

**KENTUCKY DEPARTMENT OF EDUCATION  
OFFICE OF SPECIAL EDUCATION AND EARLY LEARNING  
AGENCY CASE NO.: 2324 – 07**

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**PETITIONER**

**V. FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION**

████████████████████

**SCHOOLS**

**RESPONDENT**

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**RULING ON RESPONDENT’S MOTION TO EXCLUDE WITNESSES**

Prior to the beginning of the hearing, the Hearing Officer overruled Respondent’s Motion to Exclude witnesses from the Kentucky Department of Education from testifying, as their involvement as witnesses would not hinder the Hearing Officer’s ability to be impartial and render an independent decision.

██████████, an Educational Child Consultant at Kentucky Department of Education, testified. Mother of student had called asking questions about the issues in this matter. The testimony she gave was not deemed pertinent as the Hearing Officer must make the legal determinations. Further, she did not recall her “advice” being what mother recalled.

**RULING ON RESPONDENT’S MOTION FOR SUMMARY JUDGMENT  
ON ALLEGATIONS A, B, C, D, E, AND F IN PETITIONER’S COMPLAINT  
AND MOTION FOR DIRECTED VERDICT**

At the beginning of the hearing, the Hearing Officer withheld ruling on Respondent’s Motion for Summary Judgment until after hearing evidence. Summary Judgment is appropriate when there is no genuine issue as to any material fact to be litigated regarding the allegations and the moving party is entitled to a Judgment as a matter of law. Ky. R. Civ. P. 56.03.

At the close of Student's case, the District moved for a Directed Verdict on all issues.

**SUMMARY JUDGMENT DIRECTED VERDICT IS AWARDED TO THE RESPONDENT ON ALLEGATIONS A, B, C, D, E AND F.**

There being no genuine issues of material fact raised in the hearing concerning allegations A, B, C, D, E, or F in Petitioner's complaint, these allegations are dismissed as a matter of law.

**Discussion of Evidence and Applicable Law**

Allegation A alleges that the Student's expulsion was arbitrary and capricious, motivated by bad faith, and shocks the conscience.

**Conclusion of Law on Allegation A**

This alleges a violation over which a hearing officer in a Special Education Due Process hearing has no jurisdiction. 34 C.F.R. §300.511(a) provides that matters subject to an IDEA due process complaint are those alleging violations of 34 C.F.R. §300.507 or 34 C.F.R. §300.532. 34 C.F.R. §300.507 provides that

**DECISION ON ALLEGATION A**

Allegation A is dismissed for lack of jurisdiction.

**ALLEGATION B ALLEGES THAT THE DISTRICT STAFF FAILED TO IDENTIFY THE STUDENT FOR SPECIAL EDUCATION SERVICES IN VIOLATION OF THE LAW PRIOR TO ■■■ EXPULSION.**

**Findings of Fact on Allegation B**

1. The Student is a high school junior. ■■■ was present at the hearing and was very polite and engaging. Per the Due Process Complaint, on March 6, 2023 Student was overheard discussing that ■■■ had a gun in ■■■ vehicle on school property. A search was performed on

Student's vehicle and two guns were located in the vehicle on school property. The guns had been left inadvertently in the vehicle from hunting over the weekend. Pursuant to the school's zero tolerance policy for weapons on school property, Student was expelled after an Expulsion Hearing on March 14, 2023. Despite the fact the District was not required to continue to provide services, educational services were provided by [REDACTED], described later herein.

2. The Student's mother testified at the hearing she is a Special Education teacher in the District. She did not provide the School District with any notice that she suspected her child had a disability and needed a referral for Special Education evaluation prior to May 30, 2023. This was at the end of the school year, and two-and one-half months after the expulsion hearing was held. During the expulsion hearing she did not raise any concerns of a need for Special Education Services.

3. The Student's mother testified that [REDACTED] had an IEP for speech in Kindergarten at another school District.

4. The District had no basis of knowledge to suspect that the Student might need Special Education Services prior to the mother's referral on May 30, 2023. All of the Student's teachers and school administrators who testified said that while the Student had some increases in misbehavior, Student's behavior was nothing out of the ordinary for young people of the same sex or age, nor was Student's misbehavior so alarming that they felt Student needed to be referred for Special Education Services or to suspect [REDACTED] had ADHD.

5. The Student was not diagnosed with ADHD until July 10, 2023. This diagnosis was from [REDACTED] family doctor.

6. The Student did have an increase in disciplinary referrals on [REDACTED] Behavior Detail Report last school year, but none of these were of a serious enough nature to put the school staff on notice that Student should be referred for Special Education Services.

