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November 29, 2023

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**RE: [REDACTED] THE STUDENT, AND [REDACTED] THE PARENT V. KNOX COUNTY SCHOOLS,
APD Case No. 07.03-235595J**

Enclosed is a *Final Order*, including a *Notice of Appeal Procedures*, rendered in this case.

Administrative Procedures Division
Tennessee Department of State

Enclosure(s)

**BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION DIVISION OF
SPECIAL EDUCATION**

IN THE MATTER OF:

■ **THE PARENT, *and*
THE STUDENT,
*Petitioners,***

v.

**KNOX COUNTY SCHOOLS,
*Respondent.***

APD Case No. 07.03-235595J

FINAL ORDER

This matter was brought by the Petitioners, student ■ and ■ parent, ■ pursuant to the Individuals with Disabilities Educational Act (IDEA) and Title 49 of the Tennessee Code Annotated. The Petitioners are represented by attorneys Justin Gilbert and Christopher Sailer. The Respondent, Knox County Schools (KCS), is represented by Deputy Law Director Amanda Morse. The parties stipulated to the admission of eight exhibits, filed a Joint Stipulation of Facts, and agreed that the matter be decided on the administrative record in lieu of a hearing.

STATEMENT OF THE ISSUE

The issue presented is whether it constitutes a change of placement under 34 C.F.R. § 300.536(a)(2) such that a manifestation determination review is required under 34 C.F.R. § 300.530(e) when a disciplinary placement begins in one school year, extends 19 school days into the next school year, and the student subsequently receives eight additional days of out-of-school suspension for five instances of substantially similar conduct.

SUMMARY OF THE DETERMINATION

It is **DETERMINED** that Petitioners carried their burden of proof by a preponderance of the evidence. Petitioners have shown that when a disciplinary placement begins in one school year, extends 19 days into the next school year, and the student subsequently receives eight additional days of out-of-school suspension for five instances of substantially similar conduct, it constitutes a disciplinary change of placement under 34 C.F.R. § 300.536(a)(2) such that a manifestation determination review is required under 34 C.F.R. § 300.530(e). Accordingly, Petitioners are the prevailing party and are entitled to relief. This determination is based on the following findings of fact and conclusions of law.

FINDINGS OF FACT¹

1. [REDACTED] is a [REDACTED] student with an educational disability of a specific learning disability in reading fluency.² [REDACTED] receives special education and related services pursuant to the IDEA.
2. [REDACTED] lives in the [REDACTED] zone in Knox County, Tennessee.
3. During the 2022-2023 school year, [REDACTED] attended [REDACTED] on a general education transfer.
4. This year, the 2023-2024 school year, [REDACTED] attends [REDACTED]
5. During the 2022-2023 school year, KCS administrators found that [REDACTED] violated the student code of conduct. Specifically, KCS found that on February 1, 2023, [REDACTED] tore paper

¹ These Findings of Fact are taken from the parties' Joint Stipulation of Facts.

² [REDACTED] also has medical diagnoses including Impulse Control Disorder and Disruptive Mood Dysregulation Disorder.

from a bulletin board, overturned a file cabinet, and assaulted a teacher in [REDACTED] behavioral support classroom.

6. Following the February 1, 2023, conduct violation, KCS held a manifestation determination review (MDR) pursuant to 34 C.F.R. § 300.530(e). The school members of the Individual Education Program (IEP) team determined the conduct in question was not a manifestation of the student's disability. The parent disagreed with that outcome. The parent has appealed that outcome in APD Case No. 07.03-235342J.

7. Following the February 1, 2023, violation, KCS remanded [REDACTED] for discipline to an alternative school for 90 days, from February 1, 2023, to September 1, 2023. [REDACTED] remand spanned two school years (2022-2023 and 2023-2024).

8. In accordance with 34 C.F.R. § 300.530(c), an IEP team meeting was held, and the IEP team determined that [REDACTED] should be placed at one of KCS' two alternative schools to receive educational services in accordance with [REDACTED] IEP for the duration of [REDACTED] disciplinary placement.

