

COMMONWEALTH OF KENTUCKY
KENTUCKY DEPARTMENT OF EDUCATION
DIVISION OF EXCEPTIONAL CHILDRENS SERVICES
AGENCY CASE NO. 1617-21



██████

PETITIONER

VS.

KENTON COUNTY SCHOOLS

RESPONDENTS

DECISION AND ORDER

Introduction

This matter came to be heard as a result of a request for a Due Process Hearing filed with the Kentucky Department of Education on or about February 6, 2017.

On or about April 7, 2017 Petitioner filed a Motion for Default Judgment

On or about April 17, Respondent filed a Motion for Leave to File a Motion for Dismissal of Petitioner's Claims over Which the Hearing Officer Has No Jurisdiction.

On April 25, 2017, this Hearing Officer entered an Order Dismissing issues 1 and 2 contained in Petitioner's Due Process Request due to lack of jurisdiction as they dealt with Section 504 and denied the balance of Petitioner's Motion for Default Judgment.

There were eight days of hearing in this matter including May 2, 3, and 4 2017; May 25 and 26, 2017 June 7, 8, 2017.

In an effort to protect the Student/Petitioner's privacy, he will be referenced throughout the decision as "the Student" or "the Petitioner" or ██████

T.T. will reference the trial or hearing transcript. J.E. references the Joint Exhibit File. R.E. references the Respondent's Exhibit File.

STANDARD OF REVIEW

The scope of this hearing was for the three year period prior to February 6, 2017. In other words nothing will be considered after the filing of the Due Process Request in accordance with **20 U.S.C. § 1415 (f) (3) (B)** or greater in time than three years in accordance with **KRS § 57.224(6)**.

Burden of Proof

The burden of proof under **KRS 13B.090 (7)** is as follows. “The party proposing that 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, unless otherwise provided by statute or federal law”. In this instance, the Student is proposing that the agency take action and that he is entitled to a benefit sought. Therefore, has the burden of proof to show by the preponderance of the evidence that the IEP and the services provided were not adequate or otherwise deficient to satisfy the requirement of FAPE (Free Appropriate Education).

It is the position of the Petitioner-Student that the Respondent failed to provide the Student FAPE. It is alleged that the FAPE was denied because the Student’s IEP was not properly implemented in part due to the failure of the School District’s employees to be properly trained or otherwise educated about the Student’s IEP. Under IDEA, the burden of showing whether or not a school district provided FAPE rests with the Petitioner; who is usually the parents on behalf of the student who is challenging or otherwise disputing the effectiveness of the student’s proposed independent education program or IEP. **Board of Education of Avon Lake City School District v. Patrick M., 9 F.Supp. 2d 811, 820 (N.D. Ohio) (citing Doe v. Board of Education of Tullahoma City Schools,**

9 F.3d 455, 458 (6th Cir. 1993). See also ***Schaeffer v. Weast*, 546 U.S. 40 (2005)** in an administrative hearing, party seeking relief has the burden of proof

Relief Requested By Petitioner

1. An order finding that Petitioner is the prevailing Party; and
2. An Order requiring the Respondent School District to immediately begin fully implementing the Petitioner's IEP; and
3. An Order prohibiting the Respondent School District from discipline the Petitioner for manifestations of his disability; and
4. An Order prohibiting the Respondent School District from utilizing law enforcement to intervene in the Petitioner's disability manifestations; and
5. That the Petitioner be awarded compensatory education, for the time in which he was denied a free and appropriate education or FAPE; and
6. That the Petitioner/Student be awarded compensatory education for the time in which he was denied access to school due to his suspension; and
7. That attorney fees be awarded to the Petitioner's attorney of record; and
8. All such other relief that the Hearing Officer may deem appropriate.

PETITIONER'S ARGUMENTS

1. Did the School District fail to implement the Student's IEP in violation of **707 KAR 1:320**?
2. Did the School District fail to insure that any of its employees or contracted personnel coming into contact with the Student be properly trained regarding

- the Student's IEP and behavior plan procedures, and that those procedures would be followed by any employee or contracted personnel?
3. Were the Student's behaviors a manifestation of his disability and/or the result of the School District's failure to implement his IEP and behavior plan?
 4. Did the School District fail to make a good faith effort to assist the Student in achieving the goals, objectives, or benchmarks listed in his IEP in violation of **707 KAR 1:320**?
 5. Did the School District fail to provide the Student with a "free appropriate public education in violation of **707 KAR 1:290**?

RESPONDENT'S ARGUMENTS

1. Did the Student (3) failed to prove the allegations asserted in Issue 3, that the School District failed to implement the Student's IEP in compliance with **707 KAR 1:320**?
2. Did the Student (4) prove the allegations set forth in Issue 4, concerning whether or not the School District failed to insure that all of the School District employees working with the Student were properly trained regarding the Student's IEP?
3. The School District argues that the allegations concerning whether the Student's behavior was a manifestation of his disability, is not a proper question for this or any Due Process Hearing Officer.

--The Student's behaviors are not a result of failure to implement his IEP...
4. The Petitioner did not prove the allegations which alleged that the School District failed to make a good faith effort to assist the Student in achieving the goals, objectives and benchmarks listed in his IEP in compliance with **707 KAR 1:320**.

