

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

J.B.

PETITIONER

VS.

KENTON COUNTY SCHOOLS

RESPONDENT

**DUE PROCESS HEARING OFFICER'S
DECISION AND ORDER**

This Due Process Hearing was requested by letter filed with the Kentucky Department of Education (KDE) by Counsel for the Petitioner on August 23, 2016 pursuant to the Individuals with Disabilities Act (IDEA), (*20 U.S.C. § 1400, et. Seq.*) The Parties reached a partial resolution of some issues on or about October 27, 2017, which resulted in a resolution dismissing all claims prior to December 7, 2015.

This matter heard over three days, namely January 16, 17 and 18, 2018. Additionally, the Petitioner and Respondent submitted sequential briefs and the Petitioner a Reply Brief.

ABBREVIATIONS OR ANACRONYMS

Acronyms or abbreviations include ARC (Admission and Release Committee) Children's Hospital (Refers to Cincinnati Children's Hospital), IDEA (Individuals with Disabilities in Education Act), J.E. (Joint Exhibit and Respondent's Exhibits), Kentucky

Department of Education), KAR (Kentucky Administrative Regulations), CFR (Combined Federal Regulations) FAPE (Free and Appropriate Education) T.T. (Trial or Hearing Transcript), the Student in this matter will be referenced as the Student, Petitioner and/or Student/Petitioner. The School District will be referenced as the District, the Respondent and/or the Respondent School District.

BURDEN OF PROOF

As this Due Process Hearing is an administrative proceeding in Kentucky, there are two guides for who has the burden of proof. As the party seeking relief, Student Petitioner bears the burden of proving her entitlement to relief by a preponderance of the evidence. ***Schaffer v. Weast***, 546 U.S. 49, 62 (2005). The Supreme Court in ***Schaffer*** ruled that the party seeking relief has the burden of proof and thus the burden of persuasion as the party seeking relief. see also ***City of Louisville, Div. of Fire v. Fire Serv. Managers Ass'n by & Through Kaelin***, 212 S.W.3d 89, 95 (Ky. 2006) Citing ***KRS 13B.090(7)***—" 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". See also- ***McManus v. Ky. Ret. Sys.***, 124 S.W.3d 454, 458 (Ky. App. 2003) (citing ***KRS 13B.090 (7)***). In this situation, the Student/Petitioner is the party requesting action or seeking a benefit.

ISSUES

- I. Did the Respondent School District failed to properly determine the Petitioner's eligibility for special education and related services from December 7, 2015 until the present time in violation of ***707 KAR 1:310?***

- II. Did the Respondent School District comply with the Child Find requirements set forth in **707 KAR 1:300** from December 7, 2015 until the present time?
- III. Did the Respondent School District failed to create and implement an appropriate IEP for the Petitioner in violation of **707 KAR 1:320** from December 7, 2015 until the present time?
- IV. Did the Respondent School District failed to provide the Petitioner with a “Free Appropriate Public Education” (FAPE) in violation of **707 KAR 1:290** from December 7, 2015 until the present time?

FINDINGS OF FACT

1. Counsel on behalf of the Student Petitioner filed this Due Process Hearing Request which was received by the Kentucky Department of Education on August 23, 2016.
2. The Parties reached a partial resolution of some of the issues on or about 10/27/2017, which resulted in dismissing all claims prior to December 7, 2015.
3. On December 7, 2015, the Student/Petitioner was half way through her sixth-grade year. (1/16/18; T.T. p. 30-32; J.E.#2; p. 15-16, 18, 22)
4. This matter was heard over three days—January 16, 17 and 18, 2018.
5. The Student is a thirteen-year-old, eighth grade middle school student in the Respondent School District. (J.E#2 at J.002; 1/16/18; T.T. p. 53)
6. The Student was diagnosed with cerebral palsy, monofixation syndrome, secondary exotropia, microcephaly, myopic astigmatism and abnormal involuntary movements at the age of nine months. (1/16/2018; T.T. p. 10)

