KENTUCKY DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND EARLY LEARNING
EXCEPTIONAL CHILDREN APPEALS BOARD
AGENCY CASE NO. 2324-07

[REDACTED] PETITIONER/APPELLANT

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

[REDACTED] SCHOOLS RESPONDENT/APPELLEE

****

PROCEDURAL BACKGROUND

On September 17, 2023, Student (also referenced as "Petitioner", "Appellant", "[REDACTED]") filed a Request for a Due Process Hearing. A hearing was held October 20, 2023, in [REDACTED], [REDACTED], Kentucky, the Hon. Kim Hunt Price presiding. On November 3, 2023, Hearing Officer Price issued Findings of Fact, Conclusions of Law, and Decision in favor of Respondent [REDACTED] Schools (also referenced as "Respondent", "Appellee", "District", "School District", "[REDACTED] School District") awarding it a summary judgment and directed verdict on allegations A, B, C, D, E and F.

This matter comes before the Exceptional Children Appeals Board ("ECAB") following a timely appeal by Student. Student does not appeal all the rulings of the Hearing Officer's Decision. Student appeals four issues which are discussed below.

ISSUES FOR DECISION

1. Whether the School District failed to identify Student as a student with a disability.
2. Whether the School District failed to expeditiously evaluate Student by taking 118 days/63 school days.
3. Whether the School District violated the requirements of 34 CFR §§ 300.530 through 300.536 regarding a manifestation determination.
4. Whether the School District, through the School Board, interfered with Student's placement decision without being a member of Student's Admissions and Release Committee.

For the reasons stated herein, the ECAB affirms the Hearing Officer's Decision awarding a summary judgment and directed verdict on all issues in favor of Respondent/Appellant [redacted] Schools. The [redacted] School District did not violate Student's right to a Free Appropriate Public Education ("FAPE").

JURISDICTION BEFORE THE EXCEPTIONAL CHILDREN APPEALS BOARD IS ESTABLISHED

This is an appeal of a hearing officer's decision as permitted by 707 KAR 1:340 Section 12 which provides:

> (1) A party to a due process hearing that is aggrieved by the hearing decision may appeal the decision to members of the Exceptional Children Appeals Board as assigned by the Kentucky Department of Education. The appeal shall be perfected by sending, by certified mail, to the Kentucky Department of Education, a request for appeal, within thirty (30) days of the date of the hearing officer's decision.

Student's appeal was timely filed.

ECAB IMPARTIALLY REVIEWS THE RECORD DE NOVO AND MAKES AN INDEPENDENT DECISION

ECAB reviews the record de novo and can make fact-findings it deems necessary to address legal issues raised on appeal. Where a state has established a two-tier administrative process, the appellate review is to be conducted pursuant to 20 U.S.C. § 1415(g). Kentucky has adopted such a two-tier system. See 707 KAR 1:340 § 12. ECAB is required to conduct an impartial review of a hearing decision and make an independent decision upon completion of such review. 20 U.Ş.C. § 1415(g).

34 CFR § 300.514(b)(2) provides that the appellate panel is to examine the entire hearing record before making its independent decision. The only limitation on the de novo review is that ECAB must give deference to a hearing officer’s fact findings based on credibility judgments “unless nontestimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion.” *Carlisle Area School District v. Scott P.,* 62 F.3d 520, (3d Cir. 1995). Such deference applies only to those situations involving record-supported credibility determinations. *Id.* at 529. This panel is free to make fact findings contrary to the hearing officer's findings so long as they are supported by substantial evidence and are not based upon different views about credibility of witness testimony. *Id.* at 529. The existence of conflicting testimony does not, by itself, warrant concluding a related fact finding was implicitly a credibility determination of evidentiary facts by the hearing officer rather than differences in overall judgment as to proper inferences. *Id.* at 529.

STUDENT BEARS THE BURDEN OF PROOF

Student bears the burden of proving ██ entitlement to relief by a preponderance of the evidence. Student bears the ultimate burden of persuasion on the elements of Student's claims. *Schaffer v. Weast*, 546 U.S. 49, 57-58 (2005); KRS 13B.090. 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".

