

**KENTUCKY DEPARTMENT OF EDUCATION
DIVISION OF LEARNING SERVICES
AGENCY CASE NO. 1819-14**

████████████████████

PETITIONER

v.

██████████

COUNTY SCHOOLS

RESPONDENT

* * * * *

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

This Due Process Hearing was requested by letter filed with the Kentucky Department of Education (KDE) by Counsel for the Petitioner pursuant to the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. Section 1400, et. seq.)¹ Petitioner’s parents, ██████████ ██████ have intervened as Petitioners. An administrative hearing was conducted in ██████████ Kentucky from November 11 to November 14, 2019 and December 16 and 17, 2019. In addition, the partial testimony of one witness was taken by deposition conducted on November 26, 2019; that deposition was submitted in lieu of live testimony at the hearing.

The Honorable Marianne Chevalier represented Petitioner; the Honorable Robert Chenoweth represented Respondent. ██████████ were present during the hearing, as were the Respondent’s representatives, ██████████ and ██████████. During the course of the hearing, 11 witnesses testified and a number of exhibits were entered into the record. The hearing was conducted pursuant to 34 CFR Part 300, KRS 13B and 707 KAR 1:340.

¹ Petitioner also submitted a separate claim regarding Section 504 of the Rehabilitation Act of 1973. In the interests of economy, the hearings were consolidated for hearing purposes. This Order will address only the IDEA issues; a separate order will be issued in accord with the requirements of Section 504.

Petitioner argues that Respondent school district denied Student a free appropriate public education (FAPE) by failing to properly locate, identify and evaluate Student as a student with a disability. Petitioner also argues that Respondent failed to create and implement an appropriate Individualized Education Program (IEP) for Student.

FINDINGS OF FACT

1. At the time of the hearing in this matter, Student was an 18-year-old graduate of ██████ High School (█████ in ██████ County, Kentucky. She graduated early at the end of her eleventh-grade year, which was the 2018-2019 school year. Student attended ██████ Middle School in ██████ during her 6th and 7th grade years, before switching over to ██████ Middle School so as to qualify to attend ██████ High School her 9th grade year. At the end of her 9th grade year, Student and her family opted for Student to attend the newly opened ██████ (TE pp. 541- 559; P 001-002).²
2. Student has been diagnosed as having visual disorders and has been served by a Section 504 accommodation plan since 2010. In 2013, when Student returned to ██████ ██████ after time at a private school, a new 504 plan was developed based on a diagnosis and related impairment due to visual disorder of convergence with oculomotor dysfunction of pursuits. Student's 504 accommodations include extended time for completion of assignments, positive reinforcement and a quiet environment for work. (P 068-072).
3. During her time in the ██████ system, Student was never identified as a student with a disability in need of services under the IDEA. Her high school transcript shows mostly B and C grades and no failing grades. (P 183).

² Petitioner's exhibits are marked by tab numbers as well as Bates stamp numbers. They will be referred to herein by Bates stamp numbers unless otherwise noted. Respondent's exhibits are marked by tab and will be identified by tab numbers only.

4. [REDACTED] is structured to use academies for its students. At the start of their 10th grade year, students can participate in the health science academy, the technology academy or the professional services academy. Student started her 10th grade year in the [REDACTED] academy, then decided to switch to the [REDACTED] academy at the end of her 10th grade year. (TE pp. 29-32).

5. When Student expressed an interest in graduating early, her parents supported her. Student took part in an internship at a local dentist office during the second semester of her last year of high school, which took her away from the school for a portion of the day. She participated in band at [REDACTED] and expressed an interest in music education as a career. Student took part in dual credit courses. At the time of the hearing, she was enrolled at [REDACTED]. (TE pp. 591-592, 678, 777-778, 811).

6. A review of Student's campus portal records indicates that she had missing and late assignments during her time at [REDACTED]. Student's mother (Mom) closely followed the campus portal records and was in constant communication with various school personnel regarding requests for classes and updates on Student's progress. (P 184-212, Admitted Exhibits in P Tab 12, R 19, R 29, R 35).

