KENTUCKY DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND EARLY LEARNING
EXCEPTIONAL CHILDREN APPEALS BOARD
AGENCY CASE NO 1920-15

[redacted] **PETITIONER**

V **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND EXCEPTIONAL CHILDREN APPEALS BOARD DECISION**

[redacted] **SCHOOLS** **RESPONDENT**

FINDINGS OF FACT

The Due Process complaint was filed on December 9, 2019, seeking "stay put" and other relief for a [redacted] year-old student facing expulsion who, at the time of the filing, had not been identified as a student eligible for special education. The Complaint sought compensatory education and an evaluation for suspected disabilities. On March 11, 2020, a Hearing Officer ruled that Petitioner's request for "stay put" was denied based upon failure to establish the school had a basis of knowledge that the student was a child with a disability pursuant to 707 KAR 1:340. Section 16.

A hearing was held on October 19, October 31, and November 1-3 of 2022, at which time the student was [redacted] years old, being home-schooled, and according to the parent home-schooling [redacted] on track to complete the credits needed to earn a high school diploma.

Student began attending [redacted] Schools at age [redacted] (TE 10/31, pg. 12). Father stated [redacted] did well in elementary school and enjoyed it (TE 10/31, pg. 13). During student's fourth grade year 2014-15 there were no behavior reports. In fifth grade 2015-16 student had one behavior report about an unkind comment to another student. During sixth grade 2016-17 there were four phone calls with the parents in January and February of 2017 regarding student's

inappropriate language in the classroom (Respondent's Exhibit 2). It was in seventh grade at [redacted] School when, according to the father, "the problems actually started to arise" (TE 10/19, pg. 13). The dad testified during seventh grade he was often called by the school for behavior issues characterized as "mostly talking in class". "[there was nothing major at this point. It was, like, [redacted] wouldn't remain in [redacted] seat [redacted] would go to that - somebody else's desk and hang out..." (TE 10/31, pg. 14).

Student's grades in seventh grade remained good and were commensurate with those of [redacted] similar-age peers. Respondent's Exhibit 4 reflects an overall B average. The student was also a star on the track team (TE 10/31, pg. 110 and TE 11/2, pg. 6).

There were several suspensions in seventh grade, but most were in-school suspensions for minor infractions and resulted in student being sent to the ASP classroom for an hour or two (TE 11/2, pg. 81). The student's difficulties were clustered during the first few months of seventh grade, culminating in an out-of-school suspension at the end of November for an incident involving sexual language. After that, there were no behavior reports until February, when student used explicit sexual language and received another out-of-school suspension. There were no behavioral incidents after that until the end of April 2018, when student received out-of-school suspension for fighting. The principal did not believe the Fall 2017 misbehavior was significant, stating " I think a two-month span (of no discipline) would be indicative that we were not having major ongoing issues. It wasn't something that was happening weekly or daily." (TE 10/31, pgs. 20-21).

During seventh grade the student had not been evaluated by any mental health care professional or diagnosed with any psychological condition. Petitioner argued that disability should have been inferred from the student's misbehavior. The principal testified that Student's misbehavior was not atypical for a seventh grader entering Middle School and did not require the

principal's involvement, except once in relation to an incident involving sexually explicit language that upset the parent of another student. (TE 11/2, pgs. 6-20, 81). If the student had been perceived as a major behavior problem during seventh grade, it would have come to the principal's attention, and [redacted] would have been placed in an alternative school within the middle school (TE 11/2, pgs. 25-26).

The parents homeschooled the student beginning in eighth grade because they were getting a lot of calls from the school regarding behavior during the seventh grade (TE 11/1, pgs. 11-12). Student also had friends, including one involved in "the incident" discussed elsewhere hereinbelow, who were being home-schooled (TE 11/1, pg. 296).

An incident occurred on [redacted] (10/31, 72). [redacted] Law enforcement, juvenile court, and Child Protective Services (CPS) were involved. Prior to the incident, the student had never been diagnosed with any sort of psychological condition (TE 10/31, pg. 72).

The involvement of CPS and fear of the potential consequences of [redacted] disposition in juvenile court prompted the student to "run away" meaning [redacted] went to a friend's house when CPS came to student's residence in order to avoid CPS. Student's mother was aware of student's location on these occasions (TE 11/1, pgs. 114-115).