5. The Petitioner did not prove the allegations set forth in Issue 7 of the Due Process request that the School District failed to provide the Student with a free appropriate public education in violation of *707 KAR 1:290*.

FINDINGS OF FACT

1. Petitioner's Due Process Request is dated February 6, 2017. (See Request for Due Process Hearing and J. E. #20)
2. The Student is a ninth grader in the Respondent School District and was previously completed eighth grade at Woodland Middle School in the Respondent School District. (J.E. # 12)
3. The Student's Parents [REDACTED] [REDACTED] (T.T. Vol. VI p. 71-73)
4. The Student had neonatal exposure to drugs and alcohol. (T.T. Vol. VI. p. 228-229) He was born cocaine positive with congenital syphilis. (T.T. Vol. VI. p. 75-76)
5. Student's neonatal drug exposure and possibly being born with an addiction. Concussions have exacerbated the Student's sensory integration dysfunction and have caused a heightened flight, fight or freeze reaction in the student during times of stress. (T.T. Vol. VI p. 71-73 and p. 229-232)
6. The Student's non-verbal learning disability affects the way he perceives his environment and the people in it. He does not understand non-verbal cues and body language and may misinterpret people's intentions or think they are mad when they are not. (T.T. Vol. VI p. 12-14)

7. The Student's executive functioning deficits hinder his ability to understand the impact of his actions and inhibit or control his behaviors. (P#112-147; T.T. Vol. V p. 102-103; T.T. Vol. VI p. 12-14)
8. The Student has average cognitive abilities, but due to his disabilities, his social and emotional development is several years lower than his same aged peers. (T.T. Vol. VI p.230-233)
9. Within the IEP with the date of 01/27/2014, notes that the Student has been diagnosed with Sensory Integration Dysfunction and Static Encephalopathy. (J.E. # 3 p. 1) The Student has also been "diagnosed with Dysgraphia and a Nonverbal Learning Disability by an outside agency".
10. Within the Student's IEP of 12/15/2015 while he was a student at Woodland Middle School, it was noted that he had "been identified with Specific Learning Disability in the Area of Written Expression. (J.E. #12, p. 1).
11. On page 2 of the IEP with the ARC date of 12/15/2015; it notes that the Student's low muscle tone impacts his muscle endurance which impacts his ability to complete long term motor activities such as longer written assignments. As a result the Student is able to use technology on all assignments, as needed. He has a sensory diet and receives breaks on request to prevent sensory overload. On average the Student takes 1-2 breaks per week but may take more or less as needed. (J.E. #12)
12. Within the IEP with the ARC date of 02/08/2016, it states "Student has been identified with a Specific Learning Disability in the area of Written Expression and Mathematics Calculation". On the second page of the IEP with the ARC date of 02/08/2016, it states the Student "has been diagnosed with Sensory

Integration Dysfunction, Static Encephalopathy, Dysgraphia and a Nonverbal Learning Disability by an outside agency”. (J.E. #14)

13. Suzie Noel the Physical Therapist testified. As the Student has “dysgraphia” she explained it as difficulty with writing. A person may know what he wants to write and understand what he wants to write, but has difficulty getting it from his mind to the paper. (T.T. Vol. V, p.100)
14. The IEP with the date of 05/02/2016 was the IEP that the Student/Petitioner brought with him in the transition from Middle School to High School. (J.E. # 15)
15. When the Student was in Middle School, his services were in the general education classroom. With the exception of instruction in coping and social skills two times a week. (T.T. Vol. V, p. 20; J.E.#15, p.12)
16. The ARC with the date of 12/13/2016, indicates at p. 8-9 that his services were being provided in the resource room. (J.E. #20)
17. During the Hearing, evidence regarding IEP implementation or behavior issues were not introduced prior to the Student’s starting the ninth grad or high school or the period prior to the 2016-2017 school year. (J.E. #1-10; T.T. Vols. I-VIII)
18. Dr. Brannon Sapp the Scott High School Principal testified. He said he has two assistant principals. One assistant principal, Carolyn Stewart has special education as one of her responsibilities. Under her is Ms. Tracy Beil who is the special education lead for the school. P. 58-59; (T.T. Vol. III, p. 52-59)
19. Conference Summary Report with the ARC date of 09/29/2016, on the first page it states, “ Parents are concerned with Student’s transition to high school”.

Parents are also concerned with some of “Student’s” recent behavior at school.
(J.E. #18)

