KENTUCKY DEPARTMENT OF EDUCATION
DIVISION OF EXCEPTIONAL CHILDREN SERVICES
EXCEPTIONAL CHILDREN APPEALS BOARD
AGENCY CASE NO. 1617-05

[redacted] **PETITIONER**

V. **FINAL DECISION AND ORDER**

KENTON COUNTY SCHOOLS **APPELLEE**

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PROCEDURAL BACKGROND

On August 23, 2016, Counsel for Petitioner filed a request for a due process hearing pursuant to the Individuals with Disabilities Education Act, (hereinafter "IDEA"), 20 U.S.C. § 1400, *et seq*. A hearing was held January 16, 17 and 18, 2018, and the parties filed briefs thereafter. On June 1, 2018, Hearing Officer Whalen entered a Decision and Order holding:

1. The School District properly determined the Student was not eligible for special education and related services from December 7, 2015, to the present.

2. The School District complied with the Child Find requirements in accordance with 707 KAR 1:300 from December 7, 2015, to the present.

3. As the Student was not eligible for an IEP, the School District was not obligated to create and implement an IEP and therefore did not violate 707 KAR 1:320.

4. The School District provided the Student with Free Appropriate Public Education (hereinafter "FAPE").

5. The Student's request for compensatory education was denied.

6. The Student's request for out of pocket expenses was denied.

7. The Hearing Officer was without authority to award attorney fees.

The student timely filed an appeal on July 3, 2018. This appeal comes before the Exceptional Children Appeals Board panel (hereinafter "ECAB"). The panel, consisting of Kim Hunt Price, Dennis Lyndell Pickett, and Mike Wilson, Chair, was duly appointed to consider the appeal of the student. Having reviewed the record in its entirety, including the briefs of the parties, ECAB issues this final decision and order, affirming the hearing officer's decision entered June 1, 2018.

I. PRELIMINARY ISSUES

A. JURISDICTION BEFORE THE EXCEPTIONAL CHILDREN APPEALS BOARD IS ESTABLISHED

This is an appeal of a hearing officer's decision as permitted by 707 KAR 1:340 Section 12 which provides:

> (1) A party to a due process hearing that is aggrieved by the hearing decision may appeal the decision to members of the Exceptional Children Appeals Board as assigned by the Kentucky Department of Education. The appeal shall be perfected by sending, by certified mail, to the Kentucky Department of Education, a request for appeal, within thirty (30) days of the date of the hearing officer's decision.

The Student's appeal was timely requested.

B. THE STUDENT BEARS THE BURDEN OF PROOF

The party seeking relief bears the burden of proving their entitlement to relief by a

preponderance of the evidence. In this case, the student bears the ultimate burden of persuasion on the elements of the student's claims. *Schaffer v. Weast,* 546 U.S. 49, 57-58 (2005); KRS 13B.090. *See also, City of Louisville, Div. of Fire v. Fire Serv. Managers Ass'n by and Through Kaelin,* 212 S.W.3d 89, 95 (Ky. 2006*)* providing, "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".

C. ECAB IMPARTIALLY REVIEWS THE RECORD DE NOVO AND MAKES A DECISION INDEPENDENTLY

ECAB reviews the record de novo and can make fact-findings it deems necessary to address legal issues raised on appeal. Where a state has established a two-tier administrative process, the appellate review is to be conducted pursuant to 20 U.S.C. § 1415(g). Kentucky has adopted such a two-tier system. See 707 KAR 1:340 Section 12. ECAB is required to conduct an impartial review of a hearing decision and make an independent decision upon completion of such review. 20 U.Ş.C. § 1415(g).

34 CFR 300.514(b)(2) provides that the appellate panel is to examine the entire hearing record before making its independent decision. The only limitation on the de novo review is that ECAB must give deference to hearing officer fact findings based on credibility judgments "unless nontestimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion." *Carlisle Area School District v. Scott P.*, 62 F.3d 520, (3d Cir. 1995). Such deference applies only to those situations involving record-supported credibility determinations. *Id.* at 529. This panel is free to make fact findings contrary to the hearing officer's findings so long as they are supported by substantial evidence and are not based upon different views about credibility of witness

testimony. *Id.* at 529. The existence of conflicting testimony does not, by itself, warrant concluding a related fact finding was implicitly a credibility determination of evidentiary facts by the hearing officer rather than differences in overall judgment as to proper inferences. *Id.* at 529.

