

COMMONWEALTH OF KENTUCKY
KENTUCKY DEPARTMENT OF EDUCATION
DIVISION OF LEARNING SERVICES
AGENCY CASE NO. 1718-16

█

PETITIONER

VS.

█

COUNTY SCHOOLS

RESPONDENT

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 December 22, 2017 pursuant to the Individuals with Disabilities Act (IDEA), (*20 U.S.C. § 1400, et. Seq.*) This matter heard over three and a half days, namely Monday, April 22, 23, and 24, 2019. The witness testimony of Dr. Teresa Garera Izquierdo was taken on May 17, 2019.

Background

The Petitioner is a ten-year-old fourth grade student with a learning disability and a legal resident of the Respondent School District. Petitioner contends that his Parents made several requests for re-evaluation. Counsel on behalf of the Petitioner filed this due process request on December 22, 2017. On or about January 31, 2019, Counsel for the Petitioner Amended his Due Process Request.

There was a Motion to Dismiss (concerning jurisdiction) made just prior to hearing in August 2019.

MOTION TO DISMISS

On or about August 6, 2019, Respondent in this matter moved to dismiss this matter in its entirety due to allegations concerning the possibility that the Petitioner herein had move from the Respondent District.

After due consideration, this Hearing Officer incorporates his findings in his Order of August 14, 2019 in Agency Case No. 1718-17 (a sister case) overruling the Respondent's Motion to Dismiss.

ABBREVIATIONS OR ANACRONYMS

Acronyms or abbreviations include ARC (Admission and Release Committee), Children's Hospital (Refers to Cincinnati Children's Hospital), CVI (cortical visual impairment) IDEA (Individuals with Disabilities in Education Act), KDE (Kentucky Department of Education), KAR (Kentucky Administrative Regulations), CFR (Combined Federal Regulations), ESY (Extended School Services), FAPE (Free and Appropriate Education), LRE (Least Restrictive Environment), OHI (Other Health Impairment) OT (Occupational Therapy), PT (Physical Therapy), P.E. (Petitioner's Exhibits), R.E. (Respondent's Exhibits) RTI (Response to Intervention) SLD (Specific Learning Disability) 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.

ISSUES FOR THE STUDENT/PETITIONER

1. The Petitioner was denied FAPE from December 22, 2014 until the present time.
2. The Respondent failed in its "Child Find" Obligations towards this Student.

3. The Respondent failed to provide and perform a full individual evaluation was until May 2018.
4. The Petitioner alleges that the Respondent School District failed to properly determine the Student Petitioner was eligible for special education services in 2016 and 2017.
5. The IEPs offered to the Student/Petitioner 2016, 2017 and 2018 were inadequate and did not provide FAPE.

BURDEN OF PROOF

As this Due Process Hearing is an administrative proceeding in Kentucky (**KRS 13b**), 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.

Findings of Fact

1. The Student Petitioner filed a request for a due process hearing with KDE on December 22, 2017.
 2. On page 3 of the Petitioner's Request for a Due Process Hearing, there are seven items which the Petitioner requests of this Hearing Officer to consider after his appointment. They include:
 - i. Determination that the Petitioner is a student with a disability;
 - ii. Determination that the Respondent School District violated *707 KAR Chapter 1*; and
 - iii. Order the Respondent School District to comply with the portions of ***707 KAR Chapter 1*** that it violated; and
 - iv. Compensatory education for the time in which substantive and/or procedural violations amounted to a denial of FAPE for the Petitioner; and
 - v. Reimbursement for any out of pocket educational and evaluation expenses; and
 - vi. Attorney fees; and
 - vii. All other relief that may be deemed appropriate.
3. On or about October 18, 2018, Student Petitioner by Counsel amended his Due Process Request to include the allegation "The Respondent School District failed to provide the proper ARC membership when it denied the Petitioner's Parents to include the independent evaluator at the ARC meeting that reviewed the independent evaluation".
4. The Petitioner is a ten-year old student whose family resides in the Respondent School District. (R#1)
5. The Petitioner was initially enrolled in Respondent's [REDACTED] Elementary School and was subsequently re-enrolled in [REDACTED] Elementary in March 2017 to complete his second-grade year. (R#1,2,3)

