State of Tennessee
Department of State
Administrative Procedures Division
312 Rosa L. Parks Avenue
8th Floor, William R. Snodgrass Tower
Nashville, Tennessee 37243-1102
Phone: (615) 741-7008/Fax: (615) 741-4472

February 9, 2022

[redacted]
Nashville, TN 37214

[redacted]
Murfreesboro, TN 37130

[redacted]
Nashville, TN 37243

[redacted]
Murfreesboro, TN 37130

RE: A.F., THE STUDENT, AND T.F. AND S.F., THE STUDENT'S PARENTS V. WARREN COUNTY SCHOOLS, APD Case No. [redacted]

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:

A.F. THE STUDENT,
S.F. THE PARENT,
T.F. THE PARENT,
Petitioners,

v.

WARREN COUNTY SCHOOLS,
Respondent.

APD Case No. [redacted]

FINAL ORDER

This contested case was heard *de novo* on [redacted], in [redacted] Tennessee, before Administrative Judge Claudia Padfield, assigned by the Secretary of State, Administrative Procedures Division, to sit on behalf of the Tennessee Department of Education. The hearing addressed the allegations contained in the Due Process Hearing Request Form filed on [redacted], by Petitioners, student A.F. and his parents, T.F., and S.F. Petitioners are represented by attorney [redacted].[1] Respondent, Warren County Schools ("WCS"), are represented by attorneys [redacted] and [redacted].

At the close of the proof on [redacted], the following post-hearing schedule was agreed upon by the parties – the transcript was due and was filed on [redacted]; proposed Findings of Fact and Conclusions of Law were due and were filed by each party on [redacted] and this FINAL ORDER is due to be issued on or before [redacted].

The issues in this case are whether WCS failed in its child find obligations to identify and evaluate A.F. as a student who might have a disability and whether WCS improperly punished

[1] [redacted] was assisted at the trial by attorney [redacted]. [redacted] did not file a Notice of Appearance and is not listed on any of the documents filed by [redacted] Over the objection of Respondent, [redacted] was allowed to participate in the hearing in representing Petitioners.

A.F. Specifically, Petitioners requested in their Due Process Hearing Request Form "a stay put order, for [A.F.] to remain at [redacted] High School, and demand that school follow proper procedure, admit to its mistakes, and pay attorney fees." After consideration of the RECORD, evidence submitted, testimony, and arguments in this matter, it is determined that WCS did not violate its child find obligation to A.F. at any time relevant to this case and that WCS did not erronesouly discipline A.F. Petitioners requests are **DENIED.** These determinations are based upon the following Findings of Fact and Conclusions of Law.

SUMMARY OF THE EVIDENCE

The following witnesses testified on behalf of Petitioners: 1) A.F., the student; 2) S.F., the student's mother; 3) [redacted], [redacted] Elementary [redacted] and [redacted] grade math teacher; 4) T.F., the student's father; 5) [redacted], [redacted] Elementary principal; 6) Dr. [redacted] WCS Director of Special Education/504; and 7) [redacted], [redacted] Elementary nurse. The following witnesses testified on behalf of Respondent: 1) [redacted], [redacted] Elementary school counselor; 2) [redacted], WCS 504 coordinator; 3) [redacted] [redacted] High School physical science teacher; 4) Dr. [redacted] and 5) Dr. [redacted] expert witness in [redacted]

Thirteen exhibits were entered into evidence during the hearing. The following exhibits were marked into the record:

1. Collective: WCS Response to Instruction and Intervention Behavior (RTI2B) Parent Letter, Summary of Plan, Intervention Log, Progress Monitoring Data, and Performance Data, [redacted], to [redacted]
2. Collective: WCS emails, [redacted]; unsigned WCS release authorizations for A.F.; emails from [redacted] to S.F., [redacted], to [redacted]
3. Collective: SWIS student dashboard for A.F.

4. Collective: discipline referral forms for A.F., [redacted], to [redacted] suspension notification, not dated
5. Collective: [redacted] Academic/Behavior Documentation for A.F., [redacted] to [redacted]
6. Warren County Schools Health Services Permission for Medication Administration, [redacted], and medication log, [redacted], through [redacted]
7. Consent to Medical Treatment [redacted]
8. Collective: EPIC report card, [redacted]; [redacted] Middle School student withdrawal form, [redacted]; WCS TN comprehensive assessment program scores and report cards, [redacted]
9. Collective: I-Ready scores, report, and historical results
10. Report cards for [redacted] and [redacted] grades
11. Collective: email from Dr. [redacted] to T. F. and S.F. with attachments, [redacted]
12. Collective: [redacted] Academic/Behavior Documentation and Category 1 Behavior/Missing Work Slips for A.F., [redacted], to [redacted]; and after school learning letter to parents, [redacted]
13. PLC Meeting Action Plan, [redacted]

FINDINGS OF FACT

1. A.F. attended [redacted] grade in [redacted] When A.F. was withdrawn from [redacted] Middle School, [redacted] on [redacted], A.F. was getting passing grades in all but two classes; A.F. had current grades of 67 in English and 48 in math. COLLECTIVE EXHIBIT [redacted] p. [redacted] For the [redacted] school year at [redacted] Middle School, A.F.'s final grades reflected that he passed all of his courses. COLLECTIVE EXHIBIT [redacted] p. [redacted]

2. A.F. attended [redacted] and [redacted] grades at [redacted] Elementary ("[redacted]"), a WCS lower and middle school. The school is a pre-kindergarten through 8th grade school. A.F. was the only new student in the [redacted] grade when he started at [redacted] A.F. had a difficult time adjusting to the new school, was not used to the structure of high expectations regarding behavior, and was generally immature.