A consequence of running away was that the student was admitted to a residential facility by Student's parents for five (5) days stay, where Student was evaluated. The student's admission to the residential facility occurred when Student was being homeschooled and was prompted by reactions to "the incident" and problems with [redacted] parents, not school behavioral issues. Integrated Psychological Evaluation Report prepared by the school, dated February 26, 2020 reflects the following:

> Documents indicated upon discharge [the student] was diagnosed with Adjustment Disorder with Disturbance of Conduct by Dr. [redacted] M.D. and was prescribed [medication] to help with mood and irritability. Lastly, those records indicated that upon discharge [the student] was able to perform activities of daily life and was given follow-up appointment with therapist and psychiatrist for medication management. (Respondent's Exhibit 24).

The student was not doing school work during homeschooling and the mother was reporting Student as truant, rather than entering zeros (TE 11/1, pg. 73). CPS required that the student return to in-person attendance in the District School (TE 11/1, pg. 14). The court and CPS also required the student to go to counseling (TE 11/1,81). Counseling and reenrolling in school were conditions to avoiding a criminal trial and placement in a juvenile detention facility (TE 11/1, pg. 83).

According to the mother, during court proceedings, there was no discussion of the student's stay at the residential facility or the diagnosis of ODD (TE 11/1, pgs. 14-15). When parents reenrolled the student on February 7, 2019, the registration form filled out and signed by the father stated that the student had not been diagnosed with a disability or special need (Respondent Exhibit 8, TE 10/31, pgs. 73-74; TE 11/1, pg. 91). Neither the residential facility stay, nor ODD was discussed at the February 9, 2019, meeting concerning the student's reenrollment (TE 11/1, pg. 19). In the mother's mind, the only reason for the reenrollment meeting was "the incident" (TE 11/1, pg. 19). Records from the residential facility, or even the fact that the student had been in a residential facility, were never disclosed to the school by anyone prior to the evaluation conducted by the school in 2020.

The parents requested the student be put in an alternative school upon return to public school. The mother testified an additional restriction was requested by parents. "[M]y husband said, don't let [Student] have a phone right now." (TE 11/1, pg. 97).

The student could not be placed at the stand-alone alternative school because one of the victims of "the incident" was enrolled in that school, so upon readmission Student was placed primarily in an ASP classroom in the Middle School and during the remainder of eighth grade attended homeroom and math class outside the ASP classroom.

At the time the student and parents entered into an agreement regarding reenrollment. There was no objection from parents or student regarding the ASP setting (TE 10/31, pgs. 76-77). Later, that changed.

[redacted] provides counseling services outside of schools. Additionally, the District provides [redacted] office space inside the Middle School. [redacted] is not an employee or contractor of the school and works independently, contracting with parents and their children. After the stay in the residential facility, student saw [redacted] outside school and then established a relationship with the [redacted] counselor at the Middle School. The parents gave permission for the student to see a psychologist at school during the spring of 2019, but on the express condition that the psychologist not provide any information about the student to the school (TE 10/31, pgs. 85; 90-91). The first appearance of a diagnosis of ODD in school records is in the evaluation performed by the school in 2020, which refers to a diagnosis in March of 2019 (TE 11/1, pg. 58).

During Student's return to school in eighth grade, the student met with the principal and guidance counselor whenever Student liked, which was about once a week (TE 11/2, pg. 40). Notes, apparently kept primarily by the math and homeroom teacher during this period, (Respondent's Exhibit 11) reflect that the student continued to be disruptive, often talking in class or using sexual language. The principal testified that,

> the use of foul language and being mouthy have a pretty typical occurrence at middle school. I would say that more students than not are experimenting with

using some foul language and talkativeness. They are pretty social creatures.

(TE 11/2, pg. 47). The math teacher characterized the student's misbehaviors as seeking attention from peers (TE 11/3, pg. 71). The student's behaviors were not serious enough to generate any Behavior Detail Reports during eighth grade (TE 11/2, pg. 23).

The student basically had done no work in home-schooling since the time of the incident until Student reenrolled in February of 2019 (TE 11/1, pg. 74). However, the student managed to pull out passing grades and was prepared for ninth grade (TE11/1, pgs. 77-78) Student made a 54 for the 9 weeks and a 62 for the semester in math in end of 8th grade (TE 11/3, pg. 68). Student is capable of earning higher grades than those received in eighth grade (TE 11/3, pg. 75). However, as described above, student basically did no work at all during homeschooling and had a lot of catching up to do. Though Student ended up with a D minus in math, Student's overall grades average C, notwithstanding that Student did not attend school for most of the eighth-grade year (TE 11/2, pg. 48; and Respondent's Exhibit 13). The principal was cross-examined regarding the effect of the student's misbehaviors on Student's learning:

> Q. How is this child who is exhibiting these behaviors learning in [Student's] academic environment?
>
> A. Because the vast majority of the time, [Student's] not exhibiting those behaviors, so [Student] is learning. In that moment that [Student's] blurting out. sure, [student's] not learning. But it's not a continual habitual everyday behavior in any single class that would prevent that child from learning; [the student] or anybody else.