7. The Student has been diagnosed with epilepsy and had seizures in February 2016 and September 2017. (1/18/2017; T.T., p. 14) One of these seizures was in the 2017 evaluation performed by the Respondent School District, discussed herein. The Student's parents have never requested that epilepsy be added to a proposed IEP. The Student/Petitioner has never had a seizure at school. (1/16/2018; T.T. p. 200)
8. Petitioner has never asked for an accommodation or submitted educational recommendations regarding the Student's seizures. (1/16/2018; T.T. p. 201)
9. Student has received occupational, physical, and speech therapy at Cincinnati Children's Hospital continually since childhood. (1/16/2018; T.T., p. 11-13)
10. The Student attended First Steps up until the time she began preschool with the District. (1/16/2018; T.T., p. 14-15) At First Steps, she received speech and language, occupational therapy and physical therapy. (J.E. #28; p. J.088)
11. The Student's parents have unilaterally provided her with private tutoring after school and during the summers without the consultation with the Respondent at an estimated cost of \$2,000.00 (1/16/2018; T.T., p. 20-21) No exhibit documents were presented at the hearing to verify these expenses or identify when or on precisely what service they were incurred to obtain.
12. The Student was served by an Individual Education Plan ("IEP") from preschool until second grade, which provided for occupational therapy, physical therapy and assistance with reading. (1/16/2018; T.T., p. 15) This IEP was based on a finding by the ARC that the Student was developmentally delayed.
13. Student has been served by a 504 plan from third grade until the present time. (1/16/2018; TT., p. 30)

14. Different accommodations have been attempted and changed according to their effectiveness since the initial implementation of the 504 plan. (1/16/2018; T.T., p. 48)
15. The Student/Petitioner's 504 accommodations included a reader in fourth and fifth grade. (1/16/2018; T.T., p. 17-20; P027, P022, P005)
16. Per the Student's 504 plan, she can to turn in homework and class assignments up to one day after the assignment is due for the rest of the students in the class. (1/16/2018; T.T. p.78)
17. The Student/Petitioner can the use of the elevator to navigate the school building. (1/16/2018; T.T., p. 52)
18. The Student/Petitioner is taking Math 180 and Read 180. Math 180 is a program that has been at her Middle School for three years. Math 180 is an intervention class designed for students who score below a certain level on the MAP test. It is designed to help students with basic skills and help them prepare to be algebra ready when they enter high school. Math 180 and Reading 180 are not special education classes. (01/18/2018; T.T.-p.5-6, 42)
19. The Petitioner was in Math 180 course one in sixth grade and was in Math 180 course two in eighth grade. (01/18/2018; T.T. p. 7-8)
20. The Petitioner's grade average was about the same as the class grade average in Math 180. (01/18/2018; T.T. p. 18-19; J.E. #18; p. 049).
21. SMI stood for Scholastic Math Inventory. It now called the MI or Math Inventory. The Petitioner's fall SMI was 195 and her spring was SMI was 720. (J.E. #18, p. 53 & 01/18/2018; T.T. p. 33-35)

22. The Children's Hospital report was not provided to all the members of the ARC for review. (01/18/2018; T.T. p. 60-62)
21. The Student's current 504 gives her access to an iPad. The iPad is supposed to help the Student complete assignments, review documents, and take notes and pictures. Her 504 plan also included training on the iPad and with its applications. (1/16/2018; T.T., p. 18-19; 31 & J.E.#28 p. J098)
22. Shelley Swift, the speech language pathologist met with the Student on two separate occasions in January and February, 2017 to train her how to use the iPad. On both occasions, she confirmed that Petitioner was able to use the apps installed on the iPad to complete her assignments and otherwise support her education. The Student however, advised Ms. Swift that, though she knew how to use her iPad, she simply preferred not to use it. (1/17/18; T.T. pp. 157-167)
23. Under the Student/Petitioner's 504 Plan, she can turn in homework and class assignments up to one day after the assignment is due for the rest of the students in the class. (1/16/2018; T.T., p. 78)
24. On December 7, 2015, the Respondent convened a meeting to discuss an "Initial Evaluation Report" entered as Joint Exhibit 2. (J.E. 2; p. J002-J023). The ARC Planning Date was 09/14/2015 and the Eligibility Determination Date was 12/07/2015.
25. Within the first page of the "Initial Evaluation Report", under "areas of suspected disability it gives "SLD reading, OHI. (J.E. #2 p. J.002)
26. On page 3 of the "Initial Evaluation Report", it notes that the Student was screened for Vision on 10/0/2015, Hearing, and Motor on 11/09/2015 and