3. While at [redacted] school staff documented 24 disciplinary issues with A.F. during the [redacted] grade and approximately 15 disciplinary issues during the [redacted] grade. The disciplinary issues include using a cell phone, talking during class, chewing gum, not keeping his

hands to himself, being unprepared, being disruptive, horseplay, and being argumentative. Discipline for these behaviors included lunch detention, in-school suspensions ("ISS"), not being allowed to ride the school bus, and a loss of privilege for attending an after-school event. COLLECTIVE EXHIBIT [redacted]

4. [redacted] uses a three-tired positive behavior support program referred to as Response to Instruction and Intervention Behavior ("RTI2B"). All students are placed in the Tier 1 level of support at the beginning of each school year, as each child is provided a "fresh start". As the year progresses, students may move to either Tier II or Tier III for a higher level of interventions and additional behavioral supports. A.F. was moved to Tier II in [redacted] grade after he had more than average office discipline referrals.

5. Starting on [redacted], A.F. was initially provided with a check-in/check-out intervention where each teacher gave him points based on his classroom behavior; A.F. would check-in in the morning and check-out in the afternoon with the same teacher to discuss the day. While there was some success with this intervention, it was limited. A.F. frequently failed to either check-in/check-out and/or failed to utilize/turn in his daily point sheet.

6. In [redacted], the RTI2B team changed the intervention to a once daily check-in with an adult mentor, who was the same teacher with whom A.F. had previously checked-in twice a day. This intervention only occurred for approximately two weeks, after which all WCS schools closed for the remainder of the school year due to the pandemic.

7. A.F. and all students at [redacted] were placed in the Tier I intervention at the beginning of his [redacted] grade year. A.F.'s office discipline referrals decreased from approximately 21 during [redacted] grade to approximately 7 during [redacted] grade. A.F.'s behaviors did not rise to the level that required interventions to move him back to the Tier II level during the [redacted] grade, and A.F. did not meet criteria for referral to the RTI2B program.

8. A.F.'s overall academic benchmark scores did not fall below average of 25th percentile or below during [redacted] or [redacted] grade such that it would have triggered a referral for Tier II RTI services for academics. COLLECTIVE EXHIBIT [redacted] pp. [redacted] and [redacted], A.F.'s [redacted] and [redacted] grade math teacher, found A.F. to be an average student although one who got into trouble. A.F. passed all of his classes in [redacted] grade and was promoted to the [redacted] grade. COLLECTIVE EXHIBIT [redacted] p. [redacted] In the spring of [redacted] A.F. took the Tennessee Comprehensive Assessment Program, which found him on track in the areas of science and social studies, approaching the on-track level in mathematics, and below track in the area of English and language arts. *Id.* A.F. again passed all of his classes in [redacted] grade and was promoted to the [redacted] grade. COLLECTIVE EXHIBIT [redacted] p. [redacted]

9. A.F. completed his classroom work while at [redacted] but did not consistently complete his homework. During the first quarter of his [redacted] grade year, [redacted] had some remote learning due to the COVID-19 pandemic. During this time period, A.F. again did not consistently complete his homework.

10. A.F. has expressed willful and defiant behavior in the home and school settings during the timeframe in question. A.F. is able to control his behaviors even when he is mad.

11. On [redacted], S.F. provided a signed authorization form and the medication Strattera to WCS to allow [redacted], [redacted] school nurse, to administer the medication to A.F. The form states, '[redacted] EXHIBIT [redacted]

12. No medical records were provided to corroborate the alleged diagnosis of [redacted] Petitioners did not provide to [redacted] written documentation of who made the alleged diagnosis and when it was allegedly made. S.F. picked up the remaining medication in [redacted] after the school closed for spring break and due to the pandemic.

13. [redacted] Principal [redacted] met with or spoke with S.F. on [redacted] to discuss a 504 plan for A.F. [redacted] emailed WCS 504 Coordinator [redacted] on [redacted], to request that [redacted] arrange a planning meeting with S.F. COLLECTIVE EXHIBIT [redacted] p. [redacted] [redacted] spoke with S.F. and scheduled a meeting for [redacted]. At that time, S.F. acknowledge that A.F. did not have any medical diagnosis, but A.F. had a doctor's appointment scheduled for [redacted]. COLLECTIVE EXHIBIT [redacted] p. [redacted] On [redacted], WCS provided written notice to S.F. of the [redacted], meeting. COLLECTIVE EXHIBIT [redacted] p. [redacted] Due to the school closing due to the pandemic, the [redacted] meeting was cancelled.

14. Two medical release authorizations were provided to A.F.'s parents via email by [redacted] on [redacted], at the start of A.F.'s [redacted] grade year. [redacted] emailed S.F. on [redacted], requesting documentation of the alleged [redacted] diagnosis. COLLECTIVE EXHIBIT [redacted] p. [redacted] After hearing no response from S.F., [redacted] again emailed S.F. on [redacted], asking for the signed releases and a written diagnosis. COLLECTIVE EXHIBIT [redacted] p. [redacted] [redacted] emailed S.F. on [redacted], stating, "I wanted to check back with you one more time before I filed [A.F.]'s information away – were you ever able to get a diagnosis for him for [redacted] I never did get any medical on him, but I did not want to take him off my list without one more attempt. Please let me know if I can be of any assistance before he heads to the [redacted]." COLLECTIVE EXHIBIT [redacted] p. [redacted] Petitioners never responded to any of the emails.

