

**KENTUCKY DEPARTMENT OF EDUCATION
DIVISION OF LEARNING SERVICES
AGENCY CASE NO. 1819-21**

██████████

PETITIONER

v.

██████████

COUNTY SCHOOLS

RESPONDENT

**DECISION OF THE DUE PROCESS HEARING OFFICER
ON EXPEDITED BIFURCATED HEARING**

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Introduction

This Due Process Hearing was requested by letter filed with the Kentucky Department of Education (KDE) by Counsel for the Petitioner on March 29, 2019 pursuant to the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. Section 1400, et. seq.) Petitioner sought, among other things, an expedited hearing to be conducted in accord with 34 CFR 300.532(c)(2). Under that regulation, an expedited hearing is a hearing involving a due process complaint regarding a disciplinary matter.

Expedited hearings are subject to shorter timelines than due process hearings conducted pursuant to 34 CFR 300.507 – 300.516. Pursuant to 34 CFR 300.532(a), a parent of a child with a disability who disagrees with any decision regarding placement under 34 CFR 300.530 and 300.531, or the manifestation determination under 34 CFR 300.530(e), may appeal the decision by requesting a hearing. Whenever a hearing is requested under 34 CFR 300.532(a), the parents must have an opportunity for an expedited impartial due process hearing with the due process protections provided in 34 CFR 300.510 – 300.514. However, the hearing must occur within 20 school days of the date the complaint was filed and the hearing officer must make a determination

within 10 school days of the hearing. 34 CFR 300.532(c)(2). There is no provision in the regulations that provides authority for a hearing officer to extend either the 20 day hearing timeline or the 10 day decision timeline.

In pre-hearing filings and/or telephonic conferences, the parties raised disagreements regarding three issues: 1) the sufficiency of the due process complaint; 2) the conduct of an expedited proceeding; and 3) the bifurcation of expedited and non-expedited issues.

On April 11, 2019, Respondent filed a Motion to Dismiss and Objections to the Sufficiency of the Due Process Complaint in this matter. During a prehearing teleconference conducted on that same date, Petitioner argued against the objections. The federal regulations implementing IDEA impose specific requirements on due process complaints. The due process complaint is deemed sufficient unless the party receiving the due process complaint notifies the hearing officer within 15 days of receipt of the due process complaint that it does not meet the stated requirements. 34 CFR 300.508(d)(1). Respondent's motion was filed within 15 days of its receipt of the complaint. In accord with 34 CFR 300.508, the hearing officer must make a determination as to whether the complaint meets the regulatory requirements and must notify the parties in writing within five days of receipt of the objection. 34 CFR 300.508(d)(2).

However, in this case, Petitioner requested an expedited hearing. The sufficiency provision described in 34 CFR 300.508(d) does not apply to expedited due process complaints. Because of the expedited timelines that apply to conducting an expedited hearing, it would not be practical to extend the timeline in order for the sufficiency provision to apply. 71 FR 46725 (August 14, 2006), *Dispute Resolution Procedures under Part B of the Individuals with Disabilities Education Act (Part B)*, 61 IDELR 232 (OSEP 2013). For this reason, the undersigned held that Respondent may not challenge the sufficiency of the complaint as to the expedited hearing.

Respondent also objected to the conduct of an expedited hearing. Simply put, Respondent argues that the placement issue being contested is moot because the student is no longer in the placement.¹ On or about April 12, 2019, [REDACTED] voluntarily elected to transfer from an alternative school to a non-punitive alternative school, so he is no longer placed in the disciplinary setting. Petitioner argued that the plain language of 34 CFR 300.532(a) allows the parent of a child with a disability who disagrees with any decision regarding placement under 34 CFR 300.530 and 300.531 to request an expedited hearing.

Pursuant to 34 CFR 300.532, the hearing officer conducting an expedited proceeding under 34 CFR 300.511 hears and makes a determination regarding an appeal filed in accordance with 34 CFR 300.532(a). While the need for the expedited hearing is most evident when quick action can be taken, there is no indication that a parent loses the right to an expedited hearing because a disciplinary period has expired. Since the hearing officer is charged with determining whether the child's removal from placement violated IDEA and Petitioner is within his rights to request an expedited hearing, Respondent's objection to the conduct of an expedited hearing was overruled.