passed all three screenings. It also notes that the Student was previously evaluated for special education on 01/01/2013 suspected disability of SLD. (J.E. # 2 at J.004)

27. The school psychologist's portion of the evaluation found deficits in the Student's working memory and processing speed and that her cognitive skills to be in the borderline to average range, but her academic skills to in the average range. (J.E.#52; p. 215-221)
28. The occupational therapy assessment was conducted, and although deficits were noted in visual memory, processing, and coordination, the therapist recommended accommodations to support the Student in the classroom (J.E. # 52; p. J215-216)
27. On page 5 of the "Initial Evaluation Report", at the top of the page under "Document Parent Concerns and Input", it states "Guardian noted that her concerns are regarding how (student name) cerebral palsy and her vision disability impacting her educational progress". (J.E. # 2, p. J.006)
28. It was the conclusion of members of the ARC on 12/14/2015) with the exception of the Student's Parents that the Student did not qualify for special education services under IDEA. (J.E. # 2; p. J 022)
29. The ARC (12/14/2015) found that the Student did not have a disability which would require 'specially design instruction" under IDEA. It found that the Student was progressing at a sufficient rate without specially designed instruction (J.E. #2; p. J017) It was further noted that the Student's academic skills were in the average range, her test scores were in the average range and her grades were passing or better.
30. The Student has a 504 Student Accommodation Plan. The Plan with the handwritten date of 12-08-2015 noted 14 Accommodations. (J.E. #3; p. J023)

31. Within the Section 504 Evaluation Summary with the Meeting Date of 12/08/2015, under Comments it said—“name of the student” is diagnosed with cerebral palsy, monofixation syndrome, secondary exotropia, intermittent, microcephaly, myopic astigmatism and abnormal involuntary movements. (J.E. #4 p. J 025)
32. On the last page of the Section 504 Evaluation Summary under Special Instructional Considerations it said: “As a result of “name of student’s “health consideration, special instructional considerations must be made due to slow processing speed, decreased working memory, decreased perceptual reasoning, and her right hemiparesis. These difficulties impact her ability to write more than a paragraph effectively, carrying her supplies easily from one place to another, traveling in the hallways especially stairs, her ability to perform reading and writing tasks in a timely manner and needing more frequent restroom breaks.” (J.E.#4; p. J027)
33. Hemiparesis is defined as muscular weakness or partial paralysis restricted to one side of the body. <https://www.merriam-webster.com/medical/hemiparesis>
34. The Student/Petitioner has passed every grade with satisfactory grades. (01/17/2018; T.T. p. 96)
35. The Student Petitioner’s full-scale IQ score in 2015 was 76 and her verbal comprehension score was 103. (T.T. 136-01/16/2018; J.E. #23 p. 071)
36. On December 7, 2015 the Respondent convened an ARC at the request of the Student’s parents. The ARC again determined that the Student was ineligible for an IEP and was being properly served by her 504 Plan. The Notes from the

meeting reflect that Student's parents agreed with this determination.

