

**KENTUCKY DEPARTMENT OF EDUCATION
DIVISION OF EXCEPTIONAL CHILDREN SERVICES
EXCEPTIONAL CHILDREN APPEALS BOARD
AGENCY CASE NO. 1819-19**

██████████

PETITIONER

v.

FINAL DECISION AND ORDER

████████████████████

PUBLIC SCHOOLS

RESPONDENT

* * * * *

PROCEDURAL BACKGROUND

This case comes before the Exceptional Children Appeals Board (hereafter “ECAB”) following a timely appeal by the Petitioner ██████████ (hereafter “Student”). On March 4, 2019, Student, by counsel, filed a request for a due process hearing with the Kentucky Department of Education (hereafter “KDE”) pursuant to the Individuals with Disabilities Education Act (hereafter “IDEA”) (20 U.S.C. Section 1400, et. seq.)

An administrative hearing was held in ██████████, Kentucky, on April 12, 2021, April 13, 2021, and April 15, 2021, pursuant to 34 CFR Part 300, KRS 13B and 707 KAR 1:340. The Student was represented by the Honorable Edward E. Dove and the Respondent ██████████ ██████████ Public Schools (hereafter “School”) was represented by the Honorable Grant Chenoweth.

On October 27, 2021, the Hearing Officer issued “Findings of Fact, Conclusions of Law and Final Order”. On November 29, 2021, the Student, through counsel, filed a timely appeal to the ECAB which is the subject of this decision.

**JURISDICTION BEFORE THE EXCEPTIONAL CHILDREN APPEALS
BOARD IS ESTABLISHED**

This is an appeal of a hearing officer's decision as permitted by 707 KAR 1:340 Section 12 which provides:

- (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 as assigned by the Kentucky Department of Education. The appeal shall be perfected by sending, by certified mail, to the Kentucky Department of Education, a request for appeal, within thirty (30) days of the date of the hearing officer's decision.

The Student's appeal was timely requested.

THE STUDENT BEARS THE BURDEN OF PROOF

The party seeking relief bears the burden of proving their entitlement to relief by a preponderance of the evidence. In this case, Student bears the ultimate burden of persuasion on the elements of claims. *Schaffer v. Weast*, 546 U.S. 49, 57-58 (2005); KRS 13B.090. *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) providing, "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".

**ECAB IMPARTIALLY REVIEWS THE RECORD DE NOVO AND MAKES
AN INDEPENDENT DECISION**

ECAB reviews the record de novo and can make fact-findings it deems necessary to address legal issues raised on appeal. Where a state has established a two-tier administrative process, the appellate review is to be conducted pursuant to 20 U.S.C. § 1415(g). Kentucky has

adopted such a two-tier system. *See* 707 KAR 1:340 § 12. ECAB is required to conduct an impartial review of a hearing decision and make an independent decision upon completion of such review. 20 U.S.C. § 1415(g).

34 CFR 300.514(b)(2) provides the appellate panel is to examine the entire hearing record before making its independent decision. The only limitation on the de novo review is that ECAB must give deference to a hearing officer's fact findings based on credibility judgments "unless nontestimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion." *Carlisle Area School District v. Scott P.*, 62 F.3d 520, (3d Cir. 1995). Such deference applies only to those situations involving record-supported credibility determinations. *Id.* at 529. This panel can make fact findings contrary to the hearing officer's findings so long as they are supported by substantial evidence. The existence of conflicting testimony does not, by itself, warrant concluding a related fact finding was implicitly a credibility determination of evidentiary facts by the hearing officer rather than differences in overall judgment as to proper inferences. *Id.* at 529.

FINDINGS OF FACT

1. Student was a graduate of [REDACTED] High School at the time of the hearing (hereafter "School"). [REDACTED] freshman year was from 2015-16 and [REDACTED] graduated, on schedule, at the end of the 2018-19 school year with a weighted cumulative GPA of 2.8. (R 7 and 13).

2. Student attended [REDACTED] Public School throughout [REDACTED] academic career. [REDACTED] attended [REDACTED] School from first through fifth grade, where [REDACTED] had friends, enjoyed academic success and few disciplinary issues. Student attended [REDACTED] School for grades six through eight, again making friends and earning mostly A's and B's. Student acted up sometimes in class, had difficulty sitting still and was more interested in making friends

than in learning. There were no formal behavior referrals or disciplinary actions taken against Student while ■ was in middle school. (TE Vol. I, pp. 133-135, 212-218; R 2).

3. During Student's middle school years, ■ was not motivated and lost interest in reading. ■ called out in class more often, threw things and on one occasion crawled on the floor to retrieve a pencil. Student's mother suspected ■ had ADHD. The Student's physician referred ■ to ■, a licensed clinical psychologist and behavior analyst in ■, Kentucky. (TE Vol. I, pp. 22, 219-220).