20. On page 1 of the IEP with the date of 05/02/2016, under “Communication Status it is checked and says “Performance commensurate with similar age peers”. Then under “Academic Performance” it is typed “...Specific Learning Disability in the area of Written Expression...” Then at the bottom of the page in the next to the last paragraph which starts: “Adverse Effect”; there is written “... skill deficits with writing tasks prevent him from expressing himself and expressing himself and showing what he knows in written form...” (R.E.#15)
21. On the May 2, 2016 IEP, the last IEP prior to the Student finishing 8th grade, a “break pass” system was put in the IEP under the box about behavior impeding learning on page 3. This “break pass system” is also found in his September 29, 2016 IEP. This was the extent of the Student’s behavior until additions were made to the December 13, 2016 IEP on page 4. (J.E. 15, 17 and 20).
22. There was no behavior plan marked on the May 2, 2016 IEP, the September 29, 2016 IEP, or the December 13, 2016 IEP. (JE#15 at p. 4; JE #17 at p. 4 and JE # 20 at p. 5.)
23. The Student finished the 8th grade with cumulative grades of As and Bs. (J#16)
24. Mark Gaskins, the Student’s caseload manager and math teacher during the first trimester at Scott High School attended the ARC Meeting with the date of 05/02/2016 at Woodlands Middle School. (J.E. # 16; T.T. Vol. I, p. 21)
25. The Student was selected for Renaissance Academy during the ninth grade. It was a year long course involving instruction in both English and social studies. (T.T. Vol. 2 at p. 107) When the Student turned in completed assignments in

- Renaissance Academy during Trimester 1, his scores were high, many times he scored 100%. (P.E. # 14, p. 0413-0415).
26. Mark Gaskins testified at the hearing. Mr. Gaskins is a collaborative special education teacher with in the freshman level math classes The Student was on his caseload from first day of school in August 2016 to about the first part of February 2017. (T.T. Vol. I, p. 13-17)
 27. Mr. Gaskins testified that with the Student on his caseload of students with IEPs, that his primary responsibility was to make sure that “his IEP needs are being met”. (T.T. Vol. #I p. 17) He was the Student’s “case manager”. (T.T. Vol. I p. 20)
 28. Mark Gaskins the Student’s case manager during his first trimester testified that he gave all of the Student’s teachers a copy of the Student’s IEP or told them how to access it on Infinite Campus. (T.T. Vol. I at p. 222-223)
 29. Ms. Mary Bolger, the Student’s occupational therapist testified. She testified that the “Sensory Profile under P.E. # 8 p. 291-308 and p. 310-321, indicate that the Student was having issues with his sensory regulation (T.T. Vol VI; p. 245) (T.T. Vol. VI; p. 224-252)
 30. Suzanne Noel, testified that she was the occupational therapist who had worked with the Student since elementary school. (T.T. Vol. V, p. 190)
 31. All of the staff at Scott High School are trained in the Positive Behavioral Interventions and Supports Program (PBIS) and the school is a certified PBIS School. (T.T. Vol. III at p. 62-62)
 32. PBIS emphasizes positive interactions between staff and students. (T.T. Vol. III at p. 62)

33. In the PBIS program, staff are trained to speak with students in the classroom to keep misbehavior from escalating rather than making an office referral any time a student misbehaves. (T.T. Vol. III at p. 62-63 and p. 84-85)
34. With the PBIS program, if students act out they are treated with patience and given breaks if they get angry or upset. (T.T. Vol. 3 at p. 79)
35. Elizabeth Pawsett was Mark Gaskins co-teacher. She co-taught the Student with Mr. Gaskins during the first trimester of the 2016-17 school year. (T.T. Vol. IV, p. 10-15)
36. Ms. Pawsett testified that her classroom had to be evacuated on two occasions due to the Student's defiant behavior. (T.T. Vol. IV, p. 42)
37. The SRO (Student Resource Officer—employed by the City of Taylor Mill Police Department) was able to talk with the Student during an October 12, 2016 incident and get him (the Student) to do what was asked. (P.E. # 15)
38. Ms. Veronica Kumar testified that she co-taught (with Mr. Philpot) the Student during the second trimester, beginning just before Christmas break during the 2016 -17 school year. The Student was in Ms. Kumar's algebra I class from about December 15, 2016 until February 21, 2017. (T.T. Vol. III, p. 13-21)
39. Ms. Kumar was given a "snapshot of the Student's IEP. (T.T. Vol. III, p. 27)
40. According to the Principal of the Student's school, Ms. Tracy Beil is the special education lead. (T.T. Vol. III p. 58)
41. The Student was using technology which included an iPad. (J.E. # 16 p.5 & 6)
42. Within the Student's IEP dated 05/02/2016, he could use a calculator.(p. 12 of J.E. #15)

43. As a general rule, teachers at the Student's school who work with students who have IEPs are alerted to this fact by the Infinite Campus system. The student's teachers are added to the student's "team" in that program. (T.T. Vol. I at p. 30:7-10) On the teacher's class roster in Infinite Campus, a flag will appear next to the student's name in the teacher's class, allowing the teacher to access a student's IEP. (T.T. Vol. I at p. 30:13-15)
44. The Student's IEP at the beginning of the 2016-2017 school year allowed him to turn in all of his assignments via email as a digital copy. (T.T. Vol. I; p. 53; JE#15)
45. The Student began having behavior concerns at the beginning of the 2016-2017 school year. (J.E.# 18, T.T. Vol. I, p. 82)
46. The Student/Petitioner was allowed to go to the KTAP room when he wanted to go there despite the fact he did not qualify for the KTAP program. (T.T. Vol. VIII; p. 79-80; and p. 119-120)
47. Ms. Beil assisted the Student with any class work where he needed help when he came to the KTAP room. (T.T. Vol. VIII, p. 96-97)
48. On page 12 of the IEP with the ARC date of 09/29/2016; Under "Least Restrictive Environment (LRE) and General Education it was noted that the "Student will receive instruction in coping and social skills 1 times per day in the resource setting throughout the school day, Student will have access to a cool down area for breaks to avoid sensory overload. " _____ will participate in collaborative language arts, and Math class". (J.E. # 17)

