

**KENTUCKY DEPARTMENT OF EDUCATION
AGENCY CASE NO 1617-10**



██████████

PETITIONER

V

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND FINAL ORDER**

KENTON COUNTY SCHOOLS

RESPONDENT

BACKGROUND

The student currently is in the eighth grade and has attended school in Kenton County since Kindergarten. In 2014, the student's mother requested an evaluation for eligibility for special education services. The evaluation was conducted, considering whether the student was eligible under the categories of other health impairment (OHI) and specific learning disability (SLD). The school concluded that, notwithstanding a clinical diagnosis of ADHD, the student was not eligible for special education services in either category.

The student did not file a due process complaint or request an independent evaluation. However, on her own, the mother contacted a psychologist, ██████████ who conducted testing, discussed hereinbelow, and issued a report with new clinical diagnoses of dyslexia and dysgraphia. An ARC meeting was convened in August of 2015 to review the report. Consequently, another evaluation was conducted by the school and in November of 2015, the ARC concluded that the student still was not eligible under OHI but was eligible under SLD in the area of written expression.

The student filed an action for a due process hearing received by KDE on October 10, 2016. Student asked the hearing officer to determine that the School failed to provide FAPE by

failing to identify the student, prior to November 2015, as one entitled to special education services; for failing to create an appropriate IEP in November 2015; and for failure to implement the IEP that was created.

Relief requested by Student, in addition to the desired findings of violations, were that School be ordered to “re-determine” the student’s eligibility for special education and related services and to create an appropriate IEP. Additionally, compensatory education was requested for “the time in which such substantive and/or procedural violations” amounted to a denial of FAPE; reimbursement for “any out-of-pocket educational and evaluations expenses”; and attorney fees.

A due process hearing was convened in this matter at 9:00 a.m. April 6, 2017. At the beginning of the hearing, before taking any testimony, Petitioner tendered a motion for default or, alternatively, that the matter be continued and the delay taxed as costs to Respondent. Because of the lack of notice of the motion to Respondent, the hearing was adjourned to allow Respondent to brief a response. By order dated May 3, 2017, Petitioner’s motions were denied. The hearing was rescheduled for, and took place on May 22-23, 2017, at the Allied Health Building of Gateway Community and Technical College at 790 Thomas More Parkway in Edgewood, Kentucky.

Parties were permitted to file post-hearing briefs. After reviewing the briefs and the record, the hearing officer makes the following findings of fact, conclusions of law, and final order.

RULINGS REGARDING MOTIONS MADE AFTER THE HEARING

After briefing began, Respondent made a motion to supplement the record with legal authority. Petitioner’s response to said motion was what purports to be a letter concerning the

educational records of another student. Same is **not** accepted as a response to Respondent's motion, nor shall it be a part of the record for any purpose. The legal authority Respondent attached to its motion, to wit, *Letter to Cohen*, 67 IDELR 217 (OSEP 9/16/15); *Homer Central Sch. Dist.*, 47 IDLR 145 (NY SEA 10/27/06; and *Friendship Edison Public Charter Sch.*, 561 F. Supp. 2d. 74 (D.C. 2008), is accepted as a supplement to legal authority cited in Respondent's brief.

Petitioner filed a motion asking for an order requiring Respondent to reimburse Petitioner's cost in obtaining a copy of a deposition of [REDACTED]. Petitioner's expert witness, taken by Respondent and admitted into the record by agreement of the parties in lieu of testifying at the hearing. Respondent filed a response in which it is stated "Respondent agrees that if [the deponent] had appeared at the hearing, his testimony would have been included in the trial transcript paid for by the Respondent."

34 CFR 300.512(c)(3) dictates that school districts must "have the record of the hearing and the findings of fact and decisions described in paragraphs (a)(4) and (a)(5) of this section provided at no cost to parents." No authority is cited for any interpretation of "the record" as anything other than a transcript of the hearing. Petitioner's motion for costs is denied.

FINDINGS OF FACT

A. FINDINGS PERTINENT TO ALLEGED CHILD-FIND VIOLATION

The student contends that the school should have identified him a child eligible for special education services prior to doing so in the fall of 2015.

1. **There were not clear signs of disability that required the school to order testing**

prior to the evaluation of 2014 or made failure to evaluate prior thereto not rationally justifiable.

Prior to October 10, 2013, the date after which FAPE violations are not barred by the statute of limitations, the student had been evaluated by a psychologist hired by the mother. She had not asked the school to test the student (TE 17-18), but testified that she was concerned about his grades. The evaluation took place at the beginning of second grade (2010) and was prompted by the mother's belief that the student had problems and was not doing as well as he should. The student was evaluated by Dr. [REDACTED] H [REDACTED] a clinical psychologist. H [REDACTED] did not testify at the hearing, but H [REDACTED]'s report, Petitioner's exhibit 2, is quoted hereinbelow.

According to H [REDACTED], the student had been diagnosed with ADHD, was taking Adderal, and was reported, apparently by the parent, as

having difficulty learning to read and write. He is writing letters and numbers backwards and does not remember words he reads. His parents are interested in identifying nay learning issues he has as well as learning options that will help him develop to his potential.

(P018).

H [REDACTED] assessed the student using Weschsler Intelligence Scale for Children IV, Woodcock Johnson III Tests of Achievement, Connors Parents' Rating Scale, Vanderbilt Teacher Rating Scale, developmental history, clinical interviews with the child, and interviews with his parents.

(P018).

H [REDACTED]'s report found the student's Full Scale IQ to be 88 plus or minus 5, but said because of discrepancies subtests in the WISC_IV, a better measure of his potential was the General Ability Index, suggesting he had average potential in intellectual functioning, with strengths in

the area of verbal processing and weakness in auditory attention and working memory. H■■■■'s report stated:

[The student's] verbal skills are quite solid; he performed well on measures of abstract thinking, vocabulary, and his general fund of information. [His] long term memory is seen as being strong. He was inconsistent on measures of visual processing. He scored well on two measures and was weaker on a third involving non-verbal problem solving.

....

[His] reading, spelling and math skills are all measured in the Average range.... [He] is not seen as Learning Disabled, but is seen as being able to benefit from additional attention to his reading and language art skills.

.....

He is seen as being a slow developer who is expected to catch up to his peers in the next year or two as he matures and benefits from additional attention to his work. He has adequate phonics skills, but tends not to use these skills when approaching a new word. [He] has Attention Deficit/Hyperactivity Disorder and is currently receiving stimulant medication to help him focus and exhibit more self control.

(P020-021). H■■■■ recommended "accommodations beneficial for children with ADHD such as preferential seating, frequent cueing, and positive reinforcement for task completion. H■■■■ also recommended sharing his report with the school.

The testing by H■■■■ was performed in August of 2010, at the beginning of second grade. The mother testified that "[Dr. H■■■■] did not think that [the student] had dyslexia, which was my primary concern." (TE 18). The mother testified that she gave the report to the school (TE 19), discussed the student's ADHD with Ms. King, the student's second grade teacher. (TE 17), but did not ask the school to do an evaluation for eligibility for special education services. (TE 17). Elsewhere, there was evidence calling into question whether the school was provided with H■■■■'s report or advised about his ADHD.