4. ■ evaluated Student on July 11, 2014, when Student was age thirteen and preparing to enter eighth grade. At this time, Student had a 3.5 GPA. ■ considered the Kaufman Brief Intelligence Test, Second Edition (KBIT-2) and feedback from Student, ■ mother and a seventh-grade math teacher to examine Child Behavior Checklists for children ages six through eighteen. The KBIT-2 is a measure of cognitive ability which gives a verbal and nonverbal score and an IQ composite. Student tested within the average range on the KBIT-2. (TE Vol. I, pp 28-36, 52; P 1).

5. The second part of the KBIT-2 encompasses a broad spectrum of different types of difficulties a child may experience focusing on a child's self-reporting, and parental and teacher input. The test is designed to provide feedback about such things as anxiety, depression, social problems and ADHD. The Checklist test demonstrated significant problems in the area of attention deficit hyperactivity disorder (hereafter "ADHD"). The Student consistently had difficulties concentrating, acting impulsively, being inattentive and getting distracted. The teacher ratings included problems with finishing tasks, sitting still, fidgeting, following directions, disturbing others, talking out of turn, disrupting class and talking too much. (TE Vol. I, pp 28-36, 52; P 1).

6. Based on the results of the Checklist test, ██████████ concluded Student's pattern of behaviors met the criteria for a diagnosis of ADHD, Combined Type. A child is diagnosed with "combined type" ADHD when ██████ meets criteria for both an inattentive type and a hyperactive impulsive type. ██████████ recommended medication management, therapy, and school accommodations to help improve Student's attention, to decrease ██████ distractibility and disruption, and to improve ██████ organizational skills. (TE Vol. I, pp 28-36, 55-57; P 1).

7. When the Student's mother learned about the above diagnosis, she contacted the middle school and requested a meeting to discuss potential services Student might receive to help ██████ transition successfully into high school. ██████████, a middle school counselor, sent Student's mother a statement of parent rights and a consent form for the evaluation for eligibility for services under Section 504 of the Rehabilitation Act of 1973. (TE Vol. I, pp 28-36, 55-57; P 1).

8. A Section 504 meeting was conducted on September 5, 2014. Student's mother was accompanied by her sister and a guidance counselor from a neighboring ██████████ School who was helping to guide Student's mother through the process. (R 12; TE Vol. I, pp. 221-223, TE Vol. II, pp. 35-37).

9. ██████████ and Student's math, social studies, language arts and science teachers attended the meeting at the middle school. The committee reviewed ██████████ report and Student's medical history, grades, discipline reports/referrals and classroom/teacher data. The committee determined Student's ADHD did not substantially impact ██████ education at this time, but decided it would reconvene in the future if the Student's mother thought the

Student's ADHD was negatively impacting ■ education. (R 12; TE Vol. I, pp. 221-223, TE Vol. II, pp. 35-37).

10. Student's mother left the meeting feeling as though she wasted the committee's time because it determined Student did not qualify for Section 504 services. The mother's feeling was not based on any action by the staff indicating they thought it was a waste of their time. Student's mother did not appeal the committee's decision and did not request a follow-up meeting while Student was in middle school. (R 12; TE Vol. I, pp. 221-223, TE Vol. II, pp. 35-37).

11. Student was a freshman during the 2015-16 school year. Student's mother initially enrolled ■ in the ■") Program. Principal ■ described the ■ as a rigorous college preparatory program with a focus on the whole child rather than just academics. The ■ student workload consists of advanced level courses and is more difficult than the regular curriculum. About 60% of freshman who enroll in the ■ Program leave it and go to the regular curriculum by the time they are sophomores or juniors. (TE Vol. 2, pp. 71-72, 136, 231).

12. Principal ■ previously taught members of Student's family and made an extra effort to communicate with Student. Consequently, Principal ■ had a "great relationship" with Student. The School relies on family members and middle schools for information about incoming freshman who may need additional attention. The School did not receive any such information about Student. As a former teacher and current administrator who ensures the staff is properly trained, Principal ■ knows about the "Child Find" aspect of IDEA. Principal ■ did not have any information or reports that alerted ■ to believe Student was a candidate for a possible Child Find examination. (TE Vol. II, pp. 52-61).

17. ██████████ is the associate director of special education for ██████████ High Schools. ██████████ works with staff to review IEPs and ensure all needed services and resources are in place for students identified as needing special education services who are transitioning from middle school to high school. (TE Vol. II, pp. 55-56, 72-74).

18. ██████████ provides other transitional resources to students as needed on an individualized basis. Student did not enter ██████ freshman year identified as a student in need of special education, and there were no indicators from attendance records, test scores, guidance counselor visits or medical history that ██████ should be. Student did not come to ██████████ attention until ██████ encountered disciplinary problems ██████ senior year. (TE Vol. II, pp. 138-148, 178).