(TE 11/2, pgs. 68-69).

The student's behaviors *at school* in eighth grade were less serious than during seventh grade. While "the incident" was very serious. it occurred outside of school and did not in itself suggest the student needed special education.

Behavior Detail Reports reflect that student had eight reported misbehaviors in August, September, October and the first half of November of Student's high school freshman year for

things such as skipping class, rude comments, and vaping (Respondent Exhibit 2). On November 18, the student was sent home from school for threatening to fight a student who made a comment about Student's grandfather. Then, on November 20, assorted events occurred, including a "terroristic threat" which the student does not deny making. On the bus a student threatened to shoot the principal and another student. This threat led to Student's suspension and ultimately, expulsion. The student chose to be home-schooled after that, despite the school offering services while student was expelled (TE11/1, pg. 78).

For ninth grade, 2019-2020, prior to expulsion, the student had passing grades that average out to a high C (Respondent's Exhibit 26).

Except for the events surrounding student's expulsion, student's misbehaviors were not significantly atypical. No expert testified that such behaviors demonstrate that student had a disability requiring special education. While Student may be capable of earning higher grades if Student wants to, student's grades were comparable with peers. The school had no information that any mental health professional had diagnosed student with any psychological condition. While the school knew student saw the in-school Pathways psychologist between March and May of student's eighth-grade year, not all students who see the psychologist are children with disabilities and, at the instruction of the parents, no information concerning the student was shared with the school.

Subsequent to the expulsion, the student filed for due process and based upon the expressed concerns of the parents, the school conducted an evaluation for eligibility in the categories of emotional behavior disorder (EBD) and other health impairment (OHI). The student was found ineligible under the category of EBD and eligible under OHI.

The ARC found that the student did not demonstrate over a long period of time and to a marked degree any of the 4 characteristics for EBD. As described elsewhere in these fact-findings,

except for the "incident" during eighth-grade home-schooling, and the event in ninth grade that led to student's expulsion, the student's misbehaviors were not markedly different from other student's age. No doctor diagnosed student with EBD, and no evidence was presented that specially designed instruction was required in order for Student to benefit from education. Additionally, the two isolated events (the "incident" and the "terroristic threat") were not proved to be involuntary results of a psychological condition, rather than intentional, wanton, or willful actions.

No health professional treating the student has at any time recommended that the student be provided special education or accommodations. The school psychologist, the only professional with mental health expertise participating in the evaluation of the student, does not believe the student even qualifies for special education under OHI. She did not file a written dissent to the ARG OHI eligibility determination. The student's misbehaviors generally were not the type that require or are remediable by special education. The school psychologist testified "for [the student] it was specifically not putting away [student's] cell phone when told, not turning in assignments when told, talking out in class. Those were the kinds of behaviors [student] had." (Transcript 11/1, pg. 215; TE 11/1, pg. 217).

Those treating the student after "the incident'" prescribed medication and counseling. Student reported that student stopped taking medication prescribed by the residential facility in January of 2019 after a month, even though student's parents and family could tell a difference when student was on medication. Student just didn't like taking medication generally (Respondent's Exhibit 24). [redacted] in-school psychologist saw the student several times between March 18 and May 6 of 2019, but the student discontinued those services (TE11/1, pg. 150). As part of the school's evaluation in February 2020, a copy of the District's Medical Evaluation for Specially Designed Instruction Eligibility Determination for OHI was given to the

parents on January 22, 2020, to be completed by the student's health care providers, but it was never returned, as noted in the February 2020 evaluation (Respondent Exhibit 25).

At the hearing of this matter, more than two years after the due process complaint was filed, there still was no report from any mental health professional recommending or suggesting special education is appropriate or required for this student. There was no evidence that forbidden cellphone use, talking in class, etcetera, was caused by ODD, rather than simply being typical teenage misbehavior.

An ARC was held on January 22, 2020.

