KENTUCKY DEPARTMENT OF EDUCATION
DIVISION OF EXCEPTIONAL CHILDREN SERVICES
EXCEPTIONAL CHILDREN APPEALS BOARD
AGENCY CASE NO. 1617-21

KENTON COUNTY SCHOOLS APPELLANT

V. **FINAL DECISION AND ORDER**

[redacted]. APPELLEE

This appeal comes before the Exceptional Children Appeals Board panel (hereinafter "ECAB") following a hearing conducted by Hearing Officer Paul Whalen. The panel, consisting of Kim Price, Karen Perch, and Mike Wilson, Chair, was appointed to consider the appeal of the school. The parties filed briefs, which have been reviewed by the panel. The decision was delayed due to issues involving transmission of the record to the ECAB panel, and then due to a problem with the format of videos introduced into evidence at the hearing, but both issues were resolved.

Having reviewed the record in its entirety, including the briefs of the parties, ECAB issues this final decision and order.

I. PRELIMINARY ISSUES

A. JURISDICTION OF THE APPEAL

This is an appeal of a decision of a due process decision issued by a Hearing Officer as permitted under 707 KAR 1:340; Section 12, which provides that

> [a] party to a due process hearing that is aggrieved by the hearing decision may appeal the decision to the members of the Exceptional Children's Appeals Board as assigned by the Kentucky Department of Education. The appeal shall be perfected by sending by certified mail to the Kentucky Department of Education a request for appeal within thirty (30) days of the date of the Hearing Officers decision.

This appeal was requested timely.

B. THE STUDENT BEARS THE BURDEN OF PROOF

The party seeking relief bears the burden of proving their entitlement to relief by a preponderance of the evidence. In this case, the student filed the due process complaint and bears the ultimate burden of persuasion on the elements of student's claims. *Schaffer v Weast*, 546 U.S. 49, 57-58 (2005); KRS 13B.090 (7).

C. ECAB IMPARTIALLY REVIEWS THE RECORD DE NOVO AND MAKES A DECISION INDEPENDENTLY

The school takes issue with some fact-findings by the hearing officer. ECAB reviews de novo and can make fact-findings it deems necessary to address legal issues raised on appeal.

Where a State has established a two-tier administrative process, the appellate review is to be conducted pursuant to 20 U.S.C. § 1415(g). Kentucky has adopted such a two-tier system. See 707 KAR 1:340, Section 12. ECAB is required to "conduct an impartial review" of a hearing decision and to "make an independent decision upon completion of such review." 20 U.S.C. § 1415(g). Elaborating on the statutory language, 34 CFR §300.514(b)(2) provides that the appellate panel is to examine the entire hearing record before making its independent decision.

The only limitation on the de novo review is that ECAB must give deference to hearing officer fact findings based on credibility judgments unless nontestimonial, extrinsic evidence in the record would justify contrary conclusion or unless the record read in its entirety would compel a contrary conclusion. *Carlisle Area School v. Scott P. By and Through Bess P.*, 62 F.3d

520, (C.A.3 (Pa.) 1995). Such deference applies only "to those situations involving record-supported credibility determinations." *Id*., p. 529. This panel is free to make fact findings contrary to the hearing officer's findings so long as they are supported by substantial evidence and are based not upon different views about credibility of witness testimony. *Id.*, p. 529. The existence of conflicting testimony does not, by itself, warrant concluding that a related fact-finding was implicitly a credibility determination of evidentiary facts by the hearing officer rather than "differences in overall judgment as to proper inferences." *Id*. P. 529.

II. THE SCHOOL DISTRICT FAILED TO IMPLEMENT THE STUDENT'S IEP IN VIOLATION OF 707 KAR 1:320

The student's May 5, 2016 IEP, which covered the beginning of the student's freshmen year, called for the following: a break pass system, direct instruction in the use of technology, direct instruction in self-monitoring and self-evaluation, access to a sensory diet, extended time, guided support in practice of mathematics problems, electronic access to assignments, digital copies of teacher's notes or guided notes, chunking of assignments, sequencing of assignments or tasks, use of music, instruction in coping and social skills two (2) times per week, access to a cool down area and collaborative language arts and mathematics.

Early on in the school year the parents became concerned about the student's poor grades and missing assignments, as well as his behaviors and the communications between school and home and sought an ARC meeting. The September 29, 2016 IEP that came as a result of that meeting called for the following: direct instruction in the use of technology, a break pass system, direct instruction in self-monitoring and self-evaluation, chunking of assignments, sequencing of assignments, access to a sensory diet, work breaks, extended time, use of music, guided support and practice of mathematics problems, instruction in coping and social skills in the resource room, access to a cool down area, and collaborative language arts and math class.