9. [REDACTED] began [REDACTED] disciplinary placement at [REDACTED] during the 2022- 2023 school year. By agreement after an August 7, 2023, IEP team meeting, [REDACTED] served the remaining 19 days of [REDACTED] disciplinary placement at [REDACTED] during the 2023-2024 school year.

10. Both [REDACTED] and [REDACTED] offer a full day of educational services in general education classrooms and utilize the same general education curriculum as other schools in the KCS school system.

11. [REDACTED] returned to [REDACTED] zoned school of [REDACTED] on September 6, 2023. Since then, [REDACTED] has received eight days of out of school suspension because of code of conduct violations.

12. During the 2023-2024 school year, KCS administrators have found that [REDACTED] violated the student code of conduct on five relevant occasions:

- a. On August 25, 2023, KCS found that [REDACTED] refused to attend in-school suspension at [REDACTED] and was given a two-day out of school suspension.
- b. On September 12, 2023, KCS found that [REDACTED] threatened a teacher and destroyed school property and was given a two-day out of school suspension.
- c. On September 25 and 26, 2023, KCS found that [REDACTED] was under the influence of marijuana (and was verbally disruptive with staff) and was sent home each day for a total of two out of school suspension days.
- d. On September 28, 2023, KCS found that [REDACTED] attempted to assault a peer. When prevented from reaching the peer, [REDACTED] continued to shout threats toward the student and was given a two-day suspension.

13. [REDACTED] received discipline for all five code of conduct violations.

14. After the September 12, 2023, and September 28, 2023, code of conduct violations, [REDACTED] made written requests for an MDR through counsel. KCS refused, through counsel, asserting [REDACTED] had not been out of placement for more than 10 school days.

15. [REDACTED] and KCS acknowledge [REDACTED] conduct leading to the discipline was substantially similar in all cases.

ANALYSIS

JURISDICTION

When enacting the IDEA, Congress clearly conferred jurisdiction of a student's IDEA claims upon hearing officers, also known as administrative law judges. 20 U.S.C. § 1415(f)(3)(A). In Tennessee, the Office of the Secretary of State, Division of Administrative Procedures, has jurisdiction over the subject matter of and the parties to this proceeding and the undersigned Administrative Judge has the authority to issue final orders. *See* Tenn. Comp. R. & Regs. 0520-01-09-.18 (2023); *see also* Tenn. Code Ann. § 49-10-101.

The U.S. Supreme Court held in *Schaffer v. Weast*, that the burden of proof is on the party "seeking relief." 546 U.S. 49, 51 (2005). Thus, when a parent files a request for a due process hearing, the parent bears the burden of proof, or burden of persuasion in the due process hearing. *Id.* at 56; *see also, Cordrey v. Euckert*, 917 F.2d 1460, 1469 (6th Cir. 1990) (the party challenging the IEP bears the burden of proof in an IDEA action). Thus, Petitioners bear the burden of proof in this matter.

DISCIPLINE ACROSS TWO SCHOOL YEARS

█ lives in the █ zone; however, █ attended █ on a general education transfer for the 2022-2023 school year. On February 1, 2023, █ violated the KCS student code of conduct when █ tore paper from a bulletin board, overturned a filing cabinet, and assaulted a teacher. Following this incident, KCS conducted an MDR pursuant to 34 C.F.R. § 300.530(e), and the IEP team, over the parent's objection, determined that the incident was not a manifestation of █ disability. Because the IEP team determined that the incident was not a manifestation, KCS was permitted to impose the same