19. An ██████████ student who has not been identified for special education and who fails courses would not signal the need of a referral for special education, nor would a student who brought two failing grades in one semester up to C's during the second semester. A lot of additional information would be needed before making a referral for special education, including information about the student's records, attendance, and home environment. (TE Vol. II, pp. 138-148, 178).

20. The School has various services that can provide support to students who may be in need of assistance outside of the special education contest, including guidance counselor assistance, the family resource center, social workers, interventionists and behavioral specialists. The School has a multi-tiered system of supports that address academics, behavioral issues, mental issues, etc. There are also tutoring opportunities and transition services for both current students and alumni. (TE Vol. II, pp. 130-131, 157-161).

21. Student opted out of the [REDACTED] at the beginning of [REDACTED] sophomore year and began taking a combination of advanced courses and regular courses. Although Student struggled academically during [REDACTED] sophomore school year, [REDACTED] improved during [REDACTED] freshman year. Student's grades for both the first and second semester were mostly A's, B's and C's. Student continued to have problems when [REDACTED] repeated advanced geometry. [REDACTED] passed the class with a D. (TE Vol. II, pp. 130-131, 157-161).

22. Student's mother emailed teacher [REDACTED] near the end of the sophomore year. At that time, the mother understood Student's score in the class was 63%, only two percentage points from a passing grade of 65%. The mother asked [REDACTED] if there were any assignments Student could re-do to earn those two percentage points. [REDACTED] replied after taking time to review Student's grades and consider the situation. Citing the fact that Student had passed four out of five tests during the semester, [REDACTED] stated it was not [REDACTED] practice to fail a student to teach him/her a lesson about trying harder. With a little scolding of Student about future test preparation, homework and cell phone use, [REDACTED] informed the mother that Student would pass the class. (R 13, P 4; TE Vol. I, pp. 137-140, 227-230).

23. Teachers have the autonomy to look at a student's overall performance, and not just the results of one test, to adjust a student's grade. Teachers are expected to use their professional judgment in these situations. (TE Vol. II, pp. 92-93).

24. During part of Student's sophomore year and continuing into [REDACTED] junior year, Student became a mentee to [REDACTED]. [REDACTED] was the head football coach who also served as a police officer at the school. Student, who played high school football, met [REDACTED] during the Student's freshman year. Student's mother contacted [REDACTED] and asked if [REDACTED] would talk to Student and help Student realize [REDACTED] needs to take [REDACTED] education seriously.

Student's mother believed Student was more likely to listen to a [REDACTED]. [REDACTED] remembers the mother sharing her concerns about Student's schoolwork, attitude and maturity issues. (TE Vol. II, pp. 92-93).

25. [REDACTED] worked with Student at least twice a week helping [REDACTED] with homework and making sure Student completed the school-provided planner to record assignments. [REDACTED] occasionally removed Student from class and football practice to check Student's progress. [REDACTED] received weekly grade reports to check Student's eligibility for sports. The [REDACTED] believed Student's grades improved because of their relationship. Student enjoyed working with [REDACTED] and believed the [REDACTED] did not allow [REDACTED] to "slack off." (TE Vol. II, pp. 92-93).

26. Student gained maturity and learned how to be a better student from [REDACTED]. It is common for [REDACTED] to have a mentor-type relationship with student-athletes. [REDACTED] received a promotion and left [REDACTED] position at the School around the end of Student's junior year. (TE Vol. I, pp. 116-121, 141-142, 238-239; TE Vol. II, pp. 108-109).

27. Student's junior year grades ranged from A's to D's. [REDACTED] failed the second semester of algebra. (R 13; TE Vol. I, pp 230, 240).

28. The School's behavior detail report for Student indicates [REDACTED] was subject to formal discipline three times before [REDACTED] senior year. During [REDACTED] freshman year, Student was cited for leaving class before the bell rang. [REDACTED] conferenced with [REDACTED] and received a warning. During [REDACTED] sophomore year, Student was cited for leaving trash and throwing food in the cafeteria. [REDACTED] conferenced with staff and was warned that subsequent offenses of this nature would result in school suspension and cafeteria clean-up. (R 13; TE Vol. I, pp 230, 240).

to see and one of those viewers then posted it on Twitter, allowing for a widespread audience. (TE Vol. II, pp. 6-20).

34. On February 14, 2019, Student posted a picture of ██████ in a classroom at school to the same group of Snapchat friends with the caption: “████████ [Student 2] █████ ██████████.” The term “█████” is commonly used by youth in the community and is another term for murder. This post was again re-posted to Instagram and then Twitter and quickly led to a widespread audience. (R 1; TE Vol. 1, pp. 147-151, 170-178; TE Vol. II, p. 256-257).