15. A.F. started [redacted] grade at [redacted] High School ("[redacted]") in [redacted] A.F. joined [redacted] Junior Reserve Officers' Training Corp ("JROTC"). S.F. and A.F. signed and submitted a JROTC medical form to [redacted] on [redacted], that stated, "I am not on any type of medication." EXHIBIT [redacted]

16. A.F. showed some academic growth into his [redacted] grade school year. COLLECTIVE EXHIBIT [redacted] p. [redacted] A.F.'s [redacted] grade physical science and home room teacher, [redacted], found A.F. to be a typical [redacted] grade boy. [redacted] discussed the multiple tardies with A.F. A.F. reported to [redacted] that the reason he was tardy was due to riding to school with an older sibling which then made him tardy. A.F. earned an A in [redacted] class for the first quarter, did not have any missing assignments, and did not have any behavior problems in her class.

17. On [redacted] and [redacted], a discipline referral form was submitted by [redacted] for A.F. for A.F. having an attitude. On [redacted], a discipline referral form was submitted by [redacted] for A.F. being tardy on four occasions. A discipline referral form was submitted by [redacted] on [redacted], for A.F. using profanity.[2] Another discipline referral form was submitted by [redacted] on [redacted], for multiple tardies. Discipline referral forms were submitted by [redacted] (no first initial provided), [redacted], and [redacted] on [redacted], for being disruptive, tardy, and refusing to do work. COLLECTIVE EXHIBIT [redacted]

18. A.F. was suspended from school for two days beginning on [redacted], for fighting. A discipline board meeting was held on [redacted]. COLLECTIVE EXHIBIT [redacted] A.F. was sent to an alternative school.

19. Dr. [redacted] offered his expert opinion that although a few traits exhibited by A.F. could have been [redacted]-related, they did not rise to the level of placing WCS staff on notice of having a potential disability. Dr. [redacted] did not find any academic impact that would be supported by any alleged [redacted] symptoms. Dr. [redacted] opined that there is no evidence

[2] While the form states A.F. received a one-day ISS, the next form states, "[D]id not do ISS . . . not sure I told him." COLLECTIVE EXHIBIT [redacted]

that would suggest that A.F. was mentally ill and suffered from a mental illness of sufficient severity to trigger an emotional disturbance classification.

ANALYSIS

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 in the due process hearing. *Id.* at 56; *see also*, *Cordrey v. Euckert*, 917 F.2d 1460, 1469 (6th Cir. 1990). In this case, Petitioners bear the burden of proof.

When enacting the Individual with Disabilities Act (IDEA), Congress conferred jurisdiction of a student's IDEA claim upon administrative judges. *See* 20 U.C.A. § 1415(f)(3)(A). Administrative judges are vested with the jurisdiction to determine whether a student received a free appropriate education ("FAPE") under the IDEA. 20 U.C.A. § 1415(f)(3)(E). In Tennessee, the Office of the Secretary of State, Administrative Procedures Division, has jurisdiction over the subject matter and the parties of this proceeding; the undersigned Administrative Judge has the authority to issue final orders. *See* State Board of Education Rules, Special Education Programs and Services, 0520-01-09-.18; *see* TENN. CODE ANN. § 49-10-101.

Federal funds are provided to public educational institutions to establish procedural safeguards which ensure that the educational needs of a student with disabilities are met. The Tennessee Department of Education, *Other Health Impairment Evaluation Guidance* ("OHI Guidance") states that a child is "other health impaired" who has "chronic or acute health problems that require specifically designated instruction." TENN. DEPT. OF ED., OTHER HEALTH IMPAIRMENT EVALUATION GUIDANCE, at 5 (Revised November 2018). OHI Guidance also states

that OHI is an education disability that includes virtually any health problem *diagnosed* by a licensed practitioner.

CHILD FIND

School districts are required to identify students suspected of having a disability who are "in need of" special education and related services. IDEA U.S.C. §1401 (3)(A). Students who are eligible for special education and related services are entitled to an Individualized Education Program ("IEP"). *Bd. of Educ. of the Hendrick Hudson School Dist. v. Rowley*, 458 U.S. 176, 181 (1982). In developing educational programs and determining appropriate services for those students through an IEP, school districts must comply with the substantive and procedural requirements of the IDEA and related state law. *See Id.* at 182. However, parents are not entitled to relief for minor procedural violations alone. A determination of whether a student received FAPE must be based on substantive grounds. 34 C.F.R. § 300.513(1).

When a procedural violation is alleged, a FAPE violation exists only if a procedural violation "(1) impeded the child's right to FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the parent's child; or (3) caused a deprivation of educational benefit." 34 C.F.R. § 300.513(2). Only procedural violations that result in substantive harm constitute a denial of FAPE and justify relief. *Knable v. Bexley City Sch. Dist*., 238 F.3d 755, 764 (6th Cir. 2001); *see also Bd. of Educ. of Fayette County, Ky. v. L.M*., 478 F.3d 307, 313 (6th Cir. 2007). "The United States Court of Appeals for the Third Circuit has recognized that the substantive requirements of the Rehabilitation Act's negative prohibition and the IDEA's affirmative duty have few differences." *Centennial Sch. Dist. v. Phil L. ex rel. Matthew L.,* 799 F. Supp. 2d 473, 481 (E.D. Pa. 2011) (referencing *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.,* 172 F.3d 238, 253 (3d Cir.1999)). Here, Petitioners failed to meet the burden of proof to substantiate any procedural violations.

Under the IDEA, school districts have an obligation to identify, locate, and evaluate all children suspected of a disability. IDEA, 34 C.F.R. § 300.111; 20 U.S.C. § 1412(a)(3). To prove that a delayed evaluation for a student constitutes a procedural violation of IDEA's child find requirements, a petitioner "must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate." *L.M.*, 478 F.3d at 313. The law is clear that not every student who has academic and/or behavioral difficulties is a student with a disability. School districts are advised against rushing to identifying students as disabled without first trying interventions available in the general education environment.