(1/16/2018; T.T., p. 30-32; J15-16, 18, 22)

37. The Student/Petitioner's MAP scores at the time of the December 2015 eligibility decision was seventeenth percentile (17%ile) on reading standardized assessment, at the third percentile (3%ile) in Language usage. The Student/Petitioner's math score was in the forty-third percentile (43%tile) in the fall of 2015, but in the winter of 2014, she scored in the twenty-third (23%ile) and Spring of 2015) twenty-first (21%ile) s. (J.E. #52, p. 217)
38. Ms. Suzanne Due the Respondent's Occupational Therapist testified that the Petitioner had difficulties taking notes when teachers turned out the lights.
(01/17/2018; T.T. p. 120-121)
39. The occupational therapy assessment was conducted; deficits were noted in visual memory, processing, and coordination. It was recommended that the Student be given accommodation for the classroom. (J.E. #52; p. 215-216)
40. An assistive technology assessment (for the Integrated Assessment Report of 11/16/2015) was made and it was recommended that the Student/Petitioner use an iPad in the classroom with apps designed to address some of the visual deficits that had been identified in the occupational therapy assessment. (J.E. #52; p J.216)
41. The Student utilizes an iPad pursuant to the 504 plan. Testimony was disputed about how well she can use it. She was to use the iPad to complete assignments, review documents and take notes and pictures. (1/16/18; T.T. p.18-19, 31 & J.E. #28; J098)
42. Within the Student's Integrated Assessment Report of 11/16/2015, she scored in the single digit and below percentiles in every subtest but sequencing. Her standard

score for the VMI was 61. The average range for the Standard Scores should fall between 85 and 115. (J.E. #52; p. J 215; T.T. 01/07/2018 p. 135-130)

43. The Committee considered the Student's qualifications under both OHI and SLD, based on the Evaluation Report completed in November, 2015 and other academic data. (1/17/2018; T.T. p. 260)
44. The ARC also found that the Student did not have a specific learning disability in any area and that she was progressing at a sufficient rate without specially designed instruction. (J.E.#2; p. J017) In particular, the ARC noted that all of Student's academic skills were in the average range, her test scores were in the average range and her grades were passing.
45. The Student was re-evaluated at Cincinnati Children's Hospital based upon information gathered on August 2, 2016, October 26, 2016 and November 10, 2016. A "Confidential Neuropsychological Report" was issued on or about November 23, 2016. (J.E. # 23; p. J060-074)
46. On pages 3-5 of the Report from Children's Hospital had the Student's "Test Results". Her performance on the Wechsler Intelligence Scales for Children ranged from Moderately Impaired to Average. She performed in the Average range on subtests of language skills. She performed in the Borderline Impaired range of nonverbal reasoning and in the Moderately Impaired range on subtests involving visual spatial skills. Brief attention and working memory and processing speed were Borderline Impaired. (J.E. #23, p. J.063)
47. Within the Children's Hospital Report, at "Academic Skills" it states "Word reading and sounding out nonsense words ranged from Low Average to Average. Rote math was Average. (J.E. # 23, p. J.063)

48. The Children's Hospital Report notes on page 6 of 15: "She had a harder time working with visual materials-knowing how to make pieces of things work together, forming letters and numbers, and scanning and finding things efficiently. She has difficulty finding things efficiently. She has difficulty discriminating one similar shape from another. In between her motor control over her eyes when scanning and her difficulty appreciating what it is that she is seeing, when she scans written and drawn materials she misses things and loses her place. She has a hard time keeping what she sees in mind long enough to write it down. (J.E. #23; p J.065)
49. On page 7 of 8 of the report from Cincinnati Children's Hospital, it says: "As you can see ("Student's name") has strong verbal skills, but experiences significant barriers to her ability to apply her knowledge to make things happen. Because of this split between how well she can articulate her thoughts and her ability to make things happen, ("Student's name") is likely to present herself as more competent on the surface than she is able to actually follow through independently." (J#25 at J066; T.T. 1/16/18; p. 61)
50. The report from Children's Hospital did not include any of Student's MAP scores or grades. This report did not reference any information from the Student's performance in the classroom. This report did not cite any information from the Student's teachers and other education providers. ((1/18/2018; T.T., p. 53 & 69)
51. The Children's Hospital evaluation from 2016, recommended direct instruction in keyboarding, predictive text or speech software, instruction in the use of technology. They were to be embedded in the day to day school activities, learning strategies that emphasize deeper levels of thinking, multisensory experiences, the use of visually simplified materials with high visual contrast, one-on-one math instruction,

