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

DECISION

EXPEDITED DUE PROCESS HEARING

Name of Child: L.C.

ODR #14856/13-14 KE

Date of Birth:
[redacted]

Date of Hearing:
April 17, 2014

CLOSED HEARING

Parties to the Hearing: Parent[s]	Representative: David Frankel, Esquire Frankel & Kershenbaum 1230 County Line Road Bryn Mawr, PA 19010
Chichester School District 401 Cherry Tree Road Aston, PA 19014	Christina Stephanos, Esquire Sweet, Stevens, Katz and Williams 331 Butler Avenue New Britain, PA 18601
Date Record Closed:	April 23, 2014
Date of Decision:	April 30, 2014
Hearing Officer:	Linda M. Valentini, Psy.D., CHO Certified Hearing Official

Background

Student[1] is a pre-teenaged child enrolled in the Chichester Area School District. Following a February 21, 2014 behavioral incident the District suspended Student and ultimately the school board decided to expel Student. The Parent requested an expedited due process hearing and argues that the District's actions were inappropriate in that at the time of the incident Student was a "thought to be eligible" child and therefore entitled to the protections around discipline afforded under the IDEA, specifically a manifestation determination meeting.

Issues

As of February 21, 2014 was Student a "thought to be eligible" child who was therefore entitled to the protections the IDEA affords to students who are being disciplined?

If Student was "thought to be eligible" what remedies are appropriate?

Findings of Fact

1. [A member of Student's family died in] 2010. Since then the Parent has observed Student to show signs of sadness and unhappiness. [NT 27, 29]

2. Student enrolled in the District for the September start of the 2012-2013 school year. On one of the sections of the registration forms the Parent indicated that Student's [family member] had died two years previously.[2] [NT 27, 29, 31]

3. In addition to her indication on one of the registration forms, on the first day of school in the 2012-2013 school year the Parent verbally informed the Assistant Principal[3] about Student's [family member], and shortly after she also spoke with the Guidance Counselor about this. [NT 27-28]

4. The District provided bereavement counseling to Student in the form of a grief group run by the Guidance Counselor. [NT 32-33]

5. Student immediately had disciplinary incidents in the District, the initial one being in the first month of school. [NT 35-36; J-3]

6. As the disciplinary incidents began recurring, the Parent spoke with the classroom teacher about them, and also asked the Assistant Principal if there was anything that

[1] This decision is written without further reference to the Student's name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.
[2] Although the District provided a copy of Student's enrollment records to be marked as a joint exhibit, the particular page on which the Parent credibly testified that she had provided written information about Student's [family member] having died two years previously was not included in the exhibit. [NT 31-32; J-1]
[3] Also at times referenced as the Vice-Principal.

could be done or if there were any changes that could be made in school. The Parent was told that Student just had to stop hanging around with the wrong crowd. [NT 36, 88-89]

7. At the times when the Parent went to the school to discuss behavioral incidents she was told that Student was playing around too much in class, was easily distracted, and learned best when sitting by the teacher's desk. The Parent was told "we need to see what we can do to get [Student] to focus more" but when Parent asked what they could do Parent never received a clear answer. [NT 39, 88-89]

8. Aside from the times Parent was specifically contacted about Disciplinary Referrals, there were other situations related to behaviors about which the Parent was not informed. [NT 42-44, 46-47, 49-50, 52, 54-55, 59-60, 72; P-1, P-9]

9. On September 19, 2012, a few weeks after starting in the District, Student received a Disciplinary Referral for fighting, a "Major Problem Behavior", was given a 3-day suspension and placed on "privilege denial" meaning that for 21 calendar days Student was ineligible to participate in any school activity [class trips, dances, socials]. Parent was contacted by letter signed by the Dean of Students and cc'd to the Principal, the Guidance Counselor and the Team Leader. [J-3]

10. On October 12, 2012 Student's 5th grade teacher sent "General Classroom Information" to a substitute teacher. Among the various pieces of information was the notice, "Students to look out for in the afternoon are [redacted] and [Student]." [P-1]

11. On October 29, 2012 Student's 5th grade teacher sent "General Classroom Information" to a substitute teacher. Among the various pieces of information was the notice, "Students to look out for in the afternoon are [redacted] and [Student]." [P-1]

12. On December 5, 2012 Student received a Disciplinary Referral for harassment/bullying, a Major Problem Behavior, and received "extended detention". Parent was contacted. [J-3]

13. On December 7, 2012 Student received a Disciplinary Referral for horseplay, a Major Problem Behavior, and was given a 1-day in-school suspension. Parent was contacted by letter signed by the Assistant Principal. [J-3]

14. On December 14, 2012 the Guidance Counselor sent an email to the Assistant Principal supplying Student's parent's phone number and also noting that she had "changed [Student's] class". P-1

