KENTUCKY DEPARTMENT OF EDUCATION
DIVISION OF EXCEPTIONAL CHILDREN SERVICES
EXCEPTIONAL CHILDREN APPEALS BOARD
AGENCY CASE NO. 18-19-12

[redacted] APPELLANT

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

[redacted] SCHOOLS APPELLEE

PROCEDURAL BACKGROUND

Student, who had graduated from high school in August of 2018, requested a due process hearing on January 2, 2019, alleging denial of FAPE. After a series of motions for clarification of issues, amended requests for hearing, and prehearing conferences, the hearing officer issued an order listing eleven issues for trial. The issues concern (1) the student's transition plan, (2) a manifestation determination by the school, (3) credit recovery work that allowed the student to make up failed classes and graduate, and (4) Student not being permitted to attend graduation and related activities.

The hearing took place from September 26-29, 2022. A final order issued on September 23, 2023, in which the hearing officer ordered Respondent to provide Student 27 hours of Orientation and Mobility Training but denied all other relief. Petitioner timely appealed the decision to the Exceptional Children Appeals Board (ECAB). The Kentucky Department of Education appointed the undersigned and Kim Price to serve as the ECAB panel in this appeal. Petitioner filed a brief, Respondent filed a response, and Petitioner filed a reply. The briefs and the record have been reviewed by ECAB.

GENERAL FACT FINDINGS

1. During all times relevant to this case, the student qualified for special education based upon deafness, blindness, and ADHD.

Student argued at the hearing and on appeal that reference to "Other Health Impairment" in an IEP opened the door for arguing that OHI includes traumatic brain injury from a car accident. A review of the record conclusively shows that OHI first appears prior to the date of said accident and refers to ADHD. Nothing in the records suggests that OHI was ever understood to include traumatic brain injury.

2. Student's vision is impaired by a degenerative condition called Peroxisome Biogenesis Assemble Disorder (PBD) and Zellweger.

The student also has Retinitis Pigmentosa, a hereditary condition, which is progressive and vision loss that varies with each person. In 2017, the retinitis was re-diagnosed as retinal dystrophy secondary to PBD. (See Respondent's Exhibits). The parent testified that the student has had PBD since birth, that it's progressive, and that it affects both sight and vision. TE Vol I, p. 17, 24, 50. No medical testimony or medical records were presented addressing whether PBD causes neurological issues.

3. Independent of PBD, the student had been diagnosed with ADHD. Student's ADHD symptoms are inattention and failure to turn in work.

(See 2/7/17 IEP).

4. The student has prescribed glasses, but the corrected vision meets the legal definition of blindness.

This is undisputed.

5. Student used a laptop to magnify reading materials and do assignments, reading

16-point font with glasses.

(See 2/7/17 IEP)

6. Student received oral classroom instruction and participated in class without needing sign language for receptive or expressive communication.

This is undisputed.

7. **The student has hearing loss and is supposed to wear hearing aids in both ears**.

This is undisputed. There was testimony of a condition that temporarily caused difficulty with use of hearing aids, and there was testimony that there was a period where one of the hearing aids was not functional, but in general hearing aids were used to address hearing deficits.

8. **The hearing and vision impairments in combination constitute deaf-blindness**.

This is undisputed.

9. Student ordinarily was placed in the general education setting and also received related services to address vision, hearing, and deaf-blindness issues, including transition services to prepare for post-secondary settings.

10. Student's physical activity is restricted due to concerns over mobility, given Student's severe peripheral vision constriction.

This is undisputed. Throughout the student's time in high school the student received Orientation and Mobility (O and M) related services. The focus of the services was to prepare student to function with possibly reduced vision in the future as, at the time the student was in school, the student was able to navigate the school environment without aids such as a cane.

11. The student attended [redacted] during Student's first four years of high school (Fall 2015 through Spring 2018).

This is undisputed.

12. Student turned 18 on July 16, 2017, prior to the beginning of [redacted] 4th year of high school, at which time IDEA rights transferred from Parent to Student.

This is undisputed.

13. Student committed what the school deemed a serious violation of the conduct code on May 8, 2018. A manifestation determination was conducted at an ARC meeting on May 21, 2018. The ARC determined that the misbehavior was not a manifestation of the student's disability.

While Student takes issue with whether the manifestation determination was proper procedurally and substantively, a manifestation determination occurred.

14. After determining the behavior violation was not a manifestation of the student's disability, the school transferred the student to [redacted] for student's "5th" year, which constituted a change of placement.