6. Student Petitioner had eight IEPs. They are dated 08/14/2012, 04/05/2013, 08/06/2013, 04/04/2014, 03/16/2015, 02/24/2016, 02/22/2017, and 11/29/2018. (P#5, p204-208; 209-213; 214-219; 220-225; 226-230; 231-243; 244-249 and 250-255)
7. The Petitioner was home-schooled for his third (2017-2018) and fourth (2018-2019) grade year.
8. As part of “child-find” the Respondent School District has a pre-school screening process. (P.E.#6, p. 084-90)
9. After an initial pre-school screening in May 2012 at [REDACTED] Elementary, an ARC was scheduled in August 2012 to determine if Petitioner was eligible for services. (R#4)
10. After the ARC Meeting of August 14, 2012, it was established that an IEP was needed and Petitioner was provided speech and language therapy services during his first year of pre-school. (P.E. #6, p. 084-121)
11. During the Student Petitioner’s second year of pre-school (2013-2014), he continued to receive speech language therapy. (P.E.# 6, p. 213)
12. The Student/Petitioner was identified as a student with a developmental delay in the social-emotional area, as well as speech-language impairment in February 2016. (PE#5, p 122-141)
13. The Student Petitioner received interventions (RTI) in reading during the 2014-2015, 2015-2016, and 2016-2017 school years. He also participated in Title I reading during kindergarten. RTI was not offered by the school in math during kindergarten because there was not enough time in the day. (R.E. # 61-126; T.T. Vol. I, 19-20, 22, 37, 69-70)

14. Students in the bottom twenty percent (20%) of the class in performance are assigned to RTI. Students move up in tiers (tier I to tier II to tier III) if they do not do well in their existing tier. The Petitioner was moved to tier III interventions in reading during his first-grade year. (T.T.# Vol. 1, 48-50, 61, R.E.#70)
15. [REDACTED] was the Student's kindergarten teacher. (T.T. Vol. I, 13)
16. Reading and math were areas of concern on the Student Petitioner's report card during kindergarten, first and second grades. (P.E. # p. 001-004)
17. The Student Petitioner's kindergarten teacher, Ms. [REDACTED], indicated that he struggled with letter and number identification and pre-reading skills. (T.T. Vol. I, p. 13-15; P.E. #1)
18. Ms. [REDACTED] testified that there were concerns about (T.T. Vol. I 18) about the Student Petitioner's academic progress. However, the ARC did not choose to look to see if he had any disabilities in reading, math or any areas other than speech as Ms. [REDACTED] explained that students needed to be given time to be in the classroom. (T.T. Vol. I, 19)
19. The Student Petitioner's Report Card at the end of his kindergarten year, 2014-2015 indicated that he was receiving progressing with help (PH) or satisfactory progress (SP). (T.T. Vol. 1, 27-28) The Student was evaluated in 30 categories. At the end of the fourth term, (T4) he received 15 times as PH and 15 times as SP. (P.E. #1, p. 001)
20. At the end of the 2015-2016 school year, Petitioner's Parents requested that the Petitioner be retained for an additional year in kindergarten.

21. The Student Petitioner was evaluated in February, 2016. The evaluation noted difficulties in attention, hyperactivity, language and mathematics. (P.E. #6, p. 265-272)
22. At the end of the 2015-2016 school year, the Student's first grade teacher, Ms. [REDACTED] recommended that he be retained for another year. She was concerned that he "Struggles in all subject areas." "Has trouble staying on topic.", as well as being absent 24.5 days, tardy 12. Ms. [REDACTED] spoke to his Mother about the Student being retained in the first grade. She agreed and Ms. [REDACTED] worked to have the paperwork together to make it happened but neither of Student's Parents would sign the necessary paperwork. (P#3, 011) (T.T. Vol. I, 55-56)
23. A review of the Student's Report Card at the end of his first-grade year, 2015-2016 indicated 19 areas for evaluation. In 8 areas, he made SP. In 5 areas he had PH. In 5 areas he had AC (Area of Concern) (P.E. #1, p. 002)
24. Ms. [REDACTED] discussed her concerns with the Student's Parents about number recognition. She suggested that the Parents take the Student to an optometrist to determine it was not a problem with his sight. To the best of her knowledge, the Student's Parents had his eyes evaluated and he did not have any vision problems at that time. (T.T. Vol. I 34)
25. The Student's first grade teacher, Ms. [REDACTED] indicated that he might not be ready for first grade as he was behind his same aged peers in his academic skills. She was concerned about his progress throughout his first-grade year, 2015-2016. (T.T. Vol. I, 50-51)

26. The Student's Parents expressed their concerns about the Student's lack of academic progress to his teachers, the school counselor, the ARC chairperson, and assistant principal every year starting in kindergarten and contend they made multiple requests for the Student to be evaluated in Reading and Math. (P.E. #1, p. 484-485, 500; T.T. Vol. I, 54-55, 254-260, 267-272.) The Parents were concerned that the Student had moved from tier I to tier II math during his second-grade year because he was not making adequate progress. (T.T. Vol. I, 129-133)
27. According to a memo with the date of 3/22/17, beginning in October, 2016, the Student was observed during class wherein he appeared he appeared very sleepy. (P.E. # 4, p. 018)
28. Email correspondence between the school and the Petitioner's Parents indicated that the Student Petitioner had issues with zoning out and/or sleepiness in class. Dates of this correspondence include February 12, 2017 and March 6, 2017 (P#9, p. 347, 348, 350)
29. There was a form titled "Data Collection on (Student/Petitioner) 2016/17" which documented the Student Petitioner's being "sleepy" or lethargic in class from December 2016 through February 2017. (P.E. 9, p. 352)
30. On a "School Administered Medication Form" with the date of 8/29/18, from Cincinnati Children's Hospital stated that the Student, "...is currently being seen in the Neurology Department...for evaluation and treatment of migraine headaches." (P.E. #4, p. 022)