15. On December 18, 2012 Student's 5th grade teacher sent "General Classroom Information" to a substitute teacher. Among the various pieces of information was the notice, "Students to look out for in the morning are [redacted], [Student] and [redacted]." [P-1]

16. On January 10, 2013 Student received a Disciplinary Referral for disruptive behavior, a Major Problem Behavior, and was given a detention. When redirected Student asked to be sent to the Principal; staff member Ms. H was asked to step in and she removed

Student from the classroom. Parent was contacted by letter signed by the Assistant Principal. [J-3]

17. Also on January 10, 2013 Student received a Disciplinary Referral for harassment/bullying, a Major Problem Behavior, and was given a 1-day in-school suspension. Parent was contacted. [J-3]

18. On January 11, 2013 Student received a Disciplinary Referral for disruptive behavior, a Major Problem Behavior, and was given an extended detention. Parent was contacted. [J-3]

19. The District's middle school has teams that meet two or three days per week for the purpose of discussing any issue that a teacher might be having with a student in his/her classroom and to discern if the issues are across all areas or just in one class or just during transition times. In addition to the teachers the meeting is attended by the Guidance Counselor and a school administrator, either the building Principal or the Assistant Principal. The Guidance Counselor provides input from the unified arts teachers in those meetings. [NT 112-113]

20. The team meetings, attended by one of the school's Administrators, are the "the first basis for" the child find process. Neither the school psychologist nor the Supervisor of Special Education sits on these team meetings. [NT 118-121, 125-126]

21. On January 31, 2013 one of the special education teachers on the team emailed the team leader with the subject line being "Parent Conference Requests". The email listed Student as one of the "students that we requested for conferences." [NT 56-58, 114-118; P-1]

22. On February 8, 2013 Student received a Disciplinary Referral for harassment/bullying, a Major Problem Behavior, and was given an extended detention. Parent was contacted. [J-3]

23. On February 13, 2013 Student received an extended detention for disruptive behavior.[4] [J-3]

24. On February 13, 2013 the Family and Consumer Science teacher sent an email to the Guidance Counselor noting that apparently unprovoked Student had called a group of children "faggots" and a few days later called one of these children a "hippopotamus". [P-1]

25. In the February 13, 2013 email to the Guidance Counselor, the Family and Consumer Science teacher noted, "I was advised to give [Student's] parents a call." The record does not provide information about from whom the teacher received this advisement; it clearly was not the Guidance Counselor to whom the communication was addressed. The supervisor of the teacher was either the Assistant Principal or the Principal. [NT 51; P-1]

[4] The usual Disciplinary Referral form was not in evidence for this offense. [J-3]

26. On February 13, 2013 the Family and Consumer Science teacher sent an email to the Homeroom Teacher noting that "[Student] has been a behavior problem in my room, ([Student] won't stop talking, making comments, out of seat, calling other students names, etc." [P-1]

27. On February 13, 2013 the Homeroom Teacher wrote an email to the Family and Consumer Science teacher saying, "[Student] can be VERY challenging. [Student] really only responds to being by {}self and being talked to on a personal level." She continues to say, "I just write [Student] up every time [Student] does something. I think they need to see that [Student] is worse than they think [Student] is." [P-1]

28. On February 25, 2013 the school librarian emailed the 5th grade teachers to ask that they not issue a library pass to Student [and a peer] because "I have had problems with both of them, whenever they are here, and kids were complaining about their being 'inappropriate' with their language today". [NT 55; P-1]

29. On February 27, 2013 Student received a Disciplinary Referral for disruptive behavior, a Minor Problem Behavior, and was given an extended detention. Parent was contacted. The teacher noted, "Today was a culmination of disruptive behavior by [Student]….[Student] is constantly out of [Student's] seat, argues with me when corrected, and [*other side of the page not copied*]. [J-3]

30. On March 6, 2013 staff member AG forwarded to the Guidance Counselor a letter from another child's parent "just in case we need to have a meeting or they call you". The letter from the other child's parents noted that they are "once again" bringing to AG's attention that Student had been bullying their child, calling the child "stupid", saying the child "can't read, can't write, and came from a garbage can". The child's parents noted that the problem began at the beginning of the school year when Student hit their child in the head while putting books in the locker, and that in January 2013 Student had hit the child in the head and poked the child with pencils. [P-1]

31. On March 14, 2013 Student received a Disciplinary Referral for inappropriate language toward another student, a Major Problem Behavior, and was given a 1-day suspension and placed on privilege denial. Parent was contacted by letter signed by "The CMS Administration Team". The letter was cc'd to the Principal, the Guidance Counselor, and the Team Leader. [J-3]