discipline it would for a non-disabled student. 20 U.S.C. § 1415(k)(1)(B) and 34 C.F.R. § 300.530(c).³ Accordingly, KCS remanded [REDACTED] for a 90-day disciplinary placement to an alternative school, which was a disciplinary removal under §§ 300.530(c) and 300.536(a)(1)⁴ because it removed [REDACTED] from [REDACTED] regular placement for more than 10 consecutive school days. As required by § 300.531, the IEP team met and determined that [REDACTED] should serve the 90-day disciplinary placement at one of KCS's alternative schools to receive educational services for the duration of [REDACTED] disciplinary placement. The disciplinary placement spanned two school years, with the first 71 days being served at [REDACTED] during the 2022-2023 school year. On August 7, 2023, the IEP team met and agreed that [REDACTED] should serve the remaining 19 days at [REDACTED] at the beginning of the 2023-2024 school year. During the duration of this 90-day disciplinary placement, KCS was required to continue providing [REDACTED] with services necessary to ensure a Free Appropriate Public Education (FAPE). 20 U.S.C. § 1415(k)(1)(D) and 34 C.F.R. § 300.530(d). To that end, the parties agree that [REDACTED] continued to receive services under [REDACTED] IEP and that both [REDACTED] and [REDACTED] offer full-day educational services in general education classrooms and utilize the same general education curriculum as other KCS schools.

Upon completion of the 19 days at [REDACTED] [REDACTED] returned to [REDACTED] [REDACTED] for the 2023-2024 school year. However, between August 25, 2023, and September 28, 2023, [REDACTED] engaged in conduct substantially similar to the February 1, 2023,

³ 34 C.F.R. § 300.530(c) states: "For disciplinary changes in placement that would exceed 10 consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to paragraph (e) of this section, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except as provided in paragraph (d) of this section."

⁴ 34 C.F.R. § 300.536(a)(1) states: "For purposes of removals of a child with a disability from the child's current educational placement under §§ 300.530 through 300.535, a change of placement occurs if - (1) The removal is for more than 10 consecutive school days."

incident on five separate occasions. These incidents included refusal to attend in-school suspension on August 25, 2023, threatening a teacher and destroying school property on September 12, 2023, being verbally disruptive and under the influence of marijuana on September 25-26, 2023, and attempting to assault a peer on September 28, 2023. KCS deemed each of these incidents to be code of conduct violations and suspended [REDACTED] for a total of eight additional days (two days per incident). Following the September 12, 2023, and September 28, 2023, incidents, [REDACTED] through counsel, made written requests for KCS to conduct an MDR. KCS refused to do so reasoning that [REDACTED] had not been out of placement for more than 10 school days during the 2023-2024 school year.

NON-DISCIPLINARY PLACEMENTS vs. DISCIPLINARY PLACEMENTS

KCS contends that [REDACTED] was never removed from [REDACTED] current educational placement for more than 10 days during the 2023-2024 school year in part because [REDACTED] continued to receive education services under [REDACTED] IEP and in part because the IEP team met on August 7, 2023, and agreed that [REDACTED] should serve the remaining 19 days of disciplinary placement at [REDACTED] [REDACTED] thereby making [REDACTED] [REDACTED] current educational placement until [REDACTED] returned to [REDACTED] on September 6, 2023. In taking this position, KCS confuses a non-disciplinary placement with a disciplinary placement. In the non-disciplinary context, placement involves an IEP team keeping a student in his or her least restrictive environment along a spectrum of possible placements. *See* 20 U.S.C. § 1412(a)(5) and 34 C.F.R. § 300.116. In this context, the term “‘educational placement,’ as used in the IDEA, means educational program – not the particular institution where that program is implemented.” *White ex rel. White v. Ascension Parish School Bd.*, 343 F.3d 373, 379 (5th Cir. 2003) [internal citations

omitted]; *see also S.P., next friend M.P. v. Knox Cnty. Bd. of Educ.*, No. 3:17-CV-100, 2021 WL 6338399, at *9 (E.D. Tenn. Mar. 26, 2021) and *J.W. v. Clarksville/Montgomery Cnty. Sch. Sys.*, No. 3:12-CV-01083, 2015 WL 13859550, at *6 (M.D. Tenn. Apr. 6, 2015). Similarly, in the non-disciplinary context, “[m]aintaining a child’s placement in an educational program that is substantially and materially similar to the former placement is not a change in placement.” *Id.* at *5 quoting *D.K. v. D.C.*, 983 F. Supp. 2d 138, 145 (D.D.C. 2013).