49. On or about October 1, 2016, the Student entered into a contract noting the rules for using his ear buds to listen to music during the school day. Essentially, the Student was only able to use the ear buds and listen to music during independent work or study periods. (J.E. # 17; last page or p. 14)
50. The Student sustained two head concussions, one in October and another in November 2016. (T.T. Vol I; p. 145;)
51. According to records from [REDACTED] Hospital, the date of the original or first concussion for the Student was October 1, 2016. (P.E. #12, p. 380)
52. At the ARC with the date of 10/18/2016, the Student's Mother shared that the Student had a concussion as a result of football. (J.E. #19. P. 4)
53. At the ARC Meeting of 10/18/2016, the ARC was informed of the Student's concussion. Student's Mother shared information about the Student's concussion on page 4 of the Conference Summary Notes. (J.E. # 19)
54. As a result of the Student's concussions, he missed handing in assignments and got behind in his school work. (T.T. Vol. I p. 144-147)
55. Mary Bolger, the Respondent's OTR (Registered Occupational Therapist) who had worked with the Student; testified that the concussion could exacerbate Student's condition. This included exacerbating his sensory regulation. (T.T. Vol. VI, p. 228)
56. As a result of the Student's concussions, a protocol was put into place that reduced his work load by 50% and excused many of his missed assignment due to absences related to the concussions and a maximum of one hour homework per night. (P.E. #10 at p. 360-361, 378-389 J.E.#20; T.T. Vol. III p. 111-112)

57. On or about November 12, 2016, the Student's football Coach Dan Wooley responded to the Student's Mother concerning the concussion. Though the Coach had been supportive of the Student, he said: "Since his season was over I received no further official information on the health status of the "Student" or any other player, who was not playing varsity". (P.E. # 6, p. P0224; T.T. Vol. VI p. 29)
58. On or about November 15, 2016, the Student's Mother emailed materials to the the Principal and the Student's teachers about his concussion (s) and their response. (P.E. #12, p. P0378-P0389)
59. The Student's IEP with the date of 12/13/2016 contained requirements for math, writing, cool down area and occupational therapy. (J.E. # 20)
60. On 12/15/2016, the School's Principal sent an email to all staff containing a photo of the Student with a warning about him and advising them to avoid engaging with the Student. (P.T. E. # 1; T.T. Vol. III; p. 24-25; p.106-109)
61. Dr. Sapp was familiar with the Student and noted that the Student needed more resources. He noted.... "seemed like a lot of our normal things that we were trying behavioral-wise was not working very well..." (T.T. Vol. III, p. 61-63)
62. There were four ARC Meetings held during the Student's 8th grade year. (J.E. # 11, 13, 14 and 16)
63. There were three ARC meetings held during the first four months of the Student's 9th grade year. (J.E. # 18, 19, and 21)
64. Respondent School District's academic year is based upon the Trimester. For the high school, the academic year is roughly 60 days. (T.T. Vol. 3 at p. 180:18-24)

65. The Student ended Trimester 1 with passing grades in all classes except Algebra. The Student's Trimester 1 final exam grades in English and Social Studies were Cs. He missed only five days in Trimester 1. (R.E.# 57 and R.E. # 54)
66. At the ARC meeting held on 12/13/2016, in response to a question, Ms. Emily Kelly the regular education teacher shared that she feels that the Student's behaviors have been exacerbated since the beginning of the second trimester. (J.E. #21 at p. 5)
67. At the ARC meeting held on 12/13/2016, the District Representative Tracy Mann suggested an eligibility in the area of EBD. The Student's mother did not believe that would be appropriate. Ms. Mann thought it would appropriate due to the Student's recent diagnosis of anxiety. After some discussion, the ARC agreed that the Student did not meet the eligibility criteria for a student with Emotional-Behavioral Disability at this time. (J.E. # 21 p. 7)
68. At the ARC meeting held on 12/13/2016; appropriate supplementary aids and services for the Student were discussed. It was decided that direct occupational therapy be added to the IEP. The ARC agreed that the Student would receive 20 minutes of direct occupational services monthly. The O.T. would consult with the Student's special education teacher three times a month. Additionally, the Student would receive 20 minutes of specially designed instruction ten times a month for writing. Further, the Student would receive twenty minutes of social skills instruction daily and twenty minutes once daily in the resource room for math instruction. (J.E. #21; p. 7)