35. ██████ was on lunch duty the day the second image was generated and made public. Student 2 learned of the posting and approached ██████ in a very upset and emotional state. ██████ told ██████ the definition of “█████” and that ██████ was concerned someone would kill ██████. ██████, who was unaware of the September post, now saw both the September and the February posts. ██████ thought both posts were taken around the same time. ██████ escorted Student 2 out of the cafeteria and asked one of ██████ assistant principals to help ██████ investigate the incident. (TE Vol. II, pp. 74-76).

36. ██████, an assistant principal at the school, and ██████ interviewed the students involved. Although Student and a friend initially claimed the friend added the content to Student’s picture, they later admitted Student generated the captions on ██████ own. Student initially thought the post was funny. At ██████ request, ██████ reported the incident to law enforcement. Student 2 and ██████ father were advised how to file a criminal complaint with the ██████ district court system. ██████ reviewed the school’s student code of conduct and concluded Student’s second post was a harassing communication, an offense that merited expulsion. Student was temporarily suspended. (TE Vol. II, pp. 74-76).

41. After graduating high school, Student enrolled in [REDACTED] [REDACTED] (hereafter “ [REDACTED]”) but dropped out after a couple of months. Student had trouble keeping up with assignments and did not like driving from [REDACTED] home in [REDACTED] to [REDACTED]. (R 7; TE Vol. II, pp. 83-84, 99, TE Vol. I, pp. 153-154, 247-248).

42. Student obtained a job cleaning carpets but was fired after about three months for being late on multiple occasions. Student then got a job at an apartment complex, but lost it because of the onset of COVID. [REDACTED] received unemployment benefits for a while. Student re-enrolled at [REDACTED], but the COVID-related remote learning was too difficult for [REDACTED]. Consequently, [REDACTED] dropped out of school for the second time. Student was unemployed at the time of the hearing. (P 2; TE Vol. I, pp. 127-132).

43. Student testified that [REDACTED] cheated in classes at [REDACTED] School and at [REDACTED]. Student had never told a teacher, guidance counselor, [REDACTED] parents that [REDACTED] cheated. [REDACTED] had only disclosed this to [REDACTED] friends prior to the hearing. (P 2; TE Vol. I, pp. 127-132).

44. During the second semester of [REDACTED] senior year, Student had a light schedule with time off in the afternoon. [REDACTED] sometimes skipped classes to smoke marijuana. (TE Vol I, pp. 153-154, 164-169, 207-208).

45. The due process proceeding was held in abeyance pending Student and School working together to resolve the issues. On May 14, 2019, an Admission and Release Committee (hereafter “ARC”) convened to discuss a referral for a special education evaluation for Student. At this time, Student was enrolled at [REDACTED] near the end of [REDACTED] senior year. [REDACTED], the school psychologist and special education department chair at [REDACTED], attended the meeting. The ARC was looking for evidence of academic behavior or

social deficits that might warrant eligibility for services or specially designed instruction. The ARC was considering the “other health impairment” (hereafter “OHI”) for potential need of specially designed instruction for Student because of ■■■ ADHD diagnosis. A student can have a diagnosis of ADHD, but the ADHD may not adversely impact the student across settings. (TE Vol I, pp. 153-154, 164-169, 207-208).

46. The ARC looked for patterns of strengths and weaknesses Student demonstrated over time showed across time academically, behaviorally and socially. The ARC looked for any indication that suggested Student was struggling to access the core content of the curriculum. The ARC specifically looked at Student’s grades, testing, behavioral referrals, signs of distractibility, hyperactivity, inattentiveness and conduct problems. The review considered Student’s grades and behavior back to elementary school, including the Section 504 meeting and issues. These reviews are important in diagnosing ADHD as the markers often present before age seven. (TE Vol I, pp. 153-154, 164-169, 207-208).

47. The ARC considered feedback from two of Student’s former teachers who believed Student was compliant and did not have problems learning and applying new concepts.

■■■■■, an English teacher, attended the ARC meeting. ■■■ reported Student did not have difficulty completing work in class and needed minimal prompting. (TE Vol I, pp. 153-154, 164-169, 207-208).

48. The ARC ultimately concluded that a review of the referral information and existing data did not support a suspected disability in terms of the IDEA and that Student did not need specially designed instruction. ■■■■■ opined ■■■ would typically not have advised an assessment was necessary in these circumstances because it did not appear there were significant deficits in Student’s processing, behavior or academics that would suggest ■■■ might be eligible

for services under the OHI category. However, the ARC ultimately decided that a full evaluation would be conducted. (R 3, 4 and 5; TE Vol. II, pp. 182-189; TE Vol. III, pp. 13-16).

49. ██████████ is the Associate of Director of Special Education for Assessment for ██████████ Schools. In that role, ██████ supports and supervises the 38 school psychologists within the system. ██████████ described both Child Find and the requirements for a student's disability to qualify as an OHI under the IDEA. (R 3, 4 and 5; TE Vol. II, pp. 182-189; TE Vol. III, pp. 13-16).