At the September 2016 ARC meeting the parents brought their outside mental health therapist. It was recommended that there be a consultation from a behavioral consultant to address the student's behavior, but that did not occur. Also, the student was eventually placed in the KTAP room, a room for students with mental health disorders that are receiving counseling from the school's counselors and therapist. He was placed in this room despite not meeting the criteria for the KTAP program.

The December 13, 2016 IEP called for the following: access to a sensory diet, clear and concise directions, access to a cool down area, behavior chart with rewards and reflection, frequent praise, social stories and role playing, extended time, reduced work load, chunking of assignments into smaller assignments with individual due dates, use of music, color card system, use of technology for writing and organization skills, teacher/guided notes, access to resource room, digital access to assignments, collaboration between the occupational therapist and teachers, instruction in coping and social skills twenty (20) minutes per day in the resource room, math and writing instruction in the resource room.

The student's special education case manager, M.G., also served as the student's collaborative math teacher despite the fact he did not have any certification or expertise in teaching mathematics. During the second trimester of the 16-17 school year, the student was moved into a math class that did not have a collaborative special education teacher in it at all. The student was in a Renaissance class for language arts and history. This was an accelerated class with very few students who had an IEP. The class worked regularly on group projects and the teacher found it difficult to modify the student's work in order to allow the student to be a regular member of the group. It is not clear how much, if any, collaborative support was provided to the student in the

language arts class. M.G. testified he did not believe the student was making progress on his IEP goals.

At least one teacher, Veronica Kumar, testified that she was not familiar with exactly how the student's diagnosis affected the student or the details of the student's IEP. M.G. had given the teachers a "snapshot" of the student's IEPs at the beginning of the year and the teachers had access to the IEPs on Infinite Campus. However, as testified to by M.G., regular education teachers are not typically familiar with IEPs and need instruction in implementing IEPs. Evidence was not introduced of specific training the teachers received regarding this student and how to implement the student's IEP. No teacher voiced an understanding of their exact role in providing the student instruction under his IEP. The occupational therapist did send a PowerPoint to the student's teachers, but it was generally on the types of disabilities that the student had and not related specifically to the student.

A. THE SCHOOL DID NOT MAKE GOOD FAITH EFFORTS TO IMPLEMENT IEP REQURIEMENTS TO ADDRESS THE STUDENT'S SENSORY AND BEHAVIOR ISSUES.

The student's behavior issues, resulting largely from his sensory issues, was the major problem to the student effectively functioning in school, yet it seems the area where the school most failed to implement the IEP. Every IEP addressed the issue, but follow-through by the school was sparse.

(i) Break Pass System. A break pass system was included in May and December IEPs. A color card system was added in December. Testimony was the student did not use these. It is the school's responsibility to implement the systems, not the student's. There was no evidence introduced of what efforts the school took to implement these systems. It appears they merely acquiesced in the student not using the system.

(ii) Behavior Chart and De-escalation. Considering this student's sensory and behavioral issues it was particularly important that a behavior chart be implemented and followed and the child have clear methods to de-escalate. All IEPs required access to a cool down area. The May and September IEPs required direct instruction in self-monitoring and self-evaluation. In May, coping and social skills were to occur two (2) times per week. As behaviors escalated the September IEP moved this instruction to the resource room and in December increased the instruction in this area to 20 minutes per day in the resource room. Further, the self-reflection time that the student was to have twice a week in a resource setting was not consistently given and it was not documented how the program worked. M.G. testified that he used reflection time at the end of the day with the student to address how the student could better address situations, but no evidence was introduced to prove how this allegedly occurred, what instruction was given, or what items were worked on.

It seems very unclear where this student was and who was in charge of the student on a daily basis. No written behavior plan was introduced into evidence. There was a de-escalation plan which originally called for the student going to the assistant principal, Ms. Stewart's office, to cool down when the student needed to. However, that ended fairly early on in the school year after problems between her and the student. Testimony was even more unclear where the student was to go at that time in order to de-escalate. The break pass and color card system was never implemented and basically teachers would email each other when the student left their class going elsewhere and when the student arrived. This resulted in periods of time where the student was essentially unaccounted for and reasonably resulted in confusion to the student as to who the student was to use as a contact point when he needed to de-escalate and how he was to do so.

Although, with the increased behaviors the December IEP added a requirement of a behavior chart with rewards and reflection, no clear behavior chart was developed.