Regardless, the school had considerable information about this student. He had been a student in Kenton County since Kindergarten (TE 12). During 2nd grade, the first school year after H■■■■'s report was either given or not given to the school, the student's grades were relatively poor. Instead of letter grades, the report card has four assessments: areas of concern

(AC); beginning (BG); developing (DV) and independent (IN). The student had many ACs in all three terms. (P 118).

In 3rd grade, (2011-2012), the student's report card (P 120) shows a distinct pattern of steady improvement between the beginning term and the end term. During Term 1, there were several ACs, mostly BGs, and a few DVs and INs.. By Term 2, there are no ACs, and more substantially more DVs. By Term 3, there are no ACs, and more DVs than Term 2. According to the mother's testimony, his third-grade teacher said the student was "commensurate with his peers and... seemed to be doing okay. He did well in class and that kind of thing. So there was no alarm." (TE 29).

In 4th grade (2012-2013 school year), the student began to receive letter grades. The mother testified that this was a hard year for the student because he had a substitute teacher for most of the year due to pregnancy of his regular teacher. (TE 29-30). But she also testified that fourth grade went "fine" but there was "no level of improvement." (TE 30). In terms of grades, the student had one F in math during Term 1, which rose to a C in Term 2 and a B in Term 3. He had an A in Language Arts during Term 1, which fell to a B in Term 2 and a C in Term 3. Overall in Term 3, he had an A, three Bs, and a C. (J 148). The mother testified that she found the 4th grade results unsatisfactory because she expected

Bs at best. With the amount of work that I would help him with – I mean, I would expect him to be a B student at least, with an average IQ, and with, you know, [our] home instruction.

TE 32. The hearing officer notes that by the end of grade 4, the first year he received letter grades, the student literally *was* a "B" student.

It appears that something happened during fifth grade (2013-2014). Grades for the first term were pretty good, all Bs except one C. (J. 154). However, in October of Grade 5, the parent

sent an email to a teacher at school expressing concerns that he was not bringing work home and that the student was denying that he had homework:

I work religiously with [the student] when I know he has work to do, but the problem is there are days when I don't know he has anything because there is nothing written in his planner, and when I ask him if he has homework he says no. Most days he has just thrown papers in his backpack and I can't tell what is homework and what isn't because of the state they get here in. Now that I know he will have math every night (M-TH), I will be sure to look for his work. If he doesn't have anything in his backpack I will send you a note telling you I didn't receive anything, and if there was work to be done I would appreciate it if you let me know so I can nip this in the bud now. I am doing everything I can to make sure he doesn't fall through the cracks and would appreciate any help you can give me with him. While I understand you have many kids to work with, please let me know what else I can do to help him.

(P 14).

The second term in Grade 5 showed a dramatic drop in performance - two Fs and a D (J. 154) On February 10, 2014, the mother first requested an evaluation of the student in an email dated February 10, 2014:

I wanted to talk to you about a conversation we had with [redacted]'s primary care doctor this weekend. I'm not sure if you're aware of this, but a few years ago [redacted] was diagnosed with ADHD and after years of fighting putting him on medication, we relented. We always said that if [this] greatly impaired his academics, we'd try meds. While he has been on the medication for years and while he has tutors in the summertime and as many programs as the school can offer to help intervene, we don't feel like anything is helping. Out of his three grades at midterm, two were Fs. As I said we spoke to his doctor this weekend at his wellness test and she urged us to ask the school for psychoeducational testing to determine if he has other learning disabilities that might shed some light as to what's going on. How would we go about arranging this? Please let me know your thoughts as we are concerned and unsure of how to help [redacted].

(P. 13).

An ARC was convened on February 26, 2014, to plan an evaluation (J3). and an evaluation was performed.

After reviewing the evidence recited above, as well as other evidence in the record, the hearing officer finds that Petitioner did not prove a Child-Find violation as to the period prior to

the first evaluation in 2014. The school behaved reasonably and upon the sudden drop in the student's performance in fifth grade and the parent's request for an evaluation, responded in a timely and appropriate manner.

2. Failure to repeat an evaluation, prior to the mother's request in fall of 2015, was not a violation of Child-Find; there were no clear signs of disability that required the school to order retesting or made failure to retest not rationally justifiable.

During grade 6 (2014-2015), the student was on the honor roll for the first semester (TE 49) and during the year earned As, Bs, and Cs, which, averaged, would be "B" work except in one area – mathematics.

Sixth Grade has 4 terms. The first term went well, with an "A" at midterm and a high B at the end of the term. But something happened during the second term. The student scored Ds in math at midterm and the end of Term 2, and his grades in other subject areas dropped as well, though not as much. (J 164). By midterm of Term 3, math had improved to C and scores in all the other subjects had picked back up. But at the end of Term 3, the student's math grade was an F and the student ended term 4 with a D in math. (J 164), though he finished with Bs in all other subjects.

The 2015 Grade 6 KPREP scores show that the student at "Novice" level in areas tested, including math (J. 165) and his growth percentile in math is very low, but the Stanford Assessment Ranking shows the student at the 22nd percentile nationally in math. The Stanford Ranking for Language Mechanics, however, was in the 8th percentile. (J 166).

The student's MAP scores in math and language in the spring of 2015 were in single digits (TE 64). However, MAP scores during 5th grade had fluctuated greatly, ranging between 16% to 44% in reading, 5% to 25% in math, and 5% to 33% in language.

The parent had the student evaluated between during the summer of 2015 (TE 53) and presented a report by [REDACTED], asking the school to reevaluate, which reevaluation began August of 2015. While the student's downturn in math grades and spring MAP scores during 6th grade and his 8th percentile Stanford Ranking in language mechanics were concerning, given that the student had been evaluated the previous school year and finished sixth grade with Bs in all subjects except math, where he ranked in the 22nd percentile nationally, failure to initiate retesting for eligibility for special education prior to the mother's request in August of 2015 was rationally justifiable.

B. FINDINGS PERTAINING TO THE 2014 EVALUATION

At the parent's request, an evaluation was performed by the school in 2014 during the spring of fifth grade.

3. The school had actual or constructive knowledge of Dr. H [REDACTED]'s report.

A parent testified she gave Dr. H [REDACTED]'s report to Ms. King, the student's teacher. (TE 118). The school states it was not in the student's file (TE 456). The hearing officer finds the parent credible and that the school is chargeable with constructive knowledge of the report.

4. Actual knowledge of H [REDACTED]'s report would not have resulted in additional testing.

See TE 459.

5. The student had not been diagnosed with a special learning disability at the time of the 2014 evaluation.

Schools do not make clinical diagnoses. The parent contends that Dr. H [REDACTED]'s report had been given to the school. If so, that report did not diagnose an SLD.

6. The student had been diagnosed with ADHD at the time of the 2014 evaluation and the school's testing found working memory at the 4th percentile.

This is not disputed. The school's evaluation calls this "borderline range of ability" (J 110) as contrasted with ██████'s characterization of it as "extremely low" (J 119).

7. The school's 2014 evaluation recognized that the student's working memory deficit could affect the student's reading and writing.