This was Issue Three of the eleven issues to be tried, which the school conceded at hearing and will, therefore, not be further addressed.

15. At the time of the transfer to [redacted], the student had completed four years of high school classes but had failed some of them. The student attended and took credit recovery instruction and tests at [redacted] on August 21-23, 2018, to recover credit for the classes [redacted] had not passed previously. [redacted] completed credits needed to graduate on August 23, 2018, and graduated at that time. Hence, the student's "5th" year consisted of a few days spent recovering credit needed for graduation.

This is undisputed, but with the qualification that Student takes issue with the credit recovery process, which is addressed elsewhere hereinbelow.

16. The student participated in a graduation ceremony and picture-taking at [redacted]

for Student alone but was not permitted to participate in a class graduation ceremony at [redacted].

This is undisputed.

17. At the time of the hearing, September of 2022, the student was 23 years old.

This is undisputed.

18. The student participated in said hearing in 2022 and answered the questions asked without wearing glasses or requiring sign language for receptive or expressive communication.

This is undisputed.

FINDINGS REGARDING TRANSITION PLAN, BRAILLE,

SIGN LANGUAGE, AND O & M SERVICES

Issue One was whether the school created an appropriate transition plan. Issue Two concerned claimed deficits in provision of Braille, Sign Language, and O and M services, which were not necessary to access education in high school but were part of a transition plan that anticipated additional vision and hearing loss after graduation.

19. The student's vision and hearing deficits together constitute deaf-blindness.

This is undisputed.

20. **It was not shown that an intervenor was needed in order to implement the transition plan or as academic support.**

The student's parent testified that at an April 26, 2017 ARC meeting, an intervenor was requested but not granted. Though not addressed in Student's brief, cross-examination by

Student's counsel during the hearing suggests Student thinks an Intervenor should have been employed:

> An intervenor is somebody that would work with the student individual and support them with communications, support them with accessibility, documents, those kind of things.
> Q And an intervenor could -- could be considered a related service; correct?
> A I don't know because it's not in Kentucky.
> Q Well, in your educational -- as an – as an expert in special education, an intervenor could be a -- a -- could be considered a related service; correct?
> A I would not think so.

TE Vol 2, p. 76. While intervenors are not certified in Kentucky, ECAB believes intervention services can be provided where necessary for FAPE. However, there was not proof that the nature and extent of the student's deaf-blindness at the time the transition plan was created and implemented required one-on-one intervening services for the student to be able to participate in the transition plan or to receive meaningful benefit from the IEP.

21. It was not shown that a "liaison" between the school and the student's parent was necessary for the transition plan.

Emails from the parent to school personnel introduced as exhibits reflect a great deal of hostility. The orientation and mobility instructor testified she felt threatened by the parent (but not the student). TE Vol. 2, p. 254. Though not addressed in Student's brief, cross-examination during the hearing suggests counsel for Student contends a "liaison" should have been employed to communicate with the parent.

> And isn't it important for communication between parents and school that would benefit the child -- isn't that an important part of the -- implementing the IEP?
> A I think it is important, yes.
> Q Yeah. And so a liaison between these two factors, if there's no communication, would not have been considered to be a related services to help implement this IEP for [redacted]?
> A. No.

TE Vol II, p. 80. No legal basis was given for making a "liaison" to mediate parent communications with the school a related service on an IEP.

19. **Personnel implementing services for the transition plan were trained to work with deaf-blind.**

The orientation and mobility teacher testified as follows:

> [A]re there specific classes that you -- or coursework that you would do to -- to help you with a student like [Student] who has multiple sense -- multiple sensory loss?
> A Yes.
> Q So that wasn't new to you that – when you started working with [Student], that wasn't a first-time basis with you working with somebody with deaf-blindness?
> A No. We're trained to work with that population.

(TE Vol. 2, p. 216).

20. The transition plan took into account the potentially progressive nature of the student's vision loss.

The orientation and mobility instructor testified:

> Q I think the records that we reviewed before you joined us would tell us that [Student's] diagnoses are potentially progressive, that [redacted] could eventually be completely blind but isn't currently. Is that your understanding of what you -- you were working with when you met [the student]?
> A Yes.
> Q There are some students who you work with, I assume, who are already completely blind, completely lack sight?
> A Yes.
> Q Are there very many, I assume, who are like [Student] that they currently do have some level of sight but there's a potential you're preparing them for complete blindness --
> A Yes.

TE Vol. 2, p. 229-230. The witness testified roughly half the students on her caseload have progressive blindness. TE Vol. 2, p. 230.