Petitioners assert that A.F.'s behavioral issues at school, academic struggles, and tardies were sufficient to trigger the need for an evaluation under the IDEA. Petitioners contend that WCS violated its child find obligations by failing to timely evaluate A.F. and by failing to determine him eligible for special education as a student with a disability pursuant to the IDEA. However, Petitioners have failed to meet their burden to substantiate such alleged violations. WCS met its child find obligations under the IDEA.

For a student to be eligible as a disabled child under the IDEA, "three criteria must be met: (1) the child must suffer from one or more of the categories of impairments delineated in IDEA, (2) the child's impairment must adversely affect his educational performance, and (3) the child's qualified impairment must require special education and related services." *Jackson v. Nw. Local Sch. Dist.*, No. 1:09-CV-300, 2010 WL 3452333, at *6 (S.D. Ohio Aug. 3, 2010), *report and recommendation adopted*, No. 1:09CV300, 2010 WL 3474970 (S.D. Ohio Sept. 1, 2010); *See* 20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8. The fact that a child may have a qualifying disability does not necessarily make him "a child with a disability" eligible for special education services under the IDEA. *Id.*; *see Alvin Indep. Sch. Dist. v. A.D. ex rel.*

Patricia F, 503 F.3d 378, 383 (5th Cir. 2007). The child must also need special education and related services. *A.P. ex rel. Powers v. Woodstock Bd. of Educ.*, 572 F. Supp. 2d 221, 225 (D. Conn. Aug. 19, 2008), *aff'd*, 370 Fed. Appx. 202 (2nd Cir. 2010). "[A] child 'needs special education' if he cannot attain educational standards in the general education environment." *J.M. v. Summit City Bd. of Educ.,* No. CV1900159KMESK, 2020 WL 6281719, at *10 (D.N.J. Oct. 27, 2020), *referencing Durbow v. Cobb Cnty. Sch. Dist.*, 887 F.3d 1182, 1194–95 (11th Cir. 2018). Thus, "*to violate child find, the school district must have been on notice not only of the student's disability but also of the student's need for special education services.*" *Northfield City Bd. of Educ. v. K.S. on behalf of L.S.*, No. CV 19-9582 (RBK/KMW), 2020 WL 2899258, at *9 (D.N.J. June 3, 2020) (emphasis added); *A.P.*, 572 F. Supp. 2d at 225 (*citing* 20 U.S.C. § 1412(a)(3)(A)). Here, Petitioners have failed to prove that WCS was on such notice.

Per 34 C.F.R. § 300.8(c)(4)(i), the IDEA defines emotional disturbance as a condition which exhibits one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: 1) an inability to learn that cannot be explained by intellectual, sensory, or health factors; 2) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; 3) inappropriate types of behavior or feelings under normal circumstances; 4) a general pervasive mood of unhappiness or depression, and 5) a tendency to develop physical symptoms or fears associated with personal or school problems. Petitioners have failed to prove by a preponderance of the evidence that A.F. meets even one of these categories. A.F. was [redacted] years old during the timeframe in question. Much of A.F.'s behaviors – rough housing in the halls, not wanting to go to school or feeling anxious about going to school, not paying attention in class, talking back to teachers - were typical for any male child in this age range. Most importantly, however, Petitioners have failed to prove that A.F.'s behaviors were of such a marked degree that they adversely affected

his educational performance. A.F. was a consistent student, although a consistently mediocre one. A.F. did well in some courses and not as well in others, which again is typical for most students. Academic struggles do not automatically rise to the level of an emotionally disturbed child.

Petitioners failed to prove that A.F.'s intermittent willful disobedience was due to ADHD or an emotional disturbance such that WCS should have been on notice of a suspected disability. There must be "a nexus between the qualifying disability and the need for special education services, considering the unique facts and circumstances of the case." *M.P. BNF K.S v. Aransas Pass Indep. Sch. Dist.*, No. 2:15-CV-233, 2016 WL 632032, at *5 (S.D. Tex. Feb. 17, 2016); *See Alvin Indep. Sch. Dist.*, 503 F.3d at 383. Students who struggle for reasons unrelated to a disability do not require special education and related services.

> Not every student who falters academically owes his difficulties to a disability. Academic challenges may reflect "personal losses," "family stressors," or "unwilling[ness] to accept responsibility" on the part of the student. *D.G. v. Flour Bluff Indep. Sch. Dist.*, 481 F. App'x 887, 892 (5th Cir. 2012) (per curiam). They might simply reflect that a child is "going through a difficult time in her life." *J.S. v. Scarsdale Union Free Sch. Dist.*, 826 F.Supp.2d 635, 663 (S.D.N.Y. 2011). Therefore, schools are not required "to designate every child who is having any academic difficulties as a special education student." *A.P. ex rel. Powers v. Woodstock Bd. of Educ.*, 572 F.Supp.2d 221, 225 (D. Conn. 2008), aff'd, 370 F. App'x 202 (2d Cir. 2010).

T.B., 897 F.3d at 574 (4th Cir. 2018). These "alternative explanations for academic difficulties" require a school to differentiate between students who would benefit from special education and related services and those who would not. *Id.*

Similarly, here, the evidence points to non-disability related reasons for behaviors. Dr. [redacted] opined that A.F. was immature, was not used to a school structure where there was a high standard for appropriate behavior, appeared to be playing "fast and loose" with the rules, and was at his worst when he had a group of peers for whom he could perform. A.F.'s [redacted] and [redacted]

grade math teacher testified that A.F was disruptive when he chose to be, engaged in behaviors to get the attention of his peers or get out of work, refused to accept responsibility when he broke a classroom rule and would become argumentative, and could be especially disruptive during downtime. A.F. completed his classwork but would not consistently complete his homework. A.F. has exhibited willful and deliberate defiance of authority figures in both the home and school settings. A.F. testified that he can control his behaviors when he gets mad and was in control of his actions when he got into the fight at school.