31. Another form from Children's with the date of August 29, 2018 said "...is followed closely by our team of physicians for evaluation of episodic hypersomnia. (P.E. # 4, p.023)
32. Hypersomnia was not emphasized further in the hearing but reflected in the 2018 ARC meetings. But is defined as:

"Hypersomnia, a complaint of excessive daytime sleep or sleepiness, affects 4% to 6% of the population."
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3181743/> (Accessed September 15, 2019)
33. The Petitioner has not attended school in the Respondent School District since the conclusion of the 2016-17 school year. (P.E. #6, P152-159)
34. The Respondent School District has the RTI program to assist students. It consists of three intervention tiers which also include sub-tier rounds. Tier 1 interventions occur in the regular classroom. After spending time in a to a tier, the RTI reviews the student's progress. In the event the student is not progressing, the RTI Committee will evaluate whether to move the student to tier 2, which will involve different interventions. The tier 2 interventions often involve out-of-classroom activities and occasionally some computer programs. In the event the student does not adequately progress, the RTI Committee will move the student to tier 3, which consists primarily of computer programs. (T.T. Vol. 1, 47-48)
35. The Parties convened a resolution session on March 22, 2018. It was agreed (a) the District would conduct its own re-evaluation of the Petitioner; and (b) that the District would conduct its own re-evaluation of the Petitioner. The matter was then held in abeyance to permit the

evaluations and any further discussions to proceed. (See Joint Status Report with the date of March 26, 2018)

36. An evaluation of the Student/Petitioner was performed on or about May 31, 2018. (P.E.#9, p 373-387 The results are included in the Integrated Psychological Report date of May 31, 2018. (R.E.#9, p. 012-27)
37. The evaluation of May 31, 2018, was the first to include evaluations in the areas of reading and math. (P.E.#6, p. 273-287)
38. An ARC meeting was held on June 15, 2018 to review the Respondent School District's evaluation of the Student Petitioner. (P.E.#5, p. 162-169)
39. When making Specific Learning Disability (SLD) eligibility determinations the District considers a variety of factors. (T.T. Vol. I, 227)
40. The evaluation revealed below average scores in every reading area except letter and word recognition and reading comprehension. It also revealed low and below average scores in math and below average scores in written expression. (P.E. #6, p. 282)
41. The Respondent School District determined that the Student Petitioner was a student with a disability in only the areas of speech and math reasoning. The evaluation revealed that delayed processing speed and struggles with visual tracking. (P.E.#5, p. 162-169; 170-177)
42. Within the Summary Notes of the June 15, 2018 ARC, Respondent School District forgot to conduct an occupational therapy evaluation. (P.E.#5, 165)
43. The OT evaluation was needed for fine motor screening. There were areas of concern in handwriting, following routines and sensory and movement.

It was indicated that the Student would be scheduled for an OT evaluation and vision catalyst screening. (P.E. # 5, p. 165)

44. An IEP was not offered to the Student Petitioner at the June 15, 2018 ARC meeting. (P.E.#5, p. 162-169)
45. An independent educational evaluation (IEE) was conducted on the Student Petitioner by Dr. Teresa Izquierdo, Ph.D. on August 16, 2018. (P.E.#6, p. 289-301)
46. The September 10, 2018, ARC indicated that the Student Petitioner had received an OT evaluation. (P.E.#5, p. 180)
47. The IEE determined that the Student Petitioner had specific learning disabilities in the areas in written expression and math. It was also determined Student Petitioner had Attention Deficit Hyperactivity Disorder exclusively uses the Response to Intervention (RTI) to identify and support students with learning needs. (T.T. Vol. I 227 and 244; P.E.#3 p. 289-301)
48. The evaluator who performed the Student Petitioner's IEE was not in attendance at the September 10, 2018 ARC as the Respondent School District would not pay for her attendance. (P.E. # 5, p. 178-185, 181)
49. The Respondent School District has a process to determine whether a student with a learning issues needs special education. The first thing the Respondent determines whether the student has been provided with appropriate instructional experiences and then determine the method of instruction. (T.T. Vol. I, p. 227)

