KENTUCKY DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND EARLY LEARNING
EXCEPTIONAL CHILDREN APPEALS BOARD
AGENCY CASE NO. 2122-18

[redacted] **APPELLANT**

v.

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

[redacted] **SCHOOLS** **APPELLEE**

PROCEDURAL HISTORY

The Due Process Request ("Complaint") was filed by the parent of [redacted]., (Petitioner below) the Appellant, on February 18, 2022. The Request presented four (4) issues for review, alleging: (Count1) Denial of Free and Appropriate Education (failure to address the child's unique behavioral needs; suspending the Student in excess of 10 days during the 2021-22 school year), (Count 2) Denial of Procedural Protection (failing to develop an IEP with appropriate related services; removing Student from the agreed upon placement in excess of 10 days during the 2021-22 school year; failing to conduct a manifestation determination review), (Count 3) Failure to Adequately Evaluate (failing to develop an appropriate evaluation plan; developing a behavior intervention plan without performing a functional behavior assessment; subjecting the Student to suspensions and restraints, and (Count 4) Denial of Parental Participation (calling Student's father to school due to Student's behavior; requiring Student to obtain threat assessments; referring Student to the police and to the Cabinet for Health and Family Services).

Petitioner sought to invoke "stay put" and requested an independent functional behavior assessment and creation of a behavior plan to address Student's behavioral needs. School (Respondent below), the Appellee, filed a counterclaim on March 31, 2022, alleging that in September 2021 Student's father inappropriately withdrew consent for [redacted] to receive services under the disability category of emotional-behavioral disability (EBD) and thereafter refused to give consent for re-evaluation for eligibility under that category despite Student's increase in misbehavior soon after consent had been withdrawn, including during a manifestation determination meeting held on December 1, 2021.

In such counterclaim Respondent requested: (1) the school district be authorized to administer assessments deemed appropriate to evaluate the Student in relation to [redacted] suspected behavioral disability and to develop an IEP consistent with such evaluation results; (2) the Hearing Officer order a change in placement for Student during the pendency of this re-evaluation to avoid risk of injury to [redacted] or others; (3) the school district be awarded equitable relief in the form of excusing any claimed denial of FAPE subsequent to the withdrawal of consent to serve the Student under the disability category of EBD, from and since September 23, 2021.

On June 2, 2022 the parent filed an Amended Due Process Complaint Request amending as follows: (Count 1) included an alleged denial of FAPE for the 2019-2020 school year; (Count 2) to include the 2019-2020, 2020-2021 and 2021-2022 school years; that Student was denied an adequate behavior intervention plan; Student was placed in a more restrictive placement than appropriate during those years; adding a claim that Student was denied extended school year

(ESY) services for the 3 school years included above; (Count 3) added a new Count 3 claiming breach of confidentiality relating to the loss of the Student's educational records and alleging sharing of confidential information concerning the Student to third parties.

The Hon. Kim Hunt Price was appointed Hearing Officer to preside over the Due Process Hearing. The Due Process Hearing was conducted April 26, 27 and 28, 2023, then continued for completion of independent evaluations

On November 8, 2023, after completion of [redacted] case in chief at hearing (subject to further testimony related to independent evaluations) Student attempted to submit a Second Amended Complaint and add a new Count 4: a claim of retaliation due to juvenile charges brought during the pendency of this action. Respondent objected to the Second Amended Complaint (HT- D4-pp 8-9).[1] Petitioner's counsel conceded the retaliation claim was not within the jurisdiction of the Hearing Officer under 20 U.S.C. Sec. 1415, but requested testimony related to that allegation be heard as evidence relevant to other claims pertaining to the Student's behaviors. The Hearing Officer allowed such testimony for that limited purpose (HT-D4-p 9). No compensatory education services were requested as part of Petitioner's relief in either the original Complaint or Amended Complaint. There is no record of the Hearing Officer having issued a ruling on admissibility of Petitioner's Second Amended Complaint. Therefore, the ECAB has made such ruling below in its independent review.

The Due Process Hearing reconvened November 15, 16 and 17, 2023. Thereafter, the

[1] Citation to the hearing transcript (e.g. HT-D4-pp 8-9) refers to the 4th day of the hearing, transcript pages 8-9. In this matter, the hearings dates were: D1: 4/26/2023; D2: 4/27; D3: 4/28; D4: 11/15; D5: 11/16; and D6: 11/17.

Due Process Hearing was continued to allow the deposition of witness [redacted]. [redacted] deposition was taken December 15, 2023 and made a part of the administrative record.

Following issuance of a briefing order, Petitioner tendered a written Closing Argument, Respondent submitted its Post Hearing Argument, and Petitioner submitted a Reply Brief. The matter then stood submitted to the Hearing Officer for decision.

On August 26, 2025 the Hon. Kim Hunt Price issued Findings of Fact, Conclusions of Law and Order. Petitioner's Complaint and Amended Complaint were dismissed. Respondent's Counterclaim requesting a finding that any alleged violation of FAPE was excused on its behalf due to the parent having revoked consent for services, was granted. All remaining portions of Respondent's Counterclaim were deemed moot.

Petitioner timely filed a Notice of Appeal pursuant to 707 KAR 1:340 Sec. 12 on September 13, 2024. The Kentucky Department of Education assigned the appeal to its Exceptional Children Appeals Board (ECAB). The ECAB members are the Hon. Mike Wilson, Chair, and the Hon. Roland Merkel, member.

The [redacted], attorney for Appellant, [redacted] (Petitioner below), and the [redacted], attorney for Appellee, [redacted] Schools (Respondent below), conferred with the ECAB Chair and set a briefing schedule. The parties timely submitted their respective briefs. The matter stood submitted to the ECAB for its decision.

STANDARD OF REVIEW

The Student (Appellant) bears the burden of proving 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): "...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." KRS 13B.090(7). The Student must "bear the burden by proving by a preponderance of the evidence" that the local school district violated the IDEA. *Doe v. Bd. of Educ. of Tullahoma City Schools,* 9 F. 3d 455, 458 (6th Cir. 1993).

Where a state has established a two-tier administrative process, the appellate review is to be conducted pursuant to 20 U.S.C. Sec. 1415(g). Kentucky has adopted a two-tier process. The 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. Sec. 1415(g)(2). The appellate panel is to examine the entire hearing record before making its independent decision. 34 CFR Sec. 300.514(b)(2). The appeals panel owes no deference to the Hearing Decision except where such Decision relates to the credibility of witnesses. *500 Associates, Inc. V. Natural Resources and Environmental Protection Cabinet,* 204 S.W. 3d 121, 131-132 (Ky. App. 2006).

Where the relief sought is compensatory education or compensatory services, the Student must also bear the burden to present evidence showing where the student would be but for the claimed deprivation of services and to specifically identify those compensatory services which would be reasonably geared toward ameliorating the deficit caused by the deprivation. See: *Bd.*

of Educ. of Fayette Co. v. L.M., 478 F. 3d 307, 317 (6th Cir. 2007). The burden is on the Student to demonstrate that any particular *procedural* violation of the IDEA actually resulted in measurable, compensable, substantive harm. See: *Knable v. Bexley City Sch. Dist.,* 238 F. 3d 755, 764 (6th Cir. 2001).