21. The student at times resisted cooperating with the transition plan.

At times the student resisted working with the O & M teacher. TE Vol. 2, p. 232. The teacher testified:

> I believe that I thought [the student's] plan was fine. I think that people worked really hard with [Student] to develop the appropriate plan and it was just a matter of

implementing that plan, getting the student on board. [The student] was a very capable student.

TE Vol. 2, p. 235.

22. The transition plan provided for orientation and mobility (O & M) services to train for the ability to navigate in both daytime and nighttime settings.

This is undisputed.

23. The school stipulated, without setting forth any particulars or manner of calculating, that 27 hours of O & M services were due Student. Student agreed to the stipulation, provided doing so did not preclude presenting proof that more than 27 hours of O & M were due the Student.

Vol. 1, p. 6-7.

24. There was not proof from Student establishing how many O & M hours were owed but not provided or were needed but not provided; the only proof establishing the number of O & M hours due Student is the stipulation by the school that 27 hours are due.

Student's brief argues that Respondent failed to prove *any* night O & M was given, but the parent testified that some was given (Vol. 1, p. 48; 109) and Student testified "I don't really need [O & M services] much." Vol 2, p. 153. Student did not present proof by which ECAB can calculate what O & M was due but was not provided nor do Student's briefs attempt any such calculation.

25. The student resisted learning to use a cane because [redacted] did not yet need one.

One difficulty encountered in teaching the student skills [redacted] would only need later, when [redacted] became blind, is that at the time the plan was implemented, [redacted] didn't need these skills. The student was able to navigate hallways at school without a cane. TE Vol. 2, p. 234. Referencing an

ARC conference summary regarding goals involving cane use, the O & M teacher testified as follows:

> A Okay. So the beginning of that says that [Student] made progress on [Student's] mobility goals. **[Student] was traveling through the school without [Student's] cane, utilizing [Student's] functional vision to navigate. [Student] had lost [Student's] cane and didn't want to travel with one**. {Student] has not requested assistance going to classrooms. Observed by teachers, staff, and COMS to travel independently without cane through the school building.

TE Vol. II, p. 238, emphasis added. The student resisted cane instruction and prompting and consequently did not meet all the cane goals:

> A Okay. So [Student's] goal was "May 2018, while traveling in the school community, [Student] will use safe travel techniques, cane skills to navigate the environment with 90 percent accuracy as measured by the COMS weekly progress data." And it says [Student] did not meet that. [Student's] benchmarks were "If given a task or destination, [Student] will demonstrate proper arcing with the cane with 90 percent accuracy. No more than one prompt or three consecutive attempts." [Student] did not meet that. And then I noted that "[Student] needed heavy prompting to properly arc [Student's] cane. [Student] partially completed this goal." And then I gave -- one, two, three -- four different dates where [Student] did that…. "When detecting a drop-off, [Student] will stop and use [Student's] cane and safely approach with 90 percent accuracy. No more than one prompt or three consecutive attempts on three separate training sessions." [Student] met this on three different dates. "When traveling in the community, [Student] will locate a given destination/landmark safely and efficiently with proper cane skills. No more than one prompt or three consecutive attempts on three separate training sessions with 90 percent accuracy. Not met." P. 239-240

The O & M teacher testified it was difficult to achieve cane goals if the student wouldn't use the cane. TE Vol. 2, p. 241.

26. The school took all reasonable steps necessary for the student to continue receiving assistance after graduation from groups and organizations whose purpose is to help adults such as Student.

The school's obligation to provide services terminated when the student graduated in fall of 2018. But this did not mean the student would not need services from someone after graduation:

> O&M is a lifelong learning experience. So depending on where a person goes after graduating high school, they might need orientation to a new environment. There might be skills that they need to continue to work on.
> Q So cold -- going cold turkey and just dropping [redacted] with no O&M, it probably, in your professional opinion, would not be the best thing for [Student]?
> A Cold turkey?
> Q Yeah. Just --
> A I mean, no. Typically -- I mean, it's best practice to make sure that people are getting services that connect them to their future

TE Vol. 2, p. 258-259. The transition plan introduced the student to resources available to the student, such as the Helen Keller Institute.

> What is it you understood Helen Keller to offer as a short course as discussed in that meeting?
> A The best of my recollection is it was very similar to [Kentucky School for the Blind] and it was services for students with similar disabilities to [Student] but nothing that I recall that was outside of what we were providing.

TE Vol. 2, p. 98. The school could only help fill out necessary forms and make the introductions. It did not have the power to compel other organizations to accept Student into their programs:

> If the school district decided that Helen Keller did offer something that the school district did not offer, even then, would you have the ability to require Helen Keller Institute to accept a student into a program?
> A No.

