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 Due Process Hearing Officer

Final Decision and Order

ODR No. 27700-22-23

CLOSED HEARING

Child's Name:
G.J.

Date of Birth:
[redacted]

Parents/Guardians:
[redacted]

Counsel for Parents:
Jessica L. Tully, Esquire
Lisa Postlewait, Esquire
301 Grant Street, Suite 270
Pittsburgh, PA 15219

Local Education Agency:
Canon-McMillan School District
314 Elm Street
Canonsburg, PA 15317

Counsel for the LEA:
Patricia R. Andrews, Esquire
1500 Ardmore Boulevard, Suite 506
Pittsburgh, PA 15221

Hearing Officer:
Cathy A. Skidmore, Esquire

Date of Decision:
04/04/2023

INTRODUCTION AND PROCEDURAL HISTORY

The student, G.J. (Student),[1] is a mid-teenaged student who resides in the Canon-McMillan School District (District). Student has not been identified by the District as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)[2] or in need of services under Section 504 of the Rehabilitation Act of 1973 (Section 504).[3]

Student engaged in behavior in December 2022 that was followed by disciplinary consequences. In early March 2023, the Parents filed a Due Process Complaint against the District under the IDEA and Section 504, asserting that Student was entitled to the protections in those statutes afforded to children with disabilities or thought to have a disability. The matter proceed to an efficient expedited single-session hearing.[4]

Following review of the record and for all of the reasons set forth below, the claim of the Parents must be denied.

[1] In the interest of confidentiality and privacy, Student's name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

[2] 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

[3] 29 U.S.C. § 794. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11.

[4] References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number and School District Exhibits (S-) followed by the exhibit number. P-16 was redacted by the hearing officer to remove another student's name. The term Parents in the plural is used herein where it appears that one was acting on behalf of both.

ISSUE

Whether Student is entitled to disciplinary protections under the IDEA and/or Section 504 as a thought to be eligible child?

FINDINGS OF FACT

1. Student is a mid-teenaged student residing within the District and has been a regular education student since entering the District in the 2016-17 school year. (N.T. 96; P-20; S-8.)

2. Student had a history of anxiety beginning in the middle of the 2018-19 school year that at times let to school resistance and emotional dysregulation at home. Student frequently became upset on the way to school in the morning. Student has since had counseling and taken medication that together have been helpful in managing the anxiety. (N.T. 55, 57-58, 97-98, 106.)

3. In approximately the middle of that 2018-19 school year, when Student was attending the intermediate school, the Parents notified Student's teachers and the guidance counselor that Student had anxiety and depression. They also advised that Student was taking medication and going to counseling. They did not provide any documentation or formal diagnoses, but later reported that the counseling and medication had been very beneficial for Student. (N.T. 107, 120, 146, 157-58, S-1 at 15.)

4. Over the course of the 2018-19 school year, teachers reported one instance of Student being "withdrawn and crying" (S-1 at 9), one instance of Student being "a bit off" (S-1 at 10), and one instance of Student becoming upset over an assignment. They also reported a

"very positive change" in attitude and focus after learning about the medication (S-1 at 19). Overall, the teachers observed Student to become upset at school at times in the middle of the school year, which was not unusual for students in that grade. They spoke with Student and offered breaks when needed, which allowed Student to quickly return to classwork. (N.T. 137-43, 146-47, 153, 158; S-1.)

5. Student did meet with the guidance counselor a few times over the 2018-19 school year. All District students in the intermediate school engage with the guidance counselor. (N.T. 141-42, 147, 161, 168-75.)

6. Student's grades over the 2018-19 school year were all in the A to B range. (S-9 at 5-7.)

7. At the start of the 2019-20 school year, the Parents reported to the teachers Student's experience with anxiety the prior school year. The Parents also noted that Student did not want to go to school one day, but Student did not exhibit signs of distress after arriving. With the exception of one instance of becoming upset over a study guide, Student's teachers reported that Student did not manifest anxious or other concerning behavior at school that school year. (N.T. 183-85, 189; P-10; S-3.)