50. The second consideration is whether the student is responding to the method of instruction or intervention and progressing at a rate where he or she is cable of meeting age or grade level standards. (T.T. Vol. I, 227)
51. The third or final consideration, the Respondent School District evaluates exclusionary criteria apply for SLD consideration, i.e. lack of instruction or other alternatives which can contribute to poor performance. (T.T. Vol. I, 228)
52. By email with the date of Wednesday, August 16, 2017, the Student Petitioner's Father told [REDACTED] that the Student Petitioner and his siblings would be home schooled for the 2017-2018 school year. (P.E. # 9, P056) That was followed by a letter received by the Respondent District on August 16, 2017. (P.E. #9, p. 422)
53. The Student Petitioner's Parents had a copy of the packet entitled "Kentucky Department of Education Homeschool Information (revised May 2016). (P.E. #9, p. 416-421)
54. At page 4 of the Homeschool Information, it states: 1. "The parent is responsible providing the curriculum and the instructional materials for children being homeschooled. The responsibility for the education of the homeschooled child is borne completely by the guardians. The guardians select the curriculum and educational materials. There are many websites devoted to curriculum and instructions for homeschool families. (P.E. #9, p. 419)

55. Ms. Delena McGuire an elementary curriculum expert testified on behalf of the Respondent School District. She has been certified by KDE as a curriculum expert (T.T. Vol. III, 648) (T.T. Vol. III 644-689)
56. Based upon the review of the Student Petitioner's work (R.E. # 19 p. 143-377; R#20) Ms. McGuire had concerns about him receiving a complete and appropriate education since being home schooled in third and fourth grade. Her specific concerns were about writing and higher-level math for those grades. (T.T. Vol. III 672)
57. Ms. McGuire' resume with her education and training had been provided to Counsel prior to the hearing. (T.T. Vol. III, 637 and R#17, p. 138-140)
58. At the meeting of June 15, 2018, the ARC made an initial determination that the Student Petitioner was eligible under the categories of SLD in math reasoning and Other Health Impairments (OHI) in addition to his prior SLI determination. (R.E. # 9, p. 28-35; P.E. #6, 171-176)
59. The Student's Parents and Counsel signed off with agreement only on the "Math Determination Only". (R.E. # 9, p. 031-032)
60. The Student Petitioner's Parents did not provide consent for him to receive services for SLD in math reasoning and OHI. (P.E. # 6, p. 177; R#9, 035)
61. The Respondent School District agreed to pay for an IEE for the Student Petitioner. (P.E. #6, p.189-201)
62. The results of the IEE are included in a in Dr. Izquierdo report dated August 16, 2018. (R.E. #10, p. R036-048)
63. Dr. Izquierdo based upon her review of preliminary intake information, decided that the Petitioner needed cognitive testing, achievement testing,

and testing to understand the Petitioner's attention and concentration.
(T.T. IV. 716-717)

64. Dr. Izquierdo administered the test commonly known as TOVA. TOVA stands for Test of Variables of Attention. There is a visual and auditory component. (T.T. IV 717)

65. Dr. Izquierdo also administered the Wechsler Individual Achievement Test, Third Edition fourth edition and the third edition for academic functioning. Additionally, the Comprehensive Behavior Rating Scale, the CBRS parent form and the Adaptive Behavior Assessment form was completed. (T.T Vol. IV 718)

66. Dr. Izquierdo in reviewing the Student Petitioner's academic testing results that he completed for her in reading or written expression and mathematics and said "he actually performed well'. (T.T. Vol. IV, 722)

67. Dr. Izquierdo reviewed the Student Petitioner's results and stated: "pseudoword decoding" he scored 97, which was in the 42nd percentile and was at that time at the 3.2 grade level. In the area of word reading, his score was in the average range with a score of 97 and in the 42nd percentile. His oral reading fluency and reading comprehension scores were slightly lower but in the average range. They were in the second to mid second grade level. His overall basic reading placed him in the average range, with a score of 96 and 91, but his scores in reading comprehension, reading fluency scored at 88, which would be at the top of the low average range. (T.T. IV 723; P.E.#6, p. 293-294)

68. On the final page of the IEE, Dr. Izquierdo made recommendations for the ARC to consider implementing through the Petitioner's IEP. These recommendations include: a plan to address his academic delays and current limitations with sustained attention/concentration and processing speed in addition to academic delays in the areas of writing and math. Individualized academic instruction and support services in math calculation, math reasoning, math fluency and written expression, extended time for testing, use of distraction free environment for testing, small group instruction and preferential seating. (P.E.# 6, p.301)
69. Dr. Izquierdo also encouraged collaboration between collaboration between the Respondent and Petitioner's physicians. (P.E. #6, p.301)
70. Dr. Izquierdo also recommended for an Occupational Therapy (OT) evaluation. (P.E. #6, p. 301)
71. At the 06/15/2018 ARC, the Summary notes indicate that everyone agreed that the Petitioner qualified for SLD in math. However, the Petitioner's Parents believe he should qualify for SLD in reading as well. It also states he qualifies for SLD in speech and language as well as receptive and language impairment. (P.E. #5 p. 165)
72. In respect to qualifying for OHI, the 6/15/2018 notes indicate that the ARC did not know how the seizure activity impacted his performance in school (P.E. # 5, p. 165)
73. The Summary Notes for 06/15/2018 indicate that the Petitioner is eligible for specially designed instruction in Math reasoning. When asked about