A.F. did not exhibit the characteristics required for a classification of [redacted] pursuant to the regulations in Tennessee – "Limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems". *See* Tenn. Rules and Regs., 0520-01-09-.03(12) (definition of other health impairment).

Likewise, the reasons given for A.F.'s tardiness, which appeared to occur primarily once A.F. transitioned to [redacted] for [redacted] grade, were not related to any [redacted] diagnosis. A.F. told his teacher that he was tardy to school because he was riding to school with an older sibling. There is no evidence that Petitioners ever asserted to WCS that A.F.'s tardiness was due to his [redacted]

Petitioners have failed to prove by a preponderance of the evidence that WCS overlooked clear signs of a disability. To prevail, Petitioners must "reasonably demonstrate that school officials knew of, or should have known of, a student's genuine disability…." *Rodiriecus L. v. Waukegan Sch. Dist. No. 60*, 90 F.3d 249, 254 (7th Cir. 1996). Petitioners have not only failed to prove that WCS had direct knowledge of a diagnosis of [redacted] or any other medical or mental health impairment that might have fallen under one of the categories of impairment under the IDEA, but Petitioners have also failed to provide even at the hearing that A.F. has or ever had a

medical or mental health impairment or diagnosis. On [redacted], WCS was first made aware of any possible diagnosis by Petitioners when S.F. reported on behalf of A.F. that he had [redacted] when she took medication to [redacted] for the school nurse to administer to A.F. WCS began requesting documentation from Petitioners as to the reason stated on the medication form for why A.F. needed the medication. The self-reporting nature of the alleged diagnosis is important. Only days after submitting the form to [redacted] where she wrote that A.F. had [redacted] S.F. acknowledged that A.F. did not, as claimed, have a diagnosis, but Petitioners were hoping a diagnosis would result from a [redacted], medical appointment. The fact that S.F. signed a school form which states that A.F. had a diagnosis that he did not have undermines S.F.'s credibility.

WCS asked A.F.'s parents on multiple occasions for documentation of the alleged [redacted] diagnosis. WCS provided medical release forms to A.F.'s parents so that WCS could obtain the documentation directly from the provider without any additional effort being required of Petitioners. Petitioners failed to provide the requested documentation and refused to sign the medical release forms. Aside from the two-week period in [redacted] of A.F.'s [redacted] grade year, A.F. was never administered any other medication at [redacted] When A.F. started [redacted] grade at [redacted] both A.F. and S.F. signed a form that stated he was not on any medication. Despite the testimony that Petitioners allegedly repeatedly asked for help from WCS, Petitioners did not respond to any of the emails from WCS which requested the medical documentation or provide the medical release forms.

Assuming, *arguendo*, that at some point A.F. had any medical or mental health diagnosis, Petitioners did not apprise WCS or assert that such condition was the reason for the disruptive behaviors despite the fact that WCS and Petitioners met several times regarding A.F.'s misconduct. No evidence was presented that T.F. and/or S.F. at any time requested an evaluation

for special education eligibility from WCS. While S.F. and T.F. testified they requested an evaluation from WCS, said testimony is found not to be credible. Petitioners did not reply to any WCS emails regarding release of medical information or meetings for a 504. If Petitioners were not interested in pursuing a 504 plan as alleged at the hearing, it would have been easy and efficient to communicate that information in a reply email to any WCS staff. Petitioners did not do so.

It is well settled that "not every [medically diagnosed] disability necessarily falls within the scope of the IDEA as a 'qualified or eligible disability.'" *Heather H. v. Northwest Independent School District,* No. 419CV00823RWSCAN, 2021 WL 1523007, at *12, 16 (E.D. Tex. Feb. 25, 2021)*, report and recommendation adopted sub nom. Heather H. v. Nw. Indep. Sch. Dist., No. 4:19-CV-00823-RWS, 2021 WL 1152837 (E.D. Tex. Mar. 26, 2021)*. Knowledge of a medical or psychological diagnosis alone is not enough to trigger child find. *Id.* at 16 (upholding the lower court's decision that the district's evaluation was conducted timely due to the lack of reason to suspect the student had ED despite parents claims of anxiety struggles); *Northfield City Bd. of Educ.,* at *10 (D.N.J. June 3, 2020) (where the court found that the district did not violate child find by deciding to not evaluate a student for a disability despite its knowledge that student "was struggling with some emotional issues, was taking Prozac for depression, and was having difficulty with math."); *see Paul T. v. S. Huntington Union Free Sch. Dist.*, 49 Misc. 3d 231, 249, 14 N.Y.S.3d 627 (N.Y. Sup. Ct. 2015) (holding that despite the student's diagnoses of anxiety and depression and symptoms of [redacted], the parents failed to establish that student suffered from a disability and found that "[he] was neither 'emotionally disturbed' nor 'other health impaired' for the purposes of the IDEA."). Any knowledge of an [redacted] diagnosis, to the extent any existed, did not put WCS on notice of a suspected disability

under the IDEA. No credible evidence was submitted that shows A.F.'s actions at school were a manifestation of any medical or mental health diagnosis.