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 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.

ISSUE ONE: Whether the School District failed to identify Student as a student with a disability:[1]

Findings of Fact - Issue One.

1. Student alleged the School District failed to identify ███ as a student with a disability. (Petitioner's Initial Brief, p. 1).

2. Student's parents did not inform anyone in the school district that Student had any medical problem, disability, disabling diagnosis, or Attention Deficit Hyperactivity Disorder ("ADHD") diagnosis until after the 2022-2023 school year.

3. Years earlier, Student had been identified as a student with a disability in another school district. The mother testified the earlier Individual Education Plan ("IEP") pertained solely to speech and terminated at the end of Student's kindergarten year (T: 30). The evidence shows there were no other IEPs for Student through the 2022-2023 school year.

[1] References to trial testimony is noted by the letter "T" and the accompanying transcript page number, eg. T: 123.

4. ████████, an Assistant Principal at ████████████ School, had previously been a special education teacher (T: 143, 163). He met Student during Student's sophomore year and was one of Student's football coaches. In neither setting had he ever observed anything out of the ordinary that would warrant referring or identifying Student for special education. (T: 162,164). ████████ stated neither parent informed him Student had a medical condition. He never suspected Student had been diagnosed with ADHD (T: 170).

5. During the process of identifying a student with a disability, school personnel consider a student's grades, attendance, and behavior. An Intervention Points System is used and if the participating student's grades improve, the individual does not qualify for a referral. If grades do not improve, the process for a special education referral begins. (T: 156-158). Although Student had a number of behavior referrals, none of them were for serious behavior. Student's behaviors were addressed informally in meetings with ███ (T: 155, 171).

6. ████████████ was Student's chemistry teacher during the 2022 to March 2023 school year. (T: 181). Having been diagnosed with severe ADHD and treated with medication at age 18, she was familiar with the condition. (T: 203).

██████████ was aware of behavior reports regarding Student but testified they were mostly for inappropriate behavior and attention seeking in nature (T: 181). She observed Student's number of such referrals was comparable to other students, but were "not as vulgar" in nature (T: 185).

On January 27, 2023, she observed Student watching a movie on ██ PC instead of taking a 1-hour exam. ██████████ telephoned Student's father advising him Student received a "zero" on the test. The father assured her he would take care of the issue and she would see a

different student the following Monday. Beginning on the following Monday and continuing thereafter, Student's behavior improved. (T: 186-89). Student asked whether [redacted] would be allowed to retake the exam after school (T: 189).

Nothing about Student's behavior made [redacted] think she should refer [redacted] for special education due to ADHD. [redacted] interacted with other students and had no behavior problems with them; [redacted] grades were generally good; and, neither parent nor anyone else told her Student had a medical condition. (T: 205).

7. [redacted] was a general education classroom teacher for 9 or 10 yea[redacted] [redacted] ("[redacted]"). (T: 226). [redacted] is situated within the school district and provides students in grades 6 through 12 the opportunity to catch up on their class work with the goal of returning to their regular schools. Students come to [redacted] for any number of reasons, including truancy, inability to function in a regular setting, behavioral issues, or court ordered situations. (T: 235-37).

[redacted] was a part of Student's IEP team (T: 231). He had no issues with the goals in Student's IEP and was able to implement the IEP properly (T: 249, 253).

He observed Student to be intelligent and interested in social studies. Student asked [redacted] [redacted] questions outside of [redacted] classroom work. Student did not struggle with many subjects and asked for assistance occasionally. (T: 253-54). Student made good grades and good progress at [redacted] and was successful (T: 261, 267). [redacted] passed all [redacted] classes including Spanish, English and Geometry. (T: 260-61).

████ did not observe anything about Student to indicate there was a reason for a special education referral (T: 261).

8. ████ is a retired teacher, but now works as a part-time teacher and head football coach at ████ School. He has known Student since Student's football playing days in middle school and ██ 3 years on the high school team. ████ helps teachers if they have a problem with a student who is on the team (T: 271).