breaking down, providing the Student with contextual information, in the use of strategies that provide a structured approach to building comprehension, models, rubrics, checklists, copies of teacher notes, an organizational system and breaking assignments down into steps. (J.E. # 23, p. 060)

52. The Student/Petitioner's 2016-2017 Report Card for the 7th Grade indicated that indicated she made A's and B's in most of her classes. The only exception being a D+ or 69 for Term 1 Mathematics 7, C's for her midterm grades in math and a Term 3 grade of C in Social Studies. (J.E. #47; p. J179)

53. The Student/Petitioner's grades for the first term of the 2017-2018 School Year when she was in 8th Grade in six classes were A's and B's with C/76 in Mathematics and D-/60 in Social Studies. (J.E. # 44, p. J177)

54. The Student Petitioner was evaluated by the Respondent School District in the area of vision. Within that evaluation, she performed slightly below her performance in 2015. (J.E. # 28, p. J088-J105; 1/17/18; T.T. p. 135-136)

55. During the ARC meeting of 01/11/2017, on page 1 of the Conference Summary Report at "Document Parent Concerns and Input, --"Parent is concerned about ____ and feels that she needs an IEP in order to make educational progress. On page 3 (J084) "The area of suspected disability was to be OHI". (J#28, p. J082-J087)

56. During the ARC Meeting of 1/11/2017, a form titled "Consent to evaluate/Reevaluate" was filled out and signed by Petitioner's Mother. There was not a request to evaluate the Student for Vision or Functional Vision/Learning Media Assessment. (1/17/18; T.T. p. 27-28, J.E. #26, p. 80-82)

57. There was a second "Integrated Evaluation Report" for the Student with the date of 2/11/17. The Student was referred by her Mother for an evaluation. The ARC agreed

to evaluate the Student's fine motor abilities, academic functioning, adaptive behavior, and social/emotional status. (J.E. #28, p. J.088-105)

58. There was an ARC meeting on 02/15/2017 which was "To discuss results of an individual evaluation and develop an IEP if eligible". (J.E. #30. p. 113)
59. During the ARC meeting of 02/15/2017, the Student's mother reported that the Student cannot copy from a board. (J.E. #30, p. J.116)
60. There was testimony at the Hearing that the Student/Petitioner was unable to do map work in her social studies class because she is unable to see the map. (1/17/2018; T.T. 82-94)
61. The Student's eligibility for an IEP was discussed at the 02/15/2017 ARC meeting. There was discussion about eligibility for Other Health Impairment (OHI) - and Specific Learning Disability in reading (J.E. #30; J117 & J.119)
62. The Respondent School District did not consider the Student's eligibility for an IEP under the category of visually impaired. (01/16/18; T.T. p. 37; J.E.#2, p J018)
63. The Respondent did not consider the Student's working memory deficits, slow processing speed, or perceptual reasoning deficits when considering her eligibility for an IEP. (1/16/18; T.T. p. 43-45; J.E.#2; p. J015, J017).
64. Exhibit J.E. # 34 contains the results of Student Progress Report for Reading. On page J. 128 of that exhibit, the score of a test given on 10/15/16 indicates the Student received 87% and when taken the next month on 11/10/16 indicates a score of 80%.
65. Throughout her time in the District, the Student has completed each and every grade satisfactorily, receiving passing grades in all her classes. (1/17/2018; T.T, p. 96) Her testing scores are highly variable. While Student's MAP scores remained low, her Scholastic Math Inventory ("SMI") shows significant growth. Her Fall

2016 SMI was 195, and her Spring 2017 SMI was 750, showing a growth of 525 points. (1/18/2018; T.T., p. 35-37) She also grew on her Stanford 10 testing, which further shows growth in Math from J.B.'s 5th through 8th grade. (1/18/2018; T.T., p. 37).