GENERAL FACT-FINDINGS

This case was filed February 18, 2022. The findings below focus on the 3-year period within the statute of limitations. Citation to exhibits follows the protocol described by Appellee in its Brief, footnote 3, p 7. Petitioner's exhibits are identified as "CMPL" followed by page numbers. Respondent's exhibits are identified as "RX" followed by tab numbers and consecutive pagination.

1. Student was born in December [redacted] and is of average intelligence.

This is undisputed.

2. Student's first ARC meeting occurred on November 9, 2018, during child's second year of Head Start, at which time Student was found eligible for services under the category of speech or language impairment

See Petitioner's Exhibit 2 page 6. Parent concerns at the time were worries about stuttering and concern the child had behavioral issues.

3. The next ARC was held on March 26, 2019, again during the child's second year Head Start, at which time the ARC found that behaviors did not impede child's learning or the learning of others.

See CMPL p 16. *See* CMPL11-20; HT, Apr. 27, p. 61. The evaluation at the time supported the identification of speech as the only suspected disability. CMPL570-575. The ARC agreed academic performance, health, and social/emotional status were not areas of concern. HT, Apr. 27, p. 59; CMPL15. Consequently, the ARC developed IEP goals in the area of speech, the area for which the student qualified for special education (CMPL p 17). The parent testified regarding the March 2019 IEP that, at that time, he had no concerns regarding behavior or academics, just concerns about speech. HT Apr. 27, 58-60.

4. Student's serious behavior problems at school began manifesting in Kindergarten in the fall of 2019.

When the fall semester of 2019 began, the Student's behavior in Kindergarten quickly became an issue. For example, the record reflects incidents including hitting another student, threatening to cut students with scissors, kicking a teacher, and running from the classroom. HT, Apr. 27, pp. 63-64; CMPL22. The record is replete with behavioral issues manifesting in kindergarten. PROWL (positive attitude respectful, on task, willing to learn, lifelong leader) forms were submitted concerning Student as disciplinary referrals (CMPL p 249-285).

There were 36 reports from August 28, 2019 (the beginning of kindergarten), through May 18, 2022 (the end of Second Grade). These reported incidents varied from being rude to going at another student with scissors, throwing objects at students and staff, striking students and staff, running from the classroom, going at a teacher with a broom, refusing to do work, ripping up other students' papers, inappropriate language, threatening physical violence against other students and staff, spitting, head butting staff, slapping staff and hitting them with fist,

throwing things at students, running out of the counselors' room, refusing to listen to directions, refusing to complete work, crawling around the room and under desk, slapping another student and leaving a mark on their face, and hitting two other students, threatening to kill teachers and telling an administrator [redacted] would "send him to the hospital". Half of these incidents occurred during the child's kindergarten year with the remainder occurring during the second grade. There were no disciplinary referrals in first grade. However, the majority of first grade was virtual due to the pandemic.

5. An ARC was convened on September 30, 2019, to discuss behavior issues and the evaluations needed to determine the cause of behaviors.

Behaviors were discussed at the September 30, 2019 ARC meeting (CMPL21, *et seq.*). School personnel were concerned for the child's safety. The ARC members agreed that a Sensory Processing Evaluation needed to be completed by an occupational therapist to help determine the cause of the behaviors and the parent signed permission in that area (CMPL p 22). The evaluation planning form developed during that meeting did not indicate a new area of disability was being considered and only sought to address potential sensory issues through the consideration of occupational therapy (OT). CMPL23-24. The parent consented and had no objection to this strategy. HT, Apr. 27, pp. 65-66. In hindsight, perhaps EBD evaluations also should have been initiated at this point, but there is not sufficient evidence in the record to suggest that, given what they knew about Student at that point, the ARC erred in focusing on sensory processing.

6. Student's behaviors escalated, and another ARC was held on October 28, 2019;

an EBD eligibility evaluation was ordered and functional behavior analysis was discussed; the steps taken by School were reasonable and appropriate.

Before the OT sensory evaluation could be completed, Student's behavior issues intensified, and another ARC meeting was held on October 28, 2019. The new significant behaviors prompting this meeting are recounted in the conference summary. CMPL30, *et seq.* Evaluation for EBD eligibility was discussed. An evaluation planning form was completed on the same date. CMPL36. Functional Behavior Assessment was discussed. School and Student disagree on whether what ensued constituted an FBA. IDEA regulations do not require FBAs except in connection with manifestation determinations. There are no IDEA regulations defining the form, content, and process required for an FBA School contends that FBA was collaboratively completed by the ARC team at the October 28 ARC, based on the behavioral interventions and teachers' observations leading up to that meeting. CMPL232. [redacted], a therapist employed by [redacted] was present for that meeting and informed the ARC that she had not determined any medical diagnosis yet, but did not believe it was ADHD or impulse control. She said the intake person at [redacted] had identified "conduct disorder" and "unspecified impulsive disrupted control." CMPL31. The parent did not recall ever seeking a physician's statement from [redacted] or any other psychiatrist which reflected an ADHD diagnosis or any conduct disorder. HT, Apr. 27, pp. 77-78. Whether or not the discussions at the October 28 ARC constitutes an FBA, School took reasonable steps at the ARC meeting, particularly by setting in motion the EBD evaluation, toward trying to identify the cause of Student's behavior issues.

The ARC also took practical steps to address behaviors without yet having the benefit of evaluations by experts, discussing a shortened school day due to the pattern of Student's behavior escalating in the afternoons. A Behavior Intervention Plan (BIP) was completed using a point system and check in and out sheet.

All parties agreed to an evaluation in the area of Emotional Behavioral Disorder. (CMPL p 32, 37). Although the student was to be evaluated special education under the eligibility of EBD, at this time there were no academic concerns. HT, Apr. 27, pp. 84-85.

7. An ARC was held on October 31, 2019, to discuss shortened school days and treatment at [redacted], even though the evaluations for EBD had not been completed.

An ARC meeting was held on October 31, 2019. (CMPL p 39-43) to discuss shortened school days. [redacted] from [redacted], who works the juvenile intervention services program (JISP), explained how the program worked and that she could work up to three (3) hours daily in school setting to address behavioral regulation. [redacted] described the JISP as intensive home therapy for children with severe emotional disabilities. She stated the program was an intervention one step below residential placement. (Deposition p. 9). Student had a shortened school day of three hours Monday to Thursday while JISP was involved. [redacted] was out on Fridays to see [redacted] trauma therapist.

8. **On November 21, 2019, Parent revoked consent for communication and information-sharing between School and [redacted], and revoked consent for the EBD evaluation; at an ARC meeting on December 2, 2019, parent agreed that the EBD evaluation could proceed.**

Student's behaviors resulted in two threat assessments during November, prompting the parent, on November 21, 2019, to revoke consent for communication and sharing of information between the School District and [redacted], and to revoke consent for the EBD evaluation to continue despite having consented to it on October 28. At an ARC meeting convened December 2, 2019, the parent reversed course and agreed the EBD evaluation could continue. (See conference summary of December 2, 2019 ARC meeting in supplement to record granted on May 10, 2024).

