DELAWARE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING PANEL

In the Matter of	)
("Parents")	)
On behalf of ("Student")	)
Petitioner,	) Date of Order: 5/12/16
v	) DE DP 16-28
Cape Henlopen School District	) Date of Hearing: 5/5/16
("District")	) emailed and mailed 5/12/16

Counsel for Petitioner/Student/Parents: Jerry L Tanenbaum, Esq. (by email and mail)
Counsel for District: Allyson Britton DiRocco, Esq. (by email and mail)

DECISION AND ORDER

INDEX OF NAMES FOR DECISION AND ORDER

ACTUAL NAME	REPLACEMENT NAME/TERM USED
	Student
	Father
	Mother
Cape Henlopen School District	District
	District's Educational Psychologist

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DECISION AND ORDER

I. SUMMARY

Petitioner, Mother and Father on behalf of Student expelled filed a Complaint for Due Process under the IDEA for a Student who was not previously identified as needing special education and related services under the IDEA, but had a 504 Plan. District moved to dismiss for a lack of subject matter jurisdiction. After a hearing, it was determined that this Hearing Officer had no subject matter jurisdiction to hear the Complaint under the IDEA, or 504 **or** the exception in the IDEA for Children who had not been identified but for whom a District is deemed to have knowledge as children covered by the IDEA.

II. PROCEDURAL BACKGROUND

A. Mother and Father on behalf of Student through Counsel filed this Due Process Complaint against District on April 11, 2016. ("First Complaint").

B. The First Complaint consists of 12 pages. Page 1 of the first Complaint is a cover letter and in that it characterizes the following 11 pages as "A Due

Process Complaint Form and Request for Due Process Hearing." Critically as pages 2 through 4 inclusive, Parents used the Due Process Complaint form provided by the State of Delaware specifically for cases under the Individuals for Disability Education Act. 20 U.S.C. § 1415 *et. seq.* ("IDEA").

C. Page 5 through Pages 12 of the Complaint though make no mention of the IDEA. Instead, Page 5 through 12 of the Complaint allege that Student who had a 504 Plan due process rights were violated as Student was improperly expelled by District without a proper manifestation determination and sought compensatory education. Pages 5 through 12 of the complaint make **no mention that Student was a child identified as receiving services under the IDEA or was qualified to be treated under the IDEA for this expulsion**. Rather, Student was alleged to have a psychological disability, a mood disorder and Attention Deficit Hyperactivity, which when not properly taking Student's medications triggered outbursts of anger and resistance of authority. Student was alleged to be "entitled and qualified for a 504 Plan." That is this main portion of the Complaint details allege violations of Student's rights stemming from Student's 504 Plan.

D. The incident that led to the Complaint was on about October 26, 2015 Student, an 11th grader, allegedly missed a dosage of required medications due to District's omissions and allegedly as a result, injured a Substitute Teacher who was not made aware by District of Student's need for medications. The injury occurred while Student was trying to retrieve Student's cell phone which the substitute teacher took for alleged misuse. Student allegedly wrongfully was expelled in violation of Student's rights under 504 as the

incident was a manifestation of Student's disability alleging District's failed to both instruct the substitute teacher as to Student's need for medications and because of an improper predetermined vote to expel the Student at a manifestation hearing when held. The Complaint sought immediate return of Student to the School from which Student was expelled, compensatory education for every day from expulsion until Student had been provided with an appropriate services, weekly counseling from a qualified counselor, a Positive Behavioral Plan and a Functional Behavioral Assessment and attorney's fees.

E. On April 13, 2016, the State of Delaware appointed the undersigned as a single hearing officer under the "IDEA" to conduct an expedited hearing to determine on whether there was a violation of the IDEA. A hearing was scheduled on this issue for May 5, 2016. The authority of this Hearing Officer is only under the IDEA.

F. On April 18, 2016 District moved to dismiss alleging that the undersigned lacked subject matter jurisdiction under the IDEA as no violation had been asserted in the First Complaint under the IDEA.

G. On or about April 19,2016, Student's in its First Response to the Motion Dismiss stated that the First Complaint was filed "as a precautionary measure to ensure that "the Petitioners had exhausted whatever Delaware administrative procedures may apply."

H. The District Responded to the Allegations without prejudice to its Motion to Dismiss in essence denying the claim and is essence arguing that assaulting a 78-year-old substitute teacher was not a manifestation of the disability.