66. The Student received all A's, and two A+s in her Math 180 classes for 6th and 8th grades. (1/18/2018; T.T., p. 38) At the time of the Due Process Hearing, the Student had a B in her collaborative math class. (1/18/2018; T.T., p. 124) and an 85% in her language arts class. (1/18/2018; T.T., p. 135)

67. As of May 2017, J.B. was reading on grade level. The Student raised four grade levels in two years in reading. ((1/16/2018; T.T., p.148- 149)

ARGUMENTS

1. Did the Respondent School District fail to properly determine the Student Petitioner's eligibility for special education and related services from December 7, 2015 until the present time in violation of **707 KAR 1:310**?

a. Does the Student Petitioner have disabilities rise to the point that could entitle her services under IDEA?

In the recent Supreme Court case of ***Andrew F. v. Douglas County School District***, the Court held at p. 14-15 of the decision---

“The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress in light of the child's circumstances.”

This was followed at the bottom of 15 and continued onto page 16-

“We will not attempt to elaborate on what “appropriate” progress will look like from case to case. It is in the nature of the Act and the standard, we adopt to resist such an effort: The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.”

Therefore, in this case, there will be a review of the “unique circumstances of the child” and whether or not under those “unique circumstances”, “appropriate progress was or is being made” in making a determination of whether the Student/Petitioner should have an IEP and be provided services under IDEA instead of or in addition to those services being provided to her under Section 504 plan.

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 ailments listed in the statute and show that it had an adverse effect on the child’s educational performance. **Second**, if the child’s condition does adversely affect her performance, the team must determine whether, as a result, she needs special education.

It is the Student/Petitioner’s position that she has satisfied both of these elements and Respondent/School District that she has not. **34 CFR 300.8(a)**. The Student/Petitioner has satisfied the first prong. She has a visual impairment as specifically set forth under the regulation. (F.F. 30,48) She has also been diagnosed with cerebral palsy is considered an orthopedic disability. (F.F. 6) **34 CFR 300.8(c)(8)**. It was interesting to note, that while she has been diagnosed with cerebral palsy the issue of an orthopedic disability was not raised or considered. Under IDEA, a child with Cerebral Palsy may be entitled to services under the category orthopedic disability.

B. Do the Student/Petitioner's disabilities adversely affect her academic performance?

The second prong of the test is to determine whether Petitioner's Health Impairments adversely affect her educational performance. 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 has done so, defining an 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 (2) Section 1(2)**. Numerous decisions from both in and outside of Kentucky indicate that this standard is not met where a student, despite his or her health condition, receives passing grades, gets average scores on assessments, and performs academic tasks without or with minimal assistance.

For instance, in *In re: Student with a Disability*, 109 LRP 28018 (KY SEA July 5, 2007), a Hearing Officer from Kentucky concluded that a student whose academic progress was consistent with his IQ in the average range was found not to be a child with a disability under the OHI category. In this case the Student's grade average in math is about the same as the class average. (F.F. 20) The Student's academic skills are in the average range, her test scores are in the average range and her grades are passing or better. (F.F. 29, 44) Throughout her school career, the Petitioner has passed every grade with satisfactory grades. (F.F. 34) In the period since December 2015, the Student made mostly A's, B's some C's an occasional D. (F.F. 52, 53,65)

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, since he was earning A's, B's, and C's in his classes and had performed admirably on state achievement tests. Likewise, 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 student exhibiting both physical and emotional symptoms where assessments nonetheless indicated that his academic skills were within average range. Finally, in ***J.D. v. Pawlet Sch. Dist.***, 224 F.3d 60 (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". (Id. at 68) However, as in the situation here, the student qualified for a 504 plan.