Concerning the positive rewards, the school relies on its positive behavior program, Positive Behavioral Interventions in Supports Program (PBIS), which is used with every student. If the student behaves appropriately in accordance with the program, the student is awarded Eagle Cash which can be cashed in to purchase items the student wishes to have. This is used for all students in the school and is therefore not specific under the student's IEP.

Originally, E.P. was a co-teacher with special education teacher M.G. during the first trimester of the 2016-2017 school year. Her classroom had to be evacuated on two (2) occasions due to the student's defiant behavior. One of the occasions, the SRO talked the student into doing what was asked. V.K. also co-taught with another special education teacher, Mr. P., during the second trimester, just before the school break. E.K., a regular classroom teacher, felt the student's behavior had exacerbated since the beginning of the second trimester and voiced this at the ARC meeting on December 13, 2016. T.M., a school representative, suggested eligibility in the area of EBD at that meeting due to a recent diagnosis of anxiety, but the student's mother did not believe this was appropriate and the ARC ultimately decided against making the child eligible under emotional behavior disability. On the behavior chart there was much confusion. Assistant principal, C.S., was familiar with the behavior chart but couldn't say what it reflected. Math teacher, V.K., never saw the behavior chart and E.K. confused the behavior chart with a check-in and check-out sheet. The principal was not familiar with the behavior chart.

(iii) Instruction in Technology. All Three (3) IEPs specifically called for direct instruction in the use of technology and writing applications. This was not consistently received and in fact several teachers testified that the student told them he knew how to use the technology and the

student was not given further instruction. Obviously, if the IEP calls for direct instruction it would not matter if the student said he knew how to do it unless the student had exhibited through shown data that he had reached the goal of using the technology. The requirement remained in all three (3) IEPs. If the need no longer existed due to mastery, it should have been removed from the IEP. The student cannot simply ignore the IEP.

(iv) Math and Writing Supports. The child was identified as needing academic supports in math and writing. May and September IEPs required guided support in math problems and collaborative language arts instruction. The December IEP placed these services in the resource room. If the IEP was being implemented, one would expect less need for services and not an increase to provision of services in a resource setting. M.G. was not certified to teach math. There was a period of time without a math resource teacher and teachers changed several times. At least one time a regular education teacher refused to assist the student with a math problem because he was not showing his work. Even when he told her his IEP allowed him to use a calculator, she would not assist him. This incident led to a disciplinary matter. The District wishes to claim that the student did not avail himself of his IEP services and chose to not attend fourth period math class. However, the student's parents were not informed of this and the District cannot use a student's refusal to engage in services as an excuse for not having the services provided to the student.

(v) Music and Hoodie. There was provided use of music in the IEP to assist the student in writing productivity. He was also allowed, at some point, to wear a hoodie. However, staff was unclear about this and the student was disciplined on more than one occasion for using earbuds or headphones. There were also similar issues about the student wearing his hoodie. Ultimately, the principal sent an email to all staff to not engage with the student and included a photo of him with

the email. If staff did not know when the child could use these accommodations, the school was clearly not implementing the IEP in that regard.

The student sustained concussions in October and November 2016 and, as a result, at the student's December 2016 ARC a concussion protocol was discussed that would reduce the student's workload by fifty percent (50%), excuse missing assignments due to absences related to the concussion and maximum of one (1) hour homework per night was permitted. All of the teachers did not get a copy of this protocol and it was not always followed.

707 KAR 1:320, Individual education program, states in relevant part as follows:

> Section 1. Individual Education Programs. (1) An LEA shall ensure an IEP is developed and implemented for each child with a disability served by that LEA…
>
> (3) At the beginning of the school year, an LEA shall have an IEP in effect for each child with a disability within its jurisdiction.
> (4) An LEA shall ensure the IEP:
> (a) Is in effect before specially designed instruction and related services are provided to a child with a disability; and
> (b) Is implemented as soon as possible following an ARC meeting.
>
> (6) An LEA shall ensure that:
> (a) The child's IEP is accessible to each regular education teacher, special education teacher,
> related services provider, and other service providers who are responsible for its implementation;
> (b) Prior to the implementation of the IEP, each implementer is informed of his specific responsibilities related to implementing the child's IEP; and
> (c) The specific accommodations, modifications, and supports are provided for the child in
> accordance with the IEP.
>
> Section 5. Contents of IEP. (1) An ARC shall consider in the development of an IEP:
> (a) The strengths of the child and the concerns of the parents for enhancing the education of their child;
> (b) The results of the initial or most recent evaluation of the child;
> (c)As appropriate, the results of the child's performance on any general state or districtwide assessment programs; and
> (d) the academic, developmental, and functional needs of the child.
> (2) An ARC shall:

(a) In the case of a child whose behavior impedes his or her learning or that of others, consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior; ….