32. On April 5, 2013 Student received a Disciplinary Referral for vandalism and for defiance/disrespect, both Major Problem Behaviors, and was given a detention. Parent was contacted. [J-3]

33. On April 5, 2013 the Homeroom Teacher sent an email to the Assistant Principal and staff member DM about the Disciplinary Referral, saying, "I know this might seem like a small incident but it is kind of the icing on the cake with these two. The computers were not damaged but could have been." [P-1]

34. On April 15, 2013 Student received a Disciplinary Referral for slapping a peer, a Major Problem Behavior, and was given a 1-day suspension and placed on privilege denial. Parent was contacted by letter signed by "The CMS Administrative Team". [J-3]

35. On April 22, 2013 the Homeroom Teacher sent a document to staff member M.I. [position not identified in the record]. At the top of the document was the direction "Please check or asterisk any boxes that apply to students who may need careful placement." Student's name had a check in the box marked "Defiant, noncompliant, insubordinate, argumentative w/ adults" and in the box marked "Aggressive, physical displays, and fighting with peers". [P-1]

36. On May 23, 2013 Student received a Disciplinary Referral for harassment/bullying, defiance/disrespect/insubordination/noncompliance and disruptive behavior, all Major Problem Behaviors, and was given a 1-day suspension and placed on privilege denial. Parent was contacted by letter signed by the Assistant Principal. The letter was cc'd to the Principal, the Guidance Counselor, and the Team Leader. [J-3]

37. On June 6, 2013 Student received a Disciplinary Referral for horseplay, a Major Problem Behavior, and was given a 1-day in-school suspension. Parent was contacted by letter signed by "The CMS Administrative Team". [J-3]

38. On June 12, 2013 Student received a Disciplinary Referral for physical aggression, and was given a 1-day suspension and placed on privilege denial. Parent was contacted by letter signed by "The CMS Administrative Team". [J-3]

39. On October 9, 2013 Student received a Disciplinary Referral for defiance/disrespect/ insubordination/ noncompliance and was given a detention. The teacher noted that Student "is not able to control {}self in the classroom. [Student] runs around the room, calls out, talks back to me and laughs at me when I reprimand [Student]. [Student] has never served the detention nor has [Student's] behavior improved." [J-3]

40. On November 8, 2013 Student received a Disciplinary Referral for physical contact/horseplay, coded as a Minor Behavior Problem and was given a detention. The teacher described the problem as "2 instances of student grabbing another student by the shirt with 2 hands at the chest area". Both times were in anger and both times Student approached the other student. [J-3]

41. On November 20, 2013 Student received an extended detention for "café rules". The record did not have a corresponding Disciplinary Referral. [J-3]

42. On January 8, 2014 Student received an extended detention for "café rules". The record did not have a corresponding Disciplinary Referral. [J-3]

43. On January 28, 2014 Student received a Disciplinary Referral for fighting, a Major Problem Behavior and received a 3-day suspension and placed on privilege denial. The Parent was contacted by letter signed by "The CMS Administrative Team". [J-3]

44. On February 4, 2014 Student received a Disciplinary Referral for slapping another student in the face, a Major Problem Behavior, and received an extended detention. The Parent was contacted. [J-3]

45. From beginning in the District in September 2012 through February 20, 2014 Student received 19 Disciplinary Referrals resulting in 10 days of out-of-school suspension, 3 in-school suspensions, 12 detentions and 6 21-day privilege denials. [J-3]

46. Despite Student's having received 19 Disciplinary Referrals resulting in 10 days of out-of-school suspension, 3 in-school suspensions, 12 detentions and 6 21-day privilege denials the Guidance Counselor who was included in many of the correspondences cited above, and who had frequent contact with the Supervisor of Special Education, never brought Student to the attention of the Supervisor of Special Education. [NT 130]

47. Despite Student's having received 19 Disciplinary Referrals resulting in 10 days of out-of-school suspension, 3 in-school suspensions, 12 detentions and 6 21-day privilege denials, the first time the Supervisor of Special Education became aware of Student was after the February 21st incident. [NT 100]

48. The Assistant Principal is in charge of the 5th and 6th grade teachers in Student's school. [J-4, p22]

49. The Assistant Principal testifying under oath at the expulsion hearing opined that Student was "a regular student". However, he also testified that on average a "regular student" would get about six disciplinary suspensions or detentions. [J-4 p 68]

50. Asked at the expulsion hearing if Student had had any issues with respect to behavior prior to the [weapon] incident, the Assistant Principal under oath testified that there were but that they were not many. [J-4, p 61-62]

51. The Principal at the expulsion hearing was asked if 16 Disciplinary Referrals in a year was a lot. He testified, "16 for a single year – that's a lot". [J-4, p169]