TE Vol. 2, p. 99.

[redacted] worked with transition services for the school during the time at issue. (TE Vol.2, p. 8). [redacted] doctorate is in "organizational leadership," specifically "transition of youth with disabilities." (TE Vol. 1, p. 121). [redacted] testified she attended quite a few meetings with Student where transition services were discussed. [redacted] said Student received the same transition services other students received who were either visually impaired, deaf or both deaf-blind. [redacted] stated the school's role was to make contact with organizations such as Office of Vocational Rehabilitation and the Deaf-

Blind Project, refer Student and facilitate the connections with these organizations, all of which the school did. Sometimes staff from these organizations would participate in the ARC meetings. She also met with these staff members outside of ARC meetings to assist Student. The school helped Student complete forms for assistance from these organizations. (TE Vol. 1, pgs. 106-08). [redacted] testified the school assisted Student academically and with the IEP to prepare Student for college which, at times, was a realistic goal. [redacted] testified "[W]hen a plan is developed, it's a collaboration between the school and other outside agencies in meeting with those, and we offer all of those opportunities at our schools." (TE Vol. 1, pgs. 140-43).

[redacted], the achievement and compliance coach ("ACC"), testified she was involved in transition planning as part of her job. [redacted] also stated the school arranged for personnel from the Office of Vocational Rehabilitation and the Office of the Blind and the Deaf-Blind Project to attend meetings where transition services were discussed. (TE Vol. 1, p. 9). [redacted] attended multiple meetings with Student where Opportunity Middle College was discussed. At this time, Opportunity Middle College was a program that allowed juniors and seniors to work on obtaining college credit. (TE Vol. 1, p. 24). Student testified the school did not fail to prepare Student for college. (TE Vol 2, p. 159). Student remembered someone from the school talking to Student about how to get into college. (TE Vol. 2, p. 160).

The parent acknowledged the school arranged from representatives from various organizations to attend ARC meetings:

> Q. So I think from everything you just testified to, it seems like you acknowledge that Opportunity Middle College and Office for Vocational Rehab and the Office for the Blind, that all of those were things that would be part of the transition from being a high school student to being an adult; is that correct?
> A. Correct.
> Q. And all three of those things were discussed multiple times at ARC meetings, correct; OVR, Office for the Blind and Opportunity Middle College?
> A. But not the last year. Not the last year.

Q. Not the 2018-2019 school year when went to [redacted].
A. Yes.

TE Vol. 2, p. 213. ECAB notes that the "last year" referred to by parent consists of three days of credit recovery work during which transition meetings reasonably would not be scheduled and after which the school's obligations terminated. The student's mother also acknowledge that the school created the necessary connection between Student's family and the organizations capable of helping Student after graduation:

Q. But all of those things are transition services that were discussed repeatedly at ARC meetings, correct?
A. I wouldn't say repeatedly, no. I would not say repeatedly.
Q. OVR would not attend more than one meeting?
A. They did, but Opportunity Middle College was not discussed repeatedly. They attended but didn't really say that much, OVR and Voc Rehab.
Q. But that meeting serves to make a connection between your family and that outside organization, correct?
A. Yes.
Q. And it allowed that agency to see what the school was doing with [Student] before they started services up, correct?
A. Yes. I don't know about -- yes, they did. Is that the only two transition that you have -- they have is the Voc Rehab and the Office for the Blind?
Q. Just the ones I'm asking questions about right now. What about the deaf project? Do you recall discussion of the deaf project?
A. The Deaf-Blind Project, yes.
Q. And what is that organization?
A. That's an organization that serves the deaf-blind community.
Q. Did you invite them to be a participant in any ARC meetings with [Student]?
A. Yes.
Q. And did somebody from that organization attend any meetings?
A. I think one maybe.
Q. And that's also an organization that serves adults with those disabilities.

TE Vol 2, p. 213-215.

27. Student received significant Braille instruction as part of the transition plan in anticipation of future sight loss; student's early success was later impeded by loss of feeling in Student's fingertips.

Student's IEP stated Student had learned the majority of the braille literary code, but has

trouble because of tactile deficits. Student mastered objectives for reading/writing the final letter group signs (dots 46 and 56). Student made inconsistent progress on the fluency objective. Student currently reads between 12 - 25 words per minute on an unread passage at [redacted] instructional level. Student made good progress on the punctuation objective but still needs to learn the parenthesis and quotation marks. Student learned the mathematical symbols for numbers 0 - 9, number indicator, addition, subtraction, multiplication, division, etc. (Respondent's Ex. 16, p. 12). Student has not mastered Braille, but it was not proved that failure to instruct is the reason. An important fact to remember is that Student could still see and hear (with glasses, magnification, hearing aids, etcetera), but was being asked to learn skills that might be needed at some future date if [redacted] could not.