There were no behavior problems when Student was in ████' class; Student's behavior was "normal". (T: 273-74). Teachers contacted ████ a few times about Student's behaviors. ████ thought these contacts/behaviors were similar in frequency and nature exhibited by Student's peers (T: 272).

████ was contacted by Student's parents only after Student was expelled. The parents never indicated to ████ that Student had any health problems, ADHD, or other diagnoses. (T: 276). ████ emphasized that as a football coach he would have to know if a player had a health issue or was on medication. (T: 277-78).

9. ████ is the school district's Director of Special Education. She and her team are responsible for the identification of children with disabilities and providing them with services. (T: 279).

The school district utilizes a number of tools and procedures to locate and identify children who may have a disability including: publishing an ad in the local newspaper during the Summer; posting information on the school district's website explaining the Child Find Notification Procedures; conducting annual training of the staff which are comprised of 2 types: Team 1 for general education and special education teachers and the Special Education Staff

Academy for special education teachers; sending posters printed in Spanish and English to local schools, hospitals, doctors' offices, health department, jail, and libraries; training special education teachers monthly in PLC meetings conducted by the district's special education liaisons. was the liaison last year at School. (T: 279-80).

10. The district receives a multitude of parental referrals, sometimes several per month. For the last 26 years, the School District has maintained a data base of referrals and follows up on each one. (T: 282).

11. When the district knows or has reason to know a child may have a disability, the district must responsibly follow-up. The Admissions and Release Committee ("ARC") determines the identity of students with disabilities. An ARC is not formed until a child is referred for special education. (T: 283-84).

12. Whether a referral comes through RTI, Tier 3 or from a parent, the ARC is formed and holds a referral meeting. Consent is obtained from the parent or guardian to evaluate the child. When the evaluation(s) is completed, the ARC determines whether the child is eligible. (T: 289-90).

13. The number of Student's disciplinary incident reports increased from Freshman to Sophomore year. did not see anything in the referrals to indicate should have been referred for special education evaluation. She stated the behaviors Student exhibited were "typical" of all students such as was not where was supposed to be, issues pertaining to phone, and scratched off a sticker from Chrome book. stated, "That is not indicative of a student who has a disability. That seems to me, from a professional viewpoint, that that is behavior that we might see typical of all students." (T: 301-03).

14. The incident of March 7, 2023, when Student brought guns and ammunition to school and left it in car violated the school's zero tolerance policy on weapons and resulted in expulsion on March 14, 2023. Although a serious offense, testified there was no indication of intent to harm or that had a disability. (T: 304).

15. On May 30, 2023, received an email from Student's mother. On this date, Student was a general education student and allowed to attend the district's alternative school, , with safety measures in place during the one (1) year expulsion period. (Respondent's Ex. 10; T: 292). The parent advised Student was diagnosed with ADHD that month, and she requested an IEP/504 evaluation. responded to the mother by email asking for the student's name. School was not in session at this time because summer break had begun (T: 312). The mother emailed with Student's name and asked to call her (Respondent's Ex. 10; T: 293). telephoned the mother. The mother provided some history and inquired whether Student's suspension could be reversed under the Individuals with Disabilities Education Act ("IDEA"). (T: 293). After more discussion, the mother decided she wanted a special education evaluation (T: 312). A 504 referral could lead to accommodations. An IEP could result in specially designed instruction. (T: 312).

16. The May 30, 2023, emails and telephone call automatically triggered the Child Find procedures (T: 294). completed a Child Find intake form and sent the information to the special education consultant assigned to . The consultant contacted Student's mother about scheduling an ARC meeting to discuss the referral (T: 295).

17. When reopened after the Summer Break and was staffed, a July 24, 2023, ARC referral meeting was scheduled. This date was prior to the start of classes. The

mother signed and returned the consent form (Respondent's Motion for Summary Judgment, Ex. A).

18. At the September 25, 2023, ARC meeting, Student was deemed qualified for special education services, with a primary disability identified as "Other Health Impairment", referencing a diagnosis of ADHD. An IEP was created (Respondent's Motion for Summary Judgment, Ex. B). Student's IEP was in place on September 25, 2023, within thirty (30) school days from the date of the referral (T: 295).