An evaluation of the student was completed and an integrated report prepared in February 2020. (See R-24). Due to delays caused by the COVID-19 pandemic, the results were not discussed until an in-person meeting on September 8, 2020. (See R-29). The ARC proposed some form of "co-teaching" to help the student with attention issues. The student was not able to attend the ARC. A draft IEP was reviewed with the parents, but no goals were adopted at that time because the parents wanted the student's input first. The notes from the conference summary state "the ARC agreed to obtain input from the student to develop the IEP." Despite further efforts by the Special Education Director, the ARC never reconvened with the student present and an IEP to be implemented in school was never finalized (TE 11/2, pg. 115-116). The petitioner has made clear student's intent to complete student's education being home-schooled and will not return to in-person schooling.

THE STUDENT BEARS THE BURDEN OF PROOF

The student bears the burden of proving their entitlement to relief by a preponderance of the evidence. In this case, the student bears the ultimate burden of persuasion on the elements of the student's claims. Schaffer v. Weast, 546 U.S. 49, 57-58 (2005); KRS 13B.090. See also, City of Louisville, Div. of Fire v. Fire Serv. Managers Ass'n by and Through Kaelin, 212 S.W.3d 89,

95 (Ky. 2006) providing, "The party proposing the agency take action or grant a benefit has the burden to show the propriety of the agency action or entitlement to the benefit sought".

I. THE HEARING OFFICER CORRECTLY HELD STUDENT WAS NOT DENIED A FREE APPROPRIATE PUBLIC EDUCATION

The Student alleged student was entitled to a Free Appropriate Public Education ("FAPE"), and the School District did not provide it to student. The undersigned find the Student did not present sufficient evidence to prove student allegations.

FREE APPROPRIATE PUBLIC EDUCATION

Under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. a school which receives federal funding must provide students who qualify Free Appropriate Public Education ("FAPE"). FAPE includes both "special education" and "related services." §1401(9). "Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child . . . to benefit from" that instruction. §§1401(26), (29). See also Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 580 U.S. 386 at 391; 137 S. Ct. 988 at 994; 197 L. Ed. 2d 335 at 344 (2017). A school district covered by the IDEA must provide a "disabled child" (emphasis added) with special education and related services "in conformity with the [child's] individualized education program," ("IEP"). §1401(9)(D).

School districts have a duty to provide FAPE to all children with disabilities in their districts. 20 U.S.C. § 1412, 707 KAR 1:290. "FAPE" is defined to mean special education and related services that:

(a) are provided at public expense, under public supervision and direction, and without charge;

(b) meet the standards of the Kentucky Department of Education included in 707 KAR Chapter 1 and the Program of Studies, 704 KAR 3:303, as appropriate;

(c) include preschool, elementary school or secondary school education in the state; and

(d) are provided in conformity with an individual education program ("IEP") that meets the requirements of 707 KAR 1:320.

707 KAR 1:002(27).

707 KAR 1:290, Section 1, (1) requires a school district to make FAPE available to all children with disabilities aged three (3) to twenty-one (21) residing within its boundaries who have not received a high school diploma, including children with disabilities who have been suspended or expelled for more than ten (10) school days in a school year.

FAPE shall be provided to each child with a disability even though the child has not failed or been retained in a course and is advancing from grade to grade based on the child's unique needs and not on the child's disability. 707 KAR 1:002, Section 1, (1).

The district's obligation to locate children who may need special education services extends to children residing in the district who are in private school or home-schooled. 707 KAR 1:300, Section 1, (1)(b).

To qualify for special education services, a student must be a "child with a disability," defined as: a child evaluated in accordance with 707 KAR 1:300, as meeting the criteria listed in the definitions in this section for autism, deaf-blindness, developmental delay, emotional behavior disability, hearing impairment, mental disability, multiple disabilities, orthopedic impairment, other health impairment, specific learning disability, speech or language impairment, traumatic brain injury, or visual impairment which has an adverse effect on the child's educational performance and who, as a result, needs special education and related services. 707 KAR 1.280, Section 1,(9).

Adverse effect means the progress of the child is impeded by the disability to the extent

that the educational performance is significantly and consistently below the level of similar age peers. 707 KAR 1:002, Section 1, (2).

A disabled child needs special education if specially designed instruction is required in order for the child to benefit from education. 707 KAR 1:310, Section 1,(1).