Quoting from the school's report at J111:

Working Memory involves short-term use of memory and attention. [The student's] index score is lower, at a clinically significant level, on Working Memory, than his standard scores on all of the other WISC-IV indices measured, indicating he demonstrated a significant amount of difficulty with accessing short-term memory and manipulating auditory information, during this testing session. Working Memory is the active piece of the memory system. As information comes in, it is processed and stored simultaneously (like mental juggling). **A child uses this skill when doing math calculations or listening to a story. For example, the student needs to hold onto numbers while working with them, or needs to remember the sequence of events while processing what the story is about.**

(emphasis added) Although what is quoted refers to "listening" to a story, the hearing officer infers that the difficulty "processing what the story is about" would apply to reading, not just listening to, a story.

8. The Woodcock-Johnson scores were in the average range in all areas except written expression.

Ashley Smith, school psychologist testified that "Woodcock-Johnson is an achievement test that "tells us where your skills are right at that moment." (TE 528). Woodcock was administered to the student as part of the 2014 evaluation. According to the evaluation (J-114-115), the student scored "average" in all sub-tests in reading, average on all math calculation subtests, average on math word problems, average in Math Reasoning, but "low average" in written expression (17th percentile overall).

9. Based upon the data used in the 2014 evaluation, the student was not performing

significantly and consistently below the level of similar age peers at the time of the 2014 evaluation.

The student's history of grades is recited elsewhere hereinabove. There had been a significant drop in grades, which prompted the request for the 2014 evaluation. However, only in written expression did the student score below average and the student's MAP scores increased substantially in reading and language arts between winter and spring of 2014. (J 107), "indicating that he is making adequate progress in his curriculum. Teachers report he is progressing successfully in Do the Math and Read Naturally." (J108).

10. The ARC concluded in the 2014 evaluation that the student did qualify for special education services; based upon the data utilized, the finding was correct.

The ARC considered the student's eligibility under the categories of OHI and SLD (J31-36). On May 15, 2014, the ARC determined that

- the student had cognitive abilities in the average range;
- the student demonstrated academic functioning in the Average to Low Average ranges with relative and only slight academic weaknesses in Reading Comprehension and Written Expression
- MAP scores placing him in percentiles ranging from 25 to 44
- Academic achievement test scores in percentiles ranging from 17 to 38
- that based on the evaluation and documentation gathered, a disability did not exist

(J 27-28). By the end of 5th grade, the student's grade had improved to all Bs (J 154).

C. FINDINGS CONCERNING THE CREDIBILITY OF ██████████'S REPORT

Both parties cite portions of ██████████'s testimony in support of their respective positions

and Respondent challenged ██████'s credibility generally in cross-examination questions during the deposition. Therefore, findings are made concerning certain points relevant to credibility.

11. ██████ has training and considerable experience in performing numerous clinical evaluations related to special education.

██████ M. Ed., LPP, CBIA, performed testing on the student of the parents and provided a report. ██████ also gave deposition testimony on March 24, 2017. ██████ has a degree in special education and taught special education for a couple of years. (██████ dep., p. 37-38). Sixty percent of his private practice as a psychologist involves educational evaluations. (██████ dep., p. 40). He testified that he's done approximately 6,000 evaluations similar to the one he did for this student, he's worked with seven or eight school districts, and he's been involved in a couple hundred IEP developments. (██████ dep., p. 132-133). He testified that in preparing for his deposition testimony, he'd been advised that it was important to know "which part of the report did I cut and paste in there and which part of the report that, you know, is mine, and to make sure that I knew which it was." (██████ p. 19).

12. ██████'s evaluation and recommendations were made without making or giving any weight to classroom observations.

██████'s July 13, 2015 report utilized very little information from the school and involved no classroom observation of the student. He did not observe the student in the classroom and opined that classroom observations "had very little value" (p. 14). Although he did not know if there was empirical evidence to support that assertion, he represented that such was the commonly-held opinion of school psychologists. (██████ dep., p. 17). Later, ██████ testified as follows:

Q. [I]n terms of looking at what the consequences actually are [of the student's testing deficits], we do need to look at what he's actually doing in the classroom?"

A. Sure, sure, absolutely. Yeah.

(██████████ dep., p. 121).

13. ██████████'s evaluation and recommendations were reached without considering the student's educational performance as documented by the school.

██████████ had at his disposal the school's 2014 evaluation (██████████ dep. p. 11) and the ARC meeting summary of May 15, 2014 (██████████ dep., p. 21), which contain some information about the student's performance at school. He did see that there were MAP scores in the schools 2014 report but they played no role in the evaluation he performed. (██████████ dep., p. 12). ██████████ did not seek or have the student's MAP records, grade reports, or any other school records (██████████ dep., p. 11-12). He spoke with no teachers nor anyone else connected with the school (██████████ dep., p. 13).

He also testified that grades were of negligible importance to him in determining whether disabilities are affecting a student's classroom performance. (██████████ dep., p. 147). Assertions in his report concerning the student's performance at school simply repeated what the mother had told him. He testified that the statement in his report that "[the student] has struggled academically since early elementary school" and that "[the student's] grades have continued to fall" was based on the mother's representation that such was the case. (██████████ dep., p. 52-3). ██████████'s explanation for why he did not give weight to the MAP scores in the 2014 evaluation was, "I reviewed them, but the parent came to me and said, you know, the kiddo is not able to, you know, function in school and he was having problems." (██████████, p. 12).

14. ██████████'s evaluation procedures raise questions about the independence of conclusions that appear in the report.

██████████ testified that “work samples and things like that” weren’t relevant to “what’s going on” or his “end goal,” which he characterized as providing “information for the parents to be able to help with their educational programming of their child.” (██████████ dep., p. 71).

However, parents may be seeking the evaluation to support their own pre-determined position as advocates in the context of a conflict with a school system.

In the present case, the parents testified that they had a longstanding belief that the student suffered from dyslexia and needed special education, especially in math. ██████████’s report concluded that the student was eligible for special education but ██████████ admitted on cross-examination that “I should have known better and that I shouldn’t – I should have said: meet with school officials to consider with them.” (██████████ dep., p. 116).

██████████ does not write a report after conducting testing and analyzing the data. Instead, he meets with the parents for an hour before committing anything to writing:

I’m just a little different about it. I don’t like to do the report. I sometimes may do a preliminary report. But 99 times out of 100 I want them to come back, and I want to review everything with them. So we sit down and spend another hour going over all of the test data and what I think it means and how it applies. Because if something is, you know, out of whack, I mean, you know, then I need to look at that.

(██████████ p. 44). Parents are not psychologists capable of evaluating whether his report is “out of whack.” ██████████ could not remember whether he changed his preliminary ideas and conclusions after meeting with the parents in this case, saying “I can’t really be sure because I don’t finalize it until then.” (██████████ p. 46-47).

Then, even after the report is written, the parents are emailed the report and “[t]hey review it, **make sure that everything, you know, looks good to them...** And after that, then I will tell them that if it’s good, you know, make a copy, save it.” (emphasis added). The parents, in effect, appear to have veto power over the report. ██████████ also asks the pediatrician who

referred the client to review his report because “it’s really important to me to **make sure that everything, you know, is okay with them**, that it looks like good.” [REDACTED] p.45, emphasis added).

15. [REDACTED]’s conclusion that dyslexia and dysgraphia has an adverse effect on the student’s math and reading was credible.