19. Student was placed in IDEA services on September 25, 2023. [redacted] then received special education services as well as continuing general education at [redacted].

Conclusions of Law – Issue One.

1. The School District is required to locate children who may need special education services and conduct a full and individual initial evaluation in accordance with 20 U.S.C. Sec. 1414 before the initial provision of special education and related services to a child with a disability.

Applicable Law

20 U.S.C. Sec. 1400 et seq. requires schools receiving federal funding must provide Students who qualify with a free and appropriate public education ("FAPE"). FAPE includes both "special education which is specially designed instruction . . . to meet the unique needs of a child with a disability" and "related services which are support services required to assist a child...to benefit from that instruction." 20 U.S.C. Sec. 1401(26)(29).

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...”

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, Sec. 1(1).

C. The School District must also act in accordance with certain Federal and Kentucky Regulations:

34 CFR Sec. 300.111(A)(1) states, “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...”

(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.

34 CFR § 300.111(a)(1)(I)(c) states: Other children in child find. Child find must also include (a) 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.

34 CFR § 300.534 provides: (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 Sec. 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. (See also similar language set out in 707 KAR 1:340 Sec. 17(1)).

There are exceptions to the basis of knowledge set out in paragraph (b) above where the public agency would not be deemed to have knowledge, as follows:

(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.

707 KAR 1:300 requires schools in Kentucky to locate, identify, and evaluate students who may need special education services.

2. 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. *Knable v. Bexley City Sch. Dist.*, 238 F. 3d 755, 765-66 (6th Cir. 2001).

The Sixth 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 to did not require new district to evaluate for IDEA services. The Sixth Circuit three-judge panel noted the student had no history of receiving special education services in all the years attended school in ; the student had recently moved across state lines – a factor that the parents conceded might have an impact on behavior. District staff also testified the student's behaviors, while concerning, were not unusual or severe enough to suggest they might stem from a disability.

3. The School District lacked actual knowledge of the existence of a disability and there was a lack of clear signs of disability or facts giving rise to a suspicion of a disability.

As stated above, such evidence shows the district did not have actual knowledge student was a child with a disability, nor facts sufficient to give rise to a suspicion Student was a child with a disability.

Student's mother is a [redacted] teacher in the district and possessed knowledge of the "child find" and identification process required by the IDEA. She testified she did not provide the district with any information or notice prior to May 30, 2023, she had suspected or had knowledge Student had a disability and required referral for special education. This date was after the end of the 2022-2023 (Student's sophomore) school year. Student's mother first signed consent for Student's Special Education Evaluation on July 24, 2023.

At Student's March 14, 2023, expulsion hearing, neither Student's mother nor anyone on [redacted] behalf raised concerns of a need for special education services, or knew or suspected Student had a disability. Student had a prior IEP, but this IEP was in another district for speech services during Student's kindergarten year. The evidence showed the IEP terminated at the end of the kindergarten year.

All of Student's witnesses including Student's mother were either employees of the School District or a consultant with the Kentucky Department of Education. They all testified (with the exception of Student's mother) Student's increased behavioral incidents between freshman and sophomore year in high school were similar in nature and number to such incidents exhibited by [redacted] peers and did not rise to the level of misbehavior that warranted a referral for special education services.

Student was not diagnosed with ADHD until [redacted] family doctor, [redacted]., issued such diagnosis and provided a statement dated July 10, 2023, (Respondent's Ex. 9).

4. Summary Judgment is appropriate only when there are "no genuine issues as to any material fact and . . . the moving party is entitled to judgment as a matter of law. *Lewis v. B&R Corp.*, 56 S.W. 3d 432, 436 (Ky. Ct. App. 2001); CR 56.01, 56.03. Litigation may be terminated by Summary Judgment when evidence is viewed in the light most favorable to the nonmoving party and only if it appears it would be impossible for the opposing party to produce evidence at trial warranting judgment in his or her favor. *Pearson ex rel. Trent v. National Feeding Systems, Inc.*, 90 S.W. 3d 46, 49 (Ky. 2002); *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W. 2d 476, 480 (Ky. 1991); *Lewis* at 436.