On the other hand, disciplinary placements involve the removal of a student from [REDACTED] current educational placement pursuant to the discipline procedures set forth at 34 C.F.R. §§ 300.530 through 300.535. In this context, a “removal” occurs when a child is moved “from their current placement to an appropriate interim alternative education setting, another setting, or suspension” following a code of conduct violation. 20 U.S.C. § 1415(k)(1)(B) and 34 C.F.R. § 300.530(b). In the case at hand, [REDACTED] was removed from [REDACTED] current educational placement to an appropriate alternative school to serve [REDACTED] 90-day disciplinary placement, which included 19 days at [REDACTED] at the beginning of the 2023-2024 school year. That KCS continued to provide [REDACTED] with services under [REDACTED] IEP during [REDACTED] time at [REDACTED] [REDACTED] does not change the nature of the placement. Indeed, KCS was required to continue providing those services under 34 C.F.R. § 300.530(d) as part of the disciplinary placement. [REDACTED] placement at [REDACTED] remained a disciplinary placement under 34 C.F.R. § 300.530(c) in connection with the February 1, 2023, incident, and the IEP team, during its August 7, 2023, meeting was only fulfilling its obligation under 34 C.F.R. § 300.531⁵ to determine where the remaining 19 days of disciplinary placement should be served.

⁵ “The child’s IEP Team determines the interim alternative educational setting for services under § 300.530(c), (d)(5), and (g).” 34 C.F.R. § 300.531.

A PATTERN OF REMOVALS

34 C.F.R. § 300.536(a) defines when a change of placement occurs in the disciplinary context:

(a) For purposes of removals of a child with a disability from the child's current educational placement under §§ 300.530 through 300.535, **a change of placement occurs if—**

- (1) The removal is for more than 10 consecutive school days; or
- (2) The child has been subjected to a series of removals that constitute a pattern—
 - (i) Because the series of removals total more than 10 school days in a school year;
 - (ii) Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
 - (iii) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another. *[Emphasis added.]*

To constitute a disciplinary change of placement, the removal must “total more than 10 consecutive school days” or there must be “a series of removals that constitute a pattern.” *Id.* Here, it is undisputed that █████ 90-day disciplinary placement was a removal for more than 10 consecutive school days and that KCS followed the proper protocol by holding an MDR following the February 1, 2023, incident. Petitioners do not contend that a second MDR should be conducted in relation to the February 1, 2023, incident. Rather, noting that █████ was removed on four additional occasions during the 2023-2024 school year for which █████ received eight days of suspension, Petitioners contend that the February 1, 2023, incident was the first in “a series of removals that constitute a pattern” under § 300.536(a)(2).

For a series of removals to constitute a pattern, three criteria must be met. The parties stipulated that [REDACTED] conduct leading to discipline was substantially similar in all cases. This includes the February 1, 2023, incident as well as the incidents that occurred in August and September 2023. Therefore, the requirement of § 300.536(a)(2)(ii) is not at issue. Similarly, the factors set forth at § 300.536(a)(2)(iii) weigh in favor of [REDACTED] given the close proximity of the August 2023 and September 2023 removals⁶ and the fact that by the end of September, [REDACTED] had been away from a regular non-disciplinary placement for 27 days during the 2023-2024 school year. However, the issue raised by § 300.536(a)(2)(i), which requires that “the series of removals total more than 10 school days in a school year” is less clear. Certainly, the eight days of out-of-school suspension that [REDACTED] received during the 2023-2024 school year count toward the 10-day threshold. **Therefore, the question becomes whether the 19 days of disciplinary removal that [REDACTED] served at the beginning of the 2023-2024 school year also count toward the 10-day threshold.**

KCS contends that [REDACTED] time at [REDACTED] in the 2023-2024 school year should not count toward the 10-day threshold because [REDACTED] continued to participate in the general curriculum, receive services under [REDACTED] IEP, and participate with nondisabled children. In support of this position, KCS relies on U.S. Department of Education guidance stating that actions such as “when a school administrator unilaterally informs a parent that their child with a disability may only remain in school for shortened school days because of behavioral issues or when a child with a disability is not allowed by the teacher to attend an elective course because of behavioral concerns” are generally considered disciplinary removals that would count toward