69. Monitoring data for the Student's IEP goals was not consistently kept and the Student's Parents did not regularly receive "Progress Reports" when they were sent home with the Student. (R.E. #11; T.T. Vol. II, p. 55-61)
70. As a result of an incident on January 27, 2017, the building Principal asked the school resource officer (who is a member of the city police department) to intervene with the Student and as a result was referred to the court system. (P.E. # 13)
71. The Student received an "Out of School Suspension" beginning 01/30/2017 through 02/08/2017 for being "Aggressive to School Employee". (R.E. # 66)
72. During the 2016-2017 school year the Student had at least 20 or 21 disciplinary infractions. (T.T. Vol. III p. 81-83) Under Respondents Exhibit 65 there are 19 documented infractions for which the Student was subject to discipline.
73. Within the 11 page document "Behavior Detail Report" for the Student, he had one incident prior to October 1, 2017 and thirteen (13) incidents between October 1, 2016 and the date of the Request for a Due Process Hearing on February 6, 2017. The dates and times of those incidents are: 10/12/2016 at 11:00 a.m., 10/12/2016 at 1:00 p.m., 10/20/2016 at 11:41 a.m., 10/21/2016 at 2:25 p.m., 12/08/2016 at 4:40 p.m., 12/14/2016 p.m. at 8:13 p.m., 01/03/2017 at 10:30 a.m., 01/03/2017 at 1:00 p.m., 01/06/2017 at 11:00 a.m., 01/13/2017 at 1:30 p.m., 01/19/2017 at 1:30 p.m., 01/25/2017 at 1:20 p.m. and 01/27/ 2017 at 1:15 p.m. (R.E. #65)
74. It was the Principal's testimony the Student's disabilities make it more difficult to understand what is expected. Then he testified that the Student chooses not to follow what is expected of him. (T.T. Vol. III, p. 100-101)

75. During the Student's 8th grade year (15-16) at Woodland Middle School the District's "Behavior Detail Report" indicated the Student being involved in four incidents during the entire school year. (R.E.# 64)
76. On page 4, of the IEP with the ARC date 12/13/2016, under "Consideration of Special Factors" in the third line of the bottom paragraph, "Behavior chart with rewards and reflection" was mentioned as something to be implemented as part of the Student's IEP. (J.E. #20)
77. There was conflicting testimony regarding the Behavior Chart and the Eagle Cash rewards. Vice Principal Carolyn Stewart was familiar but could not say what the chart reflected (T.T. Vol. IV p. 118-120). Math teacher Veronica Kumar never saw the Behavior Chart. (T.T. Vol. III, p. 44) Ms. Kelly confused the Behavior Chart with the "check-in—check out" sheet" (T.T. Vol.II, p. 139-140)
78. The Principal was not familiar with the "Behavior Chart" mentioned in the IEP. (T.T. Vol. III. p 111)
79. According to the Principal, the SRO is from the Taylor Mill City Police Department. The Principal was unable to testify whether the SRO had been provided with the Student's de-escalation plan. (T.T. Vol. III, p. 140-143)
80. According to the "Student Attendance Detail" generated 04/20/2017, the Student/Petitioner was suspended on 09/23/2016, 01/20/2017, and 01/30/2017 through 02/08/2017 for a total of ten days prior to March 2017. (R.E. # 55)
81. The Student's teachers completed "Behavior Forms" through Google Docs for most of the month of January 2017. (P.E. # 1, p. P0002-20)

82. The Student was absent from his first period Renaissance Academy class 13 times between November 4, 2016 and February 6, 2017 when the Request for a Due Process Hearing was made. (R.E. #55 & R.E. 57)
83. The Student received out of school suspensions during the 2016-2017 school year which were served on 9/23/2016, 1/20/2017 and 1/30/2017 through 2/08/2017. Out of school suspension had been imposed upon the Student for a total of ten days by date of the request for a Due Process Hearing. (R.E. # 65)
84. All of the Student's IEPs include Under "Consideration of Special Factors for IEP Development; yes under "Does the child's behavior impede his/her learning or that of others? It is checked "Yes". (J.E. # 3, 7, 10, 12, 14,17, and 20)
85. Under the "Conference Summary Report" from the 12/13/2016, under the "Consideration of Special Factors for IEP Development---"Does the child's behavior impede his/her learning or that of others? It is checked "Yes". However, this section has expanded to about three paragraphs to include "***Behavior chart with rewards and reflection***". (J.E. #21, p. 4) (Emphasis Added)

Introduction

Having heard the testimony of the witnesses as reflected in close to a thousand pages of testimony and hundreds of exhibits, this Hearing Officer enters the following decision. In doing so, the Briefs and Reply Briefs of the Parties have been read and considered. The focus of this decision is whether the IEP was appropriate, was it implemented appropriately and did it need modification.

Did the School District fail to implement the Student's IEP in violation of 707 KAR 1:320?

Petitioner contends that his IEP(s) were not implemented consistently. Petitioner argues that there is a lack of data to show that implementation of the IEP was happening. Petitioner further argues that the monitoring which was done was incomplete and that "Progress Reports" were not consistently given or forwarded to the Parents.

A review of the record indicates that the IEP was properly implemented until the second trimester when the ARC was informed that the Student had suffered his first concussion while playing football for Scott High School. (F.F. 50, 51) At that point, the ARC needed to make some changes to accommodate the concussion.

707 KAR 1:320. Individual education program has nine sections. The parts applicable to this Due Process Hearing are: **Section 1 (4) (b), (b) Is implemented as soon as possible following an ARC meeting;** **Section 5. Contents of IEP. (1) An ARC shall consider in the development of an IEP:**

(b) The results of the initial or most recent evaluation of the child;

(2) An ARC shall:

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

Section 6) An LEA shall ensure that:

(a) The child's IEP is accessible to each regular education teacher, special education teacher, related services provider, and other service providers who are responsible for its implementation;

(b) Prior to the implementation of the IEP, each implementer is informed of his specific responsibilities related to implementing the child's IEP; and

(b) The specific accommodations, modifications, and supports are provided for the child in accordance with the IEP.