8. Student's grades over the 2019-20 school year were all in the A to B range with the exception of one subject in the first quarter when Student earned a C grade. (P-12; S-9 at 4-5.)

9. Student's grades over the 2020-21 and 2021-22 school years were all in the A to C range, with the exception of one subject one quarter when Student earned a failing grade. (P-13; S-9 at 1-4.)

10. Student began high school at the start of the 2022-23 school year. (S-7.)

11. In early December 2022, after Student exhibited more signs of anxiety at home, the medication was increased. The Parents did not report any concerns to the District at that time. (N.T. 114, 129.)

12. In approximately mid-December 2022, a teacher reported that a student had engaged in concerning behavior related to research the student had conducted. An investigation revealed that Student had conducted the research, and Student admitted to having done so. (N.T. 194-95, 197; P-16; S-6.)

13. After the incident, the District called the Parents to come to the high school. The Parents cooperated with the District professionals investigating the incident. (N.T. 115-16, 195.)

14. The District did not conduct a manifestation determination review after the December 2022 incident, but does intend to pursue a significant change in placement for Student. (N.T. 201-02.)

15. During the first two quarters of the 2022-23 school year, Student had grades all in the A and B range with the exception of two subjects in which Student earned a C grade one quarter. (S-7; S-9.)

16. Following the disciplinary incident in December 2022, the Parents had Student privately evaluated. At that time, Student described increased anxiety in December resulting in a medication change. (N.T. 51, 58, 116; P-18; P-19.)

17. The private evaluator conducted a threat assessment of Student as part of that evaluation. Student did not manifest signs of any threat at that time but explained that the behavior was the result of curiosity rather than an intention to cause harm. (N.T. 69-71; P-18 at 9-10.)

18. The private evaluator conducted assessments of Student in the areas of cognitive ability; memory and learning; language and verbal

fluency; social/emotional/behavioral functioning; and executive functioning skills. (P-18; P-19.)

19. The private evaluator did not contact anyone in the District to obtain information about Student in school. Part of the reason for failing to do so was the reports by Student and the Parents that Student did not manifest anxiety when at school. (N.T. 76, 80-81.)

20. In reports of January 23 and February 4, 2023, the private evaluator issued reports diagnosing Student with Generalized Anxiety Disorder and Persistent Depressive Disorder, and noting some other areas of concern to include attention/focus, hyperactivity, and some memory weaknesses. (P-18 at 19-21; P-19 at 12.)

21. In early February 2023, the District sought permission from the Parents to conduct an evaluation of Student. (N.T. 206-07; S-8.)

DISCUSSION AND APPLICATION OF LAW

General Legal Principles

In general, the burden of proof consists of two elements: the burden of production and the burden of persuasion. The burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); L.*E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case must rest with the Parents who filed the Complaint leading to this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "equipoise." *Schaffer, supra*, 546 U.S. at 58.

Special education hearing officers, who assume the role of fact-finders, have the responsibility of making credibility determinations of the witnesses who testify before them. *See J. P. v. County School Board*, 516 F.3d 254,

261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses who testified to be credible as to the facts as they recalled them, without any intention to mislead. The weight accorded the evidence, however, was not equally placed.

The Parents' private evaluator opined about how Student's education would have been impacted by Student's anxiety, but that testimony was of diminished value because it was speculative as well as not informed by any input from the District. The testimony of one of the Parents as to the frequency of communication with school professionals was not corroborated by any other evidence of record but, rather, was contradicted by District witnesses as well as telephone records (P-17), and this portion of her testimony was therefore also accorded less weight. The District professionals provided persuasive testimony that was entitled to and accorded significant weight.

The findings of fact were made as necessary to resolve the issues; thus, not all of the testimony and exhibits were explicitly cited. However, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered, as were the parties' closing statements.