28. Student received significant ASL instruction but it was discontinued at some point because Student was an oral communicator, there was no present need for ASL, and it could be learned later if hearing loss progressed to the extent it became necessary.

The parent acknowledged the ARC determined that the student did not need American Sign Language (ASL) because Student was "a more oral" communicator. The parent also acknowledged the ARC had concluded it would be nearly impossible to get Student to start expressively communicating with ASL because Student naturally preferred or had strength in speech at the time. (TE Vol.1, p 110-111). The lack of a school-based need for ASL was also explained in the conference summary from the November 15, 2017, ARC meeting. Respondent's Exhibit 20, p. 279:

> [The Deaf and Hard of Hearing] DHH teacher stated that there needs to be a need for ASL services. [redacted] can function in the regular classroom with FM system and can participate in class. [redacted] is able to communicate with the teachers in the classroom and can advocate for [redacted].

School personnel testified the student could pick up ASL later in life if Student's hearing loss progressed sufficiently to make ASL a necessity. At the hearing, more than four years after graduating, student testified orally, hearing and answering questions.

FINDINGS REGARDING THE MANIFESTATION DETERMINATION

Issue Four was whether Student's transfer to [redacted] by the school was arbitrary. Issue Five was whether the school properly notified Student of the ARC meeting at which the manifestation determination occurred. Issue Six was whether Student's alleged violation was a manifestation of [redacted] disability, and if yes, whether the School conducted a manifestation hearing. As found elsewhere hereinabove, a manifestation determination clearly occurred and the gravamen of Student's complaint is whether it was proper. Folded into Student's argument at the hearing and on appeal is the allegation that the School violated Child Find by failing to find Traumatic Brain Injury (TBI) as a disability under IDEA. Findings on Issues Four, Five and Six will be discussed together.

29. Child Find was not among the issues to be tried.

The hearing officer's order regarding issues is clear and was arrived at after considerable motion practice regarding what issues were to be tried. Evidence regarding Child Find related to TBI was introduced over the objection of School. The hearing officer's decision found the Child Find issue barred, and ECAB agrees, but the hearing officer also made an alternative ruling regarding whether a Child Find violation occurred with regard to TBI. Student argues Child Find on appeal, so ECAB will include findings on that issue.

30. There was not proof that Student suffered trauma in a car accident.

Student's counsel questioned a witness, using as an exhibit an accident report, and

established a car accident occurred in November 15, 2015, in which Student was a passenger, but did not show the accident report stated Student suffered injuries and did not submit the report itself into evidence. No hospital records, MRIs, or other evidence established evidence of trauma caused by the accident. Student testified ambiguously "there was some type of car wreck, but … it didn't really happen." TE Vol. 2, p. 157-158. A teacher, who was skeptical about the car accident (see Pet. Ex., p. 191), testified she observed no bruises or other evidence of injury after the accident. Student was not asked and did not testify that Student was injured in the car accident.

31. School took all reasonable and appropriate steps to determine whether the student was disabled by TBI for purposes of qualification to receive special education and did not so find.

References to TBI in medical records provided to School appear in Patient History or Health history, which repeats subjective information given by Student's mother or Student. Several months after the accident, a doctor recommended homebound instruction for one or two months due to Student's headaches and other physical symptoms, but made no mention of TBI in the medical diagnosis supporting the recommendation. (Resp. Ex. P. 66). Homebound was due to sores in ears from hearing aids, not TBI. When parent raised TBI as a question several months after the accident, the school repeatedly requested a medical diagnosis and explained that a doctor also would need to fill out forms, explaining how the TBI affected the student's ability to access education. The parent refused. When School asked for a medical release so School could contact Student's doctors directly, parent refused. Resp. Ex. P. 475-476.

To this date, no medical diagnosis or medical evidence relating TBI to student's ability to access education has been provided. School took all necessary steps to determine whether student qualified as disabled, for purposes of IDEA, by TBI and did not so find.

32. Student committed a serious violation of the student code of conduct in May of 2018, which resulted in transfer to [redacted] ; the transfer to [redacted] was not different than the punishment that would be given for a non-disabled student who engaged in such behavior.