9. The next day, on December 3, 2019, another ARC meeting was held; the OT evaluation found that sensory processing had no impact on Student's daily skills; the integrated report was considered and the ARC found the student qualified for special education under the category of EBD; the parent objected to the proposed IEP based on LRE.

Another ARC was held on December 3, 2019, (CMPL p 50-56). It was discussed that sensory processing had been measured and was found to have no impact on the child's daily living skills, nor academic skills. At this time a diagnostic impression had been formulated by [redacted], but there was not a formal diagnosis from a physician. (Supplemental Exhibit 12:2:19). The parent expressed concerns about a mention of medication or an inpatient setting by the [redacted] therapist after only seeing the child a couple of times. An Integrated Report was discussed by [redacted], school psychologist. The report stated Student could be compliant and complete tasks for a period of time, but could also become defiant hitting, kicking and using inappropriate language.

The parties agreed that Student's current program was not working and after reviewing the eligibility form, determined the child was eligible for services with a category of Emotional Behavioral Disability (CMPL p 54). Initially, the parent did not consent to services, disagreeing with the terms of service times and the LRE. Specifically, the parent wanted the child in the regular classroom as often as possible with minimal time in the resource room and did not agree with the child being in the resource room from 8 am to 9:45 am. The parties agreed to continue the evaluation and, due to student having no academic difficulties, to remove testing in academic areas.

10. The parties reached agreement on Student's IEP at an ARC convened the next day, December 4, 2019; parent agreed to give consent to information sharing so [redacted] could work with Student.

The ARC reconvened on December 4, 2019 (CMPL p 59-64). The purpose of this meeting was to develop, review and revise the child's IEP and make placement decisions. The Parties reached a consensus on placement options alternating between regular classroom and the resource room. A BIP was developed that if the child began having a tantrum in the regular classroom, the child would be taken to the resource room to cool down. (CMPL p 61) There was further discussion of the current BIP for positive tally marks and receiving a 5-minute choice reward for every tally mark the child earned.

Behavior was to be monitored every 15 minutes to obtain data on what would help the be child successful. It was agreed that suspension would be up to three (3) days and the child would not be suspended pending treatment in order to return to school. The IEP developed at the

December 4, 2019, meeting found the primary disability to be Emotional Behavioral Disability and that the child was also eligible for speech and language service (CMPL p. 67-73).

The parent complained that he did not want to take the child to [redacted] for threat assessments. The school agreed that only suspension would occur, and no threat assessments would be required if the parent kept Student in outside therapy and physician consultation from an outside mental health agency. Parent agreed to sign a new release to allow [redacted] at [redacted] to continue working with Student since she couldn't work with him after he revoked consent for the sharing of information. [redacted] Deposition, p. 37; HT, Apr. 27, p. 136.

11. Most documented use of restraints on Student occurred in the fall of 2019, before [redacted] was evaluated and determined eligible for services under the category of EBD.

There are 26 documented uses of restraint on Student, sixteen of which occurred in the Fall of 2019 before December 4, 2019, when student was found eligible for special education under EBD. CMPL151-194.

12. Experts who treated Student were unable to determine what was causing student's behaviors.

[redacted] from [redacted] testified there was no rhyme or reason as to what caused Student's behaviors. (Deposition p. 17). [redacted] was aware of Student's [redacted] diagnosis of unspecified impulse control and agreed with said diagnosis (Deposition p. 19). She stated services with the child were terminated after only a month because the program had "exhausted all resources" (Deposition p. 21). JISP recommended residential placement, but parent did not agree. [redacted] testified that despite her training as a social worker and being a trainer with safe

crisis management (a program which targets verbal de-escalation behaviors before utilizing physical interventions), and working side by side with Student for several hours a day for about a month, she was unable to identify Student's triggers or precursors.

None of the multiple independent therapists through [redacted] ever told Student's parent anything they thought the school should be doing or which they thought the school was doing wrong, and none of them testified they ever made recommendations which the school refused to follow.HT, Apr. 27, pp. 103-104.

13. **Behavior incidents continued, culminating in a suspension on February 20, 2020; the next day, parent revoked consent for sharing information about Student with any outside agency**.

After the incident on February 20, 2020, parent revoked his consent to "all release of information to any outside agency" in retaliation, according to Parent's own testimony, for School personnel reporting him (parent said falsely) to social service for failure to take student to required counseling. HT, Apr. 26, p. 101-102.

14. An ARC was scheduled for February 26, to conduct a manifestation determination; the manifestation determination could not be completed on that date within the time limit parent set for the meeting, but the parties agreed student's placement should be changed to Home Hospital; February 26 was the last ARC held during 2019-2020 school year.

Student received suspensions during [redacted] Kindergarten year that would have totaled 13 days had they been served in full. CMPL 660-672. Student was suspended three days during the

first semester of kindergarten. HT-D6- p 196). Then, on February 20, 2020, Student received a suspension scheduled to last through March 4. At that point the School District tried to arrange a Manifestation Determination meeting (HT- D6- p 197) in anticipation of reaching ten days or more of absence resulting from disciplinary actions. Several notices were sent home by the District to [redacted] father and a number of telephone calls were attempted (HT- D6- p 198).

An ARC was held on February 26, 2020, and a second IEP was developed in the area of Emotional Behavioral Disability. The child's strength and adverse effects under social and emotional status were the same as that on the previous IEP (CMPL p 102 and 68). Measurable goal 2 was the same as measurable goal 3 on the previous December 4, 2019, IEP. (CMPL p104 and 70) At this meeting the parent wanted the parental rights read in full and stated they could only stay until 10:00 am.

February 26, 2020 would have been the 8th day of suspension for that school year. CMPL99. One of the reasons for convening the ARC that day was to discuss behavior, including a manifestation determination. CMPL107, *et seq.* Regardless of whether parent was or was not cooperating in good faith at this meeting, the manifestation determination could not be completed within the time limit set by parent. However, the parent agreed to change placement to Home Hospital, but stated he wanted the child in school. A continuation of the meeting was scheduled for March 9 to complete discussion of the behavior issues but the meeting did not take place.

15. Shortly after Student's Home Hospital placement, students generally switched to virtual instruction due to COVID, beginning March of 2020. Consequently, Student did not

resume in-person instruction until March of 2021; during this period, behaviors were not an issue because student was attending virtually and therefore the opportunity to interact physically with students and staff did not arise.

This is undisputed.

16. During the virtual instruction period, ARC meetings continued; Student's placement was changed from Home Hospital to regular in-person (to be implemented when the COVID virtual was no longer mandatory); Student was found still eligible under EBD and speech/language; the ARC modified or made plans for the split between general ed and resource room time, access to an aide, and other provisions to be implemented when in-person instruction resumed; good progress was made in speech; there were no academic issues.

ECAB adopts and incorporates by reference the hearing officer's fact-findings in paragraphs 17 and 18 in the Final Order concerning this period.

17. An ARC meeting was held March 2, 2021; disability continued to be EBD and speech/language; at this point in time, student had returned to in-person attendance but was struggling to stay focused; the IEP developed at this meeting contained some similarities with past IEPs and some changes.

This IEP meeting had been scheduled eight (8) times since January 3, with the school cancelling meetings twice due to the weather and the parent on other occasions, often because of parents' night work schedule. Finally, to meet the annual review deadline, the meeting was held on March 2, 2021, even though the parents were not present at this ARC meeting.