[REDACTED] diagnosed dyslexia and dysgraphia. He testified that dyslexia can affect math skills, dysgraphia can affect math skills, and dyslexia affects reading skills, although there is “evidence that [the student is] able to compensate in some areas in his reading.” [REDACTED] dep., p. 87), [REDACTED] testified that the student’s Weschsler Individual Achievement Test scores were below average in math problem solving, pseudoword decoding (a phonic skill), math fluency (addition, subtraction, and multiplication). [REDACTED] dep., p. 84-85). He testified that dyslexia or dysgraphia were related to the student’s low math scores and difficulty he had in certain math functions. [REDACTED] dep., p. 135).

While [REDACTED] did not utilize much in the way of data from school to reach his conclusions, the data from tests he administered was enough to draw a connection between the SLDs of dysgraphia and dyslexia and the student’s performance in reading and math.

16. [REDACTED]’s opinion that Woodcock-Johnson results from the school inflated the apparent achievement of the student was credible.

[REDACTED]’s opinion on this point was a general one regarding Woodcock-Johnson, and there was mixed testimony about whether this test was still used by the school system and under what circumstances. Regardless, when Ashley Smith, the school psychologist, was asked whether Woodcock-Johnson inflates scores, as contended by [REDACTED], she testified that “I don’t think inflated is a word that I would use.” When invited to explain, she said “I would say that it

is a common statement amongst – especially from teachers” (TE 531) and said the test doesn’t align with the curriculum. In balance, the hearing officer finds that Smith’s testimony supports ██████’s opinion.

The hearing officer notes that the finding in this case regarding Woodcock-Johnson is **not** a finding generally regarding Woodcock-Johnson, is based only on the evidence presented in this case in the context of this particular student, and has no precedential value.

17. ██████ was uncertain whether his recommendations constituted “special education” within the meaning of applicable regulations.

In cross-examination, ██████ testified as follows:

Q. Your report... seems to list primarily accommodations that may be useful for the [the student], correct?

A. yes.

Q. I did not see anything that I would identify necessarily as specially designed instruction in terms of actual special education, modification of instruction....Is that correct?”

A. Well, I mean, I guess. Yeah, I guess.

(██████ dep. P. 121-122). In testimony that followed what is quoted above, ██████ seemed to think “specially-designed instruction” was a function of who was providing it (a regular ed or special ed teacher) rather than with what was being provided. He testified that given the student’s existing IEP for writing, accommodations would “certainly take care of” the student’s remaining writing needs, but that direct instruction in reading for phonetic skills would be needed for the student to “get up to a level that he’s capable of.” (██████ dep., p. 150).

What constitutes “special education” is a legal question to be addressed elsewhere herein.

D. FINDINGS PERTINENT TO THE 2015 EVALUATION

The school’s fall 2015 evaluation was made utilizing ██████’s July 13, 2015 report as well as other data. At the time of the 2015 evaluation, the student was beginning seventh grade.

18. The student's intelligence is in the average range.

The student scored 100 on the WISC-V Index and Ancillary Composites, right in the middle of the 90 to 109 average range. (J 120). He scored at the 70th percentile for Verbal Comprehension Index. (J 121).

19. In 2015, seventh grade, the student displayed observable signs of dyslexia and dysgraphia.

██████████'s report states, at J119:

During the evaluation, [the student] displayed signs of dyslexia and dysgraphia. He continues to reverse letters and has difficulty remembering what words to write. He displays poor phonics skills. He substitutes words and uses his fingers for math calculation. He had very slow reading fluency.

In ██████████'s report, at J 134, he states that “[the student] continues to reverse ‘d’s’ and ‘b’s’ and numbers. His penmanship is very poor and spelling is difficult. He does not spell phonetically but displays irregular spelling.”

The student's 6th grade teacher testified that she had no experience teaching students with dyslexia. Andrea Hack, his 8th grade math teacher, testified she has observed no signs of dyslexia.(TE 217, 298). None of the other teachers who taught the student before or after the 2015 evaluation testified that they observed signs of dyslexia.

Nonetheless, the hearing officer finds that the student had them. That teachers did not report seeing them seems remarkable.

20. At the time of the 2015 evaluation, there was evidence that the student had serious writing issues caused by dysgraphia.

The TOWL-4, administered by ██████████ tests various aspects of writing, the results of which appear at J 128. The student tested average in contextual conventions and superior in story composition. However, he tested at the 9th percentile (below average) in vocabulary and spelling.

He tested at the 2nd percentile in punctuation (poor), 5th percentile in logical sentences (poor), 1st percentile in sentence combining (very poor), 3rd percentile in contrived writing (poor), and 12th percentile in writing overall (below average). [REDACTED] states at J 128:

An examination of his performance on the writing portion reveals significant problems with handwriting. His story, while perceiving a high score, was fraught with reversals of letters, letter reversals within words and atypical spelling errors. Capital letters were frequently intermixed with lowercase letters within words and punctuation and capitalization were often absent or incorrectly used. Therefore, the examiner believes that the results represent dysgraphia.

21. The student exhibited below average scores on the Oral Reading Test.

The Gray Oral Reading Test administered by [REDACTED] required the student to read Orally. The reading is timed and mistakes are noted. Then questions and potential answers are asked of the student with the questions and multiple choices answers visible to them. The student's scores on the five measures ranged from the 15th percentile to the 25th percentile, including below average in accuracy, fluency, and Oral Reading index (P 129). [REDACTED] states in his report:

His fluency was weak when he read. He often substituted words for those in the story and, at times, reversed the order of words in the story. He substituted visually similar words at times and, at other times, inserted words that fit the story but were not close to those that were within the story. He skipped an entire sentence in one story and had to be redirected back.

(J 129).

22. The student had a poor ability to manage attention at the time of the 2015 evaluation.

[REDACTED] administered the STROOP test, which measures directed attention and mental agility. [REDACTED] states that "[t]he cognitive mechanism involved in this task is called directed attention. The individual has to manage attention, inhibit or stop one response in order to say or

do something else.” (J 131). ██████ found that “[the student] did struggle with these tasks. Mental agility and flexibility was an area of significant weakness and he achieved [a score] which is well below average.” (J131-132).

23. The 2015 TOVA test results show that the student has ADHD.

█████ administered TOVA-8 to test the student’s attention. The student has from time to time taken medication for ADHD, so he was tested both on the medication and off the medication. While off the medication, his results were “in the range of individuals independently diagnosed with ADHD” and the results while on the medication “were far worse.” (J 133).

Ashley Smith, the school’s psychologist, discounted TOVA. She didn’t administer it to the student in the 2015 evaluation testing because she didn’t have it available and wouldn’t use it anyway because “the input from the people who see him... on a daily basis to needs to be one of the biggest factors as long as we get it from the parents and teachers.” She said student inattention is “absolutely normal.” and testified that although “on the TOVA ██████ found that there were some issues with inattention” that her “rating scales, at least from the school folks, indicate that [the student’s] inattention is... absolutely normal.” (TE 525). She said her assessments of the student’s attention was “based on teacher observations within the school setting” based upon teacher “ratings.” (TE 526).

The hearing officer finds such teacher observations not credible in light of many teachers testifying that the student showed no signs of dyslexia and did not have problems with organization, notwithstanding clear evidence that he did.