I. On April 29, 2016, I issued an order requesting Petitioner/Student's counsel clarify whether or not there was an exception as set forth under 14 Del. Admin. Code §34.1 and 34.2[1], that allowed this matter before the undersigned and for District to clarify whether or not there was an exception to the above deemed knowledge exception under 14 Del. Admin. Code § 34.3 which would have meant this tribunal lacked jurisdiction even if Student's Parents established one of the enumerated exceptions under 14 Del. Admin. Code § 34.2. In its first response to this request for clarification, Petitioner Student Parent again argued categorically without providing authority there was no question that Petitioner Student as a child with 504 Plan had a disability and as such, I had jurisdiction. The District argued this was insufficient noting the lack of specific claims. A teleconference ensued and later this same date, April 29, 2016 Petitioner Student/ Parent's for the first time and less than 6 days before the hearing alleged there was an exception that allowed this tribunal jurisdiction under 14 Del. C. § 34.2.3 as there was an expression by District Personnel of a pattern of behavior of Student to Supervisory Personnel at the District. They also reiterated as their position that all Students with 504s, qualified for the protective measures of the IDEA for disciplinary matters.

J. The day of the hearing for the first time, on May 6, 2016 Parents Students argued that they also met the exception that permits the undersigned jurisdiction under 14 Del. Admin. Code § 34.2.1 contending they requested

[1] Which sometimes I refer to as the "deemed knowledge exception". It also should be noted this State regulation mimics the federal statute and is construed thereby and while the Delaware regulation was referred to in pretrial matters and at the hearing, since it is the equivalent, the citation herein to the corresponding federal statute makes no difference,

examination. District has maintained objections to this for a lack of notice as well as the contention made on April 29, 2016. [2]

K. The parties agreed to a bifurcated hearing with the first issue being decided was whether or not there was jurisdiction to hear this matter.

L. A decision was read into the record (as clarified in writing herein) and the parties declined to procced as to the substantive allegations and it is noted that proceeding on them would have been futile.

III. TESTIMONY AND EXHIBITS

A. (District's first and only witness- District's Educational Psychologist

The Districts' first witness (who was qualified as an expert without opposition) was District's Educational Psychologist with a Ph D. in School Psychology and over 20 years' experience. The Educational Psychologist indicated knowing Student and the issues in Educational Psychologist's capacity as the District's Educational Psychologist. District's Educational Psychologist, N.T. at 27-28.

District's Educational Psychologist testified being part of a group from District that met with Students' Mother and Father on June 4, 2014, over a year prior to the incident that gave rise to the expulsion. At this meeting, District provided to Parents an explanation and comparison between services under the IDEA (such as an Individualized Educational Plan ("IEP")) and a 504 Plan. The two legal procedures were contrasted and it was explained to Parents that for Student to qualify for the special education or related services under the IDEA, Student's mood disorder had to cause an educational deficit that required special education or related services.

[2] While District may be correct that the day of hearing change should not be allowed, that is irrelevant and it is found this exception does not apply as well,

District's District's Educational Psychologist, N.T. at 31. The Educational Psychologist also described at the meeting the 504 Plan and what it did. District's Educational Psychologist N.T. at 31-32

The District's Educational Pyschologist testified that Father adamantly expressed that he did not want Student to be examined as to this educational deficit and to have special education or related services. District's Educational Psychologist N.T. at 31. This was why the decision was made as to Student having a 504 Plan and not being diagnosed as to whether or not Student required an IEP. District's Educational Psychologist N.T. at 32. District's Psychologist not only testified that Father adamantly opposed this evaluation for special education, but that he also did not believe that Student qualified for an IEP as Student's Mental Health Challenges did not result in an educational deficit or corresponding need for special education and/or related services. District's Education School Psychologist, testified that Father at this meeting (June 2014 meeting) said Student was intelligent. District's Educational Psychologist N.T. at 30. District's Educational Psychologist agreed and that there lacked an effect of an educational deficit from this Student's mood disorder. District, on cross examination, admitted it did not have paperwork documenting this request for an evaluation explaining the reason for this absence was the clear parental expression for Student not to receive special education or related service. District's Educational Psychologist N.T. at 96-97. This led a decision made by parents and District classifying Student as needing a 504 Plan and not determining whether Student qualified for an Individualized Education Plan under the IDEA.

On cross examination, District's School psychologist to the existence of numerous complaint as to student's misbehaviors prior to the incident in question

which included those made to Supervisors. District's Educational Psychologist N.T. at 40-87.

B. **(District's first and only witness- Mother)**

Mother testified that at the relevant meeting there was no offer to evaluate the Student. Mother N.T. at 104. Mother testified that had the District offered to do an evaluation she would have agreed. Mother N.T. at 105.