52. Asked at the expulsion hearing if, as far as he knew, anyone in the District had suggested that Student should be evaluated, the Principal answered, "no". [J-4, p 177]

53. Asked if at the time of the expulsion hearing he thought Student should be evaluated the Principal answered "I do not" and more explicitly in relation to the [weapon] incident the Principal again answered that he still did not think Student should be evaluated. [J-4, p178, 183]

54. Asked if he had determined that the Team should have Student on their radar given the incident with the [weapon], the Principal answered, "It would still be a no. [Q] Because [Student] was, to our knowledge, [Student] was still performing, you know, to an acceptable level as a sixth grade student." Later in the same vein, after being told that

behavior problems continued right through the end of 5th grade and asked if that "suggested that maybe somebody missed it by not evaluating [Student] the Principal answered, "No…because [Student] was able to perform…[Student] was able to get good grades." [J-4, p 189, 197-198]

55. The Assistant Principal testified at the expulsion hearing that one of the reasons Student would not be considered as in need of an evaluation was because Student's "grades were wonderful. [Student] had some behavioral things that had happened, but never to the extent where we would think that [Student] would need to receive an evaluation or any type of extra – extra assistance". [J-4 p 66]

56. In his expulsion hearing testimony, asked about a threshold trigger that would require an evaluation the Assistant Principal under oath testified, "[T]here hasn't been anything to the level where it would require any inkling of, you know, any other services needed. I mean [Student's] grades are – [Student's] an A/B student." [J-4, p88]

57. In his expulsion hearing testimony regarding thresholds for behaviors the Assistant Principal testified under oath that an evaluation would be triggered, "if you have situations where you have the behavior and it's affecting the progress of your academics. In this case [Student] was an A/B student, it was not affecting [Student's] academics, so, therefore, there was no need to even go to a point where [Student] needed to be evaluated". [J-4, p 89-90]

58. In his expulsion hearing testimony the Assistant Principal stated under oath when his attention was drawn to specific Disciplinary Referrals that if a child's behavior is not affecting academics the child is not going to qualify for an IEP. [J4, p 97, 107]

59. The Assistant Principal testified at the expulsion hearing that the team that decides whether or not a student needs an evaluation never met about Student because the behaviors "didn't come to that level". [J-4, p 112-113]

60. The Assistant Principal is one of the individuals responsible for disseminating information about child find to the staff. [NT 128, 132-134]

61. At the expulsion hearing the Assistant Principal answered "Um-hum" and then "Oh, yes, yes" to the question, "One of the provisions [of the IDEA regarding children thought to be eligible] is that the teacher of the child or other personnel express specific concerns about a pattern of behavior demonstrated by the child either directly to the director of special education or to other supervisory personnel of the agency. Now that happened in [Student's] case, because these [Discipline Referrals] were given to the administration, right?" [J-4, p 103-104]

62. The Principal testified at the expulsion hearing. He is in charge of 120 staff. [J-4, p123]

63. The Principal testified at the expulsion hearing under oath that one of the ways decisions about evaluating a child are made at the team level. "After the teachers had tried some

team-level interventions or class-wide interventions and they had failed, then maybe they would – the counselor, who is then also part of the team, would then feel the need to make a formal recommendation to evaluate." The team did not approach him with a recommendation that Student be evaluated. [J-4, p 152]

64. The Principal testified that he was unaware of Student's discipline history in 5th grade, "because nothing was ever raised to the level where it needed to be brought to my attention. It was dealt with at the grade level". His answer was the same regarding 6th grade. [J-4, p 156-157, 161]

65. Although the Supervisor of Special Education identified building Administrators as being responsible for disseminating information about child find to the staff, the Principal said under oath at the expulsion hearing that he could not answer if everyone on the staff was trained in child find. [NT 128, 132-134; J-4, p 160]

66. The Supervisor of Special Education testified that "the discipline referral process is completely separate from the program and systems that we have in place to identify students to determine if they need testing". [NT 185]

67. On February 21, 2014 Student brought a [weapon] to school and threatened to "poke" a student. The District imposed a 3-day suspension and placed Student on privilege denial. The Parent was contacted by letter signed by "The CMS Administrative Team". [J-3, J-4 p 29]

68. On March 6, 2014 the District imposed a 7-day suspension and placed Student on privilege denial. The Parent was contacted by letter signed by "The CMS Administrative Team". [J-3]

69. On March 19, 2014 the School Board held a disciplinary hearing and subsequently voted to expel Student. [J-3, J-4]

70. The District's Policies on Weapons and Dangerous Instruments [SC 1317.2 Pol. 233] notes that, "The school district shall expel for a period of not less than one (1) year any student who violates this weapons policy…*The Superintendent may recommend modifications of such expulsion requirements on a case-by-case basis*" [emphasis added]. [J-3]