⁶ It is noted that six (6) months passed between the February 1, 2023, incident and the August 25, 2023, incident. However, this is partly due to school being out for the summer, and the proximity of the August and September incidents outweigh the time that passed between these two incidents.

the 10-days “unless all three of the following factors are met: (1) the child is afforded the opportunity to continue to appropriately participate in the general curriculum; (2) the child continues to receive the services specified on the child’s IEP; and (3) the child continues to participate with nondisabled children to the extent they would have in their current placement.”⁷ Similarly, in-school suspension days do not count toward the 10-day threshold if the three factors referenced above are satisfied.⁸ However, █████ placement at █████ was not an in-school suspension nor was it akin to a shortened school day or exclusion from an elective class referenced in the Department of Education’s guidance.

KCS also relies on *Jefferson County Bd. Of Educ.*, 75 IDELR 178 (SEA AL 2019). In *Jefferson County*, a student received out-of-school suspensions of three days and two days for two separate incidents during the school year. Upon completion of each suspension, the student was required to attend a transition classroom for several days before returning to his regular non-disciplinary placement. Based on a provision of the Alabama Administrative Code, the hearing officer concluded that the time spent in the transition classroom did not count toward the 10-day threshold because the student had access to the general curriculum, IEP services, and nondisabled peers. Unlike *Jefferson County*, the 19 days that █████ spent at █████ was not to help █████ transition back to █████ regular placement. Rather, it was the completion of a disciplinary removal under §§ 300.530(c) and 300.536(a)(1) that just happened to carry over into the next school year. The fact that KCS provided █████ with access to the general curriculum, IEP services, and nondisabled peers for the duration of █████ removal, as KCS was required to do

⁷ *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA’s Discipline Provisions*, p. 11-12 (Question C-1) (July 19, 2022), <https://sites.ed.gov/idea/files/qa-addressing-the-needs-of-children-with-disabilities-and-idea-discipline-provisions.pdf>. Citing 71 Fed. Reg. 46715 (Aug. 14, 2006).

⁸ *Id.* at 15-16 (Question C-7).

under the disciplinary procedures set forth at § 300.530(d), does not preclude those days from counting toward the 10-day threshold. It is incongruous to say that these 19-days, as part of the 90-day disciplinary placement, count toward the 10-day threshold in § 300.536(a)(1) but not in § 300.536(a)(2)(i).

Although KCS provided [REDACTED] with the opportunity to participate in the general education curriculum, receive the services specified on [REDACTED] IEP, and participate with nondisabled children during [REDACTED] 19 days at [REDACTED] those 19 days were part of a 90-day disciplinary change of placement under § 300.536(a)(1). Consequently, it is concluded that those 19 days count toward the 10-day threshold under § 300.536(a)(2)(i). Therefore, the requirements of § 300.536(a)(2)(i)-(iii) have been satisfied.

CONCLUSIONS OF LAW

1. During the 2023-2024 school year, [REDACTED] was “subjected to a series of removals that constitute a pattern” under 34 C.F.R. § 300.536(a)(2).

2. Because [REDACTED] was subjected to a series of removals that constitute a pattern, KCS was required to determine whether the “pattern of removals constitutes a change in placement.” 34 C.F.R. §300.536(b)(1). KCS failed to make such a determination.

3. The question of whether a “pattern of removals constitutes a change of placement ... is subject to review through due process and judicial proceedings.” 34 C.F.R. § 300.536(b)(2).

4. In the disciplinary context, “a change of placement occurs if ...” the criteria set forth at § 300.536(a)(1) or (a)(2)(i)-(iii) are satisfied. For the reasons discussed above, the criteria of § 300.536(a)(2)(i)-(iii) were satisfied in this case. Therefore, there was a change of placement.

5. Because there was a change of placement, KCS was required to conduct an MDR within 10 days under 34 C.F.R. § 300.530(e). However, KCS failed to conduct an MDR following any of the August 2023 and September 2023 incidents.