Mother further was asked as to whether there was a request for an evaluation in these proceedings and she indicated no. Mother N.T. at 105, line 19 – N,T, 106, line 1. This appears inconsistent with both Mother's hearing day assertion that prior to the incident in question Parents had made a request for an evaluation or that if one had been offered they would have agreed. Having said this, there remains a possibility that District and Mother were talking about examinations as different as "apples and oranges." Mother may have asked for an evaluation that was **not related to or designed to determine whether the disabilities cause educational deficit and what if any special educational or related services Student needed** and that which District described was one to see if the disabilities resulted in educational deficit and there was a need for special educational or related services. I asked if Mother was requesting an evaluation in these proceedings meaning the sort which was designed to determine educational deficit and any need for special educational services. Mother N.T. at 105, line 19 – N,T, 106, line 1. Now as with any question, it could have been framed clearer, I believe that it and Mother's answer were sufficient to distinguish that Mother did not at the time of these proceeding or the initial 504 meeting back in 2014 did not want an examination as to whether or not Student's mood disorder resulted in educational deficit and a need for special

education or related services and it is believed there was never a request by her or father for this sort of evaluation prior to the incident in question. Rather, there was a rejection at anything that could lead to special education. Mother was using her own therapists and Psychiatrist for Student.

IV. **FINDINGS OF FACTS**

A. District explained to parents the differences between the IDEA which requires an IEP and a 504 Plan and explained to Parents that before Student Qualified under the IDEA, there had to be an educational evaluation of Student to establish that there was an educational deficit from Student's Mood Disorder and that required Special Educational and or Related Services to address. Father declined this as unnecessary.

B. District did not request an educational evaluation and testing for Student as Father/ Parent's didn't want it and because they did not believe that Student suffered an educational deficit from Student's mood disorder such as to require special educational and or related services.

C. It was Father's and Parent's and District collective will to have a 504 Plan and not an Individualized Education Plan under the IDEA because of an agreed, lack of negative educational impact and a need for special educational and or related services and FAPE from Student's disability. While the reason they feel this way may or may not be accurate, there is simply nothing to suggest that it is not accurate.

D. The only evidence presented by either party as to Student's academic progress was the Student's transcript was that Student had a weighted Cumulative GPA of 80.697 with the only final grade the Student received in year in question was a 100% in creative writing. This is insufficient to show to show the need for special educational or related services.

E. The decision not to evaluate Student for an IEP included Parents' not wanting Student evaluated as to whether Student suffered educational deficits from Student's described disorders including mood disorder such as to need special education services was a mutual one between District and parents.

V. DECISION

This matter is dismissed by this hearing officer for a lack of subject matter jurisdiction. I do not have jurisdiction of the appeal of expulsions of Students who have 504 Plans and are not identified as a child with a disability as that term is defined in the IDEA where the District is deemed not to have knowledge of that the Child as a "child with a disability" as that term is defined under the IDEA.

Under 20 U.S.C. § 1415 (k)(5)(B) and 14 Del. Admin. Code § 926. 34.2.3, District is not deemed to have knowledge that Student is a Child with a Disability as Parents refused to have Student evaluated for an educational deficit from Student's Mood Disorder to determine if Student qualified for Special Education and or Related Services under the IDEA. I do not have jurisdiction under case law, or statute or otherwise to determine whether any violation of Student's rights under Section 504 or otherwise justify the relief requested and any further proceedings thereon would be futile.

VI. RATIONALE

Student in this case was expelled for injuring a Substitute Teacher while grabbing at Student's phone which was taken away by the Substitute Teacher. Student has a 504 Plan as Student suffers from a Mood Disorder. The term "child with a disability" does not for purposes of the IDEA have the more expansive lay meaning of any child with a disability. Rather, it is a defined term and in the present case Student is not a student with a disability as that term is used in the IDEA 20 U.S.C. § 1415 *et al.*

A child with a disability, as a defined term, only has the meaning set forth in 20 U.S.C. §1401 (3)(A) which says:

> 20 U.S.C. §1401 (3)(A) term "child with a disability" means a child—
> (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
> **(ii) who, by reason thereof, needs special education and related services.** (Emphasis Added).

The above means that 2 things have to exist to be a "child with a disability" under the IDEA and for this tribunal to meet the first issue as to whether it has jurisdiction. There has to be a disability and the disability has to cause the need for special education and related services. Even assuming for arguments sake, the first condition of the disability exists, there is a second requirement that because or caused by the disability the Child needs special education or related services.