Petitioner objected to the bifurcation of the expedited and non-expedited issues involved in the appeal. Under the IDEA, with the exception of matters raised under 34 CFR 300.530 and 300.531, hearing officers have discretion in how they manage cases before them. Thus, if a due process complaint includes both disciplinary and non-disciplinary matters, the hearing officer can decide that it is prudent to bifurcate the hearing, thus allowing for an expedited hearing on discipline issues and a separate hearing on other issues. *Letter to Snyder*, 116 LRP 6063 (OSEP 12/13/15). The undersigned bifurcated the hearing and ruled that, as a practical matter, it would

¹ Respondent also argues that Petitioner has failed to file a motion specifically requesting an expedited hearing, but 34 CFR 300.532 provides no requirement for such a motion. 34 CFR 300.532(a) provides that the hearing be requested by filing a due process complaint pursuant to 34 CFR 300.507 and 34 CFR 300.508(a) and (b).

not be possible for the parties to adequately prepare for a hearing on all of the issues in an expedited timeline and that it would not be possible to render a meaningful final decision on the issues within 10 school days of the hearing. In order to reach the issue of whether the disciplinary action was appropriate, a determination must first be made as to whether the school district is deemed to have knowledge that [REDACTED] (“Student”) was a child with a disability and thus subject to the disciplinary procedural protections under the IDEA. Thus, the expedited bifurcated hearing was limited to two issues:

- 1). Whether the school district is deemed to have had a “basis of knowledge” that [REDACTED] was a child with a disability pursuant to 34 CFR 300.534;
- 2). Whether Student’s placement into [REDACTED] Alternative School after January 25, 2019 and until April 12, 2019 was appropriate under the IDEA.

In order to abide by the expedited timelines set forth in 34 CFR 300.532(c) and considering [REDACTED] County schools were not in session the week of April 1, 2019 for spring break and April 19, 2019 for the observance of Good Friday, the hearing was required to take place by May 6, 2019. The expedited hearing was conducted on April 29-30, 2019 in [REDACTED], Kentucky. It was a closed hearing. Fifteen witnesses testified and a number of exhibits were introduced. The parties filed written closing arguments without the benefit of the transcript by May 9, 2019. The decision must be rendered within 10 school days after the hearing and is thus to be rendered on or before May 14, 2019. Only the expedited hearing is the subject of this decision.

FINDINGS OF FACT

1. At the start of the 2018-2019 school year, Student was in 11th grade and enrolled at [REDACTED] [REDACTED] High School ([REDACTED]) in [REDACTED], Kentucky.

2. Student has not been identified as a child with a disability who is eligible for special education and related services.
3. Student has been involved in extracurricular activities at [REDACTED], including baseball and junior varsity basketball. He has also participated in in the U.S. Army Junior Reserve Officer Training Corps (JROTC) while at [REDACTED]. Student has been identified as gifted and talented in the realm of leadership.² (Testimony of [REDACTED], [REDACTED], [REDACTED], Mom and [REDACTED]).
4. Student's mother describes him as loud, outgoing and sociable. His math teacher and family friend describe him as a happy and outgoing child who shows no signs of depression or being troubled. (Testimony of Mom and [REDACTED]).
5. Student enjoyed his participation in JROTC and was performing admirably in the program. Student was promoted within the JROTC program and there were no disciplinary referrals stemming from JROTC. (Testimony of Mom, [REDACTED], [REDACTED] and [REDACTED]).
6. Assistant Principal [REDACTED] served as a coordinator of the gifted and talented program. [REDACTED] had confidence that Student would be a good ambassador and that he had leadership skills. [REDACTED] observed Student to easily build relationships with others. (Testimony of [REDACTED]).
7. His teachers describe Student as disruptive and difficult at times, and he has a history of behavior and discipline issues. [REDACTED] [REDACTED] was Student's 9th grade social studies teacher during the 2016-2017 school year. In December of 2016, the teacher e-mailed [REDACTED] [REDACTED] Student's mom ("Mom") to express concerns regarding his disruptive and rude

² Kentucky has an educational program which provides unique opportunities for students identified as exceptional students. These students have the potential ability to perform at an exceptionally high level in several areas, one of which is leadership. *See* 704 KAR 3:285.

behavior during class. In March of 2017, the teacher again e-mailed Mom, asking for her assistance as Student continued to be disruptive by talking during class, making animal noises and yelling across the classroom. The teacher reported behavioral issues several times during that school year, including one in December of 2016, three in February of 2017 and one in April of 2017. Student's loud and disruptive behavior were the basis of all of the referrals. As a consequence for the behaviors, Student received in-school suspension (ISS), detention and lunch isolation. According to the [REDACTED] there was no doubt that Student could succeed at doing assigned work; he simply had a lack of respect. (Testimony of [REDACTED] P 055-060, P 021-025).