50. Child Find is a process of identifying children who may need special instruction. The process is different depending on the age of the child. At the high school level, one considers grades, attendance, behavior, universal screening information, and previous history from preschool, elementary school and middle school. (R 3, 4 and 5; TE Vol. II, pp. 182-189; TE Vol. III, pp. 13-16).

51. It is unusual for a student to be newly identified in high school as needing a special education. ██████████ provides Child Find training every year to ARC chairs, and the ARC chairs train the staff in their respective buildings. If it is suspected that a student needs special instruction, then adaptations are made to content or instruction to meet the unique needs of the child so he/she can access general education programs. (TE Vol. III, pp. 48-51).

52. The School uses a form based on information provided by the Kentucky Department of Education to consider the legal requirements for a qualifying OHI. The OHI Eligibility Determination form provides an ARC's first step is to determine the existence of a health impairment caused by chronic or acute health problems. If an impairment is confirmed, the next step is to determine whether, due to the chronic or acute health problem, the student has limited

strength, vitality or alertness (including heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment). (TE Vol. III, pp. 48-51).

53. Strength refers to physical strength and limitations a student may have navigating or completing tasks as would typically be found in a school setting. ADHD does not qualify. Vitality has to do with endurance to complete an activity. The alertness component is generally described as one's ability to manage or maintain attention and can include limited alertness or heightened alertness. Limited alertness is associated with inattention and described as having a short attention span. Heightened alertness is associated with hyperactivity and is described as highly distractible. It is possible for a student with combined type ADHD to have both inattention and hyperactivity. (TE Vol. III, pp. 48-51).

54. An ARC considers evaluations to determine whether a student is exhibiting limited or heightened alertness and would consider observations, rating scales, academic performance and other factors. If an ARC determines there are issues with strength, vitality or alertness, the next step is to determine whether the evaluation information confirms there is an adverse effect on educational performance. (TE Vol. III, pp. 48-51).

55. ADHD does not necessarily indicate an adverse impact on student that requires specially designed instruction. The ARC considers whether the disabling condition impedes an individual's educational performance to the extent the student performs significantly and consistently below their similar age peers in the cumulative sense or whether there is an adverse impact. (TE, Vol. III, pp. 51-57).

56. On October 10, 2019, [REDACTED], an achievement and compliance coach, issued an Integrated Evaluation Report. [REDACTED] conducted formal and informal interviews with Student as part of the evaluation. [REDACTED] looked at behavioral rating scales

to assess the presence or absence of hyperactivity. [REDACTED] also observed Student in a [REDACTED] classroom watching for signs of distractibility, inattentiveness and hyperactivity. [REDACTED] prefers to observe a student in a typical classroom setting to compare the student's behavior to peers. However, that environment was not available for Student while [REDACTED] was attending [REDACTED] night school. (TE, Vol. III, pp. 51-57).

57. The night school Student attended was a computer-based self-paced program and was only needed to earn some credits at the end of the senior year to allow Student to graduate.

[REDACTED] observed Student in a small, quiet and controlled classroom. [REDACTED] relied on feedback from Student's general classroom teachers and information from Student's physician, who confirmed Student had ADHD. [REDACTED] accepts the medical diagnosis, but notes the diagnosis by itself does not indicate whether Student meets the criteria for special education under the IDEA. [REDACTED] considers the impact of ADHD on Student's ability to access the curriculum. (R 15 & 6; TE Vol. II, pp. 189-196, 201-202).

58. [REDACTED] reviewed Student's social and development history from [REDACTED] prenatal and early childhood development, and [REDACTED] educational history back to [REDACTED] kindergarten year. [REDACTED] assessed Student's physical and cognitive functioning. [REDACTED] found Student's physical functioning to be average. [REDACTED] utilized the Kaufman Adolescent and Adult Intelligence Test (hereafter "KAIT"), the Kaufman Tests of Educational Achievement, Third Edition (hereafter "KTEA-III"), the Adaptive Behavior Assessment System, Third Edition (ABAS-3), and the Conners 3 reports. KAIT is utilized to assess whether a student is performing below or above the average range of cognitive functioning. (R 15 & 6; TE Vol. II, pp. 189-196, 201-202).

recommendation that Student receive tutoring and help learning to organize and focus [REDACTED] attention. [REDACTED] recommended Student be provided a less distractive environment, additional time to complete tasks and more positive reinforcement. (R 15; TE Vol. II, pp. 215-228).

63. The evaluation report gave the ARC the information it needed to decide whether Student was eligible for IDEA services. An ARC is not expected to “rubber stamp” the conclusion of the evaluators. (TE Vol. II, p 200, 215).