D. PRELIMINARY EXPLANATION OF THE ISSUES

The student alleged failure to comply with Child Find requirements of 707 KAR 1:300 and failure to provide special education from December 7, 2015 to the present. Both issues, as well as the relief requested, turn upon whether the student would have been entitled to special education. To be entitled to special education, the student must prove (a) a disability; (b) that the disability adversely affects her educational performance to the extent that it significantly and consistently is below the level of similar age peers; and (c) that, as a consequence, the student needs special education.

IDEA lists 13 different disability categories under which a student may be eligible for services. The list includes a visual impairment that, even with correction, adversely affects a child's educational performance. 34 CFR 300.8(c)(13). The list also includes an orthopedic impairment that adversely affects a child's educational performance. 34 CFR 300.8(c)(8). The orthopedic impairment may be caused from cerebral palsy or other reasons. *Id.* ECAB concludes, and the parties do not really dispute, that the student has a listed disability.

The IDEA requires schools to follow a two-pronged inquiry to determine whether a student is a child with a disability within the meaning of the statute, and consequently eligible for special education services. First, to qualify as a child with a disability, the student must have one of the impairments listed in the statute and show it had an

adverse effect on the student's educational performance. 34 CFR 300.8(a). Second, if the child's condition adversely affects her performance, the evaluation team must determine whether, as a result, she needs special education. *Id.*

II. STUDENT FAILED TO PROVE ADVERSE EFFECT WITHIN THE MEANING OF APPLICABLE REGULATIONS

Since the IDEA and the federal regulations do not define the term "adverse effect" the states are free to "give substance" to this term. *J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60 (2d Cir. 2000). The Kentucky Department of Education defines adverse effect to mean, "the progress of a student is impeded by the disability to the extent that it is "significantly and consistently below the level of similar age peers." 707 KAR 1:002 Section 1(2).

Many courts have ruled this standard is not met where a student, despite his or her health condition, receives passing grades, scores average on assessments, and performs academic tasks with or without minimal assistance. See *In re: Student with a Disability*, 109 LRP 28018 (KY SEA July 5, 2007), where a Kentucky Hearing Officer concluded a student whose academic progress was consistent with his average IQ was not a child with a disability under the OHI category. Similarly, in *Mowery v. Bd. of Educ.*, 56 IDELR 126 (W.D. Mo. March 18, 2011) the Western District of Missouri affirmed a hearing officer's decision that a student did not qualify for special education services despite his 43 absences in a single year, as he was earning A's, B's and C's in his classes and performed admirably on state achievement tests. And in *Brendan K. v. Easton Area Sch. Dist.*, 2007 U.S. Dist. LEXIS 27846, 2007 WL 1160377 (E.D. Pa. 2007), the Eastern District of Pennsylvania found no adverse effect on the performance of a student exhibiting both physical and emotional symptoms where assessments nonetheless indicated that his academic skills were within the average range. Also, in J.D. v. Pawlet Sch. Dist., 224 F.3d

60, 68 (2000), the Second Circuit affirmed the finding that a student who consistently demonstrated “excellent” and “outstanding” academic skills in the classroom and on assessments was not a child with a disability under the EBD category and eligible for an IEP under IDEA as his exhibition of emotional issues were not found to have an "adverse effect on educational performance”.

The evidence in the case at hand shows that this child has average or below average abilities through IQ testing, assessments, evaluations, and grades. All of the evaluation materials in the record, including the two conducted by the district, and the evaluation from Cincinnati Children’s Hospital, rate the child’s cognitive and academic skills as average or below range. The Weschler Intelligence Scale test administered by Dr. Standridge in November of 2016 reported a full-scale IQ score of 76 and overall ability score of 81. Except for verbal comprehension, which in the average range, the student scored between 61 and 77 on all of the other scales in the composite index. (See J071).