[redacted] reported that Student had not participated in any virtual learning with her during the times and days that had been agreed upon at the November 20, 2020 ARC. Now that Student had returned from virtual to in-person, Student struggled to stay focused on completion of non-preferred tasks. Support staff were in the room giving constant redirection and prompting to the student to get work completed. There was also discussion that during bus duty time the child was having a hard time sitting in the gym and had to be directed several times to stop swinging on the rail.

The IEP adopted March 2, 2021, had the same measurable goal 2 as Student's IEPs have had since the beginning of EBD services: when given a non-preferred task, Student will increase the use of self-regulation strategies and calming strategies when given 2 prompts on three out of four trials as measured weekly by behavioral chart. See CMPL 146-157. Previously, Student had four transitions in a day and 165 minutes in resource. The ARC agreed that fewer transitions would better serve the child. Time in the resource room would be reduced from 165 minutes to 60 minutes per day and would target behavior intervention. Strategies to improve the child's behavior were identified and discussed, such as taking a walk around the building, having break cards for Student to request breaks, and use of rewards as provided in the BIP. Speech sessions would continue at twice per week.

18. During the time Student returned to in-person in March of 2021 and continuing through the beginning of 2021-2022 semester, behaviors grew dramatically better, indicating that services and special education deliverable under the EBD disability were helping the student achieve success.

The parent testified that Student's behaviors were fine at the point [redacted] came back to school in 2021. HT, Apr. 26, p. 85. When school resumed in the fall of 2021, Student's behavior was significantly better. HT, Apr. 27, p. 188. The parent was in communication with Student's teacher and they discussed how [redacted] was positively handling [redacted], being respectful, following directions, and accepting redirection. HT, Apr. 27, pp. 188-192. Parent testified that Student's maturity was apparent in [redacted] behavior at school during the first two months. HT April 26, p. 112; also, see CMPL 178. To the extent an inference can be drawn, it suggests that the EBD special education and related services were working.

19. On September 23, 2021, Parent unilaterally withdrew consent for special education services and would only consent to evaluation for speech disability with the express purpose of removing EBD disability qualification for special education and related services.

This is undisputed.

20. Soon after removal of EBD qualification, Student again began exhibiting dangerous behaviors and receiving suspensions; School begged Parent to consent to evaluation for EBD so EBD special education and related services could be restored, but Parent refused; as of February 18, 2022, the date due process was filed by Parent, Parent still was refusing to consent to EBD evaluation.

This is undisputed.

21. After removal of EBD qualification, dangerous behaviors manifested again; suspensions quickly reached a sufficient number that a manifestation determination was

conducted; however, these behaviors were not a manifestation of [redacted] speech/language disability and student was no longer qualified as EBD due to parent's revocation choice.

This is undisputed and addressed more fully elsewhere herein. Student ended up being suspended 51.5 days in second grade. CMPL 660-682.

22. Parent continued to oppose EBD qualification during the due process period.

Parent consented to evaluation in a form signed June 1, 2022 (CMPL3-5), modified to determine parameters of the evaluation in an ARC meeting in August of 2022. The evaluation prepared by school psychologist [redacted] was reviewed at an ARC meeting in September (Resp. Ex. 48-49), and every member of the ARC except the parent found the report and other information considered established EBD. Parent invoked stay-put to prevent the ARC from finding EBD eligibility.

23. Student was not shown to be eligible under OHI or any other category.

In her independent evaluation performed approximately 2 years after , [redacted] found symptoms of ADHD but testified mild ADHD would not explain Student's reported extreme aggressive behaviors. HT Nov. 15, p. 144. It is not clear whether a medical diagnosis of ADHD was made by anyone prior to 2023 or, if so, was communicated to School. However, ADHD is not an eligibility category as such. Normally, it would be a condition potentially relevant to OHI. However, it was not shown, and not a single witness testified, that Student would qualify as a child needing special education under the category of OHI.

[redacted] in report dated 7/24/23 recommended Student be tested for dyslexia because [redacted] scored slightly below average on sentence construction. (Resp. Ex

53). [redacted], also in report dated 7/24/23, found a Specific Learning Disability in Reading. (Resp. Ex. 55). However, this diagnosis alone is not enough to establish disability eligibility in the category of SLD.

24. Student was shown to have reading deficiencies after the period at issue in this case.

Though not argued on appeal, ECAB notes mention of reading deficiencies in testimony in evaluations conducted after the relevant period at issue. Generally, the record reflects that both School and the parent thought, during the school years in question, that academics was not an issue. However, at the hearing, school psychologist [redacted] testified that the child's borderline reading scores, based on her September 2022 evaluation, indicates behaviors are having an adverse effect on reading and may warrant a reading goal ([redacted] p.85). Similarly, the independent evaluation of [redacted] in July of 2023 found reading scores lower than would be expected, given the student's average intelligence. (Resp. Ex 48). As mentioned above, [redacted], in 2023, also found a specific learning disability in reading.

25. The record does not establish any reading deficiencies were caused by omissions in or failure to implement IEPs during the relevant period.

A possible factor in reading deficiencies identified in September 2022 might be Student missing over 55 days of class in second grade due to suspensions after EBD was revoked by Parent on September 23, 2021. Or, if the reading deficiencies in fact existed prior to that time, they may have been the result of behaviors that School addressed with a reasonably-designed IEP sufficient to constitute provision of FAPE. Or they could be the result of failure to have a

reading goal or some other omission in the IEPs. Regardless, the record does not establish (a) the existence of reading deficiencies prior to parent's revocation of EBD on September 23, 2021, or prior to February 19, 2022, the date due process was filed, or that (b) such reading deficiencies, if they existed, were caused by an omission in or failure to implement the IEPs.

26. The facts reflected in the numerous Conference Summaries, IEPs, and testimony illustrate Student did not suffer academically at any time and that adequate services were provided, when permitted by parent, to insure child received FAPE during all years in question.

ECAB adopts this fact-finding from the opinion of the Hearing Officer .

ADDITONAL FACT FINDINGS

REGARDING STUDENT'S SECOND AMENDED COMPLAINT

27. On November 8, 2023, after completion of [redacted] case in chief at hearing (subject to further testimony related to independent evaluations) Student attempted to submit a second Amended Due Process Complaint and add a new Count 4: a claim of retaliation due to juvenile charges brought during the pendency of this action.[2]

28. On November 10, 2023 Respondent filed its *Objection to Second Amended Complaint.*

[2] Petitioner initially filed [redacted] Complaint for Due Process Hearing. [redacted] subsequently filed (06-02-2022) *Petitioner's Amended Due Process Complaint* and on 11-08-2023 tendered to be filed a document also titled *Petitioner's Amended Due Process Complaint.* The most recent document tendered is referred to herein as *Petitioner's Second Amended Complaint* or *Second Amended Complaint.*

The objection stated in relevant part:

> "Amended complaints are governed by 20 U.S.C. Sec. 1415(c)(2)(E)(i) and is subject either to the consent of the Respondent, or is within the discretion of the Hearing Officer if made at least five days before a due process hearing occurs. The Respondent does not consent to the amendment."
>
> "...this requested amendment is untimely. There is no statutory procedure for the Petitioner to add an issue mid-hearing."
>
> "...the issue the Petitioner seeks to add (Count IV-Retaliation) is not within the Hearing Officer's authority under 20 U.S.C. Sec. 1415(b)(6)(A) as the reporting of criminal conduct by a student law enforcement agency does not relate "to the identification, evaluation, or educational placement of th4e child, or the provision of a free appropriate public education to such child."
>
> Reporting various categories of student conduct to law enforcement "...is both mandated by Kentucky statute (*see* KRS 158.154, 158.144(4), and 158.156(1)) and is expressly permitted by the IDEA (20 U.S.C. Sec. 1415(k)(6)(A)."