7. Teachers described Student as very intelligent. However, Student would only complete enough work or put forth enough effort to get to do what Student wanted, play sports. Student would bring a personal computer to class, put it behind the school screen and watch videos, rather than do work.

8. Mom stated she had suspected Student had ADHD for years and that such problems do not develop overnight. She felt Student struggled more in the sophomore year as Student's classes were more difficult. However, mom never took Student to a doctor about her suspicions and never talked with school personnel about same as Student's father was adamant Student not be placed on medications.

9. Mom acknowledged that as a Tier 3 Reading Interventionist, she is aware that Response to Intervention occurs before a school refers a child for Special Education. Student has never had RTI.

10. The Student is on track to graduate.

11. The Student violated a school rule about safety which resulted in an expulsion. Although [REDACTED] made no threats, the school must ensure safety by banning all weapons on school grounds.

12. The parent made a referral for Special Education evaluation on May 30, 2023. This was after school was dismissed for the Summer Break. The school followed up on this referral in a timely manner.

13. The mother signed consent for the Special Education Evaluation on July 24, 2023.

14. Several of the Student's teachers, an assistant principal, and the District Special Education Director testified that the District provides training for all of its new teachers about how to identify Students and make referrals for Special Education Services; the District holds a second training for all Special Education teachers that includes information about the Special Education referral process; the District distributes information about referring Students for Special Education services in various ways. It advertises in the local newspaper, posts such information in each of its schools, and each of the District's schools has a Special Education liaison to whom parents and teachers can ask questions about referrals and Special Education services.

15. [REDACTED] was a new teacher and Student's geometry teacher. She testified to minor disciplinary issues with Student such as sleeping in class, not coming from lunch when she called the class to leave, and watching videos on Student's computer. She did not feel the sleeping was enough for a disciplinary referral, but did speak with the Assistant Principle and the head of the Math department about the leaving the lunchroom. She was new and wanted to understand when Behavioral Detail Reports should be filed. She stated Student wanted things [REDACTED] way, but [REDACTED] had way less incidents than other students. She had no academic concerns with Student and never suspected [REDACTED] had ADHD.

### **Conclusions of Law on Allegation B**

1. 707 KAR 1:300 requires school's to locate, identify, and evaluate Student's who may need Special Education Services.

2. Petitioner failed to prove Allegation B at the hearing by a preponderance of evidence.

3. To prevail on a claim of a Child Find violation, a petitioner must prove that the 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. *Ja.B., M.B. and Jo. B. v. Wilson County Board of Education*, 61 F.4<sup>th</sup> 494, at p. 501 (6<sup>th</sup> Cir. 2023.)

4. Child Find does not demand that schools conduct a formal evaluation of every struggling child. *Ja.B., M.B. and Jo. B. v. Wilson County Board of Education*, 61 F.4<sup>th</sup> 494, at p. 501 (6<sup>th</sup> Cir. 2023.)

5. The School District was not required to conduct a manifestation determination before expelling the Student, as it had no basis of knowledge to believe the Student should have been referred for Special Education services when the Student was expelled.

### **DECISION ON ALLEGATION B**

Allegation B is dismissed after hearing testimony at the hearing.

### **ALLEGATION C ALLEGES THAT THE DISTRICT FAILED TO EXPEDITIOUSLY EVALUTE THE STUDENT AND HAVE AN IEP IN PLACE AT THE BEGINNING OF THE SCHOOL YEAR.**

#### **Findings of Fact on Allegation C**

1. The parent made a referral for Special Education evaluation on May 30, 2023.
2. The parent signed consent for the Special Education evaluation on July 24, 2023.
3. The district's expedited evaluation was completed, and an IEP offered to begin on September 25, 2023.
4. School started for Students on August 10, 2023 and school was out for Labor Day.
5. School was out for the Summer before the mother made her request for an evaluation on May 30, 2023.
6. Part of the evaluation process requires input from teachers who are not regularly working during the Summer and observations of Student in the classroom.

7. The expedited evaluation requested by the parent was completed and an IEP in place within 31 school days from receipt of parental consent for the evaluation; this was 63 calendar days after parental consent was signed and 118 days after the parent made a referral for Special Education evaluation.

### **Conclusions of Law on Allegation C**

1. 707 K.A.R.1:320(2)(3) provides that for a normal Special Education evaluation, the evaluation is to be completed within 60 school days after obtaining parental consent.