24. The 2015 test results showed that the student has significant problems with attention, processing speed and executive function.

██████████ administered the CCTT “neuropsychological test designed to assess attention, processing speed and executive function.” (J 133). The test results revealed “significant problems with attention and executive function” and “simultaneous processing of information,” scoring a percentile rank of less than one when required to process two elements. (J 134).

25. The student had a very low working memory in 2015.

H██████'s 2010 evaluation found weaknesses in working memory. (P 19). The school's 2014 report found working memory at 4%, characterizing it as “borderline range of ability” (J 110) as contrasted with ██████████'s characterization of 4% as “extremely low” (J 119).

██████████'s 2015 evaluation found the student's working memory was “extremely low” at 2 % (J 120, 134). ██████████ found working memory at 2%.

26. The student had, at the time of the 2015 evaluation, four diagnosed disabilities: dyslexia, dysgraphia, ADHD, and a neurodevelopment disorder with impairment in working memory.

See J 137. The hearing officer finds the diagnoses credible and supported by the testing.

27. At the time of the evaluation of 2015, the student had a well-established track record of not turning in work and not bringing homework home.

The parent testified that the transition to sixth grade presented organizational problems for the student:

[I]n sixth grade you have the extra burden of separate classes and separate teachers, and things that go on between times where...there's a lot of organization that...takes place in order [to get through the] day. So that was an extra cog in the wheel.

....

We would go through his binder and try to help him organize his things...because he would just throw everything together. There was no thought process to it. As a matter of

fact, once we cleaned up his binders, a week later they were a mess again because he had no organizational skills.

....

[Even prior to sixth grade] there were times that...he would forget his binder and I would bring in his binder to school.... We were pushing as much as we could, but there was no...ability to organize.

(TE 45-46). The parent testified that, notwithstanding their efforts, the student had missing assignments. (TE 47). The parent described her concerns:

In sixth grade, math was a big concern. His scores were a big concern. He was failing math. So I communicated with...one of the math teachers.....[H]e wasn't bringing home his assignments. And if he was, they were missing, if they went back sometimes.... [T]hat's when the communications started with [the math teacher] and she started to work with him after school as well.

(TE 50-51). The parent testified that during creation of the 2015 IEP was created, she raised the issue of the student's inability to be organized enough to bring math homework home, but the validity of her concern was not validated by the school:

Q. So an IEP was developed...[S]ee if there's anything else that you recall that was specifically discussed that's significant.

A. Just the fact of his homework, you know, being his responsibility. Again, he doesn't have the organizational skills to make it his responsibility and... us as parents, we're trying to help him in any way possible. So we could try to...communicate with the school to get his homework, but he was told that it was his responsibility.

Q. Were you...objecting at that point to a lack of an eligibility in OHI?

A. Yes.

Q. Other health impairment. Did you object at this point to a lack of identification in math?

A. Yes, strongly.

(TE 72). The parent also testified, regarding the 2015 IEP, as follows:

Q. There's nothing in [the 2015 IEP] about his math struggles, his organizational struggles, his working memory struggles?

A. No.

Q. Why was that not put into the IEP?

A. Because they didn't feel that he lacked in those areas.

(TE 74). Yet, notwithstanding failure to find the student eligible in OHI, the parent testified that the school did include in the IEP “agenda checks” because

we were concerned that he wasn’t turning in his assignments, he wasn’t organizing his assignments such that...he was able to either do them or hand them in, so they were going to ...do some checks.

(TE 74-75). As of March 2017 “[the student] wasn’t’ bringing anything home... Every night I don’t have any homework, but he would have a backpack full of papers and...the papers that I saw were...very bad still.” (TE 96). At the time of the hearing the problem still existed:

He brings nothing home. He does it in school, if he has homework. And when I say he does it in school, he doesn’t do fully the work in school....[T]he teachers have said...some of the problems on here that aren’t filled out, so that’s what I mean that he has no homework. He does not bring it home.”

(TE 98).

School personnel acknowledge that the student doesn’t turn in assignments, but do not characterize it as a lack of organization. Andrea Hack, the student’s 8th grade teacher, testified as follows:

Q. Are you aware that [the student] has difficulties with organization?

A. I don’t see the organizational issues, no.

Q. You’ve never seen him have missing assignments?

A. I’ve seen him have missing assignments, but I have not seen him to be disorganized...

....

Q. Have you ever heard concerns from either one of the parents about his not bringing stuff back and forth?

A. Not until recently, no. Just a few months ago.

Angie Boerger, the student’s 7th and 8th grade math teacher, testified that the student didn’t frequently have missing assignments in seventh grade but has during eighth grade (TE 347) and that she’s sent 2 or three emails a trimester, through infinite campus, regarding missing assignments. (TE 348). She testified that

[f]irst trimester he had maybe two that he's turned in later. Second trimester, he had four that he turned in late. Third trimester he had six that he turned in late. And he has four missing assignments right now.

(TE 348). The student is doing poorly in current semester "due to missing work that he started in class" and "some of his... quiz grades aren't great." (TE 348). She testified that his problems in 7th grade were due to not turning in assignments.

The way the standards work is they get introduced to the content in the seventh grade, and then they repeat it as an eighth grade standard.... [He] struggled with them... in seventh grade. [H]e did exceptionally well with them this year. The problem was he was not turning in assignments.

(TE 358) When asked why the student is failing his math class, she responded as follows:

Q. And [the student] is failing his class?

A. Due to not finishing work. He does the work, he just never brings it back. I think if I gave him the whole 30 minutes in class to sit there and do work, he'd finish it and he'd turn it in. But because I can't devote my whole entire class to a homework session, he doesn't finish it outside of class."

(TE 375).

28. At the time of the 2015 evaluation, the student's achievement in reading was low average.

██████████ found the student tested at the 16th percentile in basic reading (J. 124). He was average in reading comprehension, low average in word reading. (J 127).

29. At the time of the 2015 evaluation, the student's achievement in math was below average.

██████████ found the student tested at the 8th percentile in mathematics and at the 6th percentile in math fluency. (J. 124). He was low average in numerical operations and below average in math problem-solving, pseudo-word decoding and math fluency for addition, subtraction and multiplication. (J 127).

30. Response to Intervention is not working.

The student has been receiving RTI his entire educational life. Becky Nixon, the DoSE director, explained how RTI relates to eligibility for special education services:

[I]f a student is referred for special education and the ARC decides to move forward with an evaluation....they also look at the RTI data to see... if they are making progress at a sufficient rate with same-age peers.....If they are, they are not eligible..... And...if along that way they are not making progress, then an appropriate response would be thatyou intensify the instruction and the frequency of it, and... you keep intensifying the frequency and the instruction....But regardless, at the end, when you look at eligibility, if they're making progress, then they are not deemed eligible."

(TE 417-418). She further testified as follows:

Q. [I]s there a policy... about how long they are in RTI before they should be referred?
A. No, there's no policy....[I]t just looks at the rate of progress that the student is making and whether it's sufficient.

(TE 420). Regarding what is "sufficient," she further testified as follows:

Q. [H]ow would you measure sufficient progress? What does that mean?
A. [O]ur Math 180 program....those standards within that program, that software, and it provides them instruction and then it will give them a test....[A]s long as they're comprehending and they're making growth and their score is increasing, then that tells them that as long as they continue to provide that intervention, that They're making growth towards those grade level standards.