The law does not require that schools evaluate and identify as disabled every student that is having academic difficulties. *See e.g., D.K. v. Abington Sch. Dist.,* 696 F.3d 233, 251 (3d Cir. 2012) (finding no violation where student was achieving "intermittent progress and even academic success in several areas" despite exhibiting disruptive behaviors because "schools need not rush to judgment or immediately evaluate every student exhibiting below-average capabilities"); *L.M.*, 478 F.3d at 314 (finding no violation where student was "meeting expectations" academically even though he was struggling socially and behaviorally); *D.K.,* 696 F.3d at 249; *see e.g., A.P.*, 572 F. Supp. 2d at 225 ("The Parents seem to argue that 'Child Find' requires LEAs to designate every child who is having any academic difficulties as a special education student. But this is not the law."); *K.S.*, 2020 WL 2899258, at *10 (due to the difficulty of diagnosing some disabilities, "school districts are not required to jump to the conclusion that the student has a disability" when "the evidence [is] mixed as to the existence of [the] disability and [the] need for special education services."); *Id; Rodiriecus,* 90 F.3d at 254 (7th Cir. 1996) ("[I]t is apparent that the school officials had neither knowledge nor reasonable suspicion to base a rational decision that [the child] was in fact disabled. In fact, his academic performance, although not outstanding, did not raise [ ] suspicions and [staff] deemed it 'average.'"); *see also Lincoln-Sudbury Reg'l Sch. Dist. v. W.*, No. CV 16-10724-FDS, 2018 WL 563147, at *17-18 (D. Mass. Jan. 25, 2018), *appeal dismissed sub nom. Lincoln Sudbury Reg'l Sch. Dist. v. Mr. & Mrs. W.*, No. 18-1524, 2018 WL 6584118 (1st Cir. Aug. 8, 2018). While the definition of "disability" is broad, school districts are afforded the "ability to exercise judgment or common sense in deciding whether to go through the lengthy process of evaluating a student for a potential IEP, no matter how minor or temporary the student's condition, and no matter

whether the student's ability to learn is actually impaired." *Lincoln-Sudbury*, 2018 WL 563147, at *17; *see* 20 U.S.C. § 1401(3)(A). Furthermore, "teachers and staff would waste their valuable time and resources evaluating students who do not need special-education services…, [which] would substantially undercut the ability of teachers and staff to assist those students who do in fact need those services." *Id.* at 17 (finding "[t]he requirements of the law in this area are already sufficiently complex and burdensome without imposing nonsensical obligations upon the schools").

To prove their child find violation, Petitioners must prove both a suspected disability, such as an OHI due to a diagnosis of ADHD, *and* that A.F. needed special education. *J.M.*, 2020 WL 6281719, at *11 (holding that the Parents failed "to establish [a] need[] for special education, outside of what was available in the District's general educational program,…[because] [t]he Parents' statement that [student] needed special education because he has ADHD is not enough" to establish that the district had knowledge or suspicion); s*ee Alvin Indep. Sch. Dist.,* 503 F.3d at 384 (holding that student did "not need special education services by reason of his [redacted]" because of his academic, behavioral, and social progress "and, therefore, is not a 'child with a disability' under the IDEA").

Petitioners have failed to prove that A.F. needed special education services to make educational progress. At no time during [redacted] or [redacted] grade did A.F.'s overall academic benchmark scores fall below average (25th percentile or below) to trigger a referral for Tier II RTI services for academics. A.F. showed academic growth into his [redacted] grade school year. After Tier II behavioral interventions were put into place during his [redacted] grade year, A.F.'s behavior improved his [redacted] grade year. It is presumed that none of the nine members of A.F.'s team of teachers and the RTI2B team thought he needed special education services, as none of them referred him for a special education evaluation. The fact that WCS and A.F. did not get to that point in the process

is further evidence that A.F. did not need special education services to make educational progress. Petitioners have failed to prove that WCS overlooked clear signs of a disability and thus a child find violation.

Concomitant with the federal child find obligations under the IDEA, Tennessee requires "school districts to seek ways to meet the unique educational needs of all children within the general education program prior to referring a child to special education." Tennessee Department of Education, *Special Education Framework*, 19 (Aug. 2018), https://www.tn.gov/content/dam/tn/education/special-education/framework/sped_framework.pdf. Thus, a Tennessee School District's obligation under federal and state laws is to identify children suspected of having a disability, provide interventions to the child, and then determine whether to conduct an evaluation based on the results of those interventions. *See e.g., Hupp v. Switzerland of Ohio Loc. Sch. Dist.*, 912 F. Supp. 2d 572, 590 (S.D. Ohio 2012) (explaining that Ohio's state law requiring school districts to "provide interventions to resolve concerns for any preschool or school-age child who is performing below grade-level standards" amounted to an obligation, consistent with federal law "to identify children suspected of having a disability, provide interventions to the child, and then determine whether to conduct an evaluation based on the results of those interventions").

The Tennessee Department of Education defines "Pre-referral interventions" as "structured, organized methods that involve critical staff." Tennessee Department of Education, *Special Education Framework*, 115, (Aug. 2018), https://www.tn.gov/content/dam/tn/education/special-education/framework/sped_framework.pdf. Staff members review existing student records and make recommendations regarding academic and/or behavioral interventions and strategies that will support increased student functioning." *Id.* at 115 (Aug. 2018). To address its obligation to implement prereferral interventions for behavioral needs, [redacted] has

implemented a RTI2B framework. These pre-referral interventions through RTI2B are based on student need and act as a procedural safeguard that prevents students from being inappropriately identified as disabled when the student's struggles could be mitigated with general education interventions.