ECAB finds the behavior in question was a threat which constituted a serious violation of the student code. There was testimony, not contradicted, that the punishment given was the same as would be given any student, disabled or not disabled.

33. School correctly determined that the behavior was not a manifestation of the student's disability.

At the time of the event, student's disabilities were vision, hearing, and ADHD. Of those, only ADHD relates to behavior. On May 21, 2018, the Admissions and Release Committee ("ARC") convened a manifestation meeting/hearing. (TE Vol. 1, p. 189 and TE Vol 3, p. 51). Student did not attend the ARC meeting and neither parents or a representative on Student's behalf.

[redacted], the achievement and compliance coach ("ACC") for School attended the ARC meeting. (TE Vol. 3, p. 21). Her role as an ACC was to schedule the ARC and IEP meetings for students in her building. She also did observations and academic testing for students that were being revaluated. (TE Vol. 3, p. 39). [redacted] reviewed Student's IEP and summarized [redacted] educational information and evaluations. She testified the ARC looks at the IEP and progress data, and obtains information from teachers regarding how Petitioner is performing in class. [redacted] stated the ARC considers the specifics and determines whether that incident

was a manifestation of the student's disability. (TE Vol. 3, p. 46-47). Prior to this incident, Student was relatively well-behaved. [redacted] testified Student's behavior that resulted in removal from [redacted] was not part of a lengthy pattern of similar behavior that started after the car wreck. (TE Vol 3, p. 48). [redacted] testified as follows.

> Q. So when [Student] who's diagnosed with ADHD, exhibits what you've agreed with me are [in some individuals] symptoms of ADHD, aggressive and compulsive behavior, how is that not a manifestation of his ADHD?
> A. Because in the past and the previous behavior records and antidotal records that we had that was part of the conference summary, Student has never exhibited aggression prior to this specific incident. And so I didn't have any documentation anywhere that stated that [Student] did have aggression with the ADHD.

TE Vol. 3, p. 86. The ARC concluded Student's series of threatening telephone voice messages within hours of each other were not a manifestation of Petitioner's disability (Respondent's Ex. 29). ECAB agrees with that conclusion.

34. **Student and Student's parent were both given notice of the ARC meeting**.

FAPE rights transferred to Student many months prior to the manifestation determination on May 21, 2018. Only Student was entitled to notice. Nonetheless, the record reflects that the parent, with consent of Student, continued to participate in ARC meetings and receive educational information regarding Student.

[redacted] testified she told Student about the May 21, 2018, meeting and she sent [redacted] an invite. The Conference Summary Report dated May 21, 2018, states:

> A copy of the procedural safeguards (parental rights) was mailed home to the student along with the meeting notices. [redacted] did not attend the ARC. Meeting notices were [postal] mailed on May 11, 2018 and May 14, 2018. A meeting notice was hand-delivered to [redacted] grandmother when she came to the school to pick up [redacted] book bag and laptop. Email notices were sent on May 11, 2018; May 14, 2018; May 16, 2018; and May 21, 2018.

School concedes that written notice postal-mailed to Student was not in 16-point font. Parent claims the postal-mailed notices were not delivered or, alternatively, that Student was in the habit of throwing away any mail [redacted] received that Student could not read, rather than ask her to read it to Student. TE Vol. 1, p. 140-146

Testimony from School personnel pointed out that emailed notice sent Student could be enlarged on Student's laptop to 16-point font in the same way that Student enlarged all written material at school. TE Vol 3, p. 93-95. Student's parent argued that student's laptop was not available at that time, but the record reflects Student's laptop was picked up from the school on May 11, 2018, along with a note taped to it giving notice of the meeting. The emailed notices were copied to parent's email. Parent contended that she did not have access to email at that time, though the record reflects parent sending and receiving many emails during the month of May, 2018 at that email address. See Resp. Ex., p. 495 and 498.

ECAB finds that Student and parent both were given notice of the ARC meeting at which the manifestation determination took place.

FINDINGS REGARDING CREDIT RECOVERY WORK

Issue Seven was whether Student completed all the classes and tests required to qualify for graduation from high school. Issue Eight was whether Student actually passed Credit Recovery tests that were given in the fall of 2018 and whether Student received necessary accommodations while taking the tests. Issue Nine was whether Student was properly exited from special education services. Issues seven, eight and nine will be discussed together.

35. Student's completion of missed work via the PLATO credit recovery program

was both expected, prior to the transfer to [redacted], and proper; work necessary to earn credit for previously-failed classes was completed, thereby qualifying student for graduation.