(f) Consider whether the child requires assistive technology.

(3) All the factors listed in this section shall be considered, as appropriate, in the review, and
if necessary, revision of a child's IEP.

(4) Once the ARC has considered all the factors listed in this section the ARC shall include a statement on the IEP indicating the needs for a particular device or service (including an intervention, accommodation, or other program modification), if any are needed, in order for the child to receive a free appropriate public education (FAPE).

….

(7) The IEP for each child shall include:

(a) A statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general curriculum as provided in the Kentucky Program of Studies, 704 KAR 3:303, or for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities; and

(b) A statement of measurable annual goals, including academic and functional goals, designed:

1. Meet the child's needs that result from the disability to enable the child to be involved in
and progress in the general curriculum as provided in the Kentucky Program of Studies, 704 KAR 3:303, or for preschool children, as appropriate, to participate in appropriate activities; and
2. Meet the child's other educational needs that result from the disability.

(c) A LEA's procedures may determine the use of benchmarks or short-term objectives for a
child's IEP.

(8) An IEP shall include a statement of the specially designed instruction and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable to be provided to the child, or on behalf of the child. There shall also be a statement of the program modifications and supports for school personnel that will be provided for the child to:

(a) Advance appropriately toward attaining the annual goals;

(b) Be involved and make progress in the general curriculum;

(c) Participate in extracurricular and other nonacademic activities; and

(d) Be educated and participate with other children with and without disabilities.

(9) An IEP shall contain an explanation of the extent, if any, to which the child will not participate with nondisabled children in regular classes.

….

(12) An IEP shall include the projected date of the beginning of the services and modifications listed on the IEP and the anticipated frequency, location (whether regular or special education), and duration of the services and modifications.

(13) An IEP shall include a statement of:

(a) How the child's progress toward meeting the annual goals will be measured; and …
(d) When periodic reports on the progress the child is making toward meeting the annual goals, (which may include the use of quarterly or other periodic reports concurrent with the issuance of report cards) will be provided.

….

Section 9. IEP Accountability. (1) An LEA shall provide specially designed instruction and related services to each child with a disability in accordance with his IEP and shall make a good faith effort to assist the child in achieving the goals, objectives, or benchmarks listed in the IEP.

Implementation of the IEP is crucial to a child receiving FAPE as recognized in Section 1(1) above. Section 1(6)(b) requires that "prior to implementation of the IEP, each implementer is informed of his specific responsibilities related to implementing the child's IEP." In the testimony M.G. merely sent "snapshots" of the IEP to the teachers. It was stated that he discussed it generally with teachers, but no teacher nor M.G. testified what their specific duties were in implementing. It seems everybody in the building relied on someone else to implement the IEP.

Section 5(8) requires specifically designed instruction, related services and supplementary aids to be "based on peer-reviewed research to the extent practicable". Behavior was the center of all concerns in this matter, yet the school presented no evidence of the content of the reflective time curriculum or method used with the student to help him with coping strategies during this time. In fact, specifics of what was covered during these so called "reflective times" was not presented. Accordingly, the ECAB cannot even begin to ascertain if it was a peer-reviewed method that would reasonably lead to implementation. The same is true of the card systems and de-escalation plan which appeared to be fluid at best.

Honing v Doe, 484 US 305 (1988) held that an IEP is the centerpiece of the special education delivery system for disabled children. Implementation of the IEP is essential to obtaining FAPE. An IEP must be consistently implemented in order to provide a disabled student with a free and appropriate public education. The regulation requires that specific

accommodations, modifications, and supports are provided for the student in accordance with the student's IEP. Further, when a student's behavior is impeding his learning, the District must consider strategies such as positive behavioral interventions and supports to address the behavior. All people delivering the special education services must be appropriately trained in the IEP and how to implement it. The school failed to make reasonable efforts in those regards.