(TE 432). Nixon testified the student was responding to RTI because he's a "star" in the Math 180 (an RTI class) and "

he's flying through the software, so the software program is leveled so once they master that program then they go up to a different level. So the fact that he said he's flying through the software program and doing well is that he's going through all those levels and he is increasing.... [T]his is one piece of the pie."

(TE 423-424). However, the teacher of Math 180 testified that it is not necessary to master the material in order to move forward:

Q. And on the computer, they can't move forward with a concept until they've mastered the one before, correct/
A. No, they can move forward.
Q. Even without mastery of the other one?

A. Yes.

Q. Okay. Does it not build upon itself?

A. It does a little bit, but they don't have to have shown mastery to actually – they just have to have completed the tasks and whatever level they complete that task at, then they're done with that and they move on to the next lesson.

(TE 569-570).

RIT “growth” apparently is given a lot of weight in determining whether progress is being made. Nixon testified that the student’s fall RIT was 197, then 207 in the spring, showing growth.

Q. And that pattern continues, if you look at the rest of the years, right?

A. Correct.

Q. So that RIT growth number tells us the way his scores have gone up or gone down over the course of a year., right?

A. Correct.

Q. Each year from fall through spring [his] scores went up, did they not.

A. They did.

Q. For math, correct?

A. Correct.

Q. The exception is spring of 2012...”

A. Correct.

Q. In reading, [his] scores also went up every year, if you look at the RIT growth number, except for spring, 2016?

A. Correct.

Q. But even though they did down, his scores in fall '16 and winter '17 were substantially higher, were they not?

A. Correct.

Q. His scores also, the number themselves, have gone up, correct.?

A. Correct.

Q. That's an indication of growth, is it not?

A. Yes.

(TE 486-488). She further testified that if RIT scores are going up, “they’re learning. They’re learning those grade level standards.” (TE 491-492).

When asked how it could be true that the student is making progress in RTI when, for many years his MAP scores have been in low percentiles in math, Nixon said

this is only one data point. This is only looking at MAP.... [W]e also use teacher recommendation. Because if a student doesn't take the full amount of time – NWEA

doesn't recommend anything less than 60 minutes. ...[The student] has not taken near that amount of time.

(TE 427). Regarding the student's drop to 7th percentile in math in 7th grade in Stanford testing, she testified that it's just one data point. (TE 429).

There was a lot of testimony about increases in MAP scores as well. MAP tests measure what information the student knows from the curriculum. (TE 257) and plays a role in determining whether RTI is working. However, students with low scores are permitted to retake it:

Sometimes if, for example, a student rushes through and clicks – gets through the test very quickly, we may have them retake it. Or if we see – not me specifically. If the teachers see a dramatic drop in the score from, say, from fall to winter, they may have the student retake it....

Q. ...[S]o [a MAP test] can be retaken?

A. It can.

(TE 255).

As the parent stated, “[H]e’s scoring 88 percentile [in MAP testing] and he’s reading at a fourth grade level, according to the testing....It doesn’t make sense.” (TE 94). The student is entering 9th grade reading on a 4th grade level, the same as he was at the beginning of 7th grade. (See P 133-134). As a parent testified, “I’ve got a 14-year-old son that can’t make change for a dollar.” (TE 208).

31. The student’s alleged lack of effort is substantially attributable to his disabilities.

The parents admitted that the student sometimes is lazy. Teachers, to some degree, attributed the student’s failure to learn to lack of effort, as evidenced by rushing through tests. The Scholastic Reading Inventory measures reading fluency and reading comprehension and is administered on a computer. (TE 259). The student’s teacher testified as follows regarding low scores on that test (see P 133):

Q. [The 7th grade Scholastic Inventory] percentile score is the lowest that it's been in [the student's] history, correct?

A. Yes. But I'm going to have to clarify. On both of those tests, I observed him both times, he was the first child finished on both occasions. And he finished way before any other students. I kind of wonder about the effort level there.

....

Q. Have you ever seen that before? That he rushes through things and he doesn't -

A. Sometimes, yes.

....

Q. [O]n this test he just rushed through it and didn't focus?

A. He did. He was the first one done by several - a good 10, 15 minutes.

(TE 262-263).

The school also attributes the student's failures to a bad attitude. His teacher testified as follows:

[T]here's a few times he's gotten an attitude with me, which I found very shocking because we have a good relationship, I feel. Just telling me he doesn't have to do certain things. He's made statements. I commented on - I said...you have a low D in language arts, don't you want to get that grade up? No. Why don't you? Can I help you with something? No. And he made a comment, he said, my mom knows that it's not my fault that I get bad grades. So he's made comments like that. And it doesn't matter, I don't have to do the work. As long as I - he said - as long as I get a D, I'm fine.

(TE 285). This same teacher, who also testified that she did not observe signs of dyslexia, dysgraphia, or working memory issues (TE 298), stated as follows:

Q. You testified that [the student] just doesn't want to do the work sometimes?

A. Every once in a while, yes.

Q. Okay. Is there any possibility that he's struggling in those areas and that's why he doesn't want to do the work?

A. As a teacher with 11 years experience, you pick up on when it's not. And when they're offered help and when they're offered assistance and things are broken down, and they still don't want to do it, that's different.

(TE 297-298).

The hearing officer believes that the more plausible explanation for the apparent lack of effort and attitude is frustration resulting from the student's disabilities. The parent testified:

It's been a struggle with him emotionally because this year he has got to the point where he – earlier in the year he started using ways to get out of class because he wasn't aware of...what was going on....[I]f he feels like I can't do this or there's something that I don't understand, his way out is...get out of the room.

....

That was early on in the year. Now in the year, I'm having issues where he doesn't turn in the work, and makes it known that he's not going to do the work. And it's defiance because he's ...at his wits' end,....He's told me he's frustrated. He's frustrated because he feels like all this time he... hasn't known what to do. And I think he looks to me for answers and I don't know how to help him anymore than I've helped him.

....

[I]f something just triggers that in one of the classes...and he's got an assignment due and where is your assignment...? Well, I ripped it up and threw it in the trash.... Not only did I rip it up and threw it in the trash, but I'm not going to do anything for the rest of the year. So how I found out about this is the teacher e-mailed me and he told me what happened.

(TE 100-102). The parent further testified as follows in response to the school's theory that it is the student is not learning because he's not making the effort:

Q. You would agree with me that [the student's] effort is not always very consistent, is it?

A. No, I would agree with that. It's not consistent. And that's one of his problems, he's not consistent. And that's been brought up many times.

Q. So that might be one possible explanation for how one term he might get Ds and Fs and the next might get Bs, right?

A.[I]t's not just [the student's] efforts. And I think the grading in the MAP testing will show that. The data shows that. So where you can say that he wasn't turning in an assignment – the other data isn't assignments, it's what they've learned to this point.... I think inconsistency is an issue....I think some of [the student's] issue with his diagnosis of dyslexia and dysgraphia and working memory deficit is part of the inconsistency.

(TE 142-143).