In this case, the second condition has not been met. There has not been either an assertion whether in the pleadings or at trial or proof at trial, that Student's asserted disabilities cause Student to need special education or related services. Rather there has

been admission that Student was never classified under the IDEA and as to the need for special education or related services, the most credible evidence presented is that Father expressly did not want the same.

In Delaware and the federal statute there is an exception to the above general rule, which mandates the same protection (and jurisdiction under this tribunal) for a limited number of students not yet classified under IDEA.[3]

20 U.S.C. § 1415 (k)(5)(A)-(D) (emphasis added) says:

> (A) **In general** A child who has not been determined to be eligible for special education and related services under this subchapter and who has engaged in behavior that violates a code of student conduct, may assert any of the protections provided for in this subchapter if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.
> (B) **Basis of knowledge** A local educational agency shall be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred—
> (i) the parent of the child has 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;
> (ii) the parent of the child has requested an evaluation of the child pursuant to section 1414(a)(1)(B) of this title; or
> (iii) the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.
> (C) **Exception** A local educational agency shall not be deemed to have knowledge that the child is a child with a disability if the parent of the child has not allowed an evaluation of the child pursuant to section 1414 of this title or has refused services under this subchapter or the child has been evaluated and it was determined that the child was not a child with a disability under this subchapter.
> (D**) Conditions that apply if no basis of knowledge**
> (i) In general If a local educational agency does not have knowledge that a child is a child with a disability (in accordance with subparagraph (B) or (C)) prior to taking disciplinary measures against the child, **the child may be subjected to disciplinary measures applied to children without disabilities** who engaged in comparable behaviors consistent with clause (ii).

[3] I have referred to this at times as the deemed knowledge exception. However, as will be discussed later even the exception uses this defined term child with a disability and is limited thereby

> (ii) Limitations 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. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with this subchapter, except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

The plain meaning of this Statute is that the above exception does not refer to any child with a disability in the layperson sense, but rather only such children with an enumerated disability that cause the need for special education and related services. This is clear from the inclusion in the last clause of 20 U.S.C. Sec. 1415(k)(5)(A) of the very precise, previously defined term and this governs the metes and bounds of the later exceptions.

In an unreported case, D.S., S.S. ex rel. Z.S. v. Neptune Township Board of Education, 49 IDELR 181, 264 F. App'x 186 (3d Cir. 2008) construed the definition "child with a disability" in this manner to deny attorney's fees under the fee shifting provisions of the IDEA. The Hearing Officer in Bloom Township High School District 206 Illinois State Educational Agency, 2012, 0230, 112 LRP 21291 (April 12, 2012) ruled that a Student with Alopecia who was expelled for fighting was not such a child with disabilities under the IDEA. The Court in T.B. v. Bryan Independent School District, 638 F. 3d 240 (5th Cir. 2010) denied attorney's fees using this limited definition of child with a disability in determining it would not award attorney's fees. In Nordonia Hills City School, District 116 LRP 18865, (May 2, 2016), the Hearing Officer found no application of the above Statute, despite finding that the multiple disciplinary measures in the past years and the report of a mental health concern, noting the lack of evidence that these challenges affected Student's ability to access the general education curriculum.

The same can be said of the evidence acquired through cross examination of the School Psychologist. In Panama Buena Vista Union School District, 115 LRP 55025 (November 13, 2015) while the issue of a 504 Plan does not appear specifically litigated, the hearing officer did not find that the mere qualification as a Student with a 504 Plan triggered a deemed knowledge exception. In Chelsea D. v. Robert D. and Joanne D. v. Avon Grove School District, 61 IDELR 161(E.D. PA. July 15, 2013)[4] affirmed a hearing officer's finding the District did not violate the IDEA as the child in that case was not found to be a child with a disability under the IDEA due to the lack of a need for specialized instruction. In that case District did give the child a 504 Plan,

This brings us to the argument first raised six (6) days before the hearing that there was an exception as there were several behavior incidents complained of by teachers or other personnel to supervisor to constitute a pattern of behavior. While there is undoubtedly a pattern of misbehavior of Student, and in one instance there was the relay of an incidence where there was physical contact between students that necessitated some discipline, it should be noted that the Pattern does not include or imply that what the teacher and other reporting to personnel in any way related to Student's a need for Special Education or Related services. While not explicitly stated in the statutory language, this lack of a connection of the pattern of behavior and the need for special education and or related services, may even mean the exception under 20 U.S.C. § 1415 (k)(5)(B)(iii) has not been triggered[5].