6. Petitioner carried ■■■ burden of proof by a preponderance of the evidence and is the prevailing party.

REMEDY

1. Because KCS failed to properly conduct an MDR as required by 34 C.F.R. § 300.530(e), KCS shall treat the August 2023 and September 2023 incidents as if they were a manifestation. Accordingly, consistent with 34 C.F.R. §300.530(f), KCS shall 1) conduct a functional behavioral assessment for ■■■ and implement a behavior intervention plan, or modify any existing behavioral intervention plan as necessary, and 2) return ■■■ to ■■■ regular, non-disciplinary placement if that has not already occurred.

2. KCS shall hold an MDR for any substantially similar conduct that ■■■ may engage in during the remainder of the 2023-2024 school year.

3. Finally, KCS shall provide ■■■ with a total of 28 hours of compensatory education for the eight days ■■■ missed for out-of-school suspensions during the 2023-2024 school year.⁹


POLICY STATEMENT

The policy reason for this decision is to uphold the federal and state laws pertaining to the education of children with disabilities.

⁹ ■■■ academic time is 3.5 hours per day. Thus, 3.5 hours per day for 8 days totals 28 hours.

It is so **ORDERED**.

This FINAL ORDER entered and effective this the **29th day of November, 2023**.



MARK GARLAND
ADMINISTRATIVE JUDGE
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE

Filed in the Administrative Procedures Division, Office of the Secretary of State, this the
29th day of November, 2023.

NOTICE OF APPEAL PROCEDURES**REVIEW OF FINAL ORDER**

The Administrative Judge's decision in your case in front of the **Tennessee Department of Education**, called a Final Order, was entered on **November 29, 2023**. If you disagree with this decision, you may take the following actions:

1. **File a Petition for Reconsideration:** You may ask the Administrative Judge to reconsider the decision by filing a Petition for Reconsideration with the Administrative Procedures Division (APD). A Petition for Reconsideration should include your name and the above APD case number and should state the specific reasons why you think the decision is incorrect. APD must **receive** your written Petition no later than 15 days after entry of the Final Order, which is no later than **December 14, 2023**.

The Administrative Judge has 20 days from receipt of your Petition to grant, deny, or take no action on your Petition for Reconsideration. If the Petition is granted, you will be notified about further proceedings, and the timeline for appealing (as discussed in paragraph (2), below) will be adjusted. If no action is taken within 20 days, the Petition is deemed denied. As discussed below, if the Petition is denied, you may file an appeal no later than **January 29, 2024**. See TENN. CODE ANN. §§ 4-5-317 and 4-5-322.

2. **File an Appeal:** You may file an appeal the decision in federal or state court within 60 days of the date of entry of the Final Order, which is no later than **January 29, 2024**, by:

(a) filing a Petition for Review "in the Chancery Court nearest to the place of residence of the person contesting the agency action or alternatively, at the person's discretion, in the chancery court nearest to the place where the cause of action arose, or in the Chancery Court of Davidson County," TENN. CODE ANN. § 4-5-322; or

(b) bringing a civil action in the United States District Court for the district in which the school system is located, 20 U.S.C. § 1415.

The filing of a Petition for Reconsideration is not required before appealing. See TENN. CODE ANN. § 4-5-317.

STAY

In addition to the above actions, you may file a Petition asking the Administrative Judge for a stay that will delay the effectiveness of the Final Order. A Petition for Stay must be **received** by APD within 7 days of the date of entry of the Final Order, which is no later than **December 6, 2023**. See TENN. CODE ANN. § 4-5-316. A reviewing court also may order a stay of the Final Order upon appropriate terms. See TENN. CODE ANN. §§ 4-5-322 and 4-5-317.

THE STUDENT, AND THE PARENT V.
KNOX COUNTY SCHOOLS

NOTICE OF APPEAL PROCEDURES

FILING

Documents should be filed with the Administrative Procedures Division by email *or* fax:

Email: APD.Filings@tn.gov

Fax: 615-741-4472

In the event you do not have access to email or fax, you may mail or deliver documents to:

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