64. On December 3, 2020, the ARC recommended a review of the evaluation results and a determination of whether Student qualified for eligibility for specially designed instruction under the category of OHI. [REDACTED] reviewed the evaluation results with the ARC, stating that neither Student’s academic scores on the administered tests or the state-wide test results indicated an adverse impact on Student’s educational performance. (TE Vol. II, p 200, 215).

65. The ARC reviewed the adaptive behavior assessment, the Conners 3 report and the remainder of the evaluation and concluded that none of the ratings indicated Student was in the “at risk” or clinically significant range. After reviewing the evaluation and the eligibility requirements for OHI, the ARC determined Student was not eligible for specially designed instruction and/or services under that category. Student requested an independent educational evaluation (hereafter “IEE”). (R 8 & 9; TE Vol. II, pp. 197-201).

66. The School agreed to an IEE. Student chose [REDACTED] who performed an independent evaluation on October of 2020. (TE Vol. III, pp. 42-48).

67. [REDACTED] interviewed the mother and Student, reviewed Student’s work history, and administered the KBIT-2 and the Checklists [REDACTED] used in [REDACTED] evaluation in 2014. [REDACTED]

found Student's KBIT-2 scores were consistent with the scores in 2014. Student's verbal, nonverbal and IQ composite scores were average. (TE Vol. III, pp. 42-48).

68. ██████████ received feedback from Student and ██████ father for the Checklists. ██████ did not obtain teacher feedback because Student had already graduated. The results demonstrated Student was still in the clinical range for attention problems and hyperactivity. ██████████ also found problems in other areas that sometimes occur with people with ADHD, specifically in the areas of depression, anxiety and anti-social or rule-breaking behavior. (TE Vol. III, pp. 42-48).

69. Because there may be a connection between impulsive behavior and driving history, ██████████ examined Student's driving history and learned Student had two accidents. ██████████ concluded Student continued to meet the criteria for diagnosis of ADHD, combined type. ██████████ recommended that Student be matched with a mentor to assist vocationally, that he consider a life coach with similar interests and that ██████ continue to manage ██████ medications for ADHD and depression. (P 2; TE Vol. I, pp. 39-48).

70. On January 22, 2021, the ARC met to discuss the results of the individual evaluation and, if an eligibility finding was warranted, to develop an IEP. ██████████ reviewed the IEE with the ARC. The ARC discussed ██████████ evaluation. (P 2; TE Vol. I, pp. 39-48).

71. The School did not dispute Student has ADHD, but decided there was insufficient evidence ADHD adversely impacted Student's alertness sufficient to meet eligibility standards. Consequently, the ARC determined Student was not eligible for specially designed instruction and/or services under the category of OHI. Student disagreed with this decision which resulted in a hearing being scheduled. (R 10 and 11).

72. ██████████, the associate director of special education, first became aware of Student after the request for a due process hearing was filed. ██████████ reviewed Student's records and attended ARC meetings to determine if the School had missed something and failed to look into Child Find. ██████████ concluded the School did not make a mistake by not referring Student for a referral. Student's records did not indicate ██████████ should have been identified as a child with a disability under the IDEA. (TE Vol. II, pp. 150-154).

73. The best indicator of cognitive ability is reflected on the cognitive intelligence scale. Although the test and IQ results of ██████████ differ, both tests indicated Student was within the average range and able to fully access School curriculum. Both tests showed Student can make decisions, think and process information at the same rate as nondisabled peers. (TE Vol. II, pp. 150-154).

74. The behavioral checklist used by ██████████ was different and more clearly indicated some of the signs, symptoms and markers of ADHD than the test used by ██████████. But, there was nothing in ██████████ test results to indicate a determination of eligibility under the category of OHI. (TE Vol. II, pp. 150-154).

75. The IEE did not change ██████████ opinion regarding Student's eligibility for special education. Student graduated high school with ██████████ peers in four years with a GPA close to 3.0 while taking a large number of advanced level courses. ██████████ was not in trouble because of hyperactivity behavior, conduct disorder or poor peer relations. Student had few behavior referrals from kindergarten through ██████████ senior year. Student's grades and standardized test scores correlated accurately with ██████████ IQ score. (TE Vol. II, pp. 150-154).

76. Simply having a medical diagnosis does not necessarily translate to an educational eligibility determination. To determine educational eligibility, there must be an adverse impact

on strength, vitality or alertness that has an adverse impact on the student’s educational progress.” (TE Vol. II, pp. 222-228).

77. In ■ role directing the IEE process, ■ reviewed the evaluation reports, including ■ report and the reports conducted by ■ in 2014 and 2020. ■ also reviewed the ARC information, including the eligibility form.

■ opined the conclusions reached by the ARCs were correct. (TE Vol. II, pp. 222-228).