8. Towards the end of his freshman year, Student served a five-day alternative suspension program (ASP) term for being disruptive and cussing at a teacher. (Testimony of [REDACTED] P 021).
9. [REDACTED] has a three-tiered behavioral intervention system. Tier 1 applies school-wide and addresses low, middle and high level behaviors that can result in detention, lunch isolation, ISS, an alternative suspension program (ASP) and out of school suspension. Students who show a disregard for school rules and who disrupt instruction on a consistent basis are referred to a committee composed of teachers and interventionists for Tier 2 and Tier 3 levels of intervention. The Tier 2 and Tier 3 teams confer to analyze data on the students to look for patterns of behavior and develop behavior plans aimed at preventing further escalation of the target behavior. Depending on the behavior of the students, the team can determine that the offending student be placed at an alternative school, referred to court for truancy or referred to the school board for disciplinary action. A referral to [REDACTED]

██████████ the alternative school, can be made if a student shows complete disregard for the school rules. (Testimony of ██████████ P 040-041).

10. ██████████ ██████████ is a district interventionist at ██████████. In that role, ██████████ meets with staff and students and collects information to implement behavioral intervention plans (BIP). He has worked as an interventionist for Student since April of Student's 9th grade year, when Student was placed on the Tier 2 intervention list based on the number of office referrals (seven) he received during the year. ██████████ met regularly with Student, communicated with his mother, observed the child and reviewed weekly reports submitted by teachers on his grades and behavior. As part of his Tier 2 interventions, Student also participated in a "What's Next" mentorship group with a former superintendent to discuss graduation and future opportunities. (Testimony of ██████████ P 042-043)
11. ██████████ ██████████ was Student's math teacher his freshman year and was one of the teachers who submitted weekly reports on his behaviors as part of the intervention process. ██████████ was also friends with Mom, and socialized with the family at times. ██████████ found Student to be disruptive in class at times. She found that Student would try to engage in power struggles, and that she refused to engage in those struggles, instead pointing out that Student was making a choice when misbehaving. (Testimony of ██████████)
12. Student continued to have behavioral issues in his sophomore year. ██████████ ██████████ Student's English teacher at the time, describes him as a defiant and disrespectful child who is smart but chooses not to do the work he is assigned. Student told her multiple times he does not like English class. ██████████ communicated her concerns to Mom via e-mail in October of 2017. In September of 2017 and January of 2018, the teacher made behavioral referrals

regarding disruptive behavior and bullying that resulted, respectively, in a warning and a conference with the student. (Testimony of ██████ P053-054, P 017-020).

13. The administration and Tier 2/Tier 3 committee placed Student on the Tier 3 intervention list during his sophomore year. (Testimony of ██████

14. A BIP was executed in August, 2019, the beginning of Student's junior year. It is noted that Student had five referrals during his sophomore year and that he could test teachers and was often reluctant to complete his work. The intervention strategy was to chunk lessons and offer the child a cool down period. Student is noted to have a temper and the BIP cautions against letting him become argumentative. ██████ is listed as the main person responsible for helping Student with the BIP. (Testimony of ██████ and ██████ R007-008).

15. ██████ ██████ was Student's math teacher during the 2018-2019 school year. According to ██████ Student was at times disruptive but could behave when he wanted to. When in danger of failing, Student would work hard and be one of the best students in the class. Student had a decent grade in the math class. In October of 2018, ██████ made a referral for Student's disrespectful behavior after he was disruptive while a guest speaker was talking to the class and refused to follow orders. Student received cafeteria suspension as a result. (Testimony of ██████ P 014, P 037).

16. ██████ was aware of Student's categorization as a Tier 3 student as he was compiling the weekly reports for submission to ██████ He conferred with ██████ and ██████ and strived to speak one on one with Student and have positive contact. He also reached out to Mom via e-mail on several occasions during the first semester of Student's junior year, letting her know that Student was playing a dog whistle in class one day and also notifying

her when Student did better at focusing on the tasks at hand. (Testimony of [REDACTED] R 089-091).