The Student entered Scott High School in the fall of 2016 with the IEP with the ARC date of 05/02/2016. On page 3 of that IEP, it states: *Under "Consideration of Special Factors for IEP Development; yes under "Does the child's behavior impede his/her*

learning or that of others? Written underneath as an answer to the question is: *The Student has a “break pass” system to use to leave class when agitated*” The ARC at that time had conformed to **Section 5 of 707 KAR 1:320**

However, by the time of the ARC Meeting of 10/18/2016, the ARC was informed of the Student’s concussion. (F.F. 52, 53) Student’s Mother shared information about the Student’s concussion on page 4 of the Conference Summary Notes. A review of the 8 pages of the document is silent as to the concussion.

When the Student’s Mother indicated at the ARC Meeting of 10/18/2016, that the Student had a concussion as a result of football. Per **Section 5 (1) (b) of 707 KAR 1:320** the results of the “most recent evaluation of the child;” are to be considered by the ARC. In this instance, there was no follow up or discussion by the ARC of this report of the Student’s concussion.

The U.S. Department of Health and Human Services Center for Disease Control and Prevention has published a booklet for school professionals titled “Heads Up Schools—Returning to School After a Concussion: A Fact Sheet for School Professionals” https://www.cdc.gov/headsup/pdfs/schools/tbi_returning_to_school-a.pdf. Within that document, it outlines the roles of school personnel in the recovery of a student with a concussion. It also discusses some of the symptoms which could be suffered by a student recovering from a concussion injury. On page 2 of 12 of that document there is this list.

When students return to school after a concussion, school professionals should watch for:

- *Increased problems paying attention or concentrating*
- *Increased problems remembering or learning new information*
- *Longer time needed to complete tasks or assignments*
- *Difficulty organizing tasks or shifting between tasks*
- *Inappropriate or impulsive behavior during class*
- *Greater irritability*
- *Less ability to cope with stress*

- *More emotional than usual*
- *Fatigue*
- *Difficulties handling a stimulating school environment (lights, noise, etc.)*
- *Physical symptoms (headache, nausea, dizziness)*

On page 2 of the IEP with the ARC Date of 12/13/2016, (J.E. # 20) on page 2, under “Health, Vision, Hearing, Motor Abilities; in the second sentence the Student’s concussion. The Student “has also been diagnosed and is being treated for on-going issues from a concussion (see concussion paperwork flagged in IC)”. There is nothing else said about the Student’s concussion(s) in that 10 page IEP document. (F.F. 85)

One hint that the concussions might have been a problem is found in the testimony of Ms. Emily Kelly the regular education teacher. She felt that the Student’s behaviors were exacerbated since the beginning of the second trimester. (F.F. 66)

Within the Conference Summary of 12/13/2016, there is no mention of the concussions.

Within the Student’s IEP with the date of 12/13/2016 at pages 8 and 9 provides the following services. “Special education staff will collaborate with [REDACTED] regular education teachers to implement (Student’s) IEP. Occupational therapist will consult with [REDACTED] special education teacher three times a month to discuss sensory input strategies and sensory diet suggestions.” Then under “Least Restrictive Environment” (LRE) and General Education it summarizes services to the Student. (Student) “will receive instruction in coping and social skills 20 minutes per day in the resource setting. He will also receive supplemental math instruction in the resource room 20 minutes per day. (Student) will receive writing instruction in the resource room for 20 minutes 10 times a month throughout his school day, (Student) will have access to a cool down area for breaks to avoid sensory overload. (F.F. 59)

However, there is no discussion or notation in the IEP or ARC Meetings about the possible impact of influence upon the Student of the two concussions upon his behavior and his ability to learn. There for the period after 10/18/2016 until the date of the request for the Due Process Hearing, the Student was denied FAPE as the ARC did not consider the report of the Student's concussion and consider its impact upon his ability to learn.

II

The Respondent School District failed to insure that any employee or contracted personnel coming into contact with the Petitioner Student be properly trained regarding the Student's IEP and behavior plan procedures, and that those procedures would be followed by any employee or contracted personnel

In the case at bar, the School Resource Officer or SRO was called by the Principal to assist with the Student in a disciplinary action. (F.F. 70) It is alleged by the Petitioner, that the SRO was not educated about the Student's IEP or de-escalation strategies. (F.F. 79) As a result of the SRO's participation, police back up was called and the student was referred to the Juvenile Court system. (F.F.70) The Student was also suspended for a total of eight days. (F.F. 71)

Within this Hearing, there was no evidence put forth whether the SRO was aware of the Student's IEP and behavior strategies. (F.F 79) It is also not clear whether the Principal was aware of the 12/13/2016 IEP included the "Behavior Chart". (F.F.78) There is indication that many members of the Respondent's Staff were not familiar with the 12/13/2016 behavior strategies for the Student. (F.F. 77)

While the Student was referred to the judicial system, evidence was not presented that in doing so, **34 C.F.R. 300.535** was followed. The regulations is set forth below.