General IDEA Principles: Child Find and Eligibility

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. The IDEA applies to a "child with a disability." 20 U.S.C. § 1415(k); 34 C.F.R. § 300.530(a). The definition of a "child with a disability" is two-pronged: having one of certain enumerated conditions

and, by reason thereof, needing special education and related services. 20 U.S.C. § 1401(3).

The IDEA and state and federal regulations further obligate local education agencies (LEAs) to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. The process of identifying children who may be eligible for special education is through an evaluation. The statute itself sets forth two purposes of the required evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to "determine the educational needs of such child[.]" 20 U.S.C. §1414(a)(1)(C)(i).

The obligation to identify students suspected as having a disability is commonly referred to as "Child Find." LEAs are required to fulfill the Child Find obligation within a reasonable time. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995). More specifically, LEAs are required to consider evaluation for special education services within a reasonable time after notice of behavior that suggests a disability. *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012). School districts are not, however, required to identify a disability "at the earliest possible moment" or to evaluate "every struggling student." *Id*.

General Section 504 and ADA Principles

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she "has a physical or mental impairment which substantially limits one or more major life activities," or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). "Major life activities" include learning, concentrating, and thinking, among others. 34 C.F.R. § 104.3(j)(2)(ii). The term "disability"

under Section 504 is to be interpreted broadly. *See* 42 U.S.C. §§ 12101-12102; *see also Dear Colleague Letter*, 58 IDELR 79 (OCR 2012). The determination of whether an individual has a disability "shall be made without regard to the ameliorative effects of mitigating measures" beyond ordinary corrective lenses. 42 U.S.C. § 12102(4)(E).

IDEA Disciplinary Principles

A local education agency (LEA), including a school district, is permitted to remove a child with a disability from his or her current educational setting for violation of the code of student conduct for a period of no more than ten consecutive school days within the same school year, provided that the same discipline would be imposed on non-disabled students. 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. §300.530(b). An LEA is also permitted to impose additional disciplinary removals for separate incidents of misconduct for fewer than ten consecutive school days, provided that such removals do not constitute a "change of placement." 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. §300.530(b). A "change of placement" based on disciplinary removals is defined as (1) removal for more than ten consecutive school days; or (2) a series of removals during the same school year that constitutes a "pattern". 34 C.F.R. § 300.536(a); *see also* 22 Pa. Code § 14.143(a). "Any unique circumstances" of a particular case may be considered by the LEA when determining whether a change in placement is appropriate for a child with a disability who violates a student code of conduct. 20 U.S.C. § 1414(k)(1)(A); 34 C.F.R. § 300.530(a).

A child who has not been identified as eligible for special education qualifies for the same protections as a child with a disability if the LEA had "knowledge (as determined in accordance with this paragraph)" of a disability before the behavior that led to the discipline. 20 U.S.C. § 1415(k)(5)(A). This is commonly termed "thought to be eligible." The basis of knowledge, as delineated by the IDEA, exists when:

i. the parent of the child has expressed concern in writing [to the LEA] that the child is in need of special education and related services;

ii. the parent of the child has requested an evaluation of the child [under the IDEA]; or

iii. the teacher of the child, or other personnel of the [LEA], has expressed specific concerns about a pattern of behavior demonstrated by the child to the director of special education or to other supervisory personnel of the agency.