Based upon the evidence presented, the Petitioner has not presented by a preponderance of the evidence that the Student has a disability that has such an "adverse effect on educational performance" that she is eligible for an IEP under the IDEA.

**DID THE RESPONDENT SCHOOL DISTRICT FAIL TO COMPLY
WITH CHILD FIND REQUIREMENTS?**

This “child find” claim is unusual in that the Student/Petitioner while attending the Respondent School District from pre-school until second grade had an IEP. (F.F. 11). Then from third grade until the present time has a 504 plan. (F.F. 12)

The IDEA includes the Child Find mandate. Child Find requires all school districts to identify, locate and evaluate all children with disabilities, regardless of the severity of their disabilities. This obligation to identify all children who may need special education services exists even if the school is not providing special education services to the child.

The KAR dealing with Child Find in **707 KAR 1:300** begins at Section 1. “Child Find Requirements”. With the case at bar, due to the Petitioner/Student’s time at the Respondent School District, **Section 4 of 707 KAR 1:300** is the appropriate place to begin review of the relevant regulation. It states:

Section 4. Evaluation and Reevaluation Procedures. (1) An LEA shall ensure that a full and individual evaluation is conducted for each child considered for specially designed instruction and related services prior to the provision of the services. The results of the evaluation shall be used by the ARC in meeting the requirements on developing an IEP as provided in 707 KAR 1:320.

To show a violation of the child-find provision, a claimant must prove that school officials “overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate.” **Bd. of Educ. of Fayette County v. L.M.**, 478 F.3d 307 (6th. Cir. 2007) (quoting **Clay T. v. Walton County Sch. Dist.**, 952 F. Supp. 817, 823 (M.D. Ga. 1997)). The mere fact that a child struggles in school or requires extra services to assist her in staying on pace with her classmates does not necessarily mean that a school district must refer him for an evaluation. For instance, in **L.M.** the parents of a child who was determined in his 3rd grade year to require special education services alleged that the district violated

child-find by not referring him for an evaluation in prior years. The Sixth Circuit rejected the claim, however, noting that though this child had some behavioral difficulties, he was meeting most academic expectations up until late in his 2nd grade year. As a result, the Court determined that the district did not overlook any clear signs that the student required special education services.

Going to **34 C.F.R. § 300.111 (a)(1)**, the Respondent District complied by having policies and procedures for to identify, locate and evaluate children with disabilities who need special education and related services. Thus, the first prong of “Child Find” requirements have been satisfied.

In this case Respondent has evaluated the Student/Petitioner for the December 2015 ineligibility decision and again for the 02/15/2017 eligibility decision. At the same time, the Student/Petitioner was on a 504 plan. (F.F.24, 25,26, 27, 28, 31, 32,56, 57)

An argument can be made that the 504 plan was ineffective. However, it has not or at least such an argument is not part of the Due Process request and there is a question of whether this Hearing Officer has jurisdiction to consider an allegation concerning the effectiveness of a 504 plan. Ineffectiveness of 504 plan revives the need to assess student's IDEA eligibility was held in ***Krawietz v. Galveston Indep. Sch. Dist.***, 69 IDELR 207 (S.D. Tex. 2017). Based upon the evaluations of the Student/Petitioner in this case, the Respondent District was timely in evaluating the Student/Petitioner.

In respect to the Student/Petitioner’s visual disabilities it was recommended that she be provided an accommodation. (F.F. 39) That accommodation for visual disabilities included use of an iPad. (F.F. 40, 41)

Based on the partial settlement in this case, Petitioner can only raise alleged

violations that occurred after December 7, 2015. Because the ARC had completed an evaluation on December 7, 2015 and found that the Student/Petitioner was ineligible for special education services.

There is nothing in the regulation that would hold a school district liable for a “child find” violation where the student was evaluated and not found eligible for services under IDEA. Additionally, the Respondent School District used the results of the evaluations to assist in formulating the Student’s 504 plan.