5. Appellant failed to prove by a preponderance of the evidence that school staff overlooked clear signs of a disability and were negligent in failing to order testing, or that there was no rational justification for deciding not to evaluate.

6. The Hearing Officer properly concluded there were no genuine issues as to any material fact and Appellee/Respondent was entitled to judgment as a matter of law. *Lewis v. B&R Corp.*, 56 S.W. 3d 432, 436 (Ky. Ct. App. 2001); *Pearson ex rel. Trent v. National Feeding Systems, Inc.*, 90 S.W. 3d 46, 49 (Ky. 2002); *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W. 2d 476, 480 (Ky. 1991); CR 56.01, 56.03.

Decision on Issue 1 - Respondent/Appellee [redacted] Schools did not violate the "Child Find" provisions of IDEA and did not fail to identify Student as a student with a disability.

ISSUE TWO: Whether the School District failed to expeditiously evaluate Student by taking 118 days/63 school days.

Findings of Fact - Issue Two.

1. On May 30, 2023, Student’s parent made a referral for a special education evaluation. The referral was made two and one-half months after Student was expelled with services at an alternative school. The school was already out for the summer at the time the parent made the request for an evaluation.
2. On July 24, 2023, Student’s parent signed consent for the IDEA evaluation. (Ex. A to Respondent’s Motion for Summary Judgment.) Student’s IDEA evaluation was completed and an IEP was in place on September 25, 2023. (Ex. B to Respondent’s Motion for Summary Judgment.) On August 10, 2023, the school year began for students. The school was out for Labor Day. (Ex. C to Respondent’s Motion for Summary Judgment.)
3. Part of the evaluation process requires input from teachers who are not regularly working during the summer and observations of students in the classroom.
4. The expedited evaluation requested by the parent was completed and an IEP in place within 31 school days from receipt of the parent’s consent for the evaluation. It was completed 63 calendar days after parental consent was signed and 118 days after the parent made a referral for special education evaluation.
5. Kentucky’s regulations allow a 60-school day timeline for completion of an initial evaluation. Student alleges 707 K.A.R.1:320(2)(3) violates the IDEA which is not correct.

Conclusions of Law - Issue Two.

1. 34 C.F.R. § 300.301(c)(1)(i) and (ii) provides that a school district has 60 days or the amount of time allowed under state law to conduct an initial IDEA evaluation.

2. 707 KAR 1:320(3) provides that for a normal special education evaluation, the evaluation is to be completed within 60 school days after receipt of parental consent.
3. No statute or regulation (federal or state) states how long a school district has to conduct an expedited evaluation.
4. Because of the disciplinary measures at issue, Student was entitled to an expedited evaluation pursuant to 34 CFR § 300.534.
5. 707 K.A.R.1:320(2)(3) does not violate the IDEA.
6. The United States Department of Education refused to add a time requirement for an expedited evaluation to the federal regulations. The 2006 Federal IDEA Regulations Commentary found at 71 Fed. Reg., No 156, p. 46728 provides an expedited evaluation should be conducted in less time than a normal evaluation. The comments acknowledge that "what may be required to conduct an evaluation will vary widely depending on the nature and extent of a child's suspected disability and amount of additional information that would be necessary to make an eligibility determination." The commentary noted the statue did not have a specific time limit for expedited evaluations.

Decision on Issue 2 - The School District evaluated Student and offered an IEP within the timelines provided by federal and state law.

Issue 3: Whether the School District violated the requirements of 34 CFR §§ 300.530 through 300.536 regarding a manifestation determination.

Findings of Fact - Issue 3.

1. A manifestation determination was not required and disciplinary protections did not apply.
2. The school district did not conduct a manifestation determination because Student was not, at that time, a student identified as needing special education.
3. Student's expulsion prevents ███ from playing football for ██████████ School during the period of expulsion.

The disciplinary letter placing him at ██████ prohibited Student from coming on ██████████ School grounds, which included participating in sports or attending sporting events. Upon completing the suspension in March 2024, Student may be permitted to return to ██████████ School but without driving privileges, and ██ must be temporarily in alternative classroom before returning to general education.