34 CFR 300. 350A requires that a District provide special education and related services to a child with a disability in accordance with the IEP and make a good faith effort to assist the child to achieve and objections or benchmarks listed in the IEP. *JK v Fayette County Schools, Civil Action 04-158-JBC (January 30, 2016)* held that good faith efforts existed when a district made changes in a student's educational program. Such an adjustment in gradual change from regular classroom to a resource was not implemented in this case. The child was moved about willy-nilly from room to room depending largely on his daily behavior. *Lathrop RHR-II School District v Gray, 611 Fed 3rd 419 (8th Circuit 2010)* held that good faith efforts included adjusting services and supports for a student. *CJN v Minneapolis Public Schools, 323 Fed 3d 630 (8th Circuit 2003)* also recognized changes in an IEP could be proof of good faith efforts at implementation. In the case at hand there were changes to the IEP which seemed to recognize the increased need for services, especially in behavior, but proof of actual consistent efforts at implementation was sparse, at best.

The 7th Circuit in *Alex R. ex rel Beth R. vs Forestville Valley Community Unit School District #221, 375 F3d 603 (7th Circuit 204)* recognized that adding a training to a student's IEP might be necessary in order for a school to be making good faith efforts at implementation noting that

> "although good faith is an abstract quality, at least where the school district possesses the means to provide the necessary training, it could reach the obligation

> of good faith by creating a theoretically valid IEP, but then deliberately sabotaging the student's chance to reach the IEP goals by depriving its staff members of necessary training."

The training did not occur in the case at hand. It is not sufficient for the case manager to give a "snapshot" of an IEP to regular education teachers or that regular education teachers have a copy of the student's IEP through Infinite Campus. As noted by the special education case manager in the case at hand, regular education teachers are not well versed in IEPs and there must be consistent training on the specifics with each student. It is clear that at least one teacher, Ms. Kumar, did not understand what the student's disability meant or how to implement the plan. Also, on one behavioral referral in January 2017 when the student asked a teacher for help, the student explained he could use a calculator, the teacher would not discuss the IEP with the student and said he would have to go see the assistant principal. This is further evidence that staff was not trained. There was not even a collaborative math teacher certified in mathematics. There was some evidence of chunking or modification of work, but largely after the request for Due Process Complaint was filed. *MRD by KD vs Fayette County Board of Education, 2001-CA-002537-MR, Slip Opinion (March 7, 2013)* stated that when there was no evidence that teachers have a real understanding of student's disabilities or that the IEP was implemented, a finding must be made in favor of the student that there was not implementation of the IEP.

Although not dispositive to this decision 707 KAR 1:320 goes further to include other service providers. It is arguable that an SRO, a school resource officer, who may be required to deal with a student who has behavioral disabilities would receive such training. It is unclear in this case whether this is required. However, it is clear to this ECAB that the School District cannot obviate its requirement for training by contracting with outside agencies and future consideration

should be given to training SRO's in implementation of student's with behavioral related disabilities and how to handle that student.

B. THE LEAST RESTRICTIVE PLACEMENT HAS NOT BEEN FOLLOWED SINCE THIS STUDENT BEGAN THE SCHOOL YEAR IN THE REGULAR CLASSROOM AND ENDED THE SCHOOL YEAR IN A RESOURCE ROOM MOST OF THE TIME.

It was never addressed in the IEP that the student could voluntarily not attend classes on a regular basis and be in the resource room. Initially, it was unclear where the student was to go for de-escalation and it appears that shortly before the filing of the Due Process Complaint, the student was placed in the KTAP room even though he did not meet the requirements for that room. The student was ultimately placed in the resource room outside of the regular classroom, which was essentially a change of placement in failing to place the student in the least restrictive educational setting. Oddly enough the testimony introduced as to occurrence after the date of the filing of the Due Process Complaint seemed to indicate that this room was fairly successful for the student, but the District never submitted the student to the actual program.

C. **THE SCHOOL WAS ON NOTICE THAT IMPLEMENTATION OF THE IEP WAS AN ISSUE.**

The School District argued that it was not on notice of its failure to make good faith efforts to implement the IEP as relates to a lack of FAPE. However, issue 6 of the Due Process Complaint specifically states, "…students need for additional support has also increased. Unfortunately, the District has failed to provide the needed emotional and sensory supports and has also failed to provide student with even the basic educational supports called for in his IEP." Clearly, that states two (2) separate claims. One, that there is a need for additional support, and two, that the school failed to make good faith efforts of implementing those supports in the IEP. The second claim that District even failed to provide the student with even basic supports called for in his IEP clearly

means there is an allegation of failure to implement the IEP. It is logical when something is not working, as was clear in each of the multiple ARC meetings in this case, that good faith efforts at implementation would require doing something differently.