7. [REDACTED] was a teacher within the [REDACTED] academy at [REDACTED] during Student's 10th and 11th grade years. [REDACTED] is familiar with Student as she had her in a class focusing on relationships during her 10th grade year. She also taught Student in two classes during the fall of her 11th grade year, including one class on relationships that [REDACTED] specially designed to encourage leadership for girls. [REDACTED] saw student on a daily basis and had a close and positive relationship with both Student and Mom, who she communicated with often. (TE pp. 864-886, 897).

8. [REDACTED] is familiar with the IDEA and aware that a teacher can make a referral if she believes a child may be eligible for IDEA protections. [REDACTED] felt that Student was doing quite well during her 11th grade year and that she was maturing and had improved “quite a bit” from her 10th grade year. [REDACTED] saw no issues in Student that she did not observe in other students in her classroom. She never thought it was necessary to refer Student for possible IDEA protections. (TE pp. 874-875, 878, 883-884, 891).

9. [REDACTED] acknowledged that failing or low grades are not the only red flags that would trigger a teacher referral. [REDACTED] also indicated that Student had missing assignments in her classes, but she did not see those missing assignments as an indication of a disability as students often had missing assignments. (TE pp. 892-897).

10. [REDACTED] is a special education teacher at [REDACTED] Student was in a senior English class that was co-taught by [REDACTED] and a regular education teacher. [REDACTED] role in the classroom was to provide supports for those students who qualified for services under the IDEA and were thus accommodated by IEPs. Although [REDACTED] primary purpose in the class was to support students with IEPs, she worked with all students in the class, including Student. [REDACTED] knew Student was accommodated by a 504 plan and at times checked in with her to inquire about her needs. [REDACTED] is aware of a teacher’s ability to make a referral for IDEA purposes, but did not see any reason to refer Student for an IDEA evaluation. (TE 915-921).

11. [REDACTED] is the director of special education for [REDACTED] [REDACTED] testified that a referral for an IDEA evaluation can be made by anyone, including a parent, teacher, administrator or community member. After the request for a due process hearing was filed in this matter, Respondent treated it as a referral and convened an admissions and release committee (ARC) to consider any concerns regarding Student. The suspected disabilities identified in the referral for

multi-disciplinary evaluation are “other health impairment” (OHI) and “specific learning disability” (SLD). (TE pp. 975, 983; R 2, R 6).

12. At Respondent’s request, Mom provided input on the initial referral, which was the starting point for the ARC. The ARC meeting was conducted on February 13, 2019. During the meeting, the ARC considered teacher input and reviewed a consultative psychological assessment report compiled by licensed psychologist [REDACTED] based on an evaluation conducted on November 6, 2018. (TE pp. 763-765, 983, R6, R7)

13. [REDACTED] is a clinical psychologist who first conducted an assessment of Student on Nov. 2, 2012, when Student was in the 5th grade. Student’s parents sought an updated evaluation in 2018. [REDACTED] conducted a clinical interview, directly observed Student, and reviewed her history. [REDACTED] methods of evaluation included the Wechsler Adult Intelligence – IV, the Woodcock-Johnson-III Scale of Achievement, and the Conners Adult ADHD (Attention Deficit Hyperactivity Disorder) Scale. She listed her “diagnostic impressions” that Student had mild ADHD, mild specific learning disorder with impairment in reading, and generalized anxiety disorder with occasional panic attacks. [REDACTED] found Student to be functioning within the average range of intellectual ability with a full-scale IQ of 94. [REDACTED] testified that Student would be expected to earn average grades and achieve similarly to her same age peers. [REDACTED] estimates that Student should be achieving B and C grades. [REDACTED] notes that Student struggles with reading comprehension and suffers from test anxiety and recommended that Student may benefit from testing in a quiet room, having extra breaks and tutoring. (TE pp. 606-608, 619-645; P 053-057, Amended P 058-061).