4. Student's one-year disciplinary expulsion and subsequent placement in ████████ occurred two months before the parent referred Student for a special education evaluation and six months before ██ was determined eligible.

The suspension occurred in March 2023. When Student was expelled, the parent raised no issue about ADHD or special needs (T: 83). Two months later, the parent made a referral for special education based on ADHD. (T: 100). A diagnosis of ADHD was obtained from a doctor dated July 10, 2023. (T: 85). Student was found eligible and given an IEP with special education services on September 25, 2023.

5. The September 2023 IEP provides for 45 minutes of special education in a resource room and general education setting the rest of the school day.

   This is undisputed.

6. The September 2023 IEP provided for delivery of services at [redacted] where [redacted] attended at the time the IEP was adopted.

   This is undisputed.

7. Student did not prove instruction at [redacted] with the existing IEP does not provide FAPE.

[redacted] teaches the Kentucky general education high school curriculum standards and is composed of many general education students and some special education students. (T. 262-63). Student was not placed by the School District into an Interim Alternative Educational Setting ("IAES"), but was expelled with services. [redacted], a teacher at [redacted], stated the vast majority of students at [redacted] have a disciplinary history. The other students attend [redacted] to fill gaps in their transcripts so they can graduate timely. There are 2 teachers, 2 instructional assistants, and 2 counselors at [redacted] teaching 14 students in 6 grades. Students are taught either by traditional stand-up instruction by teachers using textbooks and workbooks, or the students are taught using online programs, depending on the students' needs and preferences. If an [redacted] student is identified as a student with a disability, the staff provides the accommodations and services set forth in the IEP. Collaboration with a Special Education teacher occurs daily and there are weekly team treatment meetings with the student being present every other week. Students generally attend [redacted] for about 6 months. To leave [redacted], a student must accumulate 10,000 points. Six hundred points is the maximum weekly points a student can earn. Points are given for completing all 5 written

assignments each day. Points can be lost for infractions. If a student earns 10,000.00 points, but their placement time is longer than the time that took, the student remains at [REDACTED] receiving education services until their time expires.

[REDACTED] School ("[REDACTED]") has a football team; [REDACTED] does not. The record is replete with testimony establishing playing football and socializing with teammates (T. 120-121) mattered most to Student when [REDACTED] attended [REDACTED] School. The School District argues, citing the call log in Respondent's Ex. 10 and other evidence (i.e. "Mom said I want an IEP so we can go back to [REDACTED]", T: 317.), that Student's sole purpose in initiating due process was to undo the expulsion that separated Student from [REDACTED] team and friends at [REDACTED].

Ulterior motives are irrelevant to the student's entitlement to special education. However, motives may bear upon credibility and weight of testimony and opinions. The parent stated the only change needed on the IEP was to deliver the services at [REDACTED] instead of [REDACTED] [REDACTED]. (T: 47.) But doing so would violate the disciplinary conditions that bar Student from [REDACTED] school grounds. The parent opined that instruction in the format utilized in the general education setting at [REDACTED] is not appropriate for Student due to [REDACTED] "learning style." (T: 54.) However, while attending [REDACTED], Student was quite capable of doing work whenever [REDACTED] wanted (T: 209) but deliberately chose (and told teachers [REDACTED] was doing so) to do only the minimum, both academically and behaviorally, [REDACTED] believed necessary to remain eligible for football (T 132-33; 168-69; 175; 184; 207-08; 274-75). While [REDACTED] grades at [REDACTED] were lower at final than midterm, [REDACTED] teachers report [REDACTED] is having success there (T. 268-69). There was no evidence presented to show Student cannot receive FAPE at [REDACTED] under the existing IEP.

8. There was no meaningful evidence the ARC, if given the opportunity, would conclude the incident for which Student was expelled was a manifestation of a disability.

There was no manifestation determination, and the issue of manifestation was not explicitly litigated in the due process hearing. However, ECAB makes a finding on this point because Student asserted, in the reply brief, "[b]ased on the behavior that caused the expulsion, it is likely Appellant's ARC would conclude it was a manifestation of ██ disability."