- the need for specially designed instruction in math calculation, his errors seemed due to “one skill of not knowing how to borrow”. (P.E. #5, p. 165)
74. The ARC convened on September 10, 2018 to review the results of the IEE. (P.E. #6, P. 179-182)
75. The ARC Summery Notes for 09/10/2018 reflect that the Petitioner has ADHD based upon the TOVA assessment. (P.E.#5, p. 179) Based upon his OT evaluation, he was placed in the “average range for the visual moor(sic) (motor) skills assessment. (P.E. #5, p. 179) He was determined eligible for math reasoning and math calculation. (P.E. 5#181)
76. Dr. Izquierdo did not attend the September 10, 2018 ARC. (Izquierdo T.T. 761-763)
77. There was a difference between the scores on the Respondent’s evaluation and the Independent Evaluation. The ARC noted that “it is hard to determine where the errors were in the testing in order to pinpoint a reason for the discrepancy between the two evaluations. (District’s evaluation and independent evaluation). (P.E. #5, 178-185; P.E. 181; T.T. Vol. I, 240-241)
78. The TOVA that Dr. Izquierdo gave the Student Petitioner is not routinely used by school districts. (T.T. Vol. IV, 754-755)
79. The September 10, 2018 ARC meeting included school psychologist, [REDACTED], [REDACTED], made an initial determination that the Student Petitioner was eligible for services under the category of SLD in math calculation in addition to the previously identified eligibility categories. (P.E. #6, p. P190-192)

80. An IEP was not offered to the Student Petitioner at the September 10, 2019 ARC Meeting. (P.E # 5 p. 182)
81. The ARC convened on November 29, 2018 to discuss and develop a new IEP for the Petitioner. (P.E. #6, P198-199)
82. While the IEP was being developed during the March 2018-November 2018 time frame, the Student Petitioner's Parents were told that the Student could return to school and attend any school within the Respondent School District. (T.T. Vol. III, 611-612)
83. During the 11/29/2018, ARC, the Petitioner's Parents were asked if there was an elementary school they would like to consider or visit. The Respondent School District was asked if it could offer in the home services. The Respondent indicated Petitioner "could have drive in services for speech and math support". (P.E. #5, p. 199)
84. Student/Petitioner's Parents rejected the IEP developed at the November 29, 2018 ARC because they alleged that it does not address his processing delays, reading struggles or written expression. (P.E. # 5, p. 250-255; 197-203; R#6)

PETITIONER'S ARGUMENTS

I.

The Petitioner was denied FAPE from December 22, 2014 until the present time.

It is the overarching position of the Student Petitioner that he was denied FAPE from December 22, 2014 until the present time. It was December 22, 2017, when the

request for a due process hearing was filed. The statute of limitations in Kentucky is three years.

Petitioner breaks down his grounds in the Respondent's failure it's a.) child find obligations; b.) failure to properly evaluate the Student Petitioner; c.) determination of eligibility; d.) inadequate or inappropriate IEPs (February 24, 2016 and November 29, 2018 and e.) the independent evaluator should have been at the ARC to explain her evaluation.

a.

CHILD FIND

The issue put forth by the Student Petitioner alleges that the Respondent School District failed in its "Child Find" obligations.

The regulation in Kentucky regarding Child Find is **707 K.A.R. 1:300** which is set forth below.

Section 1. Child Find Requirements. (1) An LEA shall have in effect policies and procedures that plan and implement a child find system to locate, identify, and evaluate each child: (a) Whose age is three (3) to twenty-one (21); (b) Who resides in a home, facility, or residence within the LEA's geographical boundaries, including children with disabilities who attend private schools located within the LEA boundaries, children who are highly mobile such as migrant children, homeless children as described in 704 KAR 7:090, children who are wards of the state or are in state custody, and students who are advancing grade to grade resulting from passing a grade but who still may have a disability; (c) Who is either in or out of school; and (d) Who may need special education and related services. (2) For preschool age children with disabilities, an LEA must ensure a smooth and effective transition from the early intervention program to preschool. (3) Each LEA shall participate in transition planning conferences for children with disabilities served by early intervention programs.

The state regulation is required based upon Federal law and regulation. The applicable regulation is as set forth below.

34 CFR. Sec. 300.111 Child find

(a) General.

(1) The State must have in effect policies and procedures to ensure that—

(I) All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated; and

(ii) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services.