71. The District's Policies on Weapons and Dangerous Instruments follows SC 1317.2 Pol. 233 with a reference to the IDEA, "In the case of a student with disabilities, the Superintendent shall take all necessary steps to comply with the Individuals with Disabilities Education Act." [J-3]

72. At the expulsion hearing the Superintendent testified under oath that she was recommending expulsion but "if it was determined that it was a manifestation of [Student's] disability, then it would – my recommendation would change. But that hasn't happened because that is not the case." [J-4, p 233]

73. Her attention being drawn to the Disciplinary Referrals Student had accrued, the Superintendent conceded that they constituted a pattern, "just a pattern of complete disrespect for our rules." [J-4, p 240]

74. At the expulsion hearing the Superintendent further stated that Student had "a pattern of misbehavior. The pattern was misbehavior. It didn't interfere with [Student's] academics at all." [J-4, 241]

75. The Superintendent under oath at the expulsion hearing, when asked if a student would only receive a manifestation determination if they already had an IEP, testified "Yes. Diagnosed on document. If it's a documented learning disability through an IEP, yes." [J-4, p 243]

76. The District did not consider Student a child who was "thought to be eligible" and did not hold a manifestation determination meeting. [Entire record]

77. The District did not believe that a manifestation determination meeting was appropriate at the time it held the expulsion hearing. [J-4, p19]

78. As compiled by the teacher after the disciplinary incident of February 21st at the request of the Supervisor of Special Education, in 6th grade Student received the following accommodations: individual social contract, individual student conferences, a parent conference, parent communication, preferential seating away from peers, proactively placed for subs, grief group and check in with principal for conflict resolution. [NT 164-165; P11]

79. As compiled by the teacher after the disciplinary incident of February 21st at the request of the Supervisor of Special Education, in 5th grade Student received the following accommodations: permission to make up work, no penalty for being late, moved seat several times, changed homeroom which changed class schedule. [NT 164-165; P-12]

80. As compiled by the 5th grade teacher after the disciplinary incident of February 21st at the request of the Supervisor of Special Education Student: is very argumentative when corrected, demands immediate attention and became very angry when an issue of [Student's] was not addressed immediately, disrupts the classroom, has incomplete assignments, has conflicts with other students, is out of seat.[5] [NT 164-165; P-12]

[5] The 5th grade teacher also noted the second and third trimester grades in an unknown subject: Trimester 2 = 87, B+, Trimester 3 = 48, F. Given that the Administrators believe that grades determine referrals for evaluations, this information is interesting but so incomplete that it cannot form the basis of a finding of fact. The Supervisor of Special Education admitted that this "does not look like progress". [NT 169; P-12]

Legal Basis

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). In this case the Parent asked for the hearing and thus assumed the burden of proof. As the evidence was not equally balanced the Schaffer analysis was not applied.

Child Find: Both the federal Individuals with Disabilities Education Act 20 U.S.C. § 600 *et seq*.; 34 C.F.R. §300.111 and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* require school districts to identify children who may be eligible for special education services and evaluate them to determine eligibility. See also *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007*); Annika T. v. Unionville Chadds-Ford School District*, 2009 WL 778350 (E.D.Pa. 2009). Parents do not have a duty to identify, locate, or evaluate their child pursuant to IDEA. This obligation falls squarely upon the district. *Hicks, ex rel. Hicks v. Purchase Line School Dist*. 251 F.Supp.2d 1250, 1253 (W.D.Pa., 2003), citing, *M.C. v. Central Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir.1996). (noting that "[a] child's entitlement to special education should not depend upon the vigilance of parents who may not be sufficiently sophisticated to comprehend the problem). Child Find is a positive duty requiring a school district to begin the process of determining whether a student is exceptional at the point where *learning or behaviors* indicate that a child may have a disability [emphasis added]. *Ridgewood Bd. Of Educ. V. N.E*., 172 F/3d 238, 247 (3d Cir. 1996). The possibility that the student's difficulty *could* be attributed to something other than a disability does not excuse the district from its child find obligation. *See Richard V. v. City of Medford*, 924 F.Supp. 320, 322 (D.Mass.1996) The United States Supreme Court held early on that merely passing from grade to grade and achieving passing grades is not dispositive that a student has received a FAPE. *Board of Educ. v. Rowley*, 458 U. S. 176, 203, n.25 (1982). 34 C.F.R. §300.101(c)(1) provides: "Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade." An IEP confers a meaningful educational benefit when it is more than a trivial attempt at meeting the educational needs of the student, and it is designed to offer the child the opportunity to make progress in all relevant domains under the IDEA, including behavioral, social and emotional [emphasis added]. *Breanne C. v. Southern York County S.D.*, WL 3951851 (M.D.Pa. 2010) citing *M.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 368, 394 (3d Cir.1996) where the Court held that education is more than academics and involves emotional and social progress and that an IEP is appropriate if it offers meaningful progress in *all relevant domains under the IDEA* (emphasis added),