However, the student’s grades have always been passing during the entire duration of middle school. Her test scores have not always been in the highest percentile ranges, but have consistently shown growth on KPREP and that progress is being made in her reading and math intervention classes. Growth has also occurred in the reading interventions during the sixth and seventh grades, and growth was above average in those years. The teachers who testified consistently reported that the child is working to her potential. Within an IQ of 76 there will be at some point a limitation to the child’s ability to perform her work according to the child’s advocate, Ms. Sauser. Sauser also testified that the child was working to her ability.

Reviewing the child’s middle school education, she has completed each and every grade satisfactorily receiving passing grades in all her classes. The grades in classes consisted of testing,

homework and class participation, as with all students. It is correct that her MAP scores have been historically inconsistent. As a result of MAP scores, the child was placed in intervention classes for reading and math in middle school. Specifically, she was in the Math 180 program for sixth and eighth grade years. She was taken out of that program in the seventh grade and placed in a different Response to Intervention program called My Path. During sixth grade the student was in Course 1 of Math 180 and at the time of hearing, in eighth grade, she was in Course 2 which showed progression in that program. Both of her sixth and eighth grade teachers testified that she showed typical performance in her Math 180 class and that her scores were in the proficient category. According to her Math 180 teacher, the child proceeded even more quickly on her units than other students and at the time of hearing was ahead of pace in her current math intervention class. The KPREP scores have also shown that the child's math skills have grown. Her scholastic math inventory showed significant growth being 195 in the Fall of 2016 and 750 in the Spring of 2017.

The child was also in Read 180 intervention classes for sixth and seventh grade. Students in such classes are those who struggle with reading. The teacher in said class testified that when students first begin the program they are placed on a level 1 to 4 based on their Lexile score. The Lexile score is based on a reading test called the Scholastic Reading Inventory (SRI). The teacher gives the student the SRI test within the first two weeks of school. The test is self-adjusting and becomes more difficult if the student continues to answer questions correctly. The test is given several times throughout the year to ensure the student is progressing, and is in the right Read 180 level. The software in the Read 180 program has zones of reading comprehension, vocabulary, word assessment, writing success, and spelling. This allows the teacher to figure out which areas the child struggles with most in reading, so that she and the software can teach methods for those

struggling areas. As a result of the Read 180 interventions in the student's sixth grade year, her Lexile increased from 372 to 769. During that year she completed 106 total sessions in Read 180 software and had an average reading comprehension zone score of 88%, 91% in vocabulary zone, 95% in word assessment, and 65% average in spelling. At the end of her sixth grade year the student was on level 3 of the Read 180 program.

At the beginning of seventh grade, the student was also enrolled in Read 180 because her Lexile score of 871 was still below grade level. On May 30, 2017, at the end of her seventh grade year, the student's Lexile score was 981, which was on grade level. According to the instructor, the average growth in a Read 180 class is between 75 and 100 points and the child exceeded this average growth in both years she was enrolled in that intervention program.

During the child's eighth grade year, she was in Collaborative Language Arts class and Collaborative Math classes due to her advancements out of the intervention programs. She had a B in Math and an 85% in Language Arts at the time of the hearing.

Based upon the child's IQ and her test scores, intervention progress and grades, the Appellant has failed to carry her burden of proof to show that there is an adverse effect as the student has not performed significantly and consistently below her similar peers.

III. THE STUDENT DOES NOT QUALIFY FOR SPECIAL EDUCATION

Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability. 34 CFR 39(a)(1). Specially Designed Instruction means adapting, as appropriate to the needs of an eligible child, the content, methodology or delivery of instruction to address the child's unique needs resulting from the disability and ensuring the child's access to the general curriculum so the student can meet the educational

standards that apply to all children within the jurisdiction of the public agency. 34 CFR 300.39(b)(3). If a child has one of the listed impairments, but needs only related services and does not need special education, the child is not a child with a disability. 34 CFR 300.8(a)(2)(i). If the student's needs for instruction can be provided within the regular education setting without the support of special education, the student does not qualify for special education services.

In the present case, per the findings above, the impact of the student's disability does not meet Kentucky's definition of "adverse effect" so she is not eligible for special education. However, counsel for the student argues that "that this case simply comes down to a factual determination of whether or not the Appellant has been receiving specially designed instruction." The student's reasoning is that if the student actually has been receiving special education, that very fact is sufficient to establish both prongs needed to be eligible for special education.