2. Neither the federal, nor state, statutes or regulations spell out how long an expedited evaluation may take.

3. Petitioner correctly argued that 34 CFR § 300.534, requires an expedited evaluation if a request is made for an evaluation when the child is being subject to disciplinary measures. Petitioner further argued that 30 CFR § 300.301 requires an initial evaluation be conducted within 60 calendar days, and that because the State Regulation requires an evaluation only occur within 60 school days or federal constitutional violation exists.

4. The U.S. Department of Education refused to add a time requirement for an expedited evaluation to the federal regulations. 2006 Federal IDEA *Regulations Commentary* found at 71 Fed. Reg., No.156, p. 46728. Said Regulation further states expedited evaluations should be conducted in a shorter period of time than a typical evaluation, which must be conducted within sixty days of receiving parental consent. The comments acknowledge that “what may be required to conduct an evaluation will vary widely depending on the nature and extend of a child’s suspected disability and the amount of additional information that would be necessary to make an eligibility determination.” The commentary also pointed out the statute did not have a specific

time limit for expedited evaluations. Therefore, the Hearing Officer can not find that the Supremacy Clause of the United States Constitution applies.

5. The school district evaluated the Student and offered an IEP within timelines provided by federal and state law.

### **DECISION ON ALLEGATION C**

Allegation C is dismissed as a matter of law.

**ALLEGATIONS D ARE 1) THAT THE DISTRICT DENIED THE STUDENT THE RIGHT TO ASSERT DISCIPLINARY PROTECTIONS UNDER IDEA ONCE THEY WERE DEEMED TO HAVE KNOWLEDGE THAT STUDENT WAS A CHILD WITH A DISABILITY; 2) THAT THE DISTRICT REFUSED TO PERFORM A MANIFESTATION DETERMINATION; AND 3) THAT THE DISTRICT KEPT THE STUDENT ENROLLED IN AN ALTERNATIVE PLACEMENT OVER THE 45-DAY LIMIT PERMITTED BY IDEA.**

### **Findings of Fact on Allegations D**

1. The Student did not have a Special Education placement when [REDACTED] was expelled in March of 2023.

2. The Student is currently enrolled in [REDACTED] as a result of the expulsion and will remain there until March 2024.

3. School was dismissed for the 2023 summer break before the parent made the referral for the Special Education evaluation.

4. The District held a referral meeting and conducted an IDEA expedited evaluation within 31 school days of the parent signing consent for the evaluation. This was 63 calendar days after the parent signed the consent for evaluation.

5. The Student was not placed by the District into an Interim Alternative Educational Setting (IAES), but was expelled with services. [REDACTED], teacher at the [REDACTED], stated that the vast majority of student's there have a disciplinary history. The remainder are there to



fill gaps in their transcripts so they can graduate timely. There are 2 teachers, 2 instructional assistants, and 2 counselors there for 14 students in 6 grades. Students are taught either by traditional stand-up instruction by teachers using textbooks and workbooks, and using online programs depending on students' needs and preferences. If a student who is at [REDACTED] has been identified as a student with a disability, staff provide 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 are generally at [REDACTED] for about 6 months. To leave there a student must accumulate 10,000 points. The maximum weekly points possible are 600. Points are given for completing all 5 written assignments each day. Points can be lost for infractions. If a student gets 10,000.00 points, but their placement time is longer than the time that took, they remain at [REDACTED] getting education services until their time expires.

6. On September 25, 2023 the Student was determined to be a Student with a disability due to ADHD.

#### **Conclusions of Law on Allegations D**

1. 34 C.F.R. §300.534(d)(2)(i)(1) provides that a school is to conduct an expedited Special Education evaluation for a Student who is subject to a long-term disciplinary measure if the parent makes such a request.

2. If the school does not have knowledge that the Student may require Special Education services, regular disciplinary measures, which can include suspension or expulsion without educational services apply. 34 C.F.R. §300.534(d)(1) and (2)(ii).

3. No manifestation determination was required, as at the time of the expulsion in mid-March the District had no reason to believe the Student needed Special Education services.

4. Expulsions from Kentucky public high schools are determined by local Boards of Education. K.R.S. 158.150.

5. 34 CFR § 3200.530(g) requires that 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 applicable to Students who have already qualified for IDEA services and have a Special Education placement to which the principle of “stay put” applies when a Special Education Due Process hearing request is filed. 34 §C.F.R.300. 518(a) and 34 C.F.R. 300.533.