29. **During Day 4 of the evidentiary hearing, held on November 15, 2023, Counsel for Respondent voiced objection to the attempt of Petitioner to file a Second Amended Complaint in the midst of hearing procedures**.

See (HT-D4-pp 8-9).

30. Petitioner's counsel conceded the Retaliation claim was not within the jurisdiction of the Hearing Officer under 20 U.S.C. Sec. 1415, but requested testimony related to that allegation (Retaliation) be heard as evidence relevant to other claims.

(HT-D4-pp 8-9).

31. The Hearing Officer withheld ruling on the objection but agreed to allow testimony if it was relevant to other existing claims.

(HT-D4-pp8-9).

32. **While the Hearing Officer referred to Petitioner's Complaint and Amended Complaint throughout her August 26, 2025 *Order* and dismissed Petitioner's Complaint and Amended Complaint, no reference to or ruling pertaining to Petitioner's Second Amended Complaint is found therein**.

ADDITIONAL FACT-FINDINGS REGARDING

PREDETERMINATION CLAIM

33. **Student's Predetermination Claim was not alleged in either the Due Process Complaint or the Amended Complaint. The issue was not raised during the hearing. The issue was first mentioned in Student's post hearing brief below and very little about it was mentioned in Appellant's brief ("Exceptions").**

34. **Student's potential alternative eligibility category based on ADHD and OHI were never suspected by any party or raised during school years at issue.**

35. There was no documented evidence of a formal diagnosis of ADHD during the years in issue.

ADDITIONAL FACT-FINDINGS REGARDING

MANIFESTATION DETERMINATIONS

36. **Student's absence from school from February 26, 2020, until September of 2020, was due to a mutually agreed placement change to Home Hospital.**

While student's suspension had been scheduled to last until March 4, the agreement to Home Hospital constituted a change of placement that was not a school disciplinary decision.

37. **Student did not have any school suspensions during the year students attended school part-virtual and part in-person**

(HT- D6- p 201). During that time Student joined Google Meets online sessions with [redacted] general education teacher, [redacted], and [redacted] speech therapy instructor, [redacted]; [redacted] was not logging in for [redacted] social/emotional and specially designed instructions with [redacted].

38. **For all purposes, including the right to a manifestation determination, student's eligibility category became speech/language on September 23, 2021.**

See fact-findings elsewhere hereinabove. A new IEP was developed for "speech only" (HT- D6- p 204).

39. **By November 10, 2021 [redacted] had been suspended from school nine (9) days since returning to in-person attendance and after issuance of the September 23, 2021 IEP**

(HT: D6: pp 204-205).

40. **An ARC meeting was set for November 10, 2021 to discuss Manifestation Determination; that meeting did not occur as [redacted] advised [redacted] was unable to attend.**

(HT- D6- p 206).

41. **An ARC meeting was set and held on December 1, 2021 to discuss Manifestation Determination; student's misbehaviors were found not to be a result of or related to [redacted] speech disability.**

The Student's behaviors that resulted in the recent suspensions were discussed. The ARC team reviewed the Manifestation Determination form to determine whether the Student's

behaviors were related to [redacted] disability category. At that date EBD had previously been removed as a disability category; the sole existing disability category was speech. None of the ARC members, including [redacted], believed or stated that the Student's behaviors were related to [redacted] speech disability (HT- D6- p 209).

At hearing [redacted] testified he and the School District agreed at that point (December 1, 2021) that [redacted] eligibility category was speech language; that the speech disability was not the reason for [redacted] acting out; that [redacted] told school officials the behaviors were probably based on [redacted] ADHD. To [redacted] knowledge the school district was never provided a document by a physician confirming an ADHD diagnosis or any medication prescribed for same. He agreed any behaviors exhibited by his [redacted] the immediately prior months of October and November were not caused by the speech disability. (HT-D2- pp 205-208). His requests to the School pertaining to in-school suspensions and tutoring were not related to his [redacted] speech disability (HT- D2- pp 219-220).

At the December 1, 2021 ARC meeting, all parties understood Manifestation would be and was discussed at that meeting. The Conference Summary notes show clearly:

> "The purpose of the meeting is to discuss manifestation determination, consent for re-evaluation, and to discuss placement options." CMPL 217.
>
> "The ARC discussed the manifestation determination and completed the manifestation determination form. The ARC discussed that [Student's] current eligibility determination area is Speech...the guardian revoked consent for special education services under the category of EBD. The ARC discussed that [Student] has had a BIP in place while previously identified under the category of EBD and currently with RTI which will now become a part of [redacted] IEP...The ARC...do not feel that [Student] is correctly identified and suspect the disability of Emotional Behavior Disability. Members of the ARC discussed that they do not feel that [Student] is properly identified and that he needs specially designed

instruction with program modifications and supports with goals and objectives to help him become more successful at school...The ARC discussed that [redacted] does not agree to give consent for [Student] to be re-evaluated with the suspecting category of EBD." CMPL 218 [bracketed information substituted as partial redaction].

"The ARC committee finds that the behaviors in question that have resulted in [Student] being suspended are not a manifestation of [redacted] current disability Speech and that the student may be subject to the same disciplinary procedures as a student without a disability." CMPL 218 [bracketed information substituted as partial redaction].

"The ARC also discussed with [redacted] that on Monday [redacted] had contacted the school requesting copies of the threat assessments that had been completed for [Student]. The staff at the school were unable to provide the requested copies because [redacted] revoked the consent to share information with them and other outside agencies over a year ago." CMPL 219 [bracketed information substituted as partial redaction].

"The ARC committee discussed that [Student] needs to be re-evaluated and the suspected disability of EBD needs to be considered again. The ARC asked the parent to give written permission for [Student] to be re-evaluated under the category of EBD...The dad stated he will not give his consent to re-evaluate [Student] under the category of Emotional Behavioral Disability." CMPL 219 [bracketed information substituted as partial redaction].

42. **Other than EBD, which Parent refused to be considered, School, at that time, had no basis of knowledge that Student could be disabled under another eligibility category.**

A portion of the factual finding of the Hearing Officer found in Section III, page 22 of her decision is reproduced here as being an accurate Finding of Fact which is adopted by the ECAB:

"At the time of the Manifestation Determination the parent had withdrawn consent for the child to be considered for EBD disability and there was no other

evidence the school was aware of any formal diagnosis or of any medical or psychological condition that would even put them on notice that the child could be eligible under another category."