(b) Use of term developmental delay. The following provisions apply with respect to implementing the child find requirements of this section:

(1) A State that adopts a definition of developmental delay under §300.8(b) determines whether the term applies to children aged three through nine, or to a subset of that age range (e.g., ages three through five).

(2) A State may not require an LEA to adopt and use the term developmental delay for any children within its jurisdiction.

(3) If an LEA uses the term developmental delay for children described in §300.8(b), the LEA must conform to both the State's definition of that term and to the age range that has been adopted by the State.

(4) If a State does not adopt the term developmental delay, an LEA may not independently use that term as a basis for establishing a child's eligibility under this part.

(c) Other children in child find. Child find also must include—

(1) Children who are suspected of being a child with a disability under §300.8 and in need of special education, even though they are advancing from grade to grade; and

(2) Highly mobile children, including migrant children.

(d) Construction. Nothing in the Act requires that children be classified by their disability so long as each child who has a disability that is listed in §300.8 and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under Part B of the Act.

The “child find” issue here is fact driven. Did the Respondent School District have a process in place to locate and evaluate children (including Petitioner) who might have a learning disability which would entitle them to services under IDEA?

The failure to identify may entitle the student to compensatory education or tuition reimbursement accruing from the time the district first should have suspected the disability. *T.B. v. Prince George's County Bd. Of Educ.*, 72 IDELR 171 (4th Cir. 2018); *Robertson County Sch. Sys. V. King*, 24 IDELR 1036 (6th Cir. 1996,

unpublished); *Lakin v. Birmingham Pub. Schs.*, 39 IDELR 152 (6th Cir. 2003); and *Department of Educ. v. Cari Rae S.*, 35 IDELR 90 (D. Hawaii 2001).

For a district to be liable for a denial of FAPE, the student must be a student with a disability. *D.G. v. Flour Bluff Indep. Sch. Dist.*, 59 IDELR 2 (5th Cir. 2012, *unpublished*) (holding that a district cannot be liable for a **child find** violation unless the student has a need for special education).

In this case, the Student Petitioner has a disability. (F.F.6, 10,12)

When the Student Petitioner initially enrolled in the Respondent School District in the spring of 2012, he was underwent the Respondent's preschool screening process. As a result, he was found to have a disability in After an initial pre-school screening in May 2012 at [REDACTED] Elementary, an ARC was scheduled in August 2012 to determine if Petitioner was eligible for services. At the ARC Meeting of August 14, 2012, it was established that an IEP was needed and Petitioner was provided speech and language therapy services. (F.F. 9, 10, 11) A review of the evidence indicates that there are at least 11 Conference Summaries for ARC meetings held from 8/14/2012 through 11/29/2018. (F.F 7) and there were at least 8 IEPs from August 2012 through November 2018. (F.F. 6)

The Respondent School District had a process in place which identified students with learning disabilities. The Student Petitioner was identified as early as the summer of 2012 (F.F. 8) as being a student with at least one disability which would entitle him to services under IDEA. He had an IEP for most of the years he was a student in the Respondent School District. Therefore, there is no evidence of a "Child Find" violation.

Therefore, Respondent School District did not fail in its "Child Find" obligations toward the Student Petitioner.

b.

Were the IEPs of 02/24/2016 and 02/22/2017 Appropriate?

As set forth above, the Student Petitioner has had an IEP provided by the Respondent School District since pre-school. In kindergarten, first and second grade he received RTI Services. In February 2016, at the end of the Student Petitioner's kindergarten year, he was evaluated and found to have difficulties in the areas of attention, hyperactivity, language and mathematics. (F.F. 21) However, these issues were address in the Respondent's response to intervention (RTI) program, even though he had reached tier III or the highest level of intervention for general students in reading. (F.F. 14) It seems that the Respondent District tried every avenue in the RTI program to assist the Student Petitioner but came up short.

In *OSEP 11-07, Memorandum to State Directors of Special Education (January 21, 2011) 50 IDELR 50*, it stated "districts must not deny referrals or delay initial evaluations suspected of having a disability and needing education or related services based upon utilization of RTI.

While page 2 of the 2/24/2016, IEP under "Social and Emotional Status" states he has "academics difficulties including math, and reading/language skills, and hyperactivity are areas of concern". A review of the balance of the IEP finds nothing to address those issues. On page 13, of the IEP it has "Special Education-10. 0 minutes, 2 times per day provided by Special Education Collaborative in the General Education Setting. Then there is Special Education 15.0 minutes 2.0 times per week provided by Special Education-resource in the Resource room. In the Related Services there is "Speech/Language Therapy 50 minutes 3 times per month provided by the Speech/Language Therapist in the Resource Classroom.