If a student is entitled to FAPE, it must be adequately provided. The Court in Board of Education of Fayette County v. L.M., 478 F. 3rd 307, 314 (6th Cir. 2007) stated [u]nder the IDEA, the School is required to provide a basic floor of educational opportunity consisting "of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Board of Education v. Rowley, 458 U.S. at 201, 102 S. Ct. 3034. There is no additional requirement, ". . . that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children." Id. at 198, 102 S. Ct. 3034. The U.S. Supreme Court revisited the Rowley decision in Endrew F. v. Douglas City School District, 137 S. Ct. 988 (2017) and opined that to "...meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Id. at 999.

Seventh Grade:

The student did not have any significant behavior or academic problems before the seventh grade. The student's father, testified that the Student's grades were "great" during the seventh grade, that student was a star on the track team and that student misbehaviors were minor except for three instances where student was suspended for short periods of time. (TE 10/31, pgs. 15, 110; TE 11/2, pg. 6).

The student maintained disability should have been inferred from student's misbehavior. (TE 11/2, pg. 80). Principal [redacted] testified the transition to middle school is a difficult time for a lot of students. There are a lot of changes to make. She said there was only one time

when the student was in the seventh grade where student used sexually explicit language that upset the parent of another student that required the principal to get involved. (TE 11/2, pgs. 6-20). Principal [redacted] testified that she would have been notified if the student was seen as a significant disruption or a major problem during the seventh grade. If that had occurred, the student would have been placed in an alternative school within the middle school. (TE 11/2, pgs. 25-26).

There was insufficient proof the student had a disability having an adverse effect or proof the School District should have suspected student had a disability having an adverse effect during the seventh grade.

Eighth Grade:

The student was home-schooled at the start of the eighth grade. (TE 10/31, pg. 8). The student did not turn in work while student was home-schooled, and the mother reported student as absent. Therefore, CPS required the student to return to school in-person and to participate in counseling.

When the Student applied for readmission in February 2019, the School District did not know about any psychological diagnoses the student had. The parents indicated in the reenrollment form that the student did not have a disability and did not need special education. (TE 11/1, pg. 58). The students' behaviors at school in the eighth grade were less serious than during the seventh grade. Although the Student received little or no instruction for most of the school year, student earned a C average. (TE 11/1, pg. 74).

There was insufficient proof the student had a disability having an adverse effect or proof the School District should have suspected student had a disability having an adverse effect during the eighth grade.

Ninth Grade:

Student had some minor misbehaviors at the beginning of the ninth grade, but nothing

serious until November 20, 2019, when student made a "terroristic threat." The Behavior Detail Reports indicate the student had eight reported misbehaviors in August, September, October and the first half of November for things such as skipping class, rude comments and vaping. (Respondent Exhibit 2). The students' grades were similar to student's peers.

The School District knew the student saw the in-school psychologist during March through May of student eighth grade year, but the parents instructed the psychologist that no information regarding the student could be shared with the School District. Not all students who see the psychologist are children with disabilities. (TE 10/31, pgs. 85, 90-91). The student's mother testified the medical diagnosis records were not provided to anyone at the School District until student provided them to the school psychologist in February 2020. (TE 11/1, pgs. 64-65).

On November 20, 2019, the Student made a "terroristic threat" which resulted in student's expulsion. (Respondent Exhibit 21). After the Student was expelled, the School District conducted an evaluation for eligibility in the categories of emotional behavior disorder ("EBD") and other health impairment ("OHI"). On September 9, 2020, the School District determined the student was eligible for special education under OHI. (Respondent Exhibit 24, 29; Transcript 11/2, 115-116). However, the Student and student parents declined to participate in finalizing an IEP and decided instead to complete the student's education through home-schooling. (TE 11/1, pg. 78). The student did not return in person to the School District.

There was insufficient proof Student had a disability having an adverse effect or proof the School District should have suspected student had a disability having an adverse effect during the ninth grade.

II. SINCE RESPONDENT DID NOT DENY FAPE, STUDENT IS NOT ENTITLED TO COMPENSATORY EDUCATION

A claimant seeking compensatory education must present evidence of where the student would be but for the alleged deprivation of services and identify compensatory services reasonably

geared toward ameliorating that deficit. Bd. of Educ. of Fayette Co. v. L.M., 478 F.3d 307, 317 (6th Cir. 2007).

An award cannot be based merely on the duration of the alleged deprivation. The "compensatory awards should aim to place disabled children in the same position they would have occupied but for the school district's violation of IDEA." An appropriate compensatory education plan ". . . must be qualitative, fact-intensive, and...tailored to the unique needs of the disabled student." Branham v. The Gov't of the Dist. of Columbia, 427 F3d. 7, 9 (D.C. Cir. 2005). "A Hearing Officer cannot determine the amount of compensatory education that a student requires unless the record provides him with 'insight about the precise types of education services [the student] needs to progress." Mary McLeod Bethune Day Academy Public Charter School. v. Bland, 534 F. Supp. 2d 109, 116 (D.D.C. 2008).