ADDITIONAL FACT-FINDINGS

REGARDING COMPENSATORY EDUCATION CLAIMS

ECAB does not find any FAPE violation, but will make factfindings about the absence of evidence required to award any sort of compensatory education had there been a violation.

43. **There is insufficient evidence from the hearing and pleadings to show what position Student would have been in but for the alleged District violation of FAPE resulting from the alleged deprivation of services.**

44. There is a lack of evidence from the hearing and pleadings to identity the proposed compensatory services reasonably geared toward ameliorating any alleged deficit. There is a lack of supporting evidence to lend insight about the precise types of education services the student needs to progress.

45. Although the Student had a number of suspensions from school [redacted] continued to test at average intelligence and accomplished passing grades.

46. No evidence was presented to show where Student was performing at the end of the 2021-22 school year or where [redacted] would have been had other services been provided.

47. Experts did not testify or report that a FAPE violation by School caused substantial harm measurable in scope by comparing where [redacted] is compared to where [redacted] would have been without such violation, much less identify how such gap would be remediable with specific services.

The deposition testimony of [redacted] (who at that time worked with the Student in the Juvenile Intervention Service Program (JISP) was employed by [redacted] as a mental health professional) shows she did not note any deficits the Student had that were caused by School nor were any services recommended to make up for any deficits. (Dep T: pp 7-9; entire deposition generally). She worked with Student for about one (1) month in January 2022 in school where Student attended Kindergarten (Dep T: p 20). She spent 3 hours per school day with [redacted] on good days and sometimes the entire day when such day was "rough", working on [redacted] anger outbursts, behavioral problems, and techniques for de-escalation and emotion regulation (Dep T: pp 13-15).

During such time neither she nor any school staff member was able to identify a precursor or trigger for the Student's emotional outbursts (Dep T: pp 17-18). At the point when she believed they [redacted] had "exhausted" their resources, she recommended to Student's father that Student be placed either in a hospital setting or a residential setting short-term, pre-evaluation, to determine if there was something they were not seeing (Dep T: p 21). The Father did not agree to this suggestion and he ended [redacted] services. (Dep T: p 38).

As late as July 25, 2023 when [redacted] performed an in-clinic psychosocial evaluation, she was aware of Student's history of aggressive behavior and that [redacted] had been "diagnosed" with ADHD and was taking medication for the condition. She was unable to see from information provided to her, any triggers preceding behavioral aggression or outbursts. While in-clinic Student showed no aggressive behavior or anger and was compliant although sometimes [redacted] required extra encouragement to complete a task. (HT- D4-

pp 115, 128, 131). However, [redacted] testified that at the time of her evaluation she had not seen any prior diagnosis document pertaining to ADHD from any medical professional, or medical history other than information provided by the parent. In her report (page 13) she did make a DSM-V diagnosis herself. (HT: D4: p 159). At the time Student's executive functioning did not seem impaired. She believed that could be a reflection of the medication [redacted] took (HT-D4- p 134). Records she reviewed from that most recent academic year showed there were no suspensions (HT-D4- p 144). Although [redacted] teacher had rated [redacted] aggression as "significant" [redacted] saw nothing from Student's past year upon which to base that conclusion (HT: D4: pp 144-145). [redacted] made a DSM diagnosis of specific learning disability based on the test instruments she administered and not as a determination of eligibility under an IDEA disability category. She acknowledged that under IDEA in order to find someone eligible for SLD one must first rule out behavior as the cause of any deficit (HT- D4- p 160).

While the foregoing information is relevant to Student's situation, the record does not establish a violation causing substantial harm measurable by where Student is compared to where [redacted] would have been absent such violation, much less identify how such gap would be remediable with specific services.

48. **Student failed to request Compensatory Education in Student's Complaints.**

Petitioner's Due Process Complaint filed February 18, 2022[4] made no mention of a request for compensatory services either in the body of the pleading or in the prayer for relief. While Petitioner made a general request in the prayer for relief that Petitioner be awarded "...any

[4] See: *Petitioner's Exceptions....*, p. 1.

and all legal or equitable relief to which he may be entitled", such broad-based catchall request hardly identified with any specificity a request for compensatory services or the specific services to be awarded. Petitioner's Amended Due Process Complaint filed June 2, 2022 contained no prayer for relief other than for the Hearing Officer to "...accept the Petitioner's amendments to the Due Process Complaint and allow the issues to be heard at the August 24, 2022 Due Process Hearing." There is no mention in any pleading, whether in the body or prayer for relief, of a request for an award of compensatory services nor identification of any specific services to be awarded.[5]

FACT-FINDINGS REGARDING LOSS OF RECORDS

49. **Loss of Student's written records was an accident and was not shown to have caused harm.**

In fall of the 2021-2022 school year, School accidentally lost Student's written records. This event is the basis of a breach of confidentiality claim by Student. As set forth in the pertinent findings of the hearing officer and addressed elsewhere herein, ECAB agrees that the loss appears to have been accidental and that no harm was shown to have resulted. All findings of the hearing officer on the loss of records are incorporated by reference.

FACT-FINDINGS REGARD SPEECH/LANGUAGE

50. **Identification of Speech/Language disability, design of the IEP to address**

[5] The last school year considered in this appeal was the 2021-2022 school year. The school years that followed were not considered as the Petitioner's *Second Amended Complaint* was not properly tendered and could not be considered by the Hearing Officer or this ECAB (see Findings of Fact, I. Above).

Speech/Language, and implantation of the IEP provisions concerning Speech/Language are not an issue in this case.

This is undisputed.

CONCLUSIONS OF LAW

I. PETITIONER'S SECOND AMENDED COMPLAINT WAS NOT PROPERLY TENDERED AND COULD NOT BE CONSIDERED BY THE HEARING OFFICER OR THIS ECAB

Under Kentucky's two-tier review process the ECAB is required to "conduct an impartial review" of a hearing decision and "make an independent decision upon completion of such review." 20 U.S.C. Sec. 1415(g)(2). Such review and independent decision is within the authority of the ECAB in examining the objection to Petitioner's Second Amended Complaint.

20 U.S.C. Sec 1415 (c)(2)(E)(i)(I) & (II) states:

"A party may amend its due process complaint notice ***only if*** -

(I) the other party ***consents in writing*** to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to (f)(1)(B), or

(II) the hearing officer **grants permission,** except that the hearing officer may only grant such permission at any time ***not later than 5 days before a due process hearing occurs.***" (emphasis added).

See also: 34 C.F.R. Sec 300.508(d)(3)(i & ii);

In the present case, Respondent did not consent in writing to the Second Amended Complaint and presentation of the Second Amended Complaint by Petitioner occurred subsequent to **"5 days before a due process hearing occurs."** As there was no consent by

Respondent to acceptance/admission of the Second Amended Complaint and presentation of same failed to occur not later than 5 days prior to the start of the due process hearing, a ruling denying acceptance/admission of same was required. The ECAB, in its authorized role, rules on this issue below, sustains Respondent's objection.

II. THE HEARING OFFICE WAS CORRECT CONCLUDING THE PREDETERMINATION CLAIM WAS NEITHER RAISED AS AN ISSUE IN PLEADINGS OR DURING THE HEARING AND THEREFORE HAD NOT BEEN PRESERVED AS AN ISSUE.