In his IEP of 02/22/2017, he has issues with “lack of attention and focus” (IEP p.2) The biggest difference in this IEP is the increased time in the Special Education with the Special Education resource in the Resource Room-Work Completion Core Review to 20 minutes 4 times a week. (IEP p. 6; P.E.#5, p. 249)

What is most disappointing is the failure of the 2016 and 2017 IEPs to address the results of the Student’s February 2016 evaluation indicating issues with hyperactivity and mathematics. Language seemed to be addressed with speech. The failure of the IEP to address the Student’s issues with hyperactivity and mathematics violates **707 KAR 1:320** which states as follows.

An ARC shall consider in the development of an IEP:

- (a) The strengths of the child and the concerns of the parents for enhancing the education of their child;*
- (b) The results of the initial or most recent evaluation of the child;*
- (c) As appropriate, the results of the child’s performance on any general State or district wide assessment programs; and*
- (d) The academic needs of the child.*

Based upon the foregoing, the Student Petitioner was not provided FAPE by the 2016 and 2017 IEPs due to the failure to address deficits written expression as well as address his processing speed deficit and reading deficits.

However, due to the fact the Student Petitioner was removed from the Respondent School District by his Parents to be homeschooled, Student Petitioner’s loss of FAPE is limited to the period from to 2/24/2016 until the last day of school in May 2017. ***T.B. v San Diego Unified School District, 56 IDELR 152 (U.S. Dis. Cal. 2011)*** See also *F.F. 54*; “*The parent is responsible providing the curriculum and the instructional materials for children being homeschooled. The*

responsibility for the education of the homeschooled child is borne completely by the guardians.”

c.

Cost of Independent Evaluator’s Attendance at ARC Meetings

In this Due Process Request, the Petitioner puts forth the position that he was denied FAPE in part due to the failure of the Respondent to pay the IEE evaluator to be present at the ARC to explain the results of the evaluation she performed and the report she wrote. The statute is that the school district pays the full cost of the evaluation. The Petitioner’s position is that the full cost includes paying the evaluator for his/her time at meetings. Two jurisdictions have cases on this matter—Indiana and Minnesota. Below is excerpt from the U.S. District Court for the Southern District of Indiana.

The parents argue that the BSEA erred in striking the section of Order 2 that required the attendance of the private evaluators at the CCC meeting. The parents’ first argument is that the school district agreed to pay for the private evaluations, which includes the “full cost” of the evaluations. **34 C.F.R. § 300.502(a)(3)(ii)**. They contend that the “full cost” of an evaluation includes paying for the evaluators to attend the conference to explain their findings and recommendations to the Committee.

The full cost of an independent evaluation does not include the cost of paying for the parents’ chosen independent evaluators to attend conferences. The regulations require the school district to consider the results of an independent evaluation in any decision made with respect to providing the student with FAPE. **34 C.F.R. § 300.502©(1)**. Neither the regulation that discusses independent evaluations nor the regulation that discusses the composition of the Committee requires independent evaluators to be present at the meetings.

See 34 C.F.R. §§ 300.502, 300.321(a).

B.B. ex. Rel. Bruner v. Perry Tp. School, Corp. S.D. Indiana (2008 W.L. 2745094).

Hearings in Minnesota have cited **Bruner** case above in their decisions. See

In the Matter of T.O.F. and his Parents, L.F. and L.O. v. St. Paul Pub.

School Dist. No. 625, OAH Docket No. 80-1300-34041, MDE No. 17-009-H,

Order Excluding IEP Team Attendance Cost from IEE at Public Expense (Mar. 6, 2017).

<https://mn.gov/oah/lawyers-and-litigants/administrative-law/opinion-archive.jsp#/list/appId/2/filterType/searchkeyword/filterValue/80-1300-34041/page/1/sort//order/>

Based upon the foregoing, the Petitioner was not denied FAPE due to the Respondent's refusal to reimburse the IEE evaluator for her time to be at an ARC.

d.

Was the IEP offered by the Respondent on November 29, 2018 Inappropriate?

It is the position of the Student Petitioner that the IEP offered by the Respondent on November 29, 2018 was inappropriate. (F.F. 84)

As grounds for his position, the Student Petitioner cites three deficiencies. These are: 1. It failed to address the Petitioner's deficit in written expression. 2. It failed to address the Petitioner's processing speed and reading deficits. 3. It failed to include accommodations recommended by Dr. Teresa Izquierdo.

A review of the recommendations made by Dr. Izquierdo, the IEE evaluator indicates the following.