17. [REDACTED] [REDACTED] was Student's English teacher during the 2018-2019 school year and had him for two class periods, an extension class and an honors class. [REDACTED] also found Student to be disruptive and defiant. Between the start of the school year and leading up to the Christmas break and as part of the intervention weekly reports, [REDACTED] documented a list of disruptive behaviors Student exhibited. She also continuously conferred with [REDACTED] about Student's behaviors. In October of 2018, [REDACTED] e-mailed Mom to express concerns about Student's grades and offer make-up work. (Testimony of [REDACTED] and [REDACTED] R 084-088, P 012-016, R 056-057).
18. Student frankly and repeatedly told [REDACTED] that he wouldn't act up in JROTC class or other classes like he did in [REDACTED] class. He stated that he does not like English class. According to [REDACTED] Student was fully capable of doing his class work and never said he couldn't do the work; he just chose not to. When he did complete work, it was of high quality. Student's reading inventory test history indicates that he had room for growth, but was not subpar. (Testimony of [REDACTED] R 151).
19. In October of 2018, [REDACTED] e-mailed Mom and attempted to set up a meeting so that he and other teachers could discuss Student's behaviors. Mom could not attend the day of the meeting and it was not rescheduled. (Testimony of [REDACTED] R 053-055).
20. On December 10, 2018, [REDACTED] made a discipline referral when Student was talking on the phone class and ignoring [REDACTED] instruction to hang up the phone. [REDACTED] e-mailed Mom and made her aware of the incident. (Testimony of [REDACTED] and [REDACTED] P 012, R 087, R056).

21. On January 14, 2019, Student's homeroom teacher made a discipline referral when Student got into a fight with a female student. Student is alleged to have pulled the girl's hair after she hit him and the two exchanged curse words. (Testimony of Mom; P 008, P 011).
22. On January 15, 2019, [REDACTED] was playing a basketball game against rival [REDACTED] High School. At the beginning of the game, a group of approximately 15 [REDACTED] students were sitting in the [REDACTED] student section. During a game between the two schools the previous year, [REDACTED] students were asked to leave the [REDACTED] student section in an exercise of caution. In order to eliminate the possibility of tensions escalating and based on the actions taken in 2018, [REDACTED] [REDACTED] an assistant principal at [REDACTED] approached the group and asked all of the [REDACTED] students to leave the [REDACTED] student section. While most of the students left the area, Student and one or two other children remained in the stands. (Testimony of [REDACTED])
23. [REDACTED] [REDACTED] a math teacher and assistant athletic director at [REDACTED] was also at the game. The athletic director was not in attendance. [REDACTED] received a phone call from [REDACTED] [REDACTED] the [REDACTED] principal, instructing him to tell Student he needed to leave the [REDACTED] [REDACTED] student section. [REDACTED] approached Student closely and advised him that the principal had called him and asked him to have Student move. [REDACTED] told Student that there may already be consequences for his failure to move, but that the consequences would be more severe if he did not move. (Testimony of [REDACTED])
24. The band director from [REDACTED] [REDACTED] also asked the [REDACTED] students to leave the [REDACTED] [REDACTED] student section. (Testimony of [REDACTED])
25. [REDACTED] the math teacher and family friend, was also at the game. [REDACTED] became aware of the problem and texted Student, telling him that [REDACTED] was asking the students to move

and specifically asking Student to move. Student scoffed at her during the text exchange and refused to move. [REDACTED] then approached Student personally and tried to pull him aside away from the crowd. The two spoke for about five minutes, with [REDACTED] imploring Student to move. Student became angry after the exchange and texted that he didn't care about the repercussions. [REDACTED] ended the text exchange by telling Student that he made his choice and her hands were clean. (Testimony of [REDACTED] R 117-119).

26. At some point during the game, Student called Mom to ask if he should move. He did not reveal that [REDACTED] and [REDACTED] asked him to move; he indicated only that [REDACTED] had. Mom told Student he was right not to move as long as he wasn't causing a disturbance. (Testimony of Mom).

27. The day after the basketball game, [REDACTED] the school principal, met with his leadership team to do due diligence to learn about Student's history and plan how to move forward in light of Student's actions at the game. Specifically, [REDACTED] met with [REDACTED] and [REDACTED] the two assistant principals, as well as [REDACTED] the dean of students. He also reviewed Student's behavioral and disciplinary history, noting that Student was bumped into Tier 3 intervention during his sophomore year. The team determined that Student's refusal to move after being asked by multiple layers of authority figures merited a temporary placement at [REDACTED] [REDACTED] the alternative school. (Testimony of [REDACTED])

28. On January 17, 2019, [REDACTED] met with Student and his uncle. Chief [REDACTED] of the JROTC program was also in attendance, as were [REDACTED] and [REDACTED] [REDACTED] had asked Student to bring his mother to the meeting with him, but Student's uncle attended instead. Because the uncle was not on the approved contact list, [REDACTED] called Mom to get her

permission to speak to uncle and Mom agreed. During the meeting, ██████ reviewed Student's behavioral issues and indicated that the basketball game behavior was not a one-time thing. Rather, Student had a history of defiant behavior which continued into his junior year and he would be placed in the alternative school because of a culmination of his behaviors. He informed Student and his uncle that Student would be placed at ██████ ██████ for 25 days. (Testimony of ██████ P011).