It is undisputed that predetermination was never raised in pleadings or at the hearing. The Hearing Officer observed in her decision, at pp 18-19:

> "...the eligibility under the category of Other Health Impairment and Developmental Delay was never suspected or raised during the school years in question. OHI eligibility would not properly fit with aggressive, violent and threatening and destructive behavior that the child exhibited...The diagnosis of ADHD was not suggested to be an explanation for the child's actions. However, nothing in the record indicates that the school district should have known that there was some other potential eligibility category other than EBD and the Speech, and no proof was presented at the hearing that eligibility in some other category existed if the ARC had considered it."

Appellant has provided little in support of [redacted] allegation of a predetermination, other than to object to the conclusions by the Hearing Officer on this issue and to state "The Petitioner does not abandon the issues of predetermination..." See: *Petitioner's Exceptions to the Hearing Officer's Findings of Fact and Conclusions of Law*, p 13. While Petitioner's cross-examination of witnesses at the hearing touches on ADHD and OHI as a potential eligibility category alternative to EBD, there is no evidence to support an allegation that eligibility was predetermined, and if there were , the issue would be barred by failure to raise in pleadings or at

the hearing.

III. THERE WAS NOT A DENIAL OF FAPE IN EITHER THE PROCEDURAL OR SUBSTANTIVE MANNER BY WHICH RESPONDENT ADDRESSED THE MANIFESTATION DETERMINATION

A "manifestation determination" begins with a meeting that is held to determine if a student's display of behavior incidents are due to the student's disability category (HT: D6: p195). In the [redacted] District such meeting could be held if a student experiences suspension from school up to 10 days (HT- D6- p 195). 34 CFR 300.530(e) states

> [w]ithin 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 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.

The phrase "child with a disability" is defined by reference to the specific eligibility categories. 20 U.S.C. Sec. 1401(3). A significant change in placement due to discipline means: (1) a removal from class or school for longer than 10 consecutive school days, or (2) a series of removals from class or school that together total more than 10 school days in a school year and constitute a pattern of removal.

Manifestation determination appears as an issue two times in this case. In February of 2020, a suspension was issued which, had it been served in full, would have resulted in a significant change in placement due to discipline. However, on February 26, 2020, before the 10-day threshold was met, parent and School agreed to change placement to Home Hospital. Consequently, Student's placement at home from that point forward was not the consequence of a violation of the student code and no manifestation determination was required.

The second appearance of manifestation determination is when the ARC determined on December 1, 2021, that student behaviors leading to suspensions were not the result of student's speech disability. No one disagrees that, factually, that is correct. Parent's unilateral decision to remove student from EBD eligibility and refuse consent to evaluate precluded Parent from claiming EBD caused the behaviors. Per the fact-findings, there was no basis of knowledge for any other disability. See 300 CFR 300.534 (b).

School was not required to complete the manifestation determination in February of 2020 and correctly found in December of 2021 that Student's behaviors were not a manifestation of [redacted] speech disability.

IV. THE HEARING OFFICER CORRECTLY FOUND THERE WAS NOT SUFFICIENT EVIDENCE TO CRAFT ANY COMPENSATORY EDUCATION RELIEF.

. 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). "Compensatory awards should aim to place disabled children in the same position they would have occupied but for the school district's violation of the 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 F 3d 7, 9 (D.C. Cir. 2005).

Proof of damages in the form of measurable, quantitative deprivation of special education and related services is a necessary prerequisite for receiving a compensatory education award. Proof of a procedural violation alone is inadequate to warrant relief. See: *Knable v. Bexley City Sch. Dist.,* 238 F. 3d 755, at 765-766 (6th Cir. 2001)*;* and *Metro Bd. of Pub. Ed. v. Guest,* 193 F. 3d 457, 464 (6th Cir. 1999). 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).

The four (4) elements necessary for an award of compensatory services set out in *Board of Educ. of Fayette County, Ky. v. L.M.,* 478 F. 3d 307 (6th Cir.2007) and *Knable v. Bexley City Sch. Dist.,* 238 F. 3d 755, 760:

> (1) a procedural violation of the IDEA;
> (2) substantive harm caused by the procedural violation;
> (3) a measurement of the scope of that substantive harm (where the Student is as compared to where he could/should be in the absence of the procedural violation; and
> (4) identification of the specific services Student needs to get him to where he could/should have been.

Student failed to prove any of these. The Hearing Officer correctly found Student not entitled to compensatory education.

V. ALLEGED VIOLATION OF CONFIDENTIALITY IS OUTSIDE SCOPE OF THIS IDEA HEARING

Per the fact-findings, the alleged loss was an accidental destruction and was not shown to have caused harm. Confidentiality rights and duties exist under laws outside of IDEA and cannot be addressed by the hearing officer or ECAB.

VI. WRITTEN NOTICE TO FATHER OF FATHER'S OWN REVOCATION OF SPECIAL EDUCATION SERVICES WAS GIVEN TO FATHER

On September 23, 2021, the parent decided he did not want the school to provide EBD services and consented only to evaluation in the area of speech but *not* social and emotional status. The parent's express purpose in doing so was to remove EBD services from the IEP. Student argues that even though parent refused to consent to evaluation for social and emotional status the school was obligated to continue providing EBD services anyway until it sent the written notice complying with 300.503, and that no such written notice was provided.

OSEP Guidance Document dated December 1, 2008, (chrome extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.education.ky.gov/specialed/excep/Documents/2009%20Nonregulatory%20Guidance%20on%202008%20IDEA%20Regulations.pdf) states in relevant part:

> Sections 300.9 and 300.300 have been amended to **permit parents to unilaterally withdraw their children from further receipt of special education and related services by revoking their consent for the continued provision of special education and related services to their children**. Under these final supplemental regulations, a

> public agency is not able, through mediation or a due process hearing, to challenge the parent's decision or seek a ruling that special education and related services must continue to be provided to the child. These provisions require that parental revocation of consent must be in writing and upon revocation of consent a public agency must provide the parent with prior **written notice in accordance with §300.503** before ceasing the provision of special education and related services.

(emphasis added). The language in the guidance quoted above means revocation can be made only of *all* services. The same OSEP guidance elsewhere explains that a parent who objects to a particular service must file a due process complaint and prove that such service is not required in order to provide FAPE. However, if a parent revokes all services, the parent can limit a school's ability to provide special education by only consenting to evaluation in areas the parent wants addressed. Consequently, the parent revoked all services and then consented to evaluation in the area of speech/language only. The pre-printed wording in the revocation of consent form the parent signed, CMPL 172, makes clear that the person signing it revokes *all* special education services, but the parent handwrote on the form that he wanted to revoke EBD and continue with speech because, he testified, he wanted to be clear about the desired end result.

Thus, being a full revocation of services, a written notice was required containing the information required under 300.503, just as Student contends. However, the hearing officer also was correct in finding that notice was in effect given through ARC documents. The notice described in 34 CFR 300.503 requires the following:

> (1) A description of the action proposed or refused by the agency;
> (2) An explanation of why the agency proposes or refuses to take the action;
> (3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
> (4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for

evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
(5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;
(6) A description of other options that the IEP Team considered and the reasons why those options were rejected; and
(7) A description of other factors that are relevant to the agency's proposal or refusal.