32. Though found eligible in written expression, the student was not taught how to type.

The 2015 IEP has a goal that student will use word processor completely independently to edit his work, but the student has not been taught how to type. The student was provided “chromebook,” a program called Read and Write, with editing capabilities and verbal dictation after the March 2017 ARC meeting. (TE 230). His eighth grade teacher testified that

‘[t]here were attempts to show him the technology. Until very recently he had no interest in it. He indicated, I know how to type, I'm not doing that...

....

Q. Has he been given any direct instruction on typing?

A. yes, he has. By me. Uh-huh.

Q. How long did you teach him how to type?

A. Not formal the old school where ... you had to do your hands in a certain position, but showing him the program. He actually has a program where he can verbally, dictate and he's been show that and I've worked with him on that several times. But physically, like, going in and typing, no, I'm not a typing teacher....It encourages independence. It allows him to edit. It gives him the opportunity if he wants to use it.

(TE 227-228). The parent testified that the student still types with two fingers and was not provided a word processor until spring of 2017 (TE 75).

33. In addition to finding eligibility under written expression, the 2015 evaluation should have found the student eligible under OHI due to ADHD and Working Memory Deficits.

The school concedes the student has SLD and qualifies for special education in Written Expression, but did not find him eligible under OHI. While Working Memory Deficit is not a listed disability, it would fall under OHI. Ashley Smith, the school psychologist, testified the student was not eligible in OHI because

[w]hen we looked across all the data, he does have a diagnosis of ADHD, but the committee felt that...the adverse effect was not related to that, all the data saying that he was doing better on task and he was turning in assignments, and based on observations and teacher input, that was not the contributing factor to his struggles.

(TE 533). It is not disputed that the student has been diagnosed with ADHD since 2010.

██████████'s report so states and the 2015 evaluation so finds. H██████████'s 2010 evaluation found weaknesses in working memory. (P 19). ██████████ found the student's working memory was "extremely low" at 2 % (J 120, 134). ██████████'s report states:

Several studies were conducted with regards to low working memory. Compared to classmates with typical working memory skills, children with low working memory forget instructions and struggle to complete tasks or were slower involving simultaneous processing and storage. They often lose track of their place on more difficult tasks. They may lose their place in tasks involving multiple steps and they often move towards

strategies with lower processing requirements resulting in inefficiency. This may be at least one cause of poor academic performance.

(J. 136). The student's known track record of disorganization is consistent with working memory deficits affecting executive function, which in turn was affecting the student's success in school generally and in math particularly. There was extensive testimony by teachers and parents both that the student did not turn in work.

Though not finding him disabled, even the school's 2014 evaluation recognized that the student's working memory deficit could affect the student's reading and writing. Quoting from the school's report at J111:

Working Memory involves short-term use of memory and attention. [The student's] index score is lower, at a clinically significant level, on Working Memory, than his standard scores on all of the other WISC-IV indices measured, indicating he demonstrated a significant amount of difficulty with accessing short-term memory and manipulating auditory information, during this testing session. Working Memory is the active piece of the memory system. As information comes in, it is processed and stored simultaneously (like mental juggling). A child uses this skill when doing math calculations or listening to a story. For example, the student needs to hold onto numbers while working with them, or needs to remember the sequence of events while processing what the story is about.

(emphasis added).

Though not finding him disabled in OHI, the school did, in the 2015 IEP, include "agenda checks." His eighth grade teacher testified that "[the student] told me he was photographing the teacher's agendas.... We also have a Remind program which parents sign up for to get reminders about upcoming assignments." (TE 239). The parent testified that the school gives the student a written rubric, but

it's a page of a lot of writing and I don't see [the student] reading something like that. Where it's a model of...the steps that you do. And I know that they've tried to work with him with that, but...it's a lot of information on one piece of paper and I don't think that he's able to get it like that.

(TE 78). The parent testified that

we tried to get him to use a planner...for assignments – writing down assignments, but...he doesn't write very well and he doesn't take notes at all, so that didn't happen.....[Ms. Hack] does check in with him as far as...do you need any help with this.

(TE 77). Parents did not notice improvement in organization (TE 75, 79) and reported the problem at the beginning of 8th grade (TE 108-109). The parents did not receive progress reports on the IEP because the student could not be relied upon to bring them home (TE 78). After last ARC meeting, the school started giving IEP progress reports to the student's sister because she could be relied upon to get them to mom. (TE 108-109).

34. In addition to written expression, the 2015 school evaluation should have found the student eligible for services related to math calculation and reading.

██████████ found the student tested at the 8th percentile in mathematics and at the 6th percentile in math fluency. (J. 124). He was low average in numerical operations and below average in math problem-solving, pseudo-word decoding and math fluency for addition, subtraction and multiplication. (J 127). Elsewhere hereinabove, testimony is quoted explaining how working memory deficits can impair a student's ability to perform math calculations involving multiple steps.

By 7th grade, the student's Stanford Ranking in math had dropped to 7% (from 22% the year before). It appears that the student's problem is math calculation rather than understanding math concepts, and the descriptions given by his math teachers correspond with the problems students with attention problems and memory deficits have of losing track or becoming confused during multiple-step processes. Angie Boerger, the student's regular math teacher in both 7th and 8th grade (TE 333) testified that she knows he gets the concepts because during class discussion

he's one of the first to raise his hand to answer questions and demonstrates knowledge of the concepts being taught.(TE 351). However, she testified that the student usually rushes through quizzes and tests and often fails to check his work (TE 384). She said the student does not show his calculations:

Q. [S]o if he's not showing his work, you don't know if he's not knowing how to calculate.

A. Correct. Because if you go back and look at some of his work, he might make a math error or something like that. And then can't go back and check his work before he goes to turn it in because he doesn't know what he does.

(TE 350). She testified that the student's low grades are caused by repeated small mistakes caused by rushing, rather than problems understanding math concepts. (TE 384). Similarly, Brad Ernst, the student's math intervention teacher in 7th and 8th grade, testified that the student had inconsistent effort and took less time on assessments than other students.

The student's testing scores are not as bad in reading as in math. [REDACTED] found the student tested at the 16th percentile in basic reading (J. 124). He was average in reading comprehension, low average in word reading. (J 127). However, this student with an average I.Q. is entering ninth grade reading on a 4th grade level. See P 133-134.

The disabilities the student seem causally connected to the problems he has had with reading and math, and therefore are having an adverse effect on his education.

37. The student would benefit from many of the recommendations in [REDACTED]'s report, which recommendations include special education services.

[REDACTED] lists a number of recommendations in his report on J137-139. Some of those clearly are more than accommodations and rise to the level of special education services.

38. There is no factual basis to support a request for reimbursement of tutoring or the [REDACTED] evaluation.

The parents paid for tutoring before the student entered middle school (outside the limitation period for this case) and, regardless, was discontinued because it didn't help the student. (TE 110). The parents never asked for reimbursement for tutoring prior to the hearing. (TE 111). The parents did not ask the school for an independent evaluation, which would have been their right, before hiring [REDACTED] to do his evaluation. (TE 112).

CONCLUSIONS OF LAW

Under *Schaffer v. Weast*, 546 US 49, 62 (2005), the student bears the burden of to prove entitlement to relief by a preponderance of the evidence. The School's FAPE obligations are set forth in *Board of Education of Fayette County v. L.M.*, 478 F.3d 307, 314 (6th Cir. 2007):

Under the IDEA, the School is required to provide a basic floor of educational opportunity consisting "of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Rowley*, 458 U.S. at 201, 102 S.Ct. 3034. There is no additional requirement, however, "that the services so provided be sufficient to *maximize* each child's potential commensurate with the opportunity provided other children." *Id.* at 198, 102 S.Ct. 3034.