§300.535 Referral to and action by law enforcement and judicial authorities

(a) Rule of construction. Nothing in this part prohibits an agency from reporting a crime committed by a child with a disability to appropriate authorities or prevents State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

(b) Transmittal of records.

(1) An agency reporting a crime committed by a child with a disability must ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime.

(2) An agency reporting a crime under this section may transmit copies of the child's special education and disciplinary records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act.

(Authority: 20 U.S.C. 1415(k) (6))

Under existing law this Hearing Officer cannot, Order the School District to keep the SRO away from the Student. However, it is Ordered that the SRO be educated about the Student's IEP and its behavioral strategies.

III

The Petitioner/Student's behaviors are a manifestation of his disability and/or the result of the Respondent School District's failure to implement his IEP and behavior plan

This Hearing Officer is being requested by the Student/Petitioner to make a manifest determination of whether the Student's behavior is a manifestation of his disability. The Respondent School District argues that it is not within the present purview of this Hearing Officer to make such a determination. However the process is set forth in "**34 CFR § 300.523 (b) Manifestation determination review**". The process is set forth as follows.

(b) Individuals to carry out review. A review described in paragraph (a) of this section *must be conducted by the IEP team and other qualified personnel in a meeting.* (c) Conduct of review. In carrying out a review

described in paragraph (a) of this section, the IEP team and other qualified personnel may determine that the behavior of the child was not a manifestation of the child's disability only if the IEP team and other qualified personnel—(emphasis added)

A manifestation determination review is triggered only by removals from the current placement that would constitute a change in placement in the disciplinary context. **Section 300.519 of the Part B regulations** defines “change of placement for disciplinary removals” as a removal for more than 10 consecutive school days” or “a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year. **34 CFR § 300.519 (a)-(b)**. See also **KRS 158.150 (7)(a)(2)**

There was evidence that the Student was subject to some sort of disciplinary action 13 times during the 2016-2017 school year from the time of the concussion to the date of the filing of the Due Process Hearing Request. (F.F. 73) Prior to the date of the filing of the Due Process Hearing Request, the Student had accumulated at least ten “out of school” suspensions. (F.F. 83) Additionally, all of the Student's IEPs indicate that he has various degrees of behavioral issues. (F.F. 84)

With the above situation, it is the determination of this Hearing Officer that there was a de facto change of placement for the Student/Petitioner for disciplinary reasons.

Therefore, this Hearing Officer Orders that the Student/Petitioner be the subject of a Manifest Determination Review following necessary medical and psychological examinations of the Student/Petitioner. Once those examinations have been completed, then the ARC shall meet and amend the Student's IEP as appropriate.

IV.

The Respondent failed to make good faith efforts to assist the Student/Petitioner in achieving the goals, objectives, or benchmarks listed in his IEP in violation of 707 KAR 1:320

In this section the IEPs will be examined as to their appropriateness for the Student. In order for a student to have received a FAPE, the IEP must have “(1) address[d] [his] unique needs, (2) provide[d] adequate support services so the student can take advantage of the educational opportunities, and (3) [been] in accord with the individualized education program.” *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 893 (9th Cir. 1995) (citing *Rowley*, 458 U.S. at 188–89).

Within the IEP with the ARC Date of 05/02/2016 on page 3--- Under “Consideration of Special Factors for IEP Development; yes under “Does the child’s behavior impede his/her learning or that of others? It is checked “Yes”. Under appropriate strategies, there is “The Student has a “break pass” system to use to leave class when agitated”. (F.F. 21) On page 4 of the IEP: “Annual Measurable Goal #1 “When given a writing prompt, the Student will type a clear and coherent written product on 4 of 5 measured conditions. For Annual Goal (#2): Throughout the school day, the “Student” will demonstrate skills that lead to good decisions and healthy relationships on 4 out of 5 measured occasions. (F.F. 20)

Within the IEP with the ARC date of 09/29/2016 (J.E. # 17) the “break pass system” is still in place. Annual Measureable Goals #1 and #2 are the same as the IEP from 05/02/2016. Annual Measurable Goal # 3 was added. It was “Given an equation including one variable. “the Student” will solve for the variable on 4 out of 5 measured occasions. (p.5) A review of the record indicates that to this point (October 18, 2016) the

Respondent School District properly implemented the Student's IEP and he had FAPE. During the first trimester, while not perfect the Student and his behavior supports seem to have been working. (F.F. 25, 65)

On the ARC date of 12/13/2016, on page 2 under "Health, Vision, Hearing, Motor Abilities in the second sentence it makes the only mention about the concussion. "The Student" has been diagnosed and is being treated for on-going issues from a concussion. (J.E. # 20) Admittedly there was evidence that the Student was receiving accommodations from outside the IEP for his concussion(s). (F.F. 56) However, with the seriousness of concussions generally, the ARC should have considered the impact upon his existing conditions. As testified by the Student's OT, Mary Bolger a concussion could exacerbate the Student's condition including his sensory regulation. (F.F. 55)

Under the "Conference Summary Report" from the 12/13/2016, under the "Consideration of Special Factors for IEP Development---"Does the child's behavior impede his/her learning or that of others? It is checked "Yes". However, this section has expanded to about three paragraphs to include "***Behavior chart with rewards and reflection***". (J.E. #21, p. 4) (Emphasis Added) (F.F. 85)

The Fifth Circuit cited in, ***Houston Independent Sch. Dist. v. Bobby R.***, 31 IDELR 185 (5th Cir. 2000), where there was a failure to provide some services the Court held that the applicable legal standard was the following:

"[W]e conclude that to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.