In this case of the parent revoking consent to services, items #1, #2, #3 #6, #7 are apparent from the ARC summary – services are being discontinued not because of a decision by the school or action by the ARC but solely because the parent exercised his unilateral right to revoke consent. Items #4 and #5 are satisfied in the provisions above the parent's signature. See CMPL 166. The summary was signed by the parent on 9/23/21 (CMPL 165), whereupon provision and receipt of written notice was satisfied. No law has been cited that requires the 34 CFR 300.503 notice content be set forth in a separate and discrete document titled "34 CFR 300.503 Notice."

ECAB finds School provided proper written notice to father of father's own revocation of consent to special education services.

VII. SCHOOL DID NOT FAIL TO PROVIDE FAPE

Student argues that School should have performed an FBA beyond what occurred in the October 28, 2019 ARC meeting. FBAs are expressly required under IDEA only if a manifestation determination conducted after disciplinary action finds a student's behaviors were the result of his or her disability. That did not occur with this student.

Student had two disability eligibilities, speech/language and EBD. Provision of FAPE in Speech/language is not disputed. The only FAPE issue concerns the EBD. An FBA could only be relevant in this case if failure to perform one resulted prevented School from identifying

student as EBD, creating an IEP to provide EBD special education and related services, and implementing that IEP. Hereinbelow, ECAB finds FAPE was provided.

A. IDENTIFICATION OF THE CHILD AS EBD WAS TIMELY

There is no Child Find violation in this case. Per the fact-findings, behavior issues first manifested in the Fall of 2019. School convened an ARC on September 30, 2019, initiated an OT evaluation and then an EBD evaluation, and notwithstanding Parent revoking consent for School to communicate with Student's mental health care providers and revoking consent to evaluate in November, came up with EBD qualification and a proposed IEP by December 3, 2019. Additionally, School introduced other measures during the interim, such as shortened school days and a behavior intervention plan (see Fact-Finding #6 hereinabove). The School addressed student's IBD with commendable alacrity.

B. STUDENT FAILED TO PROVE THAT IEP DESIGN OR IMPLEMENTATION WAS INSUFFICIENT TO PROVIDE FAPE

The Court in *Board of Education of Fayette County v. L.M.,* 478 F. 3rd 307, 314 (6th Cir. 2007) described the obligations of a school district in providing FAPE to a student determined eligible for services under the IDEA as follows:

> "Under 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." *Rowley*, 458 U.S. at 201, 102 S. Ct. 3034. There is no additional requirement, however, "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 in order to "...meet its substantive obligation under the IDEA, a school must offer an IEP reasonable calculated to enable a child to make progress appropriate in light of the child's circumstances." 137 S. Ct. 999. The IEP must *aim* to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and *functional advancement. Id.* (emphasis added). The Court further stated:

> "[E]ducational program must be appropriately ambitious in light of [a student's] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives." 137 S. Ct. 1000.

In the present case, during the relevant period, grades were not an issue, only the fact of the behaviors. The essence of Student's argument on FAPE is that because behaviors continued, the IEP or its implementation must have been defective. However, an analysis of events as they unfolded from adoption of the IEP in December of 2019 until Parent's unilateral revocation of services in September of 2021 does not support Student's argument that FAPE was not provided.

An IEP was adopted December 4, 2019. Behaviors did not cease, Student received a long suspension on February 20, 2020, and went on Home Hospital on February 26, 2020. Thus, the first run at implementing an IEP, which, taking into consideration winter break, lasted only a few weeks, was not successful. In March of 2020, School switched to virtual instruction for all students due to COVID. This lasted roughly a year, during which time there were no behavior issues or face-to-face interaction between Student and other students and School staff. However,

from the time the student returned to face-to-face instruction in March of 2021 until Parent withdrew consent to special education services on September 23, 2021, student's behaviors grew *much* better. Fact-finding #18 states:

> The parent testified that Student's behaviors were fine at the point [redacted] came back to school in 2021. HT, Apr. 26, p. 85. When school resumed in the fall of 2021, Student's behavior was significantly better. HT, Apr. 27, p. 188. The parent was in communication with Student's teacher and they discussed how [redacted] was positively handling [redacted] being respectful, following directions, and accepting redirection. HT, Apr. 27, pp. 188-192. Parent testified that Student's maturity was apparent in [redacted] behavior at school during the first two months. HT April 26, p. 112; also, see CMPL 178. To the extent an inference can be drawn, **it suggests that the EBD special education and related services were working.**

(emphasis added). Additionally, per Fact-finding #26, numerous Conference Summaries, IEP's, and testimony illustrate Student did not suffer academically at any time and that adequate services were provided, when permitted by parent, to insure child received FAPE during all years in question.

After Parent revoked services on September 23, 2021, Student's bad behaviors escalated dramatically, resulting in 55.5 days of suspensions. (See Fact-Finding #20 and #21). However, from September 23, 2021, until the end of the period under consideration in this case, due to Parent's unilateral withdrawal of consent for special education services and refusal to consent to evaluation in the area of behaviors, Student was eligible for special education and related services **only** in the area of speech/language. There is no evidence that behaviors were caused by the speech/language disability or impaired student's progress in speech/language. Therefore, there was no need or obligation under IDEA to address behaviors as part of a speech/language IEP after September 23, 2021.

What should have happened is that School should have evaluated Student for EBD again and created an IEP with EBD special education and related services. School tried to do this, but Parent refused to consent to evaluation, limiting the scope of Student's FAPE rights to special education and related services in speech even though it was obvious Student would have qualified for EBD eligibility.

Consequently, ECAB agrees with the hearing officer that equitable considerations bar holding School responsible under IDEA for addressing behavior disabilities after September 23, 2021. Courts have stated that on equitable principles "what is important to the equitable consideration is if the parent were disruptive or uncooperative in the school district's efforts to meet its obligations under the IDEA " *In re New York City Department of Education*, 694 F 3d 167, 185 (2™ Cir. 2012). Other cases have held that courts may consider various factors weighing the equites, including whether the parent made their child available for a school's district evaluation. *C. L. vs. Scarsdale Union Free School District*, 744 F 3d 826, 840 (2nd Cir, 2014) and *E.M. v. New York City Department of Education*, 58F 3d 442, 461(2nd Cir. 2014).

FINAL DECISION AND ORDER

The Exceptional Children Appeals Board affirms the decision of the hearing officer and finds no relief is due Appellant.

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.

SO ORDERED this 21st day of February, 2025, by the Exceptional Children's Appeals Board, the panel consisting of Roland Merkel and Mike Wilson, Chair.

EXCEPTIONAL CHILDREN APPEALS BOARD

BY: /s/ Mike Wilson
Mike Wilson, Chair

CERTIFICATION:

The foregoing was emailed this 21st day of February, 2025 to the following:

Corey M. Nichols, KDE Deputy Legal Counsel
corey.nichols@education.ky.gov

With copies emailed to:

[redacted]

[redacted]

[redacted]

KDE Legal Services
kdelegal@education.ky.gov

____/S/_Mike Wilson_____
MIKE WILSON, CHAIR
EXCEPTIONAL CHILDREN APPEALS BOARD