14. The ARC took [REDACTED] report into consideration to determine whether or not there was information to support a suspected disability and whether to move forward with an evaluation of Student. The ARC reviewed Student’s current grades, which ranged from A to C. The ARC also

discussed tutoring issues, Student's ADHD, vision and organizational issues. A plan for interventions and progress monitoring was developed. The ARC ultimately determined that although that there was no clear indication of a suspected SLD under the IDEA, it would proceed to evaluate in that area. The team also agreed to proceed with an evaluation of OHI as a possible disability. (TE pp 984-987; R 7).

15. According to [REDACTED] she and other team members were very unsure as to whether there was anything to suspect in terms of a SLD because Student's scores were in the average range and IQ and academics were closely aligned. [REDACTED] noted that Student was in the 47th percentile in one area and in the 44th percentile in another area on the MAP assessment and had passing grades. [REDACTED] testified that there "wasn't a suspicion, at least in my mind as an ARC member, that there was a specific learning disability based on what we had." The ARC agreed that the possibility of OHI supported further evaluation to consider whether or not Student's ADHD inattentive type was rising to the level of warranting specially designed instruction in the form of special education services. According to [REDACTED] the team agreed to evaluate in both areas to fully address the parent request and evaluate and eliminate as necessary. (TE pp 984-987; R 7).

16. [REDACTED] is the [REDACTED] 504 coordinator. [REDACTED] is a former special education teacher who has experience working with IDEA and chairing ARC meetings. [REDACTED] reviewed [REDACTED] report on Student while serving Student's 504 needs and saw nothing in the report that would call for an IDEA referral. According to [REDACTED] [REDACTED] report only addressed mild issues that would not adversely impact Student's performance. (TE pp. 408-410, 933-934, 947-948, 954).

17. [REDACTED] is a certified school psychologist who serves [REDACTED] She teamed up with two other examiners to compile an integrated report based on the ARC's decision to evaluate for OHI and SLD. As part of the assessment, [REDACTED] and her team administered the Wechsler Individual

Achievement Test, Vineyard Adaptive Behavior Scales and Conners-3 Rating Scales. They also reviewed Student's social-developmental history, observed Student in class, interviewed a teacher and reviewed Student's records. Based on the assessment, the team concluded that Student did not meet SLD eligibility for any academic achievement areas considered as part of the evaluation. In order to be deemed to have a SLD, a student must exhibit a pattern of strengths and weaknesses in performance, achievement, or both relative to ability level or intellectual development. Based on the evaluation, [REDACTED] and her team concluded that there are no significant discrepancies between Student's full-scale cognitive score of 94 and academic achievement scores in basic reading, reading fluency, reading comprehension, math calculation, and math reasoning. (TE pp. 207, 329-362; R 8).

18. The team likewise concluded that Student does not meet the eligibility criteria for OHI. In order to be eligible for an OHI, a student must have the existence of a health impairment caused by chronic or acute health problems that result in limited strength, vitality, or alertness. The team concluded that Student's health condition of ADHD and generalized anxiety disorder did not cause her educational performance to be significantly and consistently below the level of same age peers. Based on the results of the evaluation, [REDACTED] and her team made several recommendations to address Student's inattention, organization/study skills, work completion and test anxiety. [REDACTED] testified that even though Student did not meet the eligibility requirements for SLD or OHI, she could be successful with supports and accommodations in spite of her diagnoses. The integrated report was issued on April 19, 2019. (TE pp. 207, 329-362; R 8).

19. A follow-up ARC was convened on April 25, 2019 to discuss the integrated report. The ARC discussed Student's eligibility for both SLD and OHI and concluded that she was not eligible. Specifically, with regard to SLD, the ARC concluded that Student does not meet the eligibility

requirements and is thus not eligible for specially designed instruction and related services. With regard to OHI, the ARC concluded that Student has an OHI, but that it does not adversely impact her education and thus Student is not eligible for specially designed instruction and related services. Student's parents disagreed with the ARC determination. (R 9).