Parent testified that School planned to stretch out Student's matriculation and delay graduation until age 21 so that Student could continue to receive related services from School. TE Vol. 1, p. 126 Without addressing whether doing so would be legal, ECAB finds that there was no such plan. [redacted] testified as follows:

> Q. Was there ever a discussion that [Student] needed to have those credits spread out over more than four years so that would [redacted] potentially take -- intentionally, as a plan, that [redacted] would take five years or six years to complete high school?
> A. No, there was not.

TE Vol. 3, p. 70. A conference summary in March, 2016, reported student might take more than four years, but would graduate. Multiple ARC summaries in subsequent ARCs attended by parent and, after [redacted] turned 18, by student either have the same entry or reflect that Student will graduate in 4 years, alternating apparently in optimism according to amount of missing work at the time of the ARC. The May 8 and 9, 2018 ARC meeting, at the end of the 4th year of high school at [redacted] indicated Student was expected to graduate in 4 years. TE Vol. I, p.116-126; 130- 134; 138-139.

The use of PLATO credit recovery is a method of completing classes accepted and legal in Kentucky. The record reflects that prior to transfer to [redacted]. Student had utilized PLATO at [redacted]. All of the tests Student took at [redacted] to complete credit recovery were for classes the student had previously taken one or more times. [redacted], a special ed teacher at [redacted], testified that half the special education students at [redacted] had come for credit recovery rather than taking entire classes; that it was not uncommon for a student to complete in a few days work in previously-taken courses; and that it was not odd for a student who had previously passed

English 4 to use PLATO to recover credit for an English 1 class the student previously had failed. See Vol 3, p. 169-205.

The record reflects that testing at [redacted] was proctored, necessary accommodations were provided, and Student, on Student's own, completed credit recovery on the units or sections necessary to recover credit for classes previously failed. There was not evidence proving Student was treated differently, except for proper accommodations required by [redacted] vision loss, than non-disabled students taking credit recovery or that there was anything improper about the way in which the testing was administered.

FINDINGS REGARDGING GRADUATION CEREMONY

Issue Ten was whether Student was inappropriately denied an opportunity to participate in the graduation ceremony and related activities. Issue Eleven was whether School intentionally discriminated against Student and gave [redacted] disparate treatment under section 504 of the Rehabilitation Act of 1973. Issues 10 and 11 will be discussed together. The hearing officer ruled that he did not have jurisdiction to decide these issues, but also made a fact-finding dispositive or the issues if they can be decided in this proceeding. ECAB makes essentially the same fact finding.

36. Student's exclusion from graduation and related activities was not different from how non-disabled students disciplined in similar incidents are treated.

There was no evidence presented to show School discriminated against Student. The decision to not allow Student to attend the graduation ceremony was not a violation of School's policy and was not applied to in a discriminatory manner. [redacted], principal, testified there was nothing different about the way School handled the disciplinary matter with Student as compared to a similar incident with any other student. (TE Vol. 3, pp. 40-42). Additionally,

Student participated in the graduation ceremony at [redacted] without filing for due process stay put or raising any objection.

CONCLUSIONS OF LAW

Student bears the burden of proof by a preponderance of evidence. *Schaffer v Weast, 546 SW2d 49, 57-58 (2005)* and KRS 13B.090. Accordingly, Student must prove each element of the case by a preponderance of evidence. See also: *City of Louisville, Div. Of Fire v. Fire Serv. Managers Ass'n by and Through Kaelin,* 212 S.W. 3d 89, 95 (Ky. 2006): "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."

1. Student failed to prove that School did not design and implement an appropriate transition plan.

Issues One and Two concerned the transition plan and provision of transition services. 34 CFR § 300.43 states as follows:

> (a) Transition services means a coordinated set of activities for a child with a disability that—
> (1) Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;
> (2) Is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and includes —
> (i) Instruction;
> (ii) Related services;
> (iii) Community experiences;
> (iv) The development of employment and other post-school adult living objectives; and
> (v) If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.

(b) Transition services for children with disabilities may be special education, if provided as specially designed instruction, or a related service, if required to assist a child with a disability to benefit from special education.

In the present case, per findings hereinabove, Student failed to prove that School did not design and implement an appropriate transition plan.