[4] In that case the hearing officer went on to decide the 504 claims. However, in Pennsylvania hearing officers have jurisdiction over 504 claims unlike in Delaware. 22 Pa. Code § 15.8 provides that Section 504 hearings "shall be held before an impartial hearing officer and shall be governed by § 14.64(a)—(l), (n) and (o) (relating to impartial due process hearings)….." There is no equivalent in Delaware.

[5] While I may have orally indicated it had at the hearing, the applicability of this exception on more careful review, it appears to also require the inclusion that the behaviors that correspond to a need for special education or related services. Here is why. A child expelled or suspended for more than 10 days, likely has had prior misbehaviors and may have a pattern of complaints between teachers and supervisors. If the lay

As to any exception under 20 U.S.C. § 1415 (k)(5)(B)(i), this does not exist as the evidence was that Parents did not want special education services. As to any exception under 20 U.S.C. § 1415 (k)(5)(B)(i), this is also inapliccable as the sort of examination is defined as that for the IDEA or special education under section 1414(a)(1)(B).[6]

However, even if Student met the burden and the exception under 20 U.S.C. § 1415 (k)(5)(B)(iii) or any of the above exceptions had been triggered, the District met the burden that it be deemed **not to know Student is a child with a disability** under the IDEA and that Student was not entitled to an administrative appeal under the IDEA by virtue of 20 U.S.C. § 1415 (k)(5)(C). It is unrebutted that District discussed with Parents the differences between IDEA (and IEPs pursuant to the IDEA) and 504 accommodations, in that to be entitled under the IDEA there had to be an evaluation that established that the disability detrimentally effected Student's ability to access general education services and needed special education or related services. Rather than address this possibility, Father indicated Student did not need special education related services.

Now while Mother indicated there was never a refusal an evaluation[7] as none was offered, I believe the totality of the evidence is that District offered an evaluation, but one that was meant to determine whether or not Student needed special education or related services, not the sort of evaluation unrelated to whether or not Student's disability triggered the need for special education and/ or related service. Stated alternatively, the

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interpretation is accepted as to the statutory construction "specific concern about a pattern of behavior", these children whether or not disabled under 504 or the IDEA or otherwise would have the right to a hearing and that would render 20 U.S.C. Sec. 1415(k)(5) A) and 1415(k)(5) (D) meaningless for such children. This runs counter to the general rule of statutory construction to construe each clause to give it effect. That is, I misspoke.

[6] Section 1414 (a)1(B) refers in subsection C to the same defined term of child with a disability and thus has the component of determining whether this is an educational deficit and the need for special education or related services.

[7] And at the bar of the court on May 5, 2016 for the first time asserted she requested an evaluation. The undersigned asked Mother as to this, at the hearing as to whether she wanted an evaluation in this procedure Mother declined.

Parents did not oppose any evaluation just one that may tie the Student to the need for special education or related services. In this same manner, the categorical and uncontradicted refusal of Father of Student's receipt of special educational services or related services inquiry also meets the condition for this exception to the deemed knowledge exception.

While it may be true that the District's School Psychologist agreed with Father that there was no education effect from Student's mood disorder, and no need for special educational and/or related services, that agreement does not mean the exception from deemed knowledge does not apply. Nor should it. Parents know their children and there is nothing presented here other than an agreement of both parents and district not to go the route of special education or related services. It was simply a choice. However, as a part of that choice it leads to Student's expulsion and manifestation not being reviewable by this tribunal. It is also noted that the only evidence submitted as to academic performance does not support any argument that Student's mood disorder causes a need for special education.

Lastly, as to any conclusory claim that section 504 matters are before this tribunal by statute or case law, Petitioner/Student has submitted no authority to this effect despite multiple requests and it is found that the same is not applicable. The original letter appointing me clearly indicates I was appointed only under the IDEA and makes no mention was as to Section 504. Now in other states, there may be a different procedure, but here there is simply no authorization or statute vesting me with authority to decide claims only under section 504.

V. **ORDER.**

After a hearing and evidence, it is found that this tribunal and the undersigned lack jurisdiction to grant the relief requested by Student under either the IDEA or Section 504 (as it has no jurisdiction for 504 claims). This is a final order and pursuant to 14 Del. Admin. Code 926.16.1 and 926.16.2, any party aggrieved by the findings and decision may appeal to the Family Court in and for the State of Delaware or the United States District Court for Delaware if done within ninety (90) days of this decision.

So Ordered this _____ Day of May, 2016.

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Gary R. Spritz, Esq.