These recommendations included a plan to address his academic delays and current limitations with sustained attention/concentration and processing speed in addition to academic delays in the areas of writing and math. Individualized academic instruction and support services in math calculation, math reasoning, math fluency and written expression, extended time for testing, use of distraction free environment for testing,

small group instruction and preferential seating. (F.F. 68) Dr. Izquierdo also encouraged collaboration between collaboration between the Respondent and Petitioner's physicians. (F.F. 69) She also recommended an OT evaluation. (F.F. 70)

The OT evaluation was completed. (F.F. 46)

A review of the IEP discussed his limitations with sustained attention/concentration and ADHD and ways to address them (IEP p. 2) Page 1 of the IEP address the fact he qualifies for SLD in math. In respect to the blocks of Special Education on page 6 of the IEP, they were planned to be used for extra help in math. (Summary Notes 11/29/2019, P.E. #5, p. 199)

The six annual goals of the IEP concerned 1. Observation and focus on a presenter (p. 4 of IEP) 2. Use of appropriate language with peers (p.4 of IEP) 3. "...Petitioner will be able to attend to a teacher given task with no more than 2 redirections for 4 out of 5 observations in the classroom setting. 4. Concerns conversational activity. 4. Concerns language and speech. 5. Concerns language and speech. 6. Concerned improving the Student/Petitioner's vocabulary. The recommendations in the IEE have been considered or verbalized in the IEP.

There are no goals concerning writing and math.

Based upon the foregoing, the IEP created on 11/29/2019, was not written in such a way to provide FAPE to the Student Petitioner. The IEP should have done a better job in specifically addressing the recommendations of the IEE or addressing why they were not addressed.

e.

Appropriateness of 04/04/2014 and 03/16/2015 IEPs

Petitioner did not submit proof that the IEPs of 04/04/2014 and 03/16/2015 were inappropriate or failed to provide FAPE. Therefore, it will be assumed that they provided the Student Petitioner FAPE.

f.

Compensatory Education

Petitioner did not specifically make a claim for damages or compensatory education. Compensatory education is an equitable form of reimbursement when a school district does not provide (“FAPE”). Compensatory education can be in the form of reimbursement for out-of-pocket educational expenses, additional prospective services or supports, and even a more supportive educational setting (such as residential or day school placement) than what the student would have been entitled to if the district had not failed to provide a FAPE. The concept behind compensatory education is to place the student in a position that he or she would have been if there had been no violations under the IDEA.

*“[T]he usual remedy under the IDEA for a student who has been denied appropriate services in the past is an award of compensatory educational services to place her in the same position she would have occupied, had the District complied with the IDEA.” **Sanford School Department, 47 IDELR 176 (Maine State Educational Agency, October 31, 2006)***

This issue in this situation is the Student Petitioner’s Parents have removed him for the district effective the 2017-2018 school year. He was homeschooled for the 2017-2018 and 2018-2019 school years and based upon the finding above is not eligible for compensatory education.

KRS 13B.090(7) sets forth the standard for a ruling or an award in an administrative hearing.

*(7) In all administrative hearings, unless otherwise provided by statute or federal law, **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.** The agency has the burden to show the propriety of a penalty imposed or the removal of a benefit previously granted. The party asserting an affirmative defense has the burden to establish that defense. The party with the burden of proof on any issue has the burden of going forward and the ultimate burden of persuasion as to that issue. The ultimate burden of persuasion in all administrative hearings is met by a preponderance of evidence in the record, except when a higher standard of proof is required by law. Failure to meet the burden of proof is grounds for a recommended order from the hearing officer.*

In the present case, the Student Petitioner's Parents have removed him from the Respondent School District. Therefore, he is not eligible for compensatory education and since no claim was articulated; this Hearing Officer is unable to craft a remedy for the inappropriate IEP.

DECISION AND ORDER

Determination that the Petitioner is a Student with a Disability

This is moot. The Petitioner has been provided with an IEP most of his educational career as set forth in the discussion on "Child Find". The Respondent School District continues to recognize he is a student with a disability.

Reimbursement for "Out of Pocket" Educational and Evaluation Expenses

This Hearing Officer is unable to rule on this issue as the Student Petitioner did not submit any evidence regarding this matter during the course of the hearing.

Compensation for the Independent Evaluator

The fact the independent evaluator did not appear at the ARC meeting did not violate FAPE. Furthermore, said evaluator is not entitled to be compensated by the Respondent for appearances at ARC meetings.

Inappropriate IEPs

As explained above, although the IEPs for 2016-2017, 2017-2018 and 2018-2019 were not appropriate; only the implementation of the IEP for 2/24/ 2016 -2017 violated FAPE. There was no violation of FAPE as the Student Petitioner's Parents removed him from the Respondent School District at the end of May 2017 to be homeschooled as set forth above.

Compensatory Education for 2/24/2016 to end of May 2017

In the event the Student Petitioner re-enrolls in the Respondent School District, this matter should be remanded to the ARC for consideration of compensatory education for only the period the 2/24/2016 IEP was effective and the subsequent IEP for the period ending on the last day of the 2016-2017 school year when he was actively enrolled in Respondent School District.

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 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.

This Order and Decision is entered this 23rd day of September 2019.

/x/ *Paul L. Whalen*

PAUL L. WHALEN
Due Process Hearing Officer

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 it, 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

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