29. Student did not tell Mom about the meeting before it occurred. The uncle called Mom after the meeting, and Mom then called ██████ Mom did not understand the seriousness of the meeting when ██████ called her to ask if the uncle could attend. (Testimony of Mom).

30. A referral for a pre-board hearing was filed on January 17, 2019 by assistant principal ██████ The referral indicates that Student displayed "excessive defiance of authority at a school-sponsored event," and that he has accumulated six office referrals during the first part of his junior year and a total of 20 over the course of 2 ½ years at ██████ Upon receipt of the referral, Director of Pupil Personnel of ██████ County Schools ██████ reviewed Student's office referrals, disciplinary and behavioral reports and intervention data. (Testimony of ██████ P 001).

31. The pre-board hearing was conducted on January 25, 2019. ██████ attended the pre-board, along with ██████ and other officials appointed by the school superintendent. The attorney for the school board attended the meeting, as did Mom, Student, and two of their attorneys. As a result of the proceeding, the pre-board committee recommended that Student be placed at ██████ ██████ for 25 days. ██████ ██████ is described as having a higher level of security than ASP, the alternative school suspension. Students are

placed in ASP for 10 days or less; they are placed in [REDACTED] [REDACTED] for 45 days or less.
(Testimony of [REDACTED] P 002)

32. Mom signed a statement at the conclusion of the pre-board hearing indicating she disagreed with the committee recommendations and requested a board hearing. At the request of her attorney, Mom also handwrote a note asking that Student be evaluated. (Testimony of [REDACTED] Mom and [REDACTED] P003).

33. Based on Mom's request, an Admission and Release Committee (ARC) was conducted on February 7, 2019. The purpose of the meeting was to discuss a referral for an evaluation for Student. When a referral is made, the ARC determines what suspected educational disabilities it needs to consider that could possibly lead a student to need specially designed instruction by special education staff. Mom and Student attended the ARC, along with [REDACTED] [REDACTED] [REDACTED] a guidance counselor, a special education teacher and [REDACTED] [REDACTED] an academic interventionist. [REDACTED] served as chair of the ARC. (Testimony of [REDACTED] [REDACTED] and Mom; P 042-051)

34. During the ARC, Mom indicated that she felt that since Student was having so many behavioral issues perhaps he needed something else. [REDACTED] indicated she has never worked with Student from an interventionist standpoint because his grades have never been an issue. It was noted that Student has had discipline problems especially in his English class, but that there were no issues with JROTC, which Student said he enjoys. Student's disruptive behavior does not happen throughout the school day or in every class. It was also noted that Student performs at grade level and is gifted in leadership. The ARC concluded that it is not concerned with academic issues, which it said eliminates many educational disabilities. The ARC determined that Student can build relationships and gets

along with others. It did not consider Other Health Impairment as it was not presented with a medical diagnosis. The ARC determined that there was not enough information to move forward with further evaluation. At the time, Mom indicated she would reach out to her physician regarding the need for a medical evaluation. (Testimony of [REDACTED] [REDACTED] and Mom; P 042-051)

35. During the ARC process, [REDACTED] reviewed Student's behavioral history as well as the Tier 1, Tier 2 and Tier 3 records since his freshman year. She also reviewed Student's behavioral intervention plans as well as his regular classroom work, including his grades and information from the Infinite Campus database. Considering a potential disability related to an emotional behavioral disorder (EBD), she considered whether Student's behavior occurred across all settings over a long period of time. [REDACTED] concluded that Student was not displaying the same behavior in all settings and ruled out an EBD. The district did not see a disability. (Testimony of [REDACTED])
36. At the ARC meeting, Mom did not identify a disability or say Student had a diagnosis. Although Mom testified at the hearing that Student had seen a therapist, there was no testimony as to whether he had been seen by a physician as related to a disability diagnosis. Summary notes from a follow up ARC meeting conducted in April of 2019 state that the school has not heard from Mom regarding any change regarding any type of medical diagnosis regarding Student. (Testimony of [REDACTED] R 152-155).
37. A board hearing was conducted on February 28 2019. As a result, the board assigned discipline totaling 50 days of alternative placement at [REDACTED] [REDACTED]. The board concluded that Student has "exhibited a repeated pattern of willful disobedience and defiance of school authority as well as disruption of the educational process." The decision

was based on evidence presented at the hearing, including witness testimony and documentary exhibits. (Testimony of ██████ P 004-007)