III. THE HEARING OFFICER CORRECTLY FOUND THE RESPONDENT, [redacted] SCHOOLS, DID NOT FAIL TO IDENTIFY THE STUDENT AS ELIGIBLE FOR SPECIAL EDUCATION SERVICES.

1. Applicable Law

34 C.F.R. Sec. 300.111:

(a)(1) "The State must have in effect policies and procedures to ensure that -

(I) All children with disabilities residing in the State...and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated..."

34 C.F.R. 300.111(a)(1)(I).

"(c) Other children in child find. Child find also must include -

(1) Children who are suspected of being a child with a disability under Sec. 300.8 and in need of

special education, even though they are advancing from grade to grade; and

(2) Highly mobile children, including migrant children." (emphasis added).

34 C.F.R. Sec. 300.534:

"(b) Basis of knowledge. A public agency must be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred—

(1) The parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

(2) The parent of the child requested an evaluation of the child pursuant to §§ 300.300 through 300.311; or

(3) The teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency. (emphasis added; similar language is set out in 707 KAR 1:340 Sec. 17(1)).

(c) Exception. A public agency would not be deemed to have knowledge under paragraph (b) of this section if—

(1) The parent of the child—

(I) Has not allowed an evaluation of the child pursuant to §§ 300.300 through 300.311; or

(ii) Has refused services under this part; or

(2) The child has been evaluated in accordance with §§ 300.300 through 300.311 and determined to not be a child with a disability under this part.

A "child with a disability" is defined at 20 U.S.C. Sec 1401(3) as a child with one or more of a number of categorical impairments "...who by reason thereof, needs special education and related services." Such definition also appears at 34 C.F.R. Sec 300.8(a)(1) and 707 KAR 1:002

Sec 1(9). 707 KAR 1:002 Sec 1(56) defines "special education" as "...specially designed instruction...to meet the unique needs of the child with a disability..." And 707 KAR 1:002 Sec 1(58) defines "specially-designed instruction" as "...adapting as appropriate the content, methodology, or delivery of instruction to address the unique needs of the child with a disability and to ensure access of the child to the general curriculum..."

A school district may be held liable for procedural violations of the IDEA that cause substantive harm to the student. Metro. Bd. of Pub. Ed. v. Guest, 193 F. 3d 457, 464 (6th Cir. 1999). Proof of a procedural violation without substantive harm is inadequate to warrant relief. See: Knable v. Bexley City Sch. Dist., 238 F. 3d 755, 765-766 (6th Cir. 2001).

The 6th Circuit, in Board of Educ. of Fayette County, Ky. v. L.M., 4878 F. 3d 307, 313 (6th Cir. 2007) adopted the standard of what a claimant must show, as stated in Clay T. v. Walton County Sch. Dist., 952 F. Supp. 817, 823 (M. D. Ga. 1997):

The Claimant "must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate."

In Ja.B. v. Wilson County Bd. Of Educ., 82 IDELR 191 (6th Cir. 2023) the noncompliant, disrespectful, and disruptive behaviors displayed by an eighth-grader at school after moving from Illinois to Tennessee did not require his new district to evaluate him for IDEA services. The 6th Circuit three-judge panel noted the student had no history of receiving special education services in all the years he attended school in Illinois; the student had recently moved across state lines – a factor that the parents conceded might have an impact on his behavior. District staff also testified that the student's behaviors, while concerning, were not unusual or severe enough to suggest they might stem from a disability.

2. Timing

Student attended the following grades during the following time periods:

4th Grade: 2014-2015

5th Grade: 2015-2016

6th Grade: 2016-2017 at [redacted] Intermediate School

7th Grade: 2017-2018 at [redacted] School

8th Grade: 2018-02/06/2019: Home Schooled, then placed at [redacted] for 6 days (TE 11/1 p 200; Resp. Ex. 24, p2).