The student currently receives accommodations under a 504 plan that include breaks, extended time, and technology supports. The student also has received reading interventions. The student's reading intervention teacher testified that her classroom was merely an intervention class and not intended to be special education. The student receives intervention in Math 180, an intervention class that, as stated in the student's reply brief, is required for *all* students who are performing in the bottom 30% (thirty percent) of the class.

ECAB does not find that accommodations under a 504 plan or interventions required for all students scoring below a certain range constitute special education. Such a broad interpretation of what constitutes special education would imply that all 504 plan students, all students receiving interventions, perhaps even all students who received tutoring or extra

attention from a teacher were receiving special education merely because they were receiving something that not every other student received.

Regardless, it is circular to argue that if a student receives services that could be labeled special education, he or she qualifies for special education under IDEA. To be entitled to special education, the student must prove two things: (a), that the OHI condition adversely affects her educational performance to the extent that it significantly and consistently is below the level of similar age peers, and (b), that as a consequence, the student needs special education. If she is receiving accommodations to which she is entitled under a 504 plan, or is receiving interventions of the type required of all lower-performing students, that fact does not prove either of the two prongs. The inferences Appellant would have us draw is that accommodations and interventions are actually special education, that if they were withdrawn, the student's resulting performance would fall so much that the first prong would be satisfied, which proves the second prong. This is speculative and circular reasoning.

IV. REMAINING ISSUES

Because the student was not eligible for special education, the issues of compensatory education and reimbursement of expenses are moot. Regarding attorney fees, the hearing officer correctly ruled that hearing officers cannot award attorney fees.

ORDER

There has been no denial of FAPE and the final order and decision of the hearing officer is upheld in all respects.

NOTICE OF APPEAL RIGHTS

This decision and order is a final, appealable decision. Appeal rights of the parties under 34 CFR 300.516 state:

(a) General. Any party aggrieved by the findings and decision made under Sec. 300.507 through 300.513 or Sec. 300.530 through 300.534 who does not have the right to appeal under Sec 300.514(b), and any party aggrieved by the *findings* and decision under Sec. 300.514(b), has the right to bring a civil action with respect to the due process complaint notice requesting a due process hearing under Sec. 300.507 or Sec. 300.530 through 300.532. The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(b) Time limitation: The party bringing the action shall have 90 days from the date of the decision of the hearing officer or, if applicable, the decision of the State review official, to file a civil action, or, if the State has an explicit lime limitation for bringing civil actions under Part B of the Act, in the time allowed by that State law. (Emphasis added).

In addition, 707 KAR 1:340, Section 8. Appeal of Decision provides the following information to aggrieved parties, in subsection (2):

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

KRS 13B. 140, which pertains to appeals to administrative hearings in general, in Kentucky, and not to civil actions under Part B of the Act (the IDEIA), provides:

(1) All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the

final order of the agency is mailed or delivered by personal service. If venue for appeal is not in the enabling statutes, a party may appeal to Franklin Circuit Court of the Circuit Court of the county in which the appealing patty resides or operates a place of business. Copies of the petition shall be served by the student upon the agency and all parties of the record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

Although Kentucky Administrative Regulations require the taking of an appeal from a due process decision within thirty days of the Hearing Officer's decision, the regulations are silent as to the time for taking an appeal from a state level review.

SO ORDERED this 1st day of November, 2018, by the Exceptional Children's Appeals Board, the panel consisting of Mike Wilson, Kim Hunt Price, and Dennis Lyndell Pickett.

EXCEPTIONAL CHILDREN APPEALS BOARD

BY: /s/ Mike Wilson
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MIKE WILSON, CHAIR

CERTIFICATION:

The original of the foregoing was mailed to Todd Allen, KDE, 300 Sower Blvd., 5th floor, Frankfort KY 40601, with copies to Claire Parsons, 40 West Pike Street, Covington, Ky. 41011, Lexington, KY 40503, and Marianne Chevalier, 2216 Dixie Highway, Suite 202, Ft. Mitchell, KY 41017 on November 1, 2018.

/s/ Mike Wilson
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MIKE WILSON, CHAIR
EXCEPTIONAL CHILDREN APPEALS BOARD