D. THE SCHOOL FAILED TO PROPERLY GATHER AND ANALYZE DATA CONCERNING IMPLEMENTATION.

Throughout the entire relevant time period, the Student has had an IEP with goals for written expression and behaviors. Math goals were also added. The school district did document missing assignments, as they would in progress reports for all students. The primary impediment to the Student's learning, however, appears to have been his behaviors. The May 2, 2016, September 29, 2016, and December 13, 2016 IEPs and conference summaries all indicate that the Student's behavioral issues impede his learning. For this reason, the ECAB focuses its review and analysis of data collection efforts on data collected regarding behaviors.

In mid to late November of the Student's ninth grade year, several teachers completed Sensory Profile forms, one section of which asked questions about classroom behaviors, and asked teachers to assess the frequency in which various behaviors occurred. The five possible choices for each question ranged from "almost always" to "almost never." These forms appear to be based on each teacher's recollection or impression and not on any actual underlying data. The teachers who completed these forms filled them out once only, so it is not possible to ascertain whether or not there was any improvement or decline over time.

Teachers also completed the NICHQ Vanderbilt Assessment Followup, which appear to have been completed around, or on the same date as the Sensory Profile. For this rating scale, teachers were asked to respond in the context of what is appropriate for the age of the child being rated and the child's behavior since the last assessment was filled out. No documents were submitted to show that this assessment had been completed for this Student previously. Again,

the responses in the section identifying behaviors give teachers a range of choices (four for each symptom), ranging from "never" to "very often." These scales appear to have been completed at a single point in time and no underlying data was submitted to support teacher responses.

Petitioner submitted an undated document entitled "IEP Progress Monitoring Data," which appears to be an attempt to summarize progress toward the Student's behavioral goal and the two short term benchmarks. The stated goal and benchmarks appear on the Student's IEP at least as early as May 2, 2016. Monitoring data dates appear to be missing and if the summary shows anything at all, it shows that the Student's progress toward achievement of the benchmarks decreased, rather than improved. It is not possible to know how this "data" was collected, by whom or how often. It is not possible to know whether the apparent decline was before, during or after the Student's concussions.

It is likely that the Sensory Profiles, NICHQ Vanderbilt Assessment Followup, and possibly the summary submitted by the Petitioner were the data sources used at the December 13, 2016 meeting. Prior to that time, the ninth grade IEP used, word for word, the middle school assessment of the percent of time in which the Student complied with teacher redirection and appropriate response to teacher requests. Another possible data source was the Behavior Detail Report, containing six incident reports of problem behaviors prior to the December 13, 2016 ARC meeting.

None of the documentary evidence in the record shows systematic collection of data to document Student progress, or lack thereof, toward behavioral goals and benchmarks. The December 2016 IEP included language about a behavior chart with rewards and reflection, which presumably would have been different from the Eagle program used with all students in the school,

but there is no data to show that this ever occurred. In addition, when one considers the teachers' confusion about this behavior chart, it is apparent that it was not implemented.

E. THE SCHOOL FAILED TO IMPLEMENT THE IEP THROUGHOUT THE ENTIRE SCHOOL YEAR.

Based on the findings hereinabove, to the extent that the Hearing Officer held that the IEP was properly implemented until the second trimester when the student suffered his concussions, the decision is OVERRULED and the ECAB finds that the District failed to implement the IEP from the beginning of the school year through the date of filing for due process on February 6, 2017, a period of nearly 6 months.

III. THE HEARING OFFICER CORRECTLY ORDERED THAT A MANIFESTATION DETERMINATION BE CONDUCTED.

Failure to conduct a manifestation determination when one is required under applicable law is a denial of FAPE.

A. THE HEARING OFFICER HAS AUTHORITY TO ORDER THE LEA TO CONDUCT A MANIFESTATION DETERMINATION IF THERE ARE GROUNDS FOR DOING SO.

In the present case, the school did not conduct a manifestation determination. The student's complaint does not list failure to do so as an issue, nor does it request as a remedy that the hearing officer order a manifestation determination. However, one of the issues identified by the student in the due process complaint was whether "[the student's] behaviors are a manifestation of his disability…"

The school is correct that a hearing officer cannot conduct a manifestation determination. 34 CFR 300.530(5)(e) states as follows:

> (e) Manifestation determination.
>
> (1) 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 LEA, the parent, and

relevant members of the child's IEP Team (as determined by the parent and the LEA) must 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—

(i) If the conduct in question in was caused by, or had a direct and substantial relationship to, the child's disability; or

(ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

(2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met.

(3) If the LEA, the parent, and relevant members of the child's IEP Team determine the condition described in paragraph (e)(1)(ii) of this section was met, the LEA must take immediate steps to remedy those deficiencies.