The situation involving the Student in this Due Process involves a person who has some existing behavioral issues due to brain development issues. These issues may have been compounded by concussions during the first half of the 2016-2017 school year. (F.F. Then the final IEP subject to scrutiny by this Hearing indicates the promise of “Behavior chart with rewards and reflection”. (F.F. 85) This Behavior chart with rewards and reflection seems not to have been implemented.

A failure to implement a substantial component of a student’s IEP may be deemed a denial of FAPE even if the student receives educational benefit despite such failure. See *Manalansan v. Bd. of Educ. of Baltimore City*, 35 IDELR 122 (D.Md. 2001)(good faith attempt to implement aide assistance provision of IEP, where school had difficulty finding and keeping aides, did not excuse failure to implement a significant component of the IEP). Similarly, in Where an LEA’s failure to implement is material (not merely *de minimus*), courts have held that the standard for determining whether there has been a denial of FAPE is not tied to whether the student has suffered educational harm. See *Wilson v. District of Columbia*, 770 F. Supp. 2d 270 (D.D.C. 2011) (finding a student had been denied a FAPE, even where the student made academic progress despite the LEA’s material failure to implement part of the student’s IEP). Rather, “it is the proportion of services mandated to those provided that is the crucial measure for determining whether there has been a material failure to implement.” *Turner v. District of Columbia*, 952 F. Supp. 2d 31 (D.D.C. 2013). *Turner v. District of Columbia*, 61 IDELR 126 (D.D.C. 2013)

V.

The Respondent School District shall provide the Student/Petitioner with a Functional Behavioral Assessment

As set forth above, the Respondent School District provided the Student FAPE up until the time of notification of his concussions at about October 18, 2016. (F.F. 52, 53) The Student as set forth above was child with behavior issues prior to entering ninth grade and prior to suffering one or two concussions during the fall of 2016. (F.F. 84)

Due to the significant number of behavior issues evidenced in this Hearing, this Hearing Officer is ordering the Respondent to perform a Functional Behavioral Assessment (FBA) of the Student. (F.F. 73, 76, 80, 83, 85)

It is ordered that the FBA be done after the Manifest Determination has been performed. When behavior is determined to be related to disability—, the regulation requires an FBA and implementation of a BIP when the school determines that a behavior is a manifestation of the child’s disability in a manifestation determination review. If a BIP had already been developed, the regulation requires a review of the BIP, with revisions as necessary to address the behavior. *34 C.F.R. §300.530(f)(1)*.

It is Ordered even if the behavior is not related to the Student’s disability, then a FBA be performed.

VI.

ATTORNEY FEES

Under *IDEA, 20 U.S.C. § 1415* the award of attorney fees is under the jurisdiction of the district courts of the United States. Specifically, *20 U.S.C. § (i)(3)(A)* and *(B)* is set forth is set forth below.

(3) Jurisdiction of district courts; attorneys' fees

(A) In general

The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) Award of attorneys' fees;

(i) In general in any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs—

(I) to a prevailing party who is the party of a child with a disability;

As this Hearing Officer is not with the district courts of the United States, he without the jurisdiction or the ability to award attorney fees to a prevailing party in a Due Process Hearing.

DECISION AND ORDER


This is a situation where what is based upon what has been presented to this Hearing Officer, the Student/Petitioner's transition from Middle School to High School did not go well to say the very least.

Based upon the discussion set forth above:

1. The Petitioner prevailed on the majority of issues.
2. The Respondent did not properly implement or amend the Student Petitioner's IEP for the period October 2016 through February 2017 taking into account the possible impact of the two concussions while playing football for Scott High School.
3. Not all of the Respondent's employees who came into contact with the Student were properly aware of the nature of the Student's disability and as a result there were difficulties when some employees came into contact with the Student.
4. In the future, the SRO(s) shall be briefed on the Student's IEP and behavioral strategies.

5. As set forth above, a Manifest Determination Review of the Student is ordered.
That review shall take into account the impact of the two concussions received by the Student in October and November 2016.
6. A Functional Behavioral Assessment of the Student is Ordered to be performed after the Manifest Determination Review.
7. The Student is awarded compensatory education for a period of 10 days.
8. This Hearing Officer is without the authority to award attorney fees in this matter.

This Order and Decision is entered 15th day of November 2017.


PAUL L. WHALEN
Due Process Hearing Officer

APPEAL RIGHTS

Pursuant to 707 KAR 1:340 Section 12. Appeal of Decision. (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 (ECAB) 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) calendar days of the date of the Hearing Officer's decision.

The address is: Kentucky Department of Education
Office of Legal Services
300 Sower Blvd.; 5th Floor
Frankfort, Kentucky 40601

CC: Via Email and Postage Pre-Paid to:

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