Thought to Be Eligible: Although not yet having been found eligible for special education, Student is entitled by federal law, the Individuals with Disabilities Education Act as Reauthorized by Congress December 2004, 20 U.S.C. Section 600 *et seq*. and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive certain protections. Specifically, a child who has not been determined to be eligible for special education and related services, and who has engaged in behavior that violates a code of student conduct, may assert any of the protections afforded to children with disabilities if the school district had knowledge, or is deemed to have had knowledge, that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred. The school district may be deemed to have had pre-existing knowledge that the student was a child with a disability if: 1) the student's parent expressed to the teacher or to supervisory or administrative personnel a written concern that the child was in need of special education and related services; 2) the student's parent requested an evaluation; or 3) the child's teacher or other school district personnel expressed specific concerns about a pattern of behavior demonstrated by the child, either directly to the director of special education or to other supervisory personnel of the agency. 20 USC §1415(k)(5); 34 CFR §300.534.

Disciplinary Protections: Manifestation Determination: The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1401 *et seq.*, and its implementing regulations provide for specific protections to eligible students who are facing a change in placement for disciplinary reasons. Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child' s IEP, any teacher observations, and any relevant information provided by the parents 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 an IEP. 20 U.S.C. § 1415(k)(E)(i). *See also* 34 C.F.R. § 300.530(e). If it is determined that the conduct in question had either the causal relationship with the disability or was a result of the failure to implement the child's IEP, the conduct "shall be determined to be a manifestation of the child's disability." 20 U.S.C. § 1415(k)(E)(ii). Additionally, if the conduct is determined to be a manifestation of the child's disability, the District must take certain other steps which generally include returning the child to the placement from which he or she was removed. 20 U.S.C. § 1415(k)(F). If the behavior is determined to be a manifestation of the child's disability then, with limited exceptions, the IEP team must either modify any existing behavioral intervention plan or conduct a functional behavioral assessment and develop a behavioral intervention plan. 1415(k)(1)(F); 34 CFR 300.530(f). By contrast, if school personnel determine that the behavior which resulted in discipline was not a manifestation of the student's disability, school personnel may apply the same disciplinary procedures applicable to all children without disabilities, except that children with disabilities must continue to receive educational services necessary to provide a free, appropriate public education. 20 U.S.C. § 1415(k)(1)(C) and (D); 34 C.F.R. § 300.530(c) and (d). Under Section 1415(k)(E)(i)(I), the clear language requires a determination that the conduct be "caused by" or have a "direct and substantial relationship to" the child's disability.

Weapons: In special circumstances, districts may remove a student to an interim alternative educational setting for not more than 45 days, without regard to whether the behavior is determined to be a manifestation of the child's disability if the child carries a weapon to, or possesses a weapon at, school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA. 20 U.S.C. 1415(k)(1) and (7) and 34 C.F.R. § 300.530 (g).

Authority of the Hearing Officer: The IDEA authorizes hearing officers and courts to award "such relief as the Court determines is appropriate" 20 U.S.C. § 1415(h)(2)(B). It is the explicit obligation of the hearing officer to base hearing decisions on the substantial evidence of record and upon a determination whether the child in question received all protections due to him or her. 20 U.S.C. §1415(f)(3)(E). Moreover, just as courts hearing civil actions brought to challenge a decision of a hearing officer are directed by the IDEA statute to "grant such relief as the court determines is appropriate," the hearing officer must, at times, fashion an appropriate equitable remedy where FAPE has been denied. *See*, 20 U.S.C. §1415(i)(2)(C); *Simchick v Fairfax County School Board*, 553 F.3d 315 (4th Cir. 2009).

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); See also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009).

I found the Parent's testimony to be forthright and without embellishment and gave it considerable weight.

Given her credentials and position, I found the Supervisor of Special Education's testimony to be unreliable. She stretched the limits of my ability to credit her testimony when, faced with the numerous Disciplinary Referrals Student received, she consistently explained them away by citing factors such time of day, whether the class was structured or unstructured, middle school being "a beast by itself", difficulty transitioning into 5th grade, differences in maturation, hormones, a non-academic class, and interpreting the word "constantly" and "culmination" as referring to just a specific incident. [NT 150-160, 178]. When shown the totality of the Discipline Referrals and asked if they were a pattern, the Supervisor of Special Education testified, "All of these discipline referrals, like I said before, are used for documentation purposes. No, it is not necessarily a pattern. They're all isolated discipline incidents." [NT 181] Finally, given her credentials and position, I found the absolute certainty with which she testified that she had no concerns that the District may have failed in its child find responsibilities not credible and could give her testimony little weight when balanced against the documentary evidence in the record.