CONCLUSIONS OF LAW

1. As this Due Process Hearing is an administrative proceeding in Kentucky, there are two guides for who has the burden of proof. As the party seeking relief, 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. In addition, KRS 13B.090(7) provides that 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." Here, Petitioner is the party requesting action or seeking a benefit. Thus, Petitioner has the burden of proof and must establish, by a preponderance of the evidence, that Respondent violated IDEA.

2. Petitioner specifically has the burden of proof to establish that Respondent denied Student a free appropriate public education (FAPE) by failing to properly locate, identify and evaluate Student as a student with a disability and by failing to create and implement an appropriate Individualized Education Program (IEP) for Student.

3. Petitioner's overarching argument is that Respondent has failed to provide Student with a free appropriate public education (FAPE). School districts have a duty to provide FAPE to all children with disabilities in their districts. 20 U.S.C. Section 1412, 707 KAR 1:290. "FAPE" is defined to mean special education and related services that:

- (a) Are provided at public expense, under public supervision and direction, and without charge;

- (b) Meet the standards of the Kentucky Department of Education included in 707 KAR Chapter 1 and the Program of Studies, 704 KAR 3:303, as appropriate;
- (c) include preschool, elementary school or secondary school education in the state; and
- (d) are provided in conformity with an individual education program (IEP) that meets the requirements of 707 KAR 1:320.

707 KAR 1:002(27).

4. The “child find” provisions of the IDEA require school districts to identify, locate, and evaluate children with disabilities in need of special education and related services. 20 U.S.C. Section 1412(a)(3), 34 CFR 300.111. “Special education” has been defined to mean specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability. 34 CFR 39(a)(1), 707 KAR 1:002, 1(56). “Specially designed instruction” means adapting, as appropriate to the needs of an eligible child, the content, methodology or delivery of instruction to address the child’s unique needs resulting from the disability and ensuring the child’s access to the general curriculum so the child can meet the educational standards that apply to all children within the school jurisdiction. 34 CFR 300.39(b)(3), 707 KAR 1:002, 1(58). In assessing a child’s eligibility for IDEA, ARCs are required to determine whether specially designed instruction is required for the child to benefit from education. 707 KAR 1:310, 1(1). The Kentucky regulation addressing child find is set forth in 707 KAR 1:300, which requires school districts to implement and execute a child find system and sets forth requirements for a referral system and evaluation procedures.

5. A child with a disability is defined as a child with one or more of a number of categorical impairments “who, by reason thereof, needs special education and related services.” 34 CFR 300.8(a)(1). A similar definition is set forth in 707 KAR 1:002, 1(9), which defines a child with a disability as a child with one or more of a number of categorical impairments which has an adverse effect on the child’s educational performance and who, as a result, needs special education

and related services. “Adverse effect” is defined in the same regulation to mean that “the progress of the child is impeded by the disability to the extent that the educational performance is significantly and consistently below the level of similar age peers.” 707 KAR 1:002, 1(2).

6. In short, in order to determine whether a child is a child with a disability within the meaning of IDEA and thus eligible for special education services, the child must first have one of the impairments listed in the statute. That impairment must have an adverse affect on the child’s educational performance. Thus, a medical diagnosis alone is not sufficient for a child to qualify for IDEA services. If the impairment is determined to have an adverse affect, it must then be determined whether the child needs special education and thus, specially designed instruction.

7. Further guidance on child find claims has been provided by the Sixth Circuit Court of Appeals. In a Kentucky case, *Board of Education of Fayette County, Ky. v. L.M.*, 478 F.3d 307 (6th Cir. 2007), the Court adopted a standard first articulated in *Clay T. v. Walton County Sch. Dist.*, 952 F.Supp. 817, 823 (M.D.Ga. 1997), which provides that “the claimant must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate.”

8. The possible categorical impairments relevant to this dispute are SLD and OHI. SLD is defined at 34 CFR 300.8(c)(10) generally to mean a disorder in one or more of the basic psychological processes involved in understanding or in using language that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. An SLD does not include learning problems that are primarily the result of visual, hearing or motor disabilities. Similar language is set forth in 707 KAR 1:002, (1)(59). OHI is defined at 34 CFR 300.8(c)(9) generally to mean having a condition that results in limited awareness with respect to

the educational environment that is due to chronic or acute health problems and adversely affects a child's educational performance. Similar language is set forth in 707 KAR 1:002, (1)(42).