Courts have consistently found no child find violation where a district has first attempted pre-referral type interventions for a reasonable period of time. *See Jana K. ex rel. Tim K. v. Annville-Cleona Sch. Dist.*, 39 F. Supp. 3d 584, 603 (M.D. Pa. 2014) (opining that "[a] school district is not obligated to conduct a formal evaluation of every struggling student and it may be prudent to offer other interventions before rushing to a special education identification"); *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 272 (3d Cir. 2012) (affirming ALJ decision that no child find violation occurred when the district "address[ed] [a student's] needs and provid[ed] appropriate instruction and interventions before rushing to special education identification.")); *M.A. v. Torrington Bd. of Educ.*, 980 F. Supp. 2d 245, 274-75 (D. Conn. 2013); *D.K.*, 696 F.3d at 252 (district did not fail to identify child as disabled when it offered him accommodations "en route to eventually finding a disability"). A child should not be hurried into special education, especially when he is making measurable progress with general education supports that are provided to all students. *See Hupp*, at 591 (finding no child find violation when the student was successful with general education interventions and holding that *the use of successful interventions actually "obviates a finding that the School District ignored signs of [the student's] disability, or had no rational justification for not referring him for an evaluation immediately upon suspicion of disability*."); *J.M.*, 2020 WL 6281719, at *11 (finding "[t]he District reasonably concluded that [the student] did not 'need special education' [because he] was progressing in the District with interventions that fell short of 'special education[]' [and] [a]ll of the accommodations which the District provided for [student], both academic and

behavioral, were available as part of the general education program.") (referencing *McIntyre v. Eugene Sch. Dist. 4J*, 976 F.3d 902, 910-15 (9th Cir. 2020) (holding that not all accommodations qualify as "special education")).

A.F. had a poor adjustment period when he first started [redacted] grade at [redacted] Additionally, A.F. was repeatedly described as immature, inflicting some of his school antics on his own father. WCS provided A.F. with general education interventions which were having some success by his [redacted] grade school year. WCS referred A.F. to Tier II in [redacted] when he was experiencing a high number of office discipline referrals soon after he transferred to [redacted] as a [redacted] grader. Through the RTI2B process, A.F. was initially provided with a check-in/check-out intervention which provided him with morning and afternoon check in with the PE teacher as well as a point sheet to be completed by each classroom teacher to document his behavior during each class period. While there was an initial upward trend, ultimately the check-in/check-out intervention was only in place for a few months because, despite A.F.'s success some days, the team's review of the data indicated that A.F. frequently failed to either check-in/check-out and/or failed to utilize/turn in his daily point sheet; thus, limiting the success of this intervention. As a result, the RTI2B team adjusted the intervention to a check-in daily with an adult mentor, the same PE teacher in early [redacted] of that school year, which allowed a daily check-in without the requirement of utilizing the point sheet. Unfortunately, this intervention was only in place for a short period of time due to WCS closing as a result of the pandemic. While it could reasonably be argued that [redacted] waited too long to change interventions between [redacted] and [redacted], the data presented and the behaviors observed by the teachers support [redacted] actions; the timeframe between changing interventions is not egregious enough to make any finding against WCS. Despite the changes, adjustments, and school closure, the progress monitoring data continued to show improvement

through his [redacted] grade school year. There was a reduction of approximately 21 office discipline referrals in [redacted] grade to approximately 7 office discipline referrals in [redacted] grade. As A.F.'s behaviors improved his [redacted] grade year after implementation of pre-referral interventions and after some maturation, there was no reason to suspect that A.F. needed special education services.

STAY PUT

20 U.S.C.S. § 1415(e)(3) and 34 C.F.R. § 300.518 include a "stay put" provision which directs that a child with a disability shall remain in his current educational placement pending competition of any review proceedings unless the parents and educational agencies agree otherwise. Petitioners argue that even though A.F. did not have an IEP or was not under a 504 plan, WCS violated the IDEA by failing to properly give A.F. an IEP and, therefore, WCS violated the stay put provision by not following the necessary steps before disciplining A.F. As previously found, WCS did not violate the IDEA by failing to find A.F. as a child who required an IEP. Accordingly, A.F. had no such right to any procedural safeguards before being disciplined by WCS.

Even though Petitioners now assert that A.F.'s behaviors were a manifestation of a disability, at no time during his [redacted] and [redacted] grade school years did either parent or A.F. report to WCS that A.F. was struggling due to a mental or physical health issues nor is such assertion supported by evidence presented during the due process hearing. Petitioners' testimony regarding A.F.'s behavior during the due process hearing is inconsistent with struggles related to the alleged [redacted] diagnosis and are characteristic of many students this age. Many students engage in behaviors such as fidgeting, trying to get attention from peers, refusing to take responsibility for their actions, needing to use the restroom to get out of getting in trouble, engaging in physical interactions with peers that could be labeled "rough housing", and using inappropriate language. To suggest that school staff should suspect and evaluate each middle

school student who engages in these behaviors as having an emotional disturbance or needing special education services is a step too far. Additionally, A.F.'s teachers testified that he could pay attention in class. As WCS had no knowledge or reason to suspect that A.F.'s tardiness and behavior issues were related to a suspected disability, there was not clear evidence of a suspected disability, and WCS was reasonably justified in not evaluating A.F. for a disability.

As A.F. is not a student with a disability and there was no disability to suspect at the time of the disciplinary incident, he may be disciplined as any other general education student. It is clear that a school district cannot be held liable for a child find violation when "[it] had no reason to suspect either a continuing disability or a need for special education services." *Lincoln-Sudbury*, 2018 WL 563147, at *18, *referencing D.G.*, 481 Fed. App'x. at 893. The "IDEA does not penalize school districts for not timely evaluating students who do not *need* special education." *Id.*; *See also Dubrow v. Cobb Cnty. Sch. Dist.*, No. 14-00659, 2017 WL 5203047, at *12 (N.D. Ga. Feb. 28, 2017) ("Because this Court concludes that [the student] did not need special education due to his disability, the District is not liable for failing to locate, identify, or evaluate [him], nor was it required to provide him with a FAPE pursuant to the IDEA."), *aff'd*, 887 F.3d 1182 (11th Cir. 2018); *T.C. v. Lewisville Indep. Sch. Dist.,* 4:13cv186, 2016 WL 705930, * 12 (E.D.Tex. Feb. 23, 2016) (agreeing the district was not liable for a child find violation where the team had determined that the student did not meet the eligibility criteria for special education under the IDEA because her emotional and [redacted] characteristics were not significantly impacting her educational performance). Because Petitioners have failed to provide evidence that A.F. needed special education services to make progress, they have also failed to prove any substantive harm, and therefore, are not entitled to relief for such claims.