Discussion and Conclusions

The record is unclear as to why, given that the child's offense involved bringing a weapon to school, the District chose not to exercise its option to remove Student from school for not more than 45 days[6] regardless of whether or not the behavior was a manifestation of a disability, as would have been perfectly within its right to do so. Instead the District suspended Student for several days, then several more days, and ultimately the School Board voted to expel Student for one year, without conducting a manifestation determination. The documentary record in this case makes it abundantly clear that Student should have been considered a "thought to be eligible" child, that the District is deemed to have had knowledge that Student was "thought to be eligible", and that the District failed in its child find obligations beginning at the latest by the end of February 2013. It is difficult to understand how the school team, regularly attended by either the Assistant Principal or the Principal, and coordinated by the Guidance Counselor, did not refer this child for an evaluation given the number and the nature of the Disciplinary Referrals received. The best explanation for the District's failure is likely to be the school administrators' understanding that special education evaluations are conducted when a child chronically exhibits inappropriate behavior only when the child's grades/academics are affected. The Assistant Principal, the Principal and the District Superintendent all testified with conviction in this regard at the expulsion hearing. Given their incomplete understanding of child find requirements, it is disturbing that, according to the Supervisor of Special Education, the Assistant Principal and the Principal are responsible for disseminating child find information to the staff of the school. It is likewise disturbing that the Supervisor of Special Education, presumably having greater expertise and training in special education regulations, steadfastly agreed with the Administrators' expulsion hearing testimony that was drawn to her attention at the due process hearing.

Under the IDEA as well as under Pennsylvania Chapter 14 there are three circumstances under which a school district has pre-existing knowledge, or is deemed to have pre-existing knowledge, that a child is eligible for special education and therefore as a "thought to be eligible" child must be afforded the IDEA's disciplinary protections. The first two conditions are that "student's parent expressed to the teacher or to supervisory or administrative personnel a written concern that the child was in need of special education and related services" and "the student's parent requested an evaluation". Significant consideration is given to several factors in this case. First, the Parent immediately upon enrollment and again shortly afterwards told an administrator and the school counselor that Student's [family member died]. Second, when inappropriate behaviors arose, the Parent credibly testified that on more than one occasion she asked the child's teacher and the Assistant Principal what else could be done to help the child and was not given any information about the possibility of an evaluation. Third, the Parent was not at any time directed to put her concerns in writing, much less to explicitly state that she thought the child was in need of special education. Fourth, there is no reason to believe that the Parent suspected that an evaluation for special education would be an avenue for assistance, and no evidence that the school staff to whom she spoke considered discussing this option with her when in fact the Assistant Principal to whom she spoke had an incomplete knowledge of child find and eligibility as demonstrated by his testimony under oath that "there was never a need [for special education interventions or programs] or anything to suggest that [Student] would need to be – well, first of all [Student's] grades were wonderful." While the Parent did not use the magic words "I request an evaluation" prior to February 21, 2014, the record is clear that she repeatedly sought the

[6] Unless the IDEA specifies "school days" the term "days" is interpreted as calendar days.

District's help in addressing Student's special needs both in 5th and 6th grades, all before the February 21, 2014 incident. Under these circumstances, it is perfectly appropriate that the District is deemed to have had knowledge under §300.534(b)(2) (parental request for evaluation).