78. ■ found ■ reports to be consistent. ■ noted the recommendations in ■ evaluations do not constitute specially designed instruction. There was nothing in Student’s records to indicate a need for Child Find interventions. There were no signs of adverse impact to show Student was a child with a disability under the IDEA. (TE Vol. III, pp. 59-61, 67-83).

79. ■ is familiar with the Section 504 process and is sometimes consulted regarding these issues. There are occasions when a child is deemed ineligible for IDEA because ■ does not need specially designed instruction and is then referred to a Section 504 process. However, a child deemed ineligible for a Section 504 plan would not be considered as possibly eligible for the more intensive IDEA. (TE Vol. III, pp. 65, 111).

**I. STUDENT WAS NOT ENTITLED TO STAY PUT AND A
MANIFESTATION DETERMINATION**

In February of Student’s senior year, Student committed a violation of the code of student conduct which caused ■ to be suspended and transferred to an alternative school for the remaining weeks of twelfth grade. Student, who has never been identified as a student in need of

special education, filed a due process request, asking for a stay-put order and a manifestation determination. Student argued that he was entitled to these protections under 34 CFR 500.534(a), which provides as follows:

A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in this part if the public agency had knowledge (as determined in accordance with paragraph (b) of this section) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

Paragraph (b) of the regulation provides that knowledge that the student is a child with a disability occurs if any one of three circumstances exist:

Basis of knowledge. A public agency must be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred—

- (1) The parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;
- (2) The parent of the child requested an evaluation of the child pursuant to §§ 300.300 through 300.311; or
- (3) The teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency.

34 CFR 300.354(b). Student contended that paragraph (2) applied in ■■■ case because at the beginning of ■■■ 8th grade year, in 2014, after the student was diagnosed with ADHD, ■■■ mother had met with middle school personnel regarding accommodations that could be made for the student.

Paragraph (2) applies if a student has requested evaluation for determination of eligibility for special education services. The facts surrounding the mother's meeting with school personnel establish that the purpose of the meeting was not to have the student evaluated for special education eligibility. The purpose of the meeting was to determine eligibility for

accommodations under a 504 plan. Student's mother testified the purpose of the meeting was "to determine if ■ could receive help. . . for ADHD." Vol II, p. 30. Student's mother testified she was interested in whether the school could help the student with "organization and note-taking and study skills." TE Vol. 1, p. 220. Emails between the mother and the school prior to the meeting explicitly state that the purpose of the meeting is to consider a 504 evaluation. TE Vol. II, p. 31-33. Student's mother signed a consent to 504 evaluation on August 11, 2014. TE Vol. II, p. 34. Notes from the meeting indicate that Student's teachers reported ■ was doing well academically and behaviorally and Student's mother testified she did not disagree with any of those observations. TE Vol. II, p. 35-36. The final paragraph stated that the 504 committee concluded ADHD was not substantially impacting the student's education and that "the committee will reconvene if [student's mother] thinks that ADHD is beginning to impact [Student's] education more." TE Vol. II, p. 36.

The determination that the student did not need 504 accommodations was not appealed and the student never sought 504 re-evaluation nor claimed to be a student in need of special education until after the disciplinary action that prompted the due process filing four-and-a-half years later. The hearing officer correctly found that the meeting in 8th grade in 2014 was unrelated to IDEA and did not trigger application of 34 CFR 300.354(a). Additionally, were the 504 meeting in 8th grade somehow construed to be a request for special education services, the determination of ineligibility was not appealed within the applicable statute of limitation and became absolutely final prior to the incident for which the student was disciplined. Stay-put rights for students determined ineligible but contesting that determination ends when the determination becomes final. *S.W. v. Holbrook Public Schools*, 221 F. Supp 2d. 222 (D. Mass 2002).

The hearing officer correctly found that the student was not improperly denied the protections of stay-put nor entitled to a manifestation determination.

II. THE SCHOOL DID NOT VIOLATE THE IDEA CHILD FIND PROVISIONS

Under 20 USC 1412 (a) (3), and 34 CFR 300.111 schools have a responsibility to identify, locate, and evaluate children with disabilities in need of special education and related services. This requires an analysis of several terms. First, a child with a disability is defined in 20 USC 1401 (3) “as a child with one or more of a number of categorical impairments who, by reason thereof, needs special education and related services.” The same definition is used in 34 CFR 300.8 (a) (1) and 707 KAR 1:002, Section 1 (9). Second, special education is then defined as “specially designed instruction, at no cost to the parent, to meet the unique needs of a child with a disability. 34 CFR 39 (b) (1), 707 KAR 1:002 1 (56). Thirdly, specially designed instruction means adapting, as appropriate to the needs of 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. 34 CFR 300.39 (b) (3), 707 KAR 1:002 1 (58). This requires a school who is determining eligibility to determine whether specially designed instruction is required in order for the child to benefit from education. 707 KAR 1:310 (1).