6. 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 very serious infractions of the Student *Code of Conduct*. 34 C.F.R. §300. 518(a) and 34 C.F.R. §300.533.

7. 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.

8. Schools cannot be required to modify disciplinary decisions and make manifestation determinations for discipline that occurred prior to a child being determined eligible for Special Education. To do so, would open the flood gates for families to file for Due Process and request evaluations after Student’s receive discipline with which the family did not agree.

#### **DECISION ON ALLEGATIONS D**

Allegations D are dismissed as a matter of law.

**ALLEGATION E ALLEGES THAT THE DISTRICT IS INTERFERING WITH STUDENT’S PLACEMENT DECISION WITHOUT BEING A MEMBER OF THE IEP TEAM AND IN VIOLATION OF LEAST RESTRICTIVE ENVIRONMENT LAW.**

### **Findings of Fact on Allegation E**

1. The expulsion of the Student by the Board was a disciplinary action which allowed the Student to continue ■ education in a general education setting while expelled, ■.

2. ■ is a general education environment as discussed above. Over 84 percent of the students enrolled there are general education students.

### **Conclusions of Law on Allegation E**

1. Nothing in the law authorizes the IEP team (ARC) to change discipline properly imposed under state law.

2. Federal regulations provide that when the behavior that gave rise to 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); *2006 Federal IDEA Regulations Commentary* found at 71 Fed. Reg., No. 156, p. 46580; *2006 Federal IDEA Regulations Commentary* found at 71 Fed. Reg., No. 156, p. 46586.

3. Federal regulations state that when the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the Student's disability the role of the IEP team once an eligible Student is expelled is to fashion services that will allow the Student to access a modified FAPE in another setting during the period of expulsion, not to overturn a physical setting imposed as part of the school officials' discipline. 34 C.F.R. §300.530(d); *2006 Federal IDEA Regulations Commentary* found at 71 Fed. Reg., No 156, p. 46580; *2006 Federal IDEA Regulations Commentary* found at 71 Fed. Reg., No 156, p. 46586.

4. The 2006 Federal IDEA Regulations Commentary states that Students who are properly suspended or expelled do not have to be provided a full FAPE. FAPE is modified in such situations. 2006 Federal IDEA Regulations Commentary found at 71 Fed. Reg., No 156, p. 46580; *2006 Federal IDEA Regulations Commentary* found at 71 Fed. Reg., No 156, p. 46586.

5. School administration (school officials as distinguished from the IEP team) have latitude as to where Special Education students will physically receive their services. 34 C.F.R. § 300.115; 34 C.F.R. §300.116I.

6. School District Administrators can decide in which physical facilities Special Education services are provided if more than one school offers a placement that comports 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 the 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. 34 C.F.R. § 300.115; *Letter to Trigg*, Office of Special Education Programs, U.S. Dept. of Education, November 30, 2007.

8. Least restrictive environment (LRE) 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 s/he can interact with nondisabled 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 under law, 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, p. 46586.

### **DECISION ON ALLEGATION E**

Allegation E is dismissed as a matter of law.

### **ALLEGATION F ALLEGES THAT SCHOOL DISTRICT STAFF HAVE BEEN RESTRICTED FROM INTERACTING WITH THE MOTHER.**

#### **Finding of Fact on Allegation F**

1. The mother was told by the District's Board Attorney that staff could not discuss the issues that are the subject of this Due Process hearing with her due to the fact that a Due Process hearing was ongoing.

#### **Conclusions of Law on Allegation F**

1. The Kentucky Department of Education (KDE) restricts communications between District staff and the parents about topics that are the subject of an ongoing IDEA Due Process hearing when it sends the *Notice of Hearing* to Districts.

2. Respondent District did not violate the law by instructing that School District staff could not discuss issues that were subjects of the hearing with Petitioner.

#### **Decision on Allegation F**

Allegation F is dismissed as a matter of law.

#### **Dismissal of All Complaint Allegations**

All allegations in Petitioner's Complaint are DISMISSED WITH PREJUDICE. This is a Final Order.

Dated this 3d day of November, 2023.

Kim Hunt Price  
HEARING OFFICER, KIM HUNT PRICE

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing has been served on

November 3d, 2023 to:

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Kentucky Department of Education at [KDELegal@education.ky.gov](mailto:KDELegal@education.ky.gov)

Kim Hunt Price  
HEARING OFFICER, KIM HUNT PRICE