38. The teachers who testified were never concerned that Student may need special education services. ██████ said there was no doubt that Student could do his school work and she never thought Student had any issues beyond a lack of respect for authority. ██████ had no concern for special education needs and felt Student had the potential to do fine as long as he made up missing assignments. ██████ testified that although she found Student to be disrespectful, she found his actions to be a choice on his part and had no concerns that he may need special education. Mom never approached ██████ ██████ or ██████ regarding the possible need for special education. Likewise, ██████ who was close to Mom and Student, testified that Mom never mentioned special education to her and that if Mom did have concerns about these issues, she would have confided in her. (Testimony of ██████ ██████ ██████ and ██████)

39. In his role as behavior interventionist, ██████ established a good relationship with both Mom and Student. He was also genuinely fond of both the Student and Mom and wanted the best for Student. Had ██████ had concerns that Student may need special education services, he would have spoken up. Likewise, ██████ felt that if Mom had concerns about the child's need for special education, she would have been comfortable approaching him about it. (Testimony of ██████)

40. Mom has some knowledge of the IDEA as she has another son who had a disability because of a medical diagnosis. She was approached by the school when that son began receiving special education services. Mom testified that she didn't know the words to use beyond asking ██████ for advice. (Testimony of Mom).

41. Student did well at [REDACTED] [REDACTED]. He had no disciplinary referrals during his placement there. According to Mom, Student did well at [REDACTED] because it is a more structured environment which allows students to move at their own pace. He also connected with other students there and helped them perform well. (Testimony of [REDACTED] and Mom; R 093-101)

42. When Student's alternative placement was complete, Mom and Student made the choice that he not return to [REDACTED] but that he begin attending [REDACTED] Academy, an alternative placement that is non-punitive. Student continues to do well there. (Testimony of Mom).

DISCUSSION AND CONCLUSIONS OF LAW

As this Due Process Hearing is an administrative proceeding in Kentucky, there are two guides for who has the burden of proof. As the party seeking relief, Petitioner bears the burden of proving his entitlement to relief by a preponderance of the evidence. Schaffer v. Weast, 546 U.S. 49, 62(2005). The Supreme Court in Schaffer ruled that the party seeking relief has the burden of proof and thus the burden of persuasion as the party seeking relief. In addition, KRS 13B.090(7) provides that 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." Here, Petitioner is the party requesting action or seeking a benefit. Thus, Petitioner has the burden of proof and must establish, by a preponderance of the evidence, that [REDACTED] had sufficient information available to suspect that Student is student with a disability and was in need of special education services and that his placement at [REDACTED] [REDACTED] was in violation of the IDEA.

BASIS OF KNOWLEDGE

The “child find” provisions of the IDEA require school districts to identify, locate, and evaluate children with disabilities in need of special education and related services. See 20 U.S.C. Section 1412(a)(3).

Protections for children not determined eligible for special education and related services are set forth in 34 CFR 300.534. A child who has not been determined to be eligible for special education services and who has engaged in behavior that violated a code of student conduct may assert IDEA protections if the public agency had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred. 34 CFR 300.534(a).

A public agency is deemed to have a “basis of 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 writing³ 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 Section 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.

34 CFR 300.534(b). Although Mom had e-mail exchanges with [REDACTED] and several of Student’s teachers prior to the basketball game that resulted in Student’s placement at [REDACTED] [REDACTED]

³ The applicable state regulation, 707 KAR 1:340, allows for oral notice if the parent cannot express the concern in writing. 707 KAR 1:340, Section 16(1)(a). Here, there is no claim that Mom lacks the ability to express a concern in writing.

none of the writings expressed any concern that Student might need a special education and related services.

The Department of Education has refused to clarify the requirement to “express concern,” and has concluded: “We do not believe it is necessary to clarify the phrase ‘express concern’ in 34 CFR 300.534(b) because we believe that, in the context of this section, it is understood to mean that a parent is concerned that his or her child is in need of special education and related services and expresses that concern in writing to the child’s teacher or administrative personnel.” 71 Fed. Reg. 46,727 (2006).⁴ Mom testified that she generally asked ██████ in conversations about ways to deal with Student’s behavioral issues and claims she did not know the right words to use to trigger IDEA, but it is clear that she never referenced, either orally or in writing, the concern that Student might need special education and related services. The regulation requires that the parent specifically request a need for special education. Expressing vague concerns about Student’s behavior, without referencing at all any need for special education or related services, was insufficient to satisfy 34 CFR 300.534(b)(1).