Bd of Educ. of Fayette Co., Ky. v LM, 478 F3rd 307 (6th Cir 2007) held the child find obligations of schools require that “schools must have policy and procedures in place to identify, locate, and evaluate children with disabilities who needs special education and related services.

...even children who are only suspected of having a disability, although they are progressing from grade to grade, are protected by this requirement *Id.* at 313.”

LM went onto hold that school districts “maybe held liable for procedural violations of the IDEA that cause substantive harm to the student ...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.” In the case in hand the ARC evaluated this student in the summer of 2019 after ■ graduation from high school and, as a result of said evaluation and a review of ■ records, both academic and behaviorally, determined that student did not meet eligibility criteria under IDEA. An independent evaluation was then conducted, and the ARC again met and determined that student did not meet eligibility. In order to prevail on this child find claim, student must show that at some point during the statutory limitation period student displayed clear signs of a disability, as defined by IDEA, which would have created an affirmative duty on the school to refer student for an evaluation.

The student claimed eligibility under the category of “Other Health Impairment” defined at 707 KAR 1:002 1 (42) “having limited strength, vitality, or alertness, including an heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment, that; (a) is due to a chronic or acute health problem, such as a ...attention deficient hyperactive order ...; and (b) adversely affects a child’s educational performance.” Adverse effect is defined at 707 KAR 1:002 1 (2) “the progress of the child is impeded by the disability to the extent the educational performance is significant and consistently below the level of similar age peers.”

All parties acknowledge that medical diagnosis alone is not proof that a child is qualified for IDEA services. Thus, this Board is charged with reviewing the record to determine if the student's strength, vitality, or alertness were affected by ADHD, in such a way as to cause the student's progress to be impeded to an extent that student is significantly and consistently performing below the level of same age peers and that by reason of student's impediment that the content, methodology, or delivery of instruction had to be adapted to student's unique needs in order for student to access the general curriculum. No such evidence was offered in this case.

██████████, who provided the child's original evaluation in 8th grade and who conducted the independent evaluation in the case in hand suggested that the ARC did not have to consider strength, vitality, or alertness. However, ██████████, District Associate Director of Special Education for Assessment, testified that limitation on strength, vitality, or alertness was a critical component of OHI eligibility. No evidence presented during the hearing suggested that the child's ADHD limited child's strength. ██████████ offered limited testimony about ██████ vitality, but acknowledged that ██████ definition was different than what was intended under the eligibility requirements in Kentucky. Therefore, we must turn to alertness and how the student's alertness was affected by student's ADHD. ██████████ testified that in a school setting alertness is "generally described as one's ability to manage or maintain their attention" and can be either limited or heightened alertness. TE, Vol. III, p.55. ██████ defined limited alertness being associated with inattention and was often described as short attention span. Heightened alertness was often associated with hyperactivity and is described as being highly distractable. ██████████ stated in order to determine whether the student had either heightened or limited alertness teacher evaluations, rating scales, academic performance, and standard scores would be focused on to be

later that ■ showed more signs of ADHD impact on ■ education, another meeting could be requested.

Behaviorally, this student only had a couple of referrals during high school for throwing food or not cleaning up in the cafeteria and leaving class early once. The student also enjoyed friendships, was liked by teachers and principals, and played football. It was not until the incident that caused ■ expulsion and transfer to the alternative school that any issues were raised by ■ family concerning the need for an evaluation. This was within a few months of ■ scheduled graduation. Further, such incident was not such as to impose upon the school any responsibility to undergo child find activities on their own.

The evidence was simply insufficient to show the student had a need for specially designed instruction and thus needed special education and qualified as a child with a disability. ■ failed to establish that ■ needed adaptations to the content, methodology, or delivery of instruction to address ■ need and ensure access to the general curriculum.

FINAL DECISION AND ORDER

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

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. (Emphasis added).

In addition, 707 KAR 1:340, Section 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 IDEIA), 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 patty 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.

SO ORDERED this 17th day of February, 2022, by the Exceptional Children's Appeals Board, the panel consisting of Kim H. Price, Lyndell Pickett and Mike Wilson, Chair.

EXCEPTIONAL CHILDREN APPEALS BOARD

BY: /s/ Mike Wilson
Mike Wilson, Chair

CERTIFICATION:

The foregoing was emailed this 17th day of February, 2022 to the following:

Ashley Lant, KDE Deputy Legal Counsel
Ashley.Lant@education.ky.gov

With copies emailed to:

Ed Dove
eddove@windsteam.net

Grant Chenoweth
gchenoweth@psbb-law.com

Lyndell Pickett
dlpickett2001@yahoo.com

Kim H. Price
khplaw@windstream.net

KDE Legal Services
kdelegal@education.ky.gov

____/S/_Mike Wilson_____
MIKE WILSON, CHAIR
EXCEPTIONAL CHILDREN APPEALS BOARD