The only area of concern listed on Student's IEP is staying awake during class. ██ two goals are to stay awake 80% of the time and turn in assignments 5 of 6 times. (Petitioner's Ex. 13.) ██ supplemental aids and services include a self-timer, extended time, redirection, corrective feedback, and reinforcement. While ADHD theoretically can, in some persons, affect executive functioning, no member of Student's ARC, other than the parent, indicated any suspicion that bringing guns to school in ██ truck was a manifestation of ██ ADHD. In fact, notwithstanding ██ ADHD diagnosis, the parents continue to permit Student to transport guns in ██ vehicle (T: 109), evidencing they believe ██ ADHD does not impair ██ ability to do so responsibly.

Conclusion of Law – Issue 3.

1. A Manifestation Determination Was Not Required Prior to Expelling Student.

Expulsions from Kentucky public high schools are determined by local Boards of Education. K.R.S. 158.150. However, students receiving special education are, under certain circumstances, accorded protections under federal law from disciplinary action without first determining if the behavior that prompted the discipline was a manifestation of disability. In the present case, no manifestation determination was required because at the time of the expulsion,

Student was not qualified for special education and the District had no reason to believe Student needed special education services. If the school district does not have knowledge that a student may require special education services, then regular disciplinary measures, which can include suspension or expulsion without educational services, apply. 34 C.F.R §§ 300.534(d)(1) and (2)(ii).

2. The School District did not improperly change the placement of Student or violate disciplinary protections for special education students.

34 CFR § 3200.530(g) requires a child with a disability not be placed in an alternative program for more than 45 days without a manifestation determination. The 45 school-day IAES placement is an exception to application of the "stay put" principle when a parent files for a Special Education Due Process hearing to challenge long-term disciplinary action or a manifestation determination regarding certain serious infractions of the Student Code of Conduct. 34 C.F.R. § 300.518(a) and 34 C.F.R. § 300.533.

However, the 45 school-day IAES placement only applies to students already qualified for IDEA services who have a Special Education placement to which the principle of "stay put" applies when a Special Education Due Process hearing request is filed. *Id.* The IAES provisions do not place a 45-day limit on a student expulsion that occurred **prior** to the child being determined as a child with a disability. In this case, the child was expelled prior to the parent even making a request for a Special Education evaluation. There was no change of placement because Student had no "placement" when the expulsion occurred.

3. The school district is not required to retrospectively revisit discipline imposed before a student qualified for or was suspected of needing special education.

Neither federal nor Kentucky law require schools to modify disciplinary decisions or make manifestation determinations for discipline that occurred prior to a child being determined eligible for Special Education. To create that obligation by administrative fiat would place burdens on schools that greatly exceed those established under IDEA or Kentucky regulations. That also would invite families to file for Due Process and seek evaluations solely to delay or undo discipline with which the family did not agree. It is particularly inappropriate to invent an exception to the rule in the present case where there was no Child Find violation, and the evidence does not suggest a meaningful possibility the ARC would or should find the behavior triggering the expulsion was caused by a disability.

Student argues the refusal to undo [redacted] disciplinary placement limits those administering [redacted] IEP, but that is not accurate. If the ARC determines FAPE or special education services cannot be delivered at [redacted], the ARC not only can but would be required to make whatever change is necessary to provide FAPE. Here, Student did not prove FAPE cannot be provided at [redacted]. Student is not seeking FAPE per se, but a return to [redacted] team and friends at [redacted].

Decision on Issue 3 - The School District did not violate the requirements of 34 CFR §§ 300.530 through 300.536 regarding a manifestation determination.

Issue 4: Whether the School District, through the School Board, interfered with Student's placement decision without being a member of Student's Admissions and Release Committee.

Findings of Fact - Issue 4.

1. The expulsion of Student by the board was a disciplinary action which allowed [redacted] to continue [redacted] education in a general education setting - [redacted].
2. [redacted] teaches the Kentucky general education high school curriculum standards. 84% of its students are general education students. (T: 262-63)
3. Student was allowed to attend the alternative school during [redacted] expulsion period where [redacted] received general education services. After Student qualified for IDEA services on September 25, 2023, [redacted] began receiving special education services at [redacted]. (T: 228).
4. The School Board did not make a change to Student's IDEA educational placement by expelling [redacted] This would not have been possible because [redacted] was a general education student when [redacted] was expelled in March 2023, and [redacted] did not have an IDEA placement.