2. The disciplinary transfer was proper, notice of the manifestation meeting was given, and the Student's misbehavior was not a manifestation of the student's disability

The School conceded Issue Three, that the transfer to [redacted] was a change in placement. Issues Four, Five, and Six concerned the manifestation determination process. Student argued the transfer to [redacted] for disciplinary reasons was arbitrary because the manifestation hearing occurred without proper notice and was conducted without considering whether the student's misbehavior was caused by an alleged TBI disability. 707 KAR 1:340, Section 15. Manifestation Determination states:

(1) Within ten (10) school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the relevant members of the child's ARC, as determined by the LEA and the parent, shall convene a meeting to review all relevant information in the student's file, including the child's IEP, any teacher observations, teacher-collected data, and any relevant information provided by the parents to determine:
(a) If the conduct in question was caused by, or had a direct and substantial relationship to **the child's disability**; or
(b) If the conduct in question was the direct result of the LEA's failure to implement the IEP.
(2) The conduct shall be determined to be a manifestation of the child's disability if the ARC determines that either of the conditions in subsection (1)(a) or (b) of this section was met.

(emphasis added). Neither the parent nor the adult Student, to whom IDEA rights had transferred, attended the meeting but per fact-findings hereinabove notice of the meeting was given to both in multiple ways, both in writing through multiple media and orally to the student. Regarding the substance of the meeting, per fact-findings hereinabove, Student's disabilities for

special education purposes at the time of the meeting were vision, hearing, and ADHD, and none of those caused the misbehavior for which the student was disciplined. Student argued that another disability exists, TBI, which should have been considered. However, applicable law limits the inquiry to disabilities that qualify the student for special education. TBI is not one of those disabilities and Child Find was not among the issues to be tried at the hearing. Additionally, per the fact-findings, proper documentation was not, and as of the date of the hearing, still had not been provided to establish traumatic brain injury that affected or affects the student in a way that would qualify the student for special education, or that it was causally linked to the student's misbehavior. ECAB finds, as did the hearing officer, that the disciplinary transfer was proper, that notice of the meeting was given, and that the finding that the behavior was not a manifestation of the student's disability was correct.

3. Student completed classes and tests required to qualify for graduation from high school, passed Credit Recovery tests, received necessary accommodations while taking the tests, and was properly exited from special education services.

Issue Seven was whether Student completed all the classes and tests required to qualify for graduation from high school. Issue Eight was whether Student actually passed Credit Recovery tests that were given in the fall of 2018 and whether Student received necessary accommodations while taking the tests. Issue Nine was whether Student was properly exited from special education services. Per the fact-findings hereinabove, the evidence showed that all of these were true.

4. Student was not inappropriately denied an opportunity to participate in graduation services and related activities.

Issue Ten was whether Student was inappropriately denied an opportunity to participate - in the graduation ceremony and related activities. Per fact-findings hereinabove, ECAB finds that is not the case.

5. The hearing officer lacked jurisdiction to rule on claims of disparate treatment under section 504 of the Rehabilitation Act of 1973; alternatively, there was no proof of discrimination.

Issue Eleven was whether School intentionally discriminated against Student and gave [redacted] disparate treatment under section 504 of the Rehabilitation Act of 1973. Issues 10 and 11 will be discussed together. The hearing officer ruled that he did not have jurisdiction to decide these issues, but also made a fact-finding dispositive or the issues if they can be decided in this proceeding. ECAB makes essentially the same fact findings.

FINAL DECISION AND ORDER

The Exceptional Children Appeals Board affirms the decision of the Hearing Officer and finds no relief is due Appellant.

SO ORDERED on March 11, 2024, by the Exceptional Children's Appeals Board, the panel consisting of Kim H. Price and Mike Wilson, Chair.

NOTICE OF APPEAL RIGHTS

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

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

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

707 KAR 1:340 § 8. Appeal of Decision provides the following information to aggrieved parties, in subsection (2): A decision made by the Exceptional Children Appeals Board shall be final unless a party appeals the decision to state circuit court or federal district court.

KRS 13B.140, which pertains to appeals to administrative hearings in general, in Kentucky, and not to civil actions under Part B of the Act (the IDEA), provides: (1) All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not in the enabling statutes, a party may appeal to Franklin Circuit Court of the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the student upon the agency and all parties of the record. The petition shall include the names

and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

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

EXCEPTIONAL CHILDREN APPEALS BOARD

____/_s/ *Mike Wilson* _____
Mike Wilson, Chair
March 12, 2024

CERTIFICATE OF SERVICE

CERTIFICATION:

The foregoing was served by email on March 12, 2024, on the following:

Donald Haas, KDE Deputy Legal Counsel
donald.haas@education.ky.gov

With copies emailed to:

[redacted]

[redacted]

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_____/S/_____
MIKE WILSON, CHAIR
EXCEPTIONAL CHILDREN APPEALS BOARD