Even if, *arguendo,* Petitioners could substantiate a child find violation, such violation did not result in substantive harm as A.F., even if a student with a disability, could still be removed

to the alternative school for the violation of the code of student conduct so long as the behavior that gave rise to the violation of school rules was determined not to be a manifestation of the suspected disability. 34 C.F.R. 300.530 (c); *see also* 34 C.F.R. 300.530 (e)(1)(i). If the conduct is determined not to be a manifestation of the suspected disability, 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. 34 C.F.R. 300.530 (c). Accordingly, even assuming Petitioners could substantiate a child find violation, such violation did not result in substantive harm, and Petitioners are not entitled to any recovery.

In this situation, A.F.'s conduct of fighting, which supposedly resulted in removal to the alternative school, would not likely be a manifestation of a diagnosis of [redacted], the only disability for which Petitioners have alleged. A.F. testified under oath that he was in control of his actions when he got into the fight. A.F.'s own statements do not support a manifestation. Regardless of a disability, A.F. would have received the disciplinary removal.

Petitioners are barred from any potential recovery due to their failure to participate in the Section 504 process despite WCS's repeated efforts to obtain information from Petitioners to determine if A.F. was a student with a qualified disability. Parents can be barred from recovery when they refuse to cooperate with the district. *See Price v. Commonwealth Charter Acad. - Cyber Sch.*, No. CV 18-1778, 2019 WL 3816788, at *7 (E.D. Pa. Aug. 13, 2019) (holding that the Guardian's ADA and Section 504 claims failed because the Guardian failed to provide sufficient evidence to support their claim and the "Guardian thwarted [the school district]'s efforts to provide [student] in-home services."); *see Horen v. Bd. of Educ. of City of Toledo Pub. Sch. Dist.,* 948 F.Supp.2d 793, 815 (N.D. Ohio 2013) (refusing to put liability on the school system when the parent refused to attend an IEP meeting and refused educational services). Petitioners assert they did not participate in the 504 process because they had requested an IEP.

There is no documentation of any requests for an evaluation or for an IEP. Petitioners' refusal to cooperate with WCS prevented WCS from having any knowledge of a potential disability under the IDEA. S.F. made an assertion – that A.F. had an [redacted] diagnosis – which was false at the time S.F. made the assertion. Requests to document the alleged diagnosis were repeatedly ignored by Petitioners. Petitioners could have prevented this entire matter by simply providing to WCS either the needed documentation or the signed release forms so WCS could obtain the documentation.

A.F. is not entitled to a stay-put placement pursuant to the IDEA, 20 U.S.C. § 1415(j-k) as a student's stay-put placement during the pendency of a due process hearing and appeal is based upon the last agreed upon IEP, unless (1) a judge issues injunctive relief changing the child's placement or (2) the parent and State or local education agency agree otherwise. As A.F. has not been identified as a student with a disability pursuant to the IDEA, A.F. has no "placement" under the IDEA; therefore, IDEA's stay-put provisions do not apply. Furthermore, even if A.F. were a child with a disability, stay-put is not applicable in the context of a disciplinary removal. Pursuant to the IDEA, disputes over disciplinary placements in alternative educational settings entitle parents to an expedited due process hearing. During the pendency of the expedite hearing, the student remains in the interim alternative setting. 20 U.S.C. § 1415 (k)(4)(A). Thus, Petitioners are not entitled to their requested remedy which was for A.F. To remain at [redacted]

CONCLUSIONS OF LAW

1. Petitioners have failed to meet their burden of proof that WCS committed a child find violation for the [redacted] school year.

2. Petitioners have failed to meet their burden of proof that WCS committed a child find violation for the [redacted] school year.

3. Petitioners have failed to meet their burden of proof that WCS committed a child find violation for the [redacted] school year until the time that the present due process action was filed.

4. Petitioners have failed to meet their burden of proof that A.F. was eligible for special education services under the IDEA.

5. Petitioners failed to meet their burden of proof that WCS erroneously disciplined A.F.

6. Petitioners' requests for "a stay put order, for [A.F.] to remain at [redacted] School, and demand that school follow proper procedure, admit to its mistakes, and pay attorney fees" are **DENIED.**

7. WCS is the prevailing party on all claims.

The policy reasons for this decision are to uphold the laws of the State of Tennessee and to facilitate the fair and efficient management of the Tennessee Department of Education rules and statutes.

It is so **ORDERED**.

This FINAL ORDER entered and effective this the **9th day of February, 2022.**

CLAUDIA PADFIELD
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 **9th day of February, 2022.**

STEPHANIE SHACKELFORD, DIRECTOR
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE

IN THE MATTER OF:
A.F., THE STUDENT, AND T.F. AND S.F., THE STUDENT'S PARENTS V. WARREN COUNTY SCHOOLS

APD CASE No. [redacted]

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 **February 9, 2022**. 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 **February 24, 2022.**

   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 **April 11, 2022**. *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 **April 11, 2022**, 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 **February 16, 2022**. *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.

IN THE MATTER OF:
A.F., THE STUDENT, AND T.F. AND S.F., THE STUDENT'S PARENTS V. WARREN COUNTY SCHOOLS

APD CASE No. [redacted]

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:

Secretary of State
Administrative Procedures Division
William R. Snodgrass Tower
312 Rosa L. Parks Avenue, 8th Floor
Nashville, TN 37243-1102