(emphasis in *L.M.*)

1. Claims prior to October 7, 2013 are barred.

Student filed an action for a due process hearing on October 7, 2016. At a point in these proceedings, in response to a motion in limine, student argued for a finding that the three-year statute of limitations should not apply because alleged violations were ongoing. This argument was renewed in the student's post-hearing brief.

KRS 157.224(6) provides that claims must be brought within three years of the date the parent or eligible student "knew about the alleged action that forms the basis for the complaint unless a longer period is reasonable because the violation is continuing." There is no case law interpreting this provision of the statute. There is, however, case law on the continuing violation

doctrine, an equitable doctrine sometimes applied in other types of cases to “bootstrap” claims outside an applicable limitation period. *Waltman v. International Paper Co.*, 875 F.2d 468, 475 (5th Cir.1989), applying the doctrine in an employment case, identifies as factors the identical nature of the acts, the frequency with which they are repeated, and, most importantly, whether the acts

should trigger an employee's awareness and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected....

The parent knew the student was not being provided special education services prior to 2013 and knew or should have known this circumstance would continue to exist. It was incumbent upon the parent to assert the student’s rights.

Regardless, it is not reasonable to interpret a failure to find a child in need of special education or failure to provide FAPE as *per se* a “continuing” violation simply because it continues to exist. Such an interpretation would render time limitations meaningless in almost all cases. There is nothing unique in the circumstances of this case that makes it reasonable to extend the period limitations. Nor are there alleged or present circumstances of fraud or procedural irregularities that could make the three-year period inapplicable under other provisions of the statute.

2. There was no violation of Child-Find prior to the 2015 evaluation.

To prove a violation of Child-Find, the student must show that (1) the school overlooked clear signs of disability and were negligent in failing to order testing, or (2) that there was no rational justification for not deciding to evaluate. *Board of Education of Fayette County v. L.M.*, 478 F.3d 307 (6th Cir. 2007). *L.J. by and through Hudson v. Pittsburg Unified School District*, 850 F.3d 996 (9th Cir. 2017) holds that under the “snapshot rule,” the appropriateness of a

student's eligibility for Individuals with Disabilities Education Act (IDEA) benefits should be assessed in terms of its appropriateness at the time of the student's evaluation and not from the perspective of a later time with the benefit of hindsight.

Under the findings of fact hereinabove, the requirements for a Child-Find violation were not proved. It was only after ██████████'s report was presented to the school that the school had information sufficient to meet either of the two tests articulated in *L.M.*

3. The November 2015 IEP failed to provide FAPE.

Marshall Joint Sch. Dist. No. 2 v. C.D., 616 F.3d 632, 635 (7th Cir. 2010), cited by Respondent, holds that to qualify as a "child with a disability" the student must have one of the disabilities listed in the statute and show that it had an adverse effect on the child's educational performance. 707 KAR 1:1002 Section 1(9). In Kentucky, adverse effect exists when "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).

The diagnoses and academic achievement scores from ██████████'s report, together with other data, should have put the school on notice that the student had the disabilities that ██████████ identified. Regarding "adverse effect," the achievement scores in ██████████'s test, together with other data the school already had in November of 2105, that the disabilities were having an adverse effect on this child's educational performance. The data as a whole, in light of the student's admitted average intelligence, show that the student's progress was significantly and consistently below the level of similar age peers as indicated in the fact findings elsewhere in this opinion. While the school did find the test was met with regard to special learning disability (which should have included both dyslexia and dysgraphia), it should also have so found with regard to OHI due to ADHD and working memory deficit.

Marshall also requires that if disability and adverse effect are found, there also must be a need for special education services. Respondent argues that the student just needs accommodation, not specially-designed instruction, although the school found the student eligible in written expression and is providing specially-designed instruction in that area at least. 34 C.F.R. §300.39 (3), as well as applicable Kentucky regulations defined specially-designed instruction as

adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction— (i) To address the unique needs of the child that result from the child’s disability; and (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

L.J., cited hereinabove, holds that methods and services not used with all students constitute specially-designed education. The recommendations in [REDACTED]’s report, and the student’s current IEP, includes measures not offered to all students generally that would constitute specially-designed instruction.

The student’s 2015 IEP should have included specialized instruction for math calculation and reading. It also should have clearly provided for teaching the student to type, not just use voice recognition software to create text he could edit with his two-fingered typing.

4. The student is not entitled to the costs requested at the hearing and alluded to in the due process complaint.

Per the fact findings, there is no factual basis to support such a request.

5. The hearing officer lacks authority to award attorney fees.

6. The student’s IEP should be modified to provide special education services for reading, math calculation, and written expression, reasonably taking into account the recommendations of [REDACTED] and all of the diagnosed disabilities found by [REDACTED].

The hearing officer does not find that all [REDACTED]'s recommendations should be followed, or that an outside consultant on Orton-Gillingham, or instruction using that method necessarily, is required, or that any particular program mentioned in the recommendations, such as Cogmed, be utilized. However, [REDACTED]'s findings and recommendations should be reasonably taken into account, along with the fact-findings herein, when the ARC modifies the IEP.

7. Petitioner failed to prove entitlement to compensatory education, except for instruction for typing.

Reid ex rel. Reid v. District of Columbia, 401 F.3d 516, 524 (D.C. 2005). rejects an hour-for hour “cookie-cutter” approach to fashioning compensatory education, instead holding that

[i]n every case ... the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.

In the present case, there is a period from November of 2015 to the present during which the student was provided special education, but not all services to which he was entitled.

The hearing officer finds that the 2015 IEP should have included typing instruction, and providing such instruction will remediate that educational deficiency. However, in all other respects there is no factual basis, not even speculation by an expert, for assessing (1) what educational benefits likely would have accrued during that two-year period from the additional special education services that will be provided in a modified IEP yet to be created by the ARC, or (2) whether any educational services *in addition* to those that will be provided in the modified IEP, are necessary to provide such “lost” benefits.

ORDER

The hearing officer orders the matter remanded to the ARC for action in conformity with the findings of fact and conclusions of law herein.

NOTICE

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 at Office of Legal Services, 300 Sower Blvd., 5th floor, Frankfort KY 40601. The appeal shall be perfected by sending, by certified mail, to the Kentucky Department of Education, a request for appeal within thirty (30) calendar days of date of the hearing officer's decision.

Dated September 25, 2017.



MIKE WILSON, HEARING OFFICER

CERTIFICATION:

A copy of the foregoing was mailed to the following on September 25, 2017, to Claire Parsons, Adams, Stepner, Woltermann & Dusing, 40 West Pike Street, Covington, Ky. 41011, and Marianne S. Chevalier, 2216 Dixie Highway, Suite 200, Ft. Mitchell, Kentucky 41017, and the original to Hon. Todd Allen, Kentucky Department of Education, 300 Sower Blvd., 5th floor, Frankfort KY 40601.



MIKE WILSON, HEARING OFFICER