02/07/2019-05/30/2019 [redacted] School

9th Grade: 2019-2020 at [redacted] High School

The student's request ("Complaint") for a Due Process hearing was filed December 9, 2019. (Administrative Record No.1). Petitioner/Appellant agrees student was found eligible for special education after the Due Process Complaint was filed (Petitioner/Appellant's Reply Brief, p. 2). Such eligibility determination for "Other Health Impairment" (OHI) was made September 8, 2020 based on a February 26, 2020 evaluation (Resp. Ex. 29). An eligibility consideration is to focus on a "snapshot period" immediately surrounding the meetings during which eligibility is considered and discussed. L. J. v. Pittsburgh Unified School District, 850 F. 3d 996, 1004 (9th Cir. 2017). Student's 2020 eligibility determination in and of itself cannot be used to support a claim that student should have been found eligible had student been evaluated during student's attendance at [redacted] School.

A. 4th, 5th and 6th Grades

Student began attending [redacted] Schools at age 5 (TE 10/31, p 12). During 2014-2015 in the 4th Grade student received zero (0) behavior reports (Respondent's Ex. 2). During the 2015-2016 5th Grade year, there was one (1) behavior report regarding an unkind comment to another student. During the 6th Grade year (2016-2017) when student began

attendance at [redacted] School, student had two (2) disciplinary infractions (Resp. Ex. 2, pp 14-15).

B. 7th Grade

Student's father testified that "the problems actually started to arise." when student attended 7th grade at [redacted] School (2017-2018) (TE 10/31, p 13). He also testified student's grades were "great" (TE 10/31, p 15). Although the Hearing Officer made mention of student's grades in 7th grade, he did not overly rely on such fact. He merely concluded the evidence showed such grades were commensurate with those of similar-age peers. Student's report card reflected an overall "B" average. (TE 10/31, p 110; 11/2, p 6). Student grades however, are an element to be considered when examining any "adverse effect", as is discussed in greater detail below.

During 7th grade student had thirteen (13) disciplinary infractions (Resp. Ex. 2). However, during this time period student had not been evaluated by any mental health care professional or diagnosed with any psychological condition.

C. 8th Grade

During 8th grade student had no disciplinary infractions.

D. 9th Grade

During 9th grade (high school) student had 12 disciplinary infractions (Resp Ex. 2, pp 1-6).

3. Basis of Knowledge

A. 7th Grade

Most of student's behavioral incidents in 7th grade were minor in nature, as acknowledged by the student's father:

> "...it was mostly talking in class. A lot of talking in class and - nothing other than – it was talking in class" and "[t]here was nothing major at this point. It was, like, [student]

wouldn't remain in [student] seat. Student would go to that – somebody else's desk and hang out..." (TE 10/31, p 14).

Most suspensions were in-school which resulted in student being sent to the ASP classroom for 1-2 hours. Testimony showed that among the approximately 650 7th and 8th graders, many students exhibited this kind of behavior at that time (TE 11/2, p 81) and rarely required the principal's involvement (TE 11/2, pp 6-20).

There was an out-of-school suspension at the end of November for an incident involving sexual language; no other behavior report issued until February (using explicit language resulting in an out-of-school suspension). [redacted] School Principal [redacted] testified:

"Q: If we go from November – end of November to end of February and then end of February to end of April as a separation between events, would that have been typical for you? Would that have been a student making progress with their behaviors, that we're having decreased severity? How do you review that?
A. I think a two-month span would be indicative that we were not having major ongoing issues. It wasn't something that was happening weekly or daily."

(TE 11/2, pp 20-21).

Nothing was brought to the Principal by the parents by the end of student's 7th grade year that they were "dissatisfied customers" (TE 11/2, p 24; phrase used by Appellant's counsel). [redacted] did not receive any information from a parent, teacher, counselor or another administrator to indicate student might be a student who needed referral for a possible behavioral disability (TE 11/2, p 27). Nor had there been any incident that required the involvement of the School Resource Officer during the 7th grade (TE 11/2, p 31). No health professional treating student had recommended special education, evaluation for special education eligibility, or accommodation.

The parents did not express concern in writing that student needed special education, nor did they request an evaluation. No teacher or other school personnel expressed behavior concerns to the Director of Special Education or other supervisory personnel.

B. 8th Grade

The child's removal from school was done at the insistence of student's parents (TE 10/31,

p 17). The parents took student out of [redacted] School per the August 28, 2020, Home Schooling Notification they provided to the Respondent (Resp. Ex. 28); (TE 10/31, p 18). Student was home schooled from the beginning of 8th grade, then at some point she attended [redacted] for 4-5 days. During the time the student was home schooled student recorded a sexually violent Facetime video and sent it to someone. The "video leaked" resulting in the involvement of law enforcement and Child Protective Services (TE 10/31, p 19). CPS issued an Order requiring student be enrolled in and attend school (TE 10/31, p 19).