Conclusions of Law – Issue 4.

1. Nothing in the law authorizes the ARC to change discipline properly imposed under state law.
2. Federal regulations provide that when the behavior that caused the violation of the school code is determined not to be a manifestation of the student's disability, the IEP team determines appropriate services during an expulsion period, which services may

be in another setting. 34 C.F.R. § 300.530(d)(1); 2006 Federal IDEA regulations commentary found at 71 Fed. Reg., No. 156, pp. 46580, 46586.

3. Federal regulations state when the behavior that caused the violation of the school code is determined not to be a manifestation of the student's disability, the role of the IEP team when an eligible student is expelled is to provide services that will allow the student to access a modified FAPE in another setting during the period of expulsion, not to overturn the physical setting imposed as part of the school's official discipline. *Id.*
4. The 2006 Federal IDEA regulations commentary provides that students who are properly suspended or expelled do not have to be provided a full FAPE. FAPE is modified in such situations. *Id.*
5. IDEA placement does not mean a physical location. School District administrators as opposed to the IEP team have discretion regarding where special education students will physically receive their services. 34 C.F.R. § 300.115; 34 C.F.R. § 300.116.
6. School District administrators can decide in which physical facilities special education services are provided if more than one school offers a placement that is consistent with a child's IEP. Letter to Trigg, Office of Special Education Programs, U.S. Dept. of Education, November 30, 2007.
7. "Placement" under special education law refers to points along continuum of placement options available for a child with a disability, i.e. time in general education versus time on special education classes, and "location" refers to the physical surroundings, i.e. school where services are provided. *Id.;* 34 C.F.R. § 300.115

8. Least restrictive environment is not about whether a student serves disciplinary time in a certain type of general education physical location. It is about whether the student is in a setting where he/she can interact with non-disabled peers. 34 C.F.R. § 300.115; 34 C.F.R. § 300.116.
9. Least restrictive environment does not apply to a student who has been properly expelled even if the student is eligible for special education services at the time of the expulsion from school. 34 C.F.R. § 300.530(d)(1)(i) and (2); *2006 IDEA Regulations Commentary* at 71 Fed. Reg., No 156, pp. 46580, 46586.
10. The "stay put" principle does not keep Student from remaining expelled with services at the alternative school when ███ qualified for IDEA services more than six months after ███ was expelled. "Stay put" applies to leave a student in the IDEA placement at the time an IDEA due process hearing is filed. 34 C.F.R. § 300.518(a).

Decision on Issue 4 – The School District did not interfere with Student's placement decision.

For the reasons stated herein, it is hereby ORDERED Petitioner/Appellant's appeal is denied, and the Hearing Officer's decision awarding a summary judgment and directed verdict in favor of Respondent/Appellant ██████████ Schools is affirmed. The School District did not violate Student's right to FAPE.

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 IDEA), 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 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 29th day of February 2024, by the Exceptional Children's Appeals Board, the panel consisting of Roland Merkel, Mike Wilson, and Dennis Lyndell Pickett, Chair.

EXCEPTIONAL CHILDREN APPEALS BOARD

BY: *<u>/s/ Dennis Lyndell Pickett</u>*
DENNIS LYNDELL PICKETT, CHAIR

CERTIFICATE OF SERVICE

This is to certify that on February 29, 2024, I served a true and correct copy of the foregoing via email as follows:

Kentucky Department of Education
kdelegal@education.ky.gov

Tina Drury
tina.drury@education.ky.gov

Hearing Officer Roland Merkel
RolandMerkel@gmail.com

Hearing Officer Mike Wilson
MikeWilsonAttorney@earthlink.net

Counsel for Petitioner

Counsel for Respondent

Counsel for Respondent

/s/ Dennis Lyndell Pickett
Dennis Lyndell Pickett, Chair
Exceptional Children Appeals Board