Because the hearing officer is not the LEA, the parent, or a member of the IEP Team, the hearing officer cannot conduct a manifestation determination. However, the allegations in complaint sufficiently raise manifestation determination as an issue that, even though not specifically requested, that the school's failure to conduct a manifestation determination is implied as an issue and the school's failure to conduct such a determination is a denial of FAPE remediable in a due process proceeding. Thus, a hearing officer can order a manifestation determination if there are grounds for doing so.

B. THERE WAS A DISCIPLINARY CHANGE OF PLACEMENT.

A manifestation determination is necessary only if there is a disciplinary change of placement, which is defined under 34 CFR 300.536(a) as follows:

(a) For purposes of removals of a child with a disability from the child's current educational placement under §§ 300.530 through 300.535, a change of placement occurs if—

(1) The removal is for more than 10 consecutive school days; or

> (2) The child has been subjected to a series of removals that constitute a pattern—
>
> (i) Because the series of removals total more than 10 school days in a school year;
> (ii) Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
> (iii) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

Subparagraph (1) does not apply because there was no removal for more than 10 consecutive days. (see H.O. Finding of Fact #83).

But subparagraph (2) is based upon a series of removals that constitutes a pattern, rather than a single removal of consecutive days. The series of removal provision has three elements, all of which must be present. One of those elements is that non-consecutive removals total more than 10 days in a school year. When combined, the non-consecutive days of out-of-school suspensions do exceed 10 days (see H.O. finding of fact #83). In addition, the student experienced a number of disciplinary actions, such as detentions and in-school suspensions. As quoted in the school's brief, commentary by the Department of Education takes the position that

> in-school suspension would not be considered a part of the days of suspension addressed in Sec. 300.530 as long as the child is afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified on the child's IEP, and continue to participate with nondisabled children to the extent they would have in their current placement.

IDEA, 71 Fed. Reg. 46715 (August 14, 2006). Although the parent testified that on days when the student attended in-school suspension he often completed his assigned work and was productive at home on those evenings (PO328), that does not meet the above standard. The in-school suspensions add to the total of the removals and also illustrate the pattern that constitutes a change of placement.

ECAB finds that the other two requirements of subparagraph (2) also are met. The behaviors involved in the removals are similar enough (requirement ii) and the length of

removals, total time of removals, and proximity of removals to each other (requirement iii) are such that a manifestation determination is required and the hearing officer was correct to order that one be conducted.

IV. THE HEARING OFFICER'S ORDER THAT A FUNCTIONAL BEHAVIOR ASSESSMENT BE CONDUCTED WAS PREMATURE.

34 CFR 300.530(f)(1) describes a step-by-step process that begins with a manifestation determination:

> (f) Determination that behavior was a manifestation. If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must—
> (1) Either—
> (i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or
> (ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior;

The hearing officer is not an LEA, parent, or a member of the IEP team and so could not make a manifestation determination based upon evidence at the hearing. The manifestation determination must be conducted first. If the behaviors are determined to be a manifestation, then the IEP team must conduct an FBA, unless one had been conducted before the behaviors that resulted in the change of placement occurred, and implement a BIP or, if a BIP already has been developed, review the BIP and modify it as necessary.

V. THE SCHOOL WAS GIVEN NOTICE IN THE COMPLAINT THAT THE STUDENT CLAIMED THAT SUPPORTS PROVIDED FOR IN THE IEP WERE INADEQUATE.

The school argues in its brief to ECAB that the student failed to raise the issue of adequacy of the IEP in the complaint and did not present proof about it at the hearing. 20 USC 1415(b) (7) requires that a due process complaint, in part, state:

> (III) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and
> (IV) a proposed resolution of the problem to the extent known and available to the party at the time.

20 USC 1415 (f)(3)(B) states that

> [t]he party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b)(7), unless the other party agrees otherwise.

The complaint listed seven issues, including failure to implement the existing IEP, but did not expressly list as an issue whether the IEP was inadequate or should be modified. The complaint requested 11 remedies, none of articulated a request that the IEP be modified. However, the complaint did state the following:

> [The student's] need for additional support has also increased. Unfortunately, the Kenton County School District has failed to provide the needed emotional and sensory supports and has also failed to provide [the student] with even the basic educational supports called for in his IEP.

The language quoted does not state that the IEP is deficient, but it implies that additional supports are needed and there was proof on that point, supporting student's claim that the issue was tried by implication. The adequacy of the supports in the IEP was preserved by student. Additionally, the failures to implement themselves generate a need for modification of the IEP to prevent future failures.