COMPENSATORY EDUCATION

A compensatory education award is an equitable remedy that "should aim to place disabled children in the same position they would have occupied but for the school district's violations of the IDEA." *Reid v. District of Columbia*, 401 F.3d 516 at 518, 523 (D.C. Cir. 2005). In crafting a compensatory education award, the Hearing Officer must engage in a fact-intensive analysis that is qualitative rather than quantitative. *Branham v. D.C.*, 427 F.3d 7, 11 (D.C.Cir.2005). In *Reid*, the Court rejected "cookie-cutter" or mechanical remedies, such as awarding one hour of compensatory instruction for each hour that the student was denied FAPE and stressed that the Hearing Officer must take into account individual assessments of the student and focus on the student's individual needs. *Reid*, 401 F.3d at 523-24. An arbitrary compensatory education award will never pass muster under the *Reid* standard.

REIMBURSEMENT FOR OUT-OF-POCKET EXPENSES

While the Student/Petitioner raised the issue of out-of-pocket educational and evaluation expenses, there were no receipts or invoices presented during the Hearing.

(F.F. 11) There was no evidence that the Petitioner's Parents requested that the Respondent pay for such expenses. Therefore, the request for reimbursement for out of pocket and evaluation expenses are denied.

ATTORNEY FEES

Under **IDEA, 20 U.S.C. § 1415** the award of attorney fees is under the jurisdiction of the district courts of the United States. Specifically, **20 U.S.C. § (i) (3) (A) and (B)** is set forth below.

(3) Jurisdiction of district courts; attorneys' fees

(A) In general

The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) Award of attorneys' fees;

(i) In general, in any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs—

(I) to a prevailing party who is the party of a child with a disability;

As this Hearing Officer is not with the district courts of the United States, he without the jurisdiction or the ability to award attorney fees to a prevailing party in a Due Process Hearing.

DECISION AND ORDER

This is a situation where the Student is being served with a 504 Plan and desires to specially designed instruction under IDEA. As the Parties had resolved all claims prior

to December 7, 2015, this decision is for claims from December 7, 2015 forward. Based upon the evidence presented at the Hearing held on January 16, 17 and 18th 2018, Exhibits and the Arguments of the Parties and the discussion set forth above:

1. The Respondent School District properly determined that the Student/Petitioner was not eligible for special education and related services from December 7, 2015 until the present time.
2. The Respondent School District complied with the Child Find requirements in accordance with **707 KAR 1:300** from December 7, 2015 until the present time.
3. As the Student/Petitioner was not eligible for an IEP, the Respondent School District was not obligated to create an implement an IEP and therefore did not violate **707 KAR 1:320**.
4. While this Hearing Officer is without jurisdiction over the Student/Petitioner's 504 plan, from what has been presented in this Due Process Hearing, the Respondent School District has provided the Student/Petitioner with FAPE.
5. The Student/Petitioner has not shown proof of entitlement for an award for compensatory education. Therefore, the request for compensatory education is denied.
6. The Student/Petitioner has not provided proof for reimbursement for out of pocket expenses. Therefore, Student/Petitioner's request for such reimbursement is denied.

7. This Hearing Officer is without the authority to award attorney fees in this matter.

This Order and Decision is entered 1st day of June 2018.

/s/ Paul L. Whalen

PAUL L. WHALEN
Due Process Hearing Officer

CC:
Counsel of Record Via email and U.S. Postage Pre-paid
KDE: Todd Allen, Esq. & Tina Drury

APPEAL RIGHTS

Pursuant to **707 KAR 1:340 Section 12**. Appeal of Decision. (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 (ECAB) 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) calendar days of the date of the Hearing Officer's decision.

The address is: Kentucky Department of Education
Office of Legal Services
300 Sower Blvd.; 5th Floor
Frankfort, Kentucky 40601