20 U.S.C. § 1415(k)(5)(B); *see also* 34 C.F.R. § 300.534(b).

Once a decision is made to change the placement of a child with a disability, or thought to be eligible, for violating the code of student conduct, the LEA must conduct a manifestation determination review to determine whether the conduct "was caused by, or had a direct and substantial relationship to, the child's disability; or … was the direct result of" the LEA's failure to implement the child's IEP. 20 U.S.C. § 1415(k)(1)(E); *see also* 34 C.F.R. § 300.530(e). The team must consider "all relevant information in the student's file…including any relevant information provided by the parents[[.]" 20 U.S.C. § 1415(k)(1)(E); *see also* 34 C.F.R. § 300.530(e). This same procedure applies to a child whom the LEA had knowledge may have a disability even without a prior identification. 20 U.S.C. § 1415(k)(5); 34 C.F.R. § 300.534(a). The manifestation determination must be made within ten school days of any decision to change the eligible child's placement, and must be made by "the LEA, the parent, and relevant members of the child's IEP team (as determined by the parent and the LEA)." 34 C.F.R. § 300.530(e); *see also* 20 U.S.C. § 1415(k)(1)(E).

If the team determines that the behavior was a manifestation of the child's disability, the IEP team must return the child to the placement from which the child was removed unless the parent and LEA agree otherwise; and the team must also either conduct an FBA and implement a behavior intervention plan, or review and modify an existing behavior plan. 20 U.S.C. § 1415(k)(1)(F); 34 C.F.R. § 300.530(f). If the team determines that the behavior was not a manifestation of the child's disability, the LEA may take disciplinary action that would be applied to children without disabilities, except that the child with a disability is entitled to special education services. 20 U.S.C. §§ 1415(k)(1)(C) and (k)(1)(D); 34 C.F.R. §§ 300.101(a), 300.530(c) and (d).

Section 504 Discipline Provisions

Section 504 does not contain any requirement for a manifestation determination review; however, it does include provisions in its implementing regulations relating to significant changes in placement and procedural safeguards. 34 C.F.R. §§ 104.35, 104.36. The federal Office for Civil Rights has long concluded that even under Section 504, children with disabilities must be afforded a manifestation determination for a significant change in placement. *See, e.g., Duval County Public Schools*, 118 LRP 24691 (OCR 2017); *Dunkin R.-V. School District*, 52 IDELR 138 (OCR 2009). Application of the IDEA discipline protections is one means of meeting this obligation. 34 C.F.R. § 104.36.

The IDEA Statute of Limitations

The IDEA ensures that parties have the opportunity to "present a complaint [] with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to [a] child." 20 U.S.C. § 1415(b)(6)(A). However, a party "must request an impartial due process hearing on their

due process complaint within two years of the date the parent or public agency knew or should have known about the alleged action which forms the basis of the complaint." 20 U.S.C. § 1415(f)(3)(C); *see also* 34 C.F.R. § 300.511(e). This IDEA limitation also applies to Section 504 claims. *P. P. v. West Chester Area School District*, 585 F.3d 727, 737 (3d Cir. 2009).

"The IDEA statute of limitations is triggered when the parent knew or should have known about the action that forms the basis of the complaint." *J.L. v. Ambridge Area School District*, 2008 U.S. Dist. LEXIS 54904, * 28-29, 2008 WL 2798306 (W.D. Pa. July 18, 2008). In examining such a question, the Third Circuit in *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 614 (3d Cir. 2015), instructs that the focus is on the accrual of a cause of action "once the plaintiff did discover or a reasonably diligent plaintiff would have discovered the facts constituting the violation." 802 F.3d at 614.

The Parents' Claims

The Parents contend that Student is a "thought to be eligible" student under the IDEA and Section 504. They do not assert any of the enumerated bases in the IDEA implementing regulations for that assertion. Rather, they raise a novel claim that the District has violated its child find obligation in failing to suspect that Student had a disability and may be in need of services under the IDEA and/or Section 504; and that, therefore, Student qualifies for "thought to be eligible" status.

At the outset, it is necessary to address the District's affirmative defense that the applicable statute of limitations operates to bar the claims relating to the 2018-19 and 2019-20 school years. Neither party has cited to any relevant authority on this issue. However, although the evidence focused to a large extent on those school years that are clearly beyond the limitations period, the instant Complaint was filed solely in relation to the

December 2022 incident. The Parents here do not seek any remedy for their child find claim other than an ordered manifestation determination review. Moreover, at least one Pennsylvania federal district court has concluded that there is not a temporal cutoff in the IDEA between a discussion of a student's struggles and a discipline incident several years later. *G.R. v. Colonial School District,* 2019 U.S. Dist. LEXIS 39224, 2019 WL 1128757 (E.D. Pa. 2019). Thus, as applied to this case, the statute of limitations does not preclude their claim.