Mom did request an evaluation of Student by submitting a written note on January 25, 2019 at the pre-board meeting, but that was clearly after Student’s disciplinary infraction at the January 15, 2019 basketball game. Both 34 CFR 300.534(a) and (b) specifically require that the district have knowledge that a child is a child with a disability before the behavior that precipitated by disciplinary action occurred. The requirements in 34 CFR 300.534(b)(2) were not satisfied.

Finally, a district is said to have a “basis of knowledge” that a child is a child with a disability if district staff expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education or other supervisory personnel. Again, such

⁴ See also Chippewa Local Sch. Dist. 117 LRP 7220 (SEA OH 02/18/17 (a mere e-mailed request for academic help is insufficient to satisfy the requirement of expressing concern for the need for special education).

concerns must be expressed before the behavior that resulted in the disciplinary action. 34 CFR 300.534(b)(3). Petitioner argues that Student has consistently displayed disruptive and defiant behaviors and has been in targeted interventions since his freshman year. As authority for its argument that this constituted a basis of knowledge, Petitioner cites to *Jackson v. Northwest Local School District*, 10 LRP 49983, August 3, 2010. In that case, the court found that a child who had nearly two years of intervention services without improvement should have been recognized by the school district as a child with disability related issues. However, in that case, the student had been diagnosed with ADHD and her intervention team found her to have major concerning behavior and concluded that she should be referred to an outside mental health agency. The court found that that referral was reason for the district to suspect that the child may have a disability.

In this case, there was no such referral and no indication that Student was experiencing such concerning behavior. The teachers who documented Student's behavior did so not out of a desire to express specific concerns about Student's pattern of behavior as that term is contemplated in the regulation, but rather to abide by the school's disciplinary procedures and intervention protocol.

Petitioner has also relied on *Anaheim Union High School District v. J.E.*, 113 LRP 22112, May 21, 2013. In that case, the hearing officer held that the school district should have had knowledge of a child's disability status after the assistant principal attended a Section 504 meeting during which teachers discussed the child's severe anxiety, panic attacks and hospitalization for attempted suicide. Here, there is no comparable indication that Student has a mental illness or serious issue; rather, his actions have simply been the result of his defiance and choices made on his part. Student's teachers testified that Student had the ability to perform the requisite work when he wanted to.

Petitioner cites to *Voyageur Academy, Michigan State Education Agency*, 114 LRP 34791, March 21, 2014 as another case in which a district is held to have a basis of knowledge that a student may have a disability after teachers documented a pattern of aggressive, defiant and disruptive behavior. However, in that case, the child's mother informed the district, verbally and in writing, that she thought the child may have ADHD and in fact was being evaluated for ADHD. Here, there is no evidence that Student has any kind of diagnosis that may result in eligibility under the IDEA. Mom testified that Student had seen a therapist, but only after the incident involving the basketball game and the resulting placement in the alternative school.

Disciplinary referrals, in and of themselves, do not necessarily indicate a basis for a referral for special education and related services. *Dickinson Indep. Sch. Dist*, 29 IDELR 290 (SEA TX 1998). In that case, the hearing officer held that a student's 19 disciplinary referrals during one school year did not necessarily indicate a need for a referral to special education. Many students without disabilities have trouble conforming to school rules and suffer disciplinary consequences. Disciplinary problems and defiance in the classroom alone do not give a school district a basis of knowledge that a child may have a disability.

Petitioner has not demonstrated that [REDACTED] personnel expressed specific concerns about a pattern of behavior before the behavior that precipitated the disciplinary action occurred as required by 34 CFR 300.534(b)(3).

A public agency is deemed **not** to have a basis of knowledge that a child is a child with a disability under 34 CFR 300.534(b) if:

- (1) The parent of the child-
 - (i) Has not allowed an evaluation of the child pursuant to Sections 300.300 through 300.311; or
 - (ii) Has refused services under this part; or

(2) The child has been evaluated in accordance with Sections 300.300 through 300.311 and determined to not be a child with a disability under this part.⁵

Respondent argues that this exception also applies as Student was evaluated and found not to be a child with a disability as part of the February 7, 2019 ARC process. Respondent specifically argues that the ARC reviewed existing data as part of the evaluation process in accordance with 34 CFR 300.305 and determined that no additional data are needed to determine whether the child continues to be a child with a disability. As part of an initial evaluation, 34 CFR 300.305(a) allows for the review of existing evaluation data, including information provided by parents, current classroom-based observations and observations by teachers. If the ARC team determines that a child does not need special education and related services and that no additional data are needed, the ARC must notify the parent of the reason for its decision and the right of the parents to request further assessment. 34 CFR 300.305(d).

