is a manifestation of ED could it exclude a student from eligibility as SLD on that basis); and *El Dorado Sch. Dist.*, 81 IDELR 27 (SEA AK 2022) (the fact that a student regularly failed to turn in assignments did not justify an Arkansas district's decision to attribute his ongoing academic struggles to a lack of motivation rather than ADHD and SLD.).

Emotionally Disturbed. Yet, the record is preponderant that the "environmental" factor test was used to nullify consideration of an Emotional Disturbance.

Applying the catch-all "environmental" rubric, the psychologist listed the Parents' divorce, the Student's anger with the Mother over the divorce, and the Student's involvement with juvenile justice as an "environmental barrier" that negated consideration of a Specific Learning Disability. The psychologist's conclusions are unsupported.

The psychologist did not administer any objective measures to support a finding that "drug use," "motivation," or "environmental" factors were otherwise present or "primary" exclusionary factors. Without a checklist or rating scale gauging the degree or significance of the barriers, the psychologist's conclusions do not pass muster as a valid measure of the Student's circumstances or needs. Contrary to Pennsylvania Department of Education guidance used to identify students with a learning disability, the psychologist did not interview the family members or complete a developmental history. The report fails to include a "variety" of "valid" assessment data that a group of knowledgeable individuals reviewed and used to determine the Student was not IDEA eligible. 34 CFR 300.309(b)(v).

Accordingly, for all the above reasons, I now find that the "expedited" evaluation is procedural and substantively flawed. To remedy these violations, the District is Ordered to fund an IEE. An Order follows granting appropriate relief.

### **SUMMARY**

The Parent's IDEA "child find" and "eligibility" claims and the request to return the Student to the high school are Denied. Based on the Student's current drug use, the Parent failed to meet her burden that the Student is a person with a disability under Section 504. However, I agree with the Parent that the "expedited" evaluation is inappropriate. To remedy the flawed evaluation, the District is now Ordered to fund an "expedited" Independent Educational Evaluation. Once the

evaluation is completed, the District must gather a team of knowledgeable people to review the report.

An **ORDER** consistent with the above Findings of Fact and Conclusions of Law follows.

### **FINAL ORDER**

And now, on this December 6, 2023, it is hereby **ORDERED** as follows:

1. The Parent's request to identify the Student as IDEA eligible, provide compensatory education, and return the Student to the high school with an individualized program are Denied.
2. The Parent's Section 504 eligibility claim is denied.
3. The Parent's request for an "expedited" Independent Educational Evaluation is Granted.
4. The Parent is free to select the independent evaluator, and the independent evaluator is expected to participate in all meetings until the District issues another Notice of Recommended Educational Placement, either accepting or rejecting the independent evaluator's findings. The independent evaluation should be completed within 90 school days.
5. All other claims, demands, and affirmative defenses relating to this expedited hearing are exhausted and otherwise dismissed with prejudice.

**December 6, 2023**

**s/ Charles W. Jelley, Esq. LL.M.**

HEARING OFFICER  
ODR FILE #28746-23-24