VI. ATTORNEY FEES

20 USC 1415 (i) (3) grants the District Court jurisdiction over the issue of attorney fees. Neither the hearing officer nor ECAB can award attorney fees.

VII. COMPENSATORY EDUCATION

Reid ex rel. Reid v. District of Columbia, 401 F.3d 516, 524 (D.C. 2005) rejects an hour-for hour "cookie-cutter" approach to fashioning compensatory education, instead holding that

> [i]n every case … the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.

FAPE was denied for nearly six months due to failure to implement the IEP. ECAB finds it more likely than not that the behavioral issues and suspensions have a causal relationship to the student's struggles in his classes and, consequently, needs the option of tutoring to help him catch up. The hearing officer's order of 10 days of compensatory education is affirmed, and made more specific in the order below.

ORDER

The case is remanded to the ARC with the following instructions:

1. The ARC shall conduct a manifestation determination and perform whatever other steps are required and appropriate, based upon the determination made and the requirements of applicable regulations.
2. A written BIP should be created and should include the procedure for and location of de-escalation and the roles of teachers and staff in de-escalation.
3. Behavior data using objective measures rather that subjective impressions should be collected systematically and from time to time as determined by the ARC, documenting how, by whom, and when collected, and regularly analyzed to ascertain improvement or decline over time.
4. All persons involved in educating, de-escalating, or disciplining the student should receive training concerning this specific student's IEP and how it affects their roles as teachers, administrators, or staff.

5. The student was denied FAPE for approximately six months due to failure to implement the IEP. The hearing officer's order of 10 days compensatory education is made more specific to mean 60 hours total of tutoring to be offered by the school before classes, after classes, or during the summer at the option of the student.
6. The school shall provide the student with 4 to 6 hours of direct instruction in technology.
7. The student prevailed on most issues, but the hearing officer and ECAB lack authority to award attorney fees.

NOTICE OF APPEAL RIGHTS

This decision and order is a final, appealable decision. Appeal rights of the parties under 34 CFR 300.516 state:

(a) General. Any party aggrieved by the findings and decision made under Sec. 300.507 through 300.513 or Sec. 300.530 through 300.534 who does not have the right to appeal under Sec 300.514(b), and any party aggrieved by the *findings* and decision under Sec. 300.514(b), has the right to bring a civil action with respect to the due process complaint notice requesting a due process hearing under Sec. 300.507 or Sec. 300.530 through 300.532. The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(b) Time limitation: The party bringing the action shall have 90 days from the date of the decision of the hearing officer or, if applicable, the decision of the State review official, to file a civil action, or, if the State has an explicit lime limitation for bringing civil actions under Part B of the Act, in the time allowed by that State law. (Emphasis added).

In addition, 707 KAR 1:340, Section 8. Appeal of Decision provides the following information to aggrieved parties, in subsection (2):

A decision made by the Exceptional Children Appeals Board shall be final unless a party appeals the decision to state circuit court or federal district court.

KRS 13B. 140, which pertains to appeals to administrative hearings in general, in Kentucky, and not to civil actions under Part B of the Act (the IDEIA), provides:

(1) All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not in the enabling statutes, a party may appeal to Franklin Circuit Court of the Circuit Court of the county in which the appealing patty resides or operates a place of business. Copies of the petition shall be served by the student upon the agency and all parties of the record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

Although Kentucky Administrative Regulations require the taking of an appeal from a due process decision within thirty days of the Hearing Officer's decision, the regulations are silent as to the time for taking an appeal from a state level review.

SO ORDERED this 1st day of May, 2018, by the Exceptional Children's Appeals Board, the panel consisting of Mike Wilson, Kim Price, and Karen Perch.

EXCEPTIONAL CHILDREN APPEALS BOARD

/s/ Mike Wilson
BY: _____
MIKE WILSON, CHAIR

CERTIFICATION:

The original of the foregoing was mailed to Todd Allen, KDE, 300 Sower Blvd., 5th floor, Frankfort KY 40601, with copies to Teresa Combs, 230 Lexington Green Circle, Suite 605, Lexington, KY 40503; Marianne Chevalier, 2216 Dixie Highway, Suite 202, Ft. Mitchell, KY 41017; Kim Price, P.O. Box 1189, Owingsville, KY 40360; and Karen Perch, 2333 Alexandria Drive, Lexington, Kentucky 40504-3215 on May 1, 2018.

/s/ Mike Wilson
_____
MIKE WILSON, CHAIR
EXCEPTIONAL CHILDREN APPEALS BOARD