When the ARC met on February 7, 2019, it reviewed existing data and determined that Student was performing at grade level and that he was thus not eligible for many educational disabilities. It also found that Student was not eligible under the disability category of “Other Health Impairment” as there was no applicable medical diagnosis. The ARC also concluded that the data presented does not show that Student’s misbehavior is happening throughout the school day or in every class.⁶ For example, the ARC notes that while Student has been defiant in English

⁵ Kentucky’s regulation also includes a provision that a district shall not be deemed to have knowledge that a child is a child with a disability if it determined that an evaluation was not necessary and provided notice of the parents of these determinations. 707 KAR 1:340, Section 16(2)(b).

⁶ This finding is relevant in the evaluation because the ARC was considering whether Student may be diagnosed with an emotional behavior disorder. 707 KAR 1:002, Section 1(24)(a)(1), which defines a child with an “Emotional Behavioral Disability” (EBD) as a child who, when provided with interventions to meet instructional and social-emotional needs, continues to exhibit specific issues across settings, over a long period of time and to a marked degree. One of the four listed issues includes: “severe deficits in social competence or appropriate behavior which cause an inability to build or maintain satisfactory interpersonal relationships with adults or peers.”

class, there are no behavioral issues in JROTC. Based on these findings, the ARC concluded not to move forward with further evaluation.

Respondent school conducted an evaluation pursuant to 34 CFR 300.305 and determined that Student is not a child with a disability. Thus, aside from not having a basis of knowledge under any of the provisions of 34 CFR 300.534(b), it is deemed not to have knowledge pursuant to 34 CFR 300.534(c)(2).

PLACEMENT

If a public agency does not have knowledge that a child is a child with a disability prior to taking disciplinary measures against the child, the child may be subjected to the disciplinary measures applied to children without disabilities who engage in comparable behaviors consistent with 34 CFR Section 300.534(d)(2). That subsection requires that, if requested, an evaluation be conducted expeditiously, that the child remain in the placement as determined by school authorities, and that, if the child is determined to have a disability, the agency provide appropriate special education and related services.

As the Respondent had no basis of knowledge that Student had a disability prior to placing him in the alternative school, it complies with the IDEA's protections for children not determined eligible for special education and related issues if it imposes disciplinary measures as it would against children without disabilities in comparable situations. It is undisputed that Student was listed on the Tier 3 intervention level and placement at [REDACTED] [REDACTED] is one of the interventions available for students. There is no indication the placement was improper.

Petitioner argues that Student was entitled to a manifestation determination prior to the change in placement from [REDACTED] to [REDACTED] [REDACTED]. Pursuant to 34 CFR 300.530(e), a manifestation determination must be conducted on any decision to change the placement of a child

with a disability to determine if the conduct in question was caused by, or had a substantial relationship to, the child's disability. Since Respondent had no basis of knowledge that Student had a disability, no manifestation determination was required.

FINAL ORDER

The undersigned concludes that Petitioner failed to present sufficient evidence to establish that Respondent had a "basis of knowledge" that Student was a child with a disability under 34 CFR 300.534. Petitioner has also failed to present sufficient evidence that Student was placed at [REDACTED] in violation of the IDEA.

APPEAL RIGHTS

The decisions on expedited due process hearings are appealable consistent with 34 CFR 300.514. In accord with that regulation and pursuant to 707 KAR 1:340, Section 12, 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, via certified mail, a request for appeal within thirty (30) calendar days of the date of the Hearing Officer's decision. The appeal shall be submitted to the Kentucky Department of Education at the following address:

Kentucky Department of Education
Office of Legal Services
300 Sower Blvd; 5th Floor
Frankfort, KY 40601

A decision made by the ECAB shall be final unless a party appeals the decision to state circuit court or federal district court.

So ordered this 14th day of May, 2019.

/s/ Susan Gormley Tipton
SUSAN GORMLEY TIPTON
Hearing Officer
susantipton@roadrunner.com

CERTIFICATION

I hereby certify that a true copy of the foregoing Decision of Due Process Hearing Officer on Expedited Bifurcated Hearing has been served by mailing same to the following, via **U.S. mail and e-mail**, on this the 14th day of May, 2019:

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/s/ Susan Gormley Tipton
Susan Gormley Tipton
Hearing Officer