Student then re-enrolled in [redacted] School (TE 10/31, p 19). On February 7, 2019, re-enrollment form the parents affirmatively indicated student had not been diagnosed with a disability or special need (Resp. Ex. 8, p1). Despite a lack of participation in the home-schooled instruction, student achieved passing grades by the end of 2019.

C. 9th Grade

Student's father, in a message to her English teacher, mentioned student had been diagnosed with Oppositional Defiance Disorder (ODD) (Resp. Ex. 15).

Student had received outside counseling at [redacted] from about February 2019 to May 2019. Parents gave permission for student to see [redacted] a [redacted] therapist who provided services in student's school, on express condition the psychologist not provide any information about student to the school. (TE 10/31, pp 85; 90-91).

In November of 2019 student made a threat against the [redacted] High School principal. As a result, [redacted] was expelled from school. In 9th grade, prior to expulsion, student had passing grades averaging a high "C" (Resp. Ex. 26).

[redacted] the school psychologist, testified for Petitioner/Appellant. She had been a school psychologist for 29 years and was currently employed by the [redacted] Board of Education (TE 11/1, p 181). The Hearing Officer believed she was a credible witness.

[redacted] opined that a child with a diagnosis of ODD did not require intervention when the teacher and parent were handling the situation, as she believed was the case with student. Intervention would be warranted if the parent and teacher lost communication (TE 11/1, p 191).

At the parents' request during the referral ARC, [redacted] performed and authored a Psychoeducational Evaluation Report (TE 11/1, p 191). At that point student's suspected disabilities were emotional/behavioral as well as other health impaired (TE 11/1, p 202). [redacted] reviewed student's high school behavior records and 8th grade middle school behavior records. She opined student had not exhibited much difficulty in behavior; that student's 8th grade behavioral incidents did not rise to a level of severity warranting intervention. [redacted] did not view student's high school difficulties as the same [redacted] may have had in Middle School (TE 11/1, pp 192-193, 196). Attendance was not a concern (TE 11/2, p 199). She had also reviewed records from [redacted] who on March 21, 2019, diagnosed student with ODD (TE 11/1, p 202; Resp. Ex. 24, p3). The records from [redacted] who, upon student's discharge from [redacted] diagnosed student with "...adjustment disorder with disturbance of conduct" (TE 11/2, p 203; Resp. Ex. 24). These are the first records of the school district where mention of the ODD diagnosis appeared. (TE 11/1, p 58).

Based on all the information made available to her for the Evaluation, [redacted] did not make a recommendation that student was suffering from a categorical disability that would require intervention and special services. Although she went along with the ARC which determined student eligible for services under "other health impaired", she individually would not have made this determination (TE 11/1, pp 216-217).

4. Adverse Effect and Need for Special Education and Related Services

On appeal Appellant alleged a number of times that the Hearing Officer erroneously focused on student's grades and father's statements that academically student was doing "great"

(TE 10/31, p 15). The Hearing Officer justifiably examined student's educational progress, as "Adverse Effect" is defined at 707 KAR 1:002 Sec.1(2) as "the progress of the child is impeded by the disability to the extent that the educational performance is significantly and consistently below the level of similar age peers."

The burden was on Appellant to show (1) the level of educational performance among student's similarly aged peers, and (2) that student during the relevant time period was consistently below student same age peers academically, behaviorally, or socially. There is a lack of evidence in the record to show student performed consistently below same age peers academically, behaviorally, or socially during the relevant time period.

The Hearing Officer was correct in finding Respondent did not have a basis of knowledge to suspect or know student was a child with a disability in need of special education. The substantial evidence in the record supports the findings, conclusions and decision on this issue by the Hearing Officer.

NOTICE OF APPEAL RIGHTS

This decision 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.

Based upon the above it is hereby ORDERED that the appeal is denied.

This 31st day of August, 2023, by the Exceptional Children's Appeals Board, the panel consisting of Roland Merkel, Lyndell Pickett, and Kim Hunt Price, Chair.

EXCEPTIONAL CHILDREN APPEALS BOARD

BY: Kim Hunt Price
KIM HUNT PRICE, CHAIR

CERTIFICATION:

The foregoing was electronically mailed to [redacted] KDELegal@education.ky.gov; [redacted] on August 31st, 2023.

Kim Hunt Price
KIM HUNT PRICE, CHAIR
EXCEPTIONAL CHILDREN APPEALS BOARD