Assuming, *arguendo*, that the statute of limitations does apply, the expedited hearing timeline did not permit the type of fact-finding that would be necessary to decide such an issue. The statute of limitations is an affirmative defense, and the District thus had the burden of persuasion on that defense. *See J.L. v. Ambridge Area School District*, 2008 U.S. Dist. LEXIS 54904, **28-29, 2008 WL 2798306 *10 (W.D. Pa. 2008). Because there is nothing in the record from which one can reach any conclusion on application of the statute of limitations in this case, that defense cannot operate to bar the Parents' claim.

On the merits, the language of the IDEA and its implementing regulations is very specific on what circumstances must exist in order for "thought to be eligible" status. In 2003, Congress considered the related provision in the 1997 version of the statute and intentionally removed the language that permitted this classification when the child's ''behavior or performance demonstrates the need'' for special education and related services, or because a teacher expressed a ''concern about the behavior or performance of the child." S. Rep. 108-185 at 45-46 (2003) (citing the IDEA, 20 U.S.C. § 1415(k)(8)(B) (1997) (amended 2004)). The Parents have cited no relevant authority for application of circumstances that do not appear in the current IDEA; nor do any of the three that are included in the regulations exist here.

To the extent that the current law may be read to permit a child to meet "thought to be eligible" status because of an alleged child find violation, the Parents simply have not done so in this case. The Parents have established, as of January 2023, that Student has a disability, but not as of any prior timeframe including December 2022 when the incident occurred. The communications over the 2018-19 and 2019-20 school years were little more than exchanges of information that included Student's difficulties at home for a period of time and a few non-atypical struggles in the school setting. *See D.K., supra.* The District thus did not have the requisite reasonable suspicion until receipt of the January 2023 private evaluation report, and it promptly sought permission to evaluate. Furthermore, even if the communications over the 2018-19 and 2019-20 school years rose to the level of requiring an evaluation under the IDEA or Section 504, which they did not, consideration must be given to the time that elapsed between those and the December 2022 incident and Student's successes in between. *See Colonial, supra*, at *13 (concluding that the "supposed discussions of a pattern of behavior pointed to by [the] parents as the IDEA-triggering event, must be considered in light of the succeeding academic successes [the student later] experienced.").

The Parents also point to the definition of disability under Section 504 that does not permit consideration of the ameliorative effect of mitigating measures such as medication. While this assertion is wholly accurate, the Parents take it one step farther by arguing that Student's prescribed medication beginning in the 2018-19 school year is strongly suggestive of an ameliorated disability known to the District. The flaw in this contention is that the District professionals who worked with Student during the 2018-19 and 2019-20 school years provided convincing testimony, corroborated by documentary evidence, that they did not have reason to suspect a disability that impacted Student in the school setting to any degree that would

warrant an evaluation under either the IDEA or Section 504 prior to January 2023. And, again, the intervening time period is also an important consideration that further fails to support this contention, so it must fail.

For all of these reasons, the Parents' claim cannot be sustained.

CONCLUSION OF LAW

The District did not inappropriately fail to provide to Student the disciplinary protections available under the IDEA and Section 504 following the December 2022 incident.

ORDER

AND NOW, this 4th day of April, 2023, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the District did not violate the IDEA or Section 504 in failing to provide to Student the disciplinary protections in those statutes following the incident in December 2022. The District is not ordered to take any action.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are DENIED and DISMISSED.

/s/ Cathy A. Skidmore
_____
Cathy A. Skidmore, Esquire
HEARING OFFICER
ODR No. 27700-22-23