9. Respondent does not deny that Student has various health diagnoses. Specifically, in the fall of 2013, Student's 504 plan was drafted to include accommodations based on her visual diagnosis. In February of 2019, Student's 504 plan was updated based on [REDACTED] evaluation and diagnostic impressions including mild ADHD, a mild reading disorder, and generalized anxiety. However, the IDEA requires more than just the existence of an impairment; it requires that the impairment adversely affects a child's educational performance. In this case, there is inadequate evidence that Student's educational performance was adversely affected by her impairments.

10. Although receiving accommodations under a 504 plan, Student has never been deemed eligible for IDEA purposes. School personnel, including a teacher with a close relationship to Student and a special education teacher who worked closely with Student at [REDACTED] both of whom are familiar with IDEA and referral processes, never saw reason to refer Student for possible IDEA services.

11. At the February, 2019 ARC meeting, the ARC considered whether to evaluate Student for IDEA eligibility. After discussing [REDACTED] report and despite some doubt, the ARC decided to evaluate Student for suspected disabilities under the eligibility criteria of SLD and OHI. After a thorough evaluation and the issuance of an integrated report prepared primarily by the school psychologist, the ARC determined that Student did not meet Kentucky's eligibility requirements for either SLD or OHI. Although Student's parents disagreed with the determination, the ARC reasoning was sound.

12. The evidence of record does not support a finding that Student's educational performance was adversely affected by her impairments. There is no evidence that Student's

experience was significantly and consistently below the level of similar aged peers. Rather, the testimony and exhibits, including [REDACTED] report and testimony, indicate that Student was functioning within the average range of intellectual abilities and achieving average grades. She participated in band, took dual credit courses, and even graduated a year early. There is evidence that Student had late or missing assignments, but there is inadequate proof that this was tied to any IDEA-qualifying disability or that in that regard Student was unlike any other student.

13. Even if there was evidence that Student's educational performance was adversely affected as a result of her impairments, there is a lack of evidence that she would need special education and thus specially designed instruction as referenced in Paragraph 4, *supra*.

14. Because Student is deemed not eligible for special education, the argument regarding her IEP is moot.

FINAL ORDER

The undersigned concludes that Petitioner failed to prove by a preponderance of evidence that Student was denied FAPE. Specifically, Petitioner did not demonstrate that Respondent denied Student FAPE by failing to properly locate, identify and evaluate Student as a student with a disability and by failing to create and implement an appropriate IEP for Student.

APPEAL RIGHTS

In accord with that regulation and pursuant to 707 KAR 1:340, Section 12, 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, via certified mail, a request for appeal within thirty (30) calendar days of the date of the Hearing Officer's decision. The appeal shall be submitted to the Kentucky Department of Education at the following address:

Kentucky Department of Education
Office of Legal Services
300 Sower Blvd; 5th Floor
Frankfort, KY 40601

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

So ORDERED this 9th day of June, 2020.

/s/ Susan Gormley Tipton
SUSAN GORMLEY TIPTON
Hearing Officer
susantipton@roadrunner.com

CERTIFICATION

I hereby certify that a true copy of the foregoing Order has been served by mailing same to the following, via **e-mail**, on this the 9th day of June, 2020:

Hon. Marianne Chevalier
mchevalier@lawcgs.com

Hon. Robert Chenoweth
chenoweth@kih.net

Todd Allen
Todd.allen@education.ky.gov

Jennifer Payne
KDElegal@education.ky.gov

And by **U.S. mail** on this same date to:

Todd Allen
Kentucky Department of Education
Office of Legal Services
300 Sower Blvd; 5th Floor
Frankfort, KY 40601

/s/ Susan Gormley Tipton
Susan Gormley Tipton
Hearing Officer