The third circumstance, under which a student can be considered "thought to be eligible" is that "the child's teacher or other school district personnel expressed specific concerns about a pattern of behavior demonstrated by the child, either directly to the Supervisor of Special Education or to other supervisory personnel of the agency". Here it is noted that the OSEP Commentary states "[W]e are removing from §300.534(b)(3) the requirement that concerns be expressed in accordance with the agency's established child find or special education referral system…[However] we would encourage those States and LEAs whose child find or referral procedures do not permit teachers to express specific concerns directly to the Supervisor of Special Education of such agency or to other supervisory personnel of the agency to change these processes to meet this requirement." In the case of this child, for purposes of a "thought to be eligible" designation, it is first necessary to determine to whom a teacher in this District could "directly" address "specific concerns". The testimony of the Supervisor of Special Education established that in the middle school, the teachers had no route of direct access to her. The Supervisor of Special Education did not sit in on the team meetings held on various children about whom concerns were discussed in the group. Further, the Supervisor of Special Education does not routinely review disciplinary incidents that are serious enough that they "made it to the office" as demonstrated by her testimony at this hearing that despite Student's having received numerous disciplinary referrals the first knowledge she had of Student was after the incident on February 21, 2014. The teachers meet as a team, and the team is coordinated by the counselor; when concerns arise about a child it appears from the testimony that it is the counselor's responsibility to take concerns to the Supervisor of Special Education. Given the administrative structure as it was described in the hearing, I conclude that the "supervisory personnel" to whom teachers can address specific concerns are the Principal and the Assistant Principal. As the persons in charge of supervising the instruction and the operations in their building, it would be expected that they would supervise the teachers and that they would review concerns expressed by teachers on Disciplinary Referral forms. It is very clear that the teachers did repeatedly express significant concerns in written form using this format. As illustrated in the Findings of Fact above, the concerns established that Student was exhibiting a pattern of behavior that should have triggered child find procedures and that certainly indicate that the District was deemed to have knowledge that Student was "thought to be eligible". Intriguing but unfortunately unexplained at the hearing is the February 13, 2013 Homeroom Teacher's email to the Family and Consumer Science teacher. After noting that Student is "VERY" challenging, the Homeroom Teacher said, "I just write [Student] up every time [Student] does something. I think they need to see that [Student] is worse than they think [Student] is." An inference that can be drawn is that the "they" is someone in a position of authority in the school. The documentary evidence clearly shows that the requirements under 34 C.F.R. §300.534(b)(3) (pattern of concerns) are met.

In the instant matter, having failed to recognize its child find obligations and evaluate Student, the District now seeks to deny Student IDEA disciplinary protections precisely because Student was not evaluated. In *Forest Grove S.D. v. T.A.*, 557 U.S. 230 (2009), the United States Supreme Court noted: "The District's position similarly conflicts with IDEA's "child find" requirement, pursuant to which States are obligated to "identif[y], locat[e], and evaluat[e]" "[a]ll children with

disabilities residing in the State" to ensure that they receive needed special-education services…A reading of the Act that left parents without an adequate remedy when a school district unreasonably failed to identify a child with disabilities would not comport with Congress' acknowledgment of the paramount importance of properly identifying each child eligible for services. Indeed, by [immunizing a school district's refusal to find a child eligible for special-education services no matter how compelling the child's need] … would produce a rule [bordering on the irrational.] It would be particularly strange for the Act to provide a remedy, as all agree it does, when a school district offers a child inadequate special-education services but to leave parents without relief in the more egregious situation in which the school district unreasonably denies a child access to such services altogether."

The three top administrators responsible for Student – the Assistant Principal, the Principal and the Superintendent – strongly believe that special education evaluations are not needed when a child is receiving good grades regardless of the disciplinary history. The Assistant Principal and the Principal are responsible for disseminating child find information to the school staff. The school-based team did not consider referring Student for an evaluation or bringing Student to the attention of the Supervisor of Special Education despite numerous disciplinary incidents including physical aggression and despite knowing that the child had suffered a traumatic loss. The Supervisor of Special Education testified that she agreed wholeheartedly with the beliefs of the Administrators. Given these facts, I do not believe the District is able, at least for this child, to conduct an appropriate multidisciplinary evaluation to determine eligibility for special education. Accordingly the District will be ordered to fund an independent educational evaluation conducted by qualified professionals in the areas of school psychology and child psychiatry for the purposes of determining whether the child is eligible for special education and related services under the classification of emotional disturbance and/or other IDEA classifications.

Order

It is hereby ordered that:

The District is deemed to have had knowledge that Student was a child with a disability before the February 21, 2014 behavior that resulted in Student's suspensions and expulsion. Because Student was entitled to a manifestation determination, the District's failure to conduct a manifestation determination was a violation of 34 CFR §300.530. Pursuant to 34 CFR §300.532(b)(2)(i), the District must immediately return Student to the placement from which Student was removed in February 2014.

The District must fund an independent educational evaluation conducted by qualified professionals in the areas of school psychology and child psychiatry for the purposes of determining whether the child is eligible for special education and related services under the classification of emotional disturbance and/or other pertinent classifications. The

evaluation must be completed within sixty [60] calendar days of the date of this decision and provided to the Parent and to the District within that timeframe.

The evaluators will be chosen by the Parent with assistance of her counsel, except that the psychiatrist chosen may not be the psychiatrist who evaluated Student in March 2014.

The Parent must provide a copy directly, or sign a release of information for the independent evaluators to receive a copy, of the psychiatric evaluation done in March 2014. The Parent must also sign a release to enable the evaluators to speak with the psychiatrist who conducted the March 2014 evaluation and with Student's current therapist.

Any claims not specifically addressed by this decision and order are denied and dismissed.

April 30, 2014
Date

Linda M. Valentini, Psy.D., CHO

Linda M. Valentini, Psy.D., CHO
Special Education Hearing Officer
NAHO Certified Hearing Official