KENTUCKY DEPARTMENT OF EDUCATION
DIVISION OF LEARNING SERVICES
AGENCY CASE NO. 1819-12

[redacted] **PETITIONER**

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

[redacted] **SCHOOLS** **RESPONDENT**

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PROCEDURAL HISTORY

On January 2, 2019, Petitioner [redacted] ("Petitioner" or "Student"), by counsel, filed a Request for a Due Process Hearing pursuant to the Individuals with Disabilities Education Act, ("IDEA") and 707 KAR 1:340 with the Kentucky Department of Education ("KDE"). An administrative hearing was conducted in [redacted], Kentucky, from September 26 – 29, 2022. The [redacted] represented the Petitioner. [redacted] represented the Respondent [redacted] Schools ("Respondent"). The undersigned was assigned as the Hearing Officer.

During the course of the proceeding, various 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. After the hearing, Petitioner filed "Petitioner's Closing Argument"

requesting an award of three years of compensatory education. Respondent filed "Respondent's Response to Petitioner's Closing Argument" in opposition to the request. Petitioner elected not to file a Reply Brief.

ISSUES, FINDINGS AND CONCLUSIONS OF LAW

ISSUES AND SHORT ANSWERS

1. Whether the Respondent failed to develop an adequate transition plan for the Petitioner in violation of 34 CFR 300.43 and 707 KAR 1:320, Sec 4. Respondent did not fail to develop an adequate transition plan for Petitioner.

2. Whether the Respondent failed to provide related services of braille, sign language, and orientation and mobility. Respondent stated in its post-hearing brief that it did not provide 27 hours of orientation and mobility ("O&M") to Petitioner. Petitioner requested more hours be awarded for O&M; however, Petitioner did not sustain [redacted] burden to show [redacted] was entitled to more. Therefore, Respondent shall provide 27 hours of O&M to Petitioner.

3. Whether the transfer to [redacted] was a change of placement. Petitioner's transfer to [redacted] was a change of placement.

4. Whether the Petitioner's transfer to [redacted] by the Respondent was arbitrary. Respondent's determination to transfer Petitioner to [redacted] was not arbitrary.

5. Whether the Respondent properly notified the Petitioner of the Admissions and Release Committee ("ARC") meeting. Respondent properly notified the Petitioner of the ARC meeting.

6. Whether the Petitioner's alleged violation was a manifestation of [redacted] disability. If yes, whether the Respondent conducted a manifestation hearing. Petitioner's behavioral violation was not a manifestation of [redacted] disability. Respondent conducted a manifestation hearing.

7. Whether the Petitioner completed all the classes and tests required to qualify [redacted] for graduation from high school. Petitioner completed all the classes and tests required to qualify for graduation from high school.

8. Whether the Petitioner actually passed the final two tests that were given to [redacted] in the fall of 2018. Whether the Petitioner received necessary accommodations while taking the tests. Petitioner passed the final tests that were given to [redacted] at [redacted] in the fall of 2018. Petitioner received appropriate accommodations while taking the tests.

9. Whether the Petitioner was properly exited from special education services. Petitioner was properly exited from special education services.

10. If the Petitioner graduated from high school, whether [redacted] was inappropriately denied an opportunity to participate in the graduation ceremony and related activities. The undersigned does not have jurisdiction over this issue. As an alternative, Petitioner was not inappropriately denied an opportunity to participate in the graduation ceremony and related activities. Respondent did not allow Petitioner to participate in the graduation ceremony because [redacted] committed a serious behavioral violation.

11. Whether the Respondent intentionally discriminated against the Petitioner and gave [redacted] disparate treatment under section 504 of the Rehabilitation Act of 1973. The undersigned does not have jurisdiction over this issue. As an alternative ruling,

Respondent did not intentionally discriminate against the Petitioner and did not give [redacted] disparate treatment under section 504 of the Rehabilitation Act of 1973.

PETITIONER 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, the student bears the ultimate burden of persuasion on the elements of the student's 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".

INDIVIDUAL EDUCATIONAL PLANS

Under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. a school which receives federal funding must provide students who qualify a Free and Appropriate Public Education, or FAPE. A FAPE includes both "special education" and "related services." §1401(9). "Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child . . . to benefit from" that instruction. §§ 1401(26), (29). See also *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1,* 580 U.S. 386 at 391; 137 S. Ct. 988 at 994; 197 L. Ed. 2d 335 at 344 (2017). A school district covered by the IDEA must provide a disabled child with special education and related services "in conformity with the [child's] individualized education program" ("IEP"). § 1401(9)(D).

"The IEP is "the centerpiece of the statute's education delivery system for disabled children." *Endrew F.,* quoting *Honig*, 484 U. S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988). An IEP must include "a statement of the child's present levels of academic achievement and functional performance," describe "how the child's disability affects the child's involvement and progress in the general education curriculum," and set out "measurable annual goals, including academic and functional goals," along with a "description of how the child's progress toward meeting" those goals will be gauged. §§1414(d)(1)(A)(i)(I)-(III). The IEP must also describe the "special education and related services . . . that will be provided" so that the child may "advance appropriately toward attaining the annual goals" and, when possible, "be involved in and make progress in the general education curriculum." §1414(d)(1)(A)(i)(IV).

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:

- 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;

- 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).

In implementing IEPs, Kentucky school districts are required to make "a good faith effort to assist the child in achieving the goals, objectives, or benchmarks listed in the IEP." 707 KAR 1:320, Section 9(1). A party challenging the implementation of an IEP must show more than a

de minimis failure to implement the IEP; it must demonstrate that the district failed to implement substantial or significant provisions of the IEP. *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

Endrew F ex rel Joseph F v. Douglas Cty. Sch. Dist., 137 S. Ct. 988 (2017) concluded that an IEP has to be "reasonably calculated to enable a student to make some progress. *Id.* at 1,342. The *Endrew* case further focused on the district's inability to address Endrews' behavioral needs as evidenced by "the district's lack of success in providing a program that would address the Petitioner's maladaptive behaviors." *Id.* at 1,184. The court correctly noted that when a district is unable to appropriately address a student's behavior, their behavior ". . . in turn, negatively impacts his ability to make progress on his educational and functional goals, [that] also cuts against the reasonableness of the … IEP." *Id.* (citing *Paris School District v. A.H. by and through Harter*, 217 WL 1234151 (WD Ark, April 3, 2017), an unpublished opinion.

School officials are not required to "maximize" the potential of the disabled student. *Board of Educ. v. Rowley*, 458 U.S. 176 (1982). "To provide FAPE, schools must develop, review, and be prepared to revise an IEP for each student . . . ." "The IEP must (1) comply with the procedures set forth in the IDEA and (2) be 'reasonable calculated to enable the [student] to receive educational benefits.'" *Somber v. Utica Comm. Schs*., 908 F.3d 162 (6th Cir. 2018) (internal citations omitted). To be reasonably calculated to enable the student to receive education benefits, the IEP must include, among other things, measurable annual goals and a description of how the progress will be measured. *Id.*

20 U.S.C. 1414(c)(1) provides that when determining eligibility an IEP team must (A) review existing evaluation data on the child, including -

(i) evaluations and information provided by the parents of the child;

(ii) current classroom-based, local, or State assessments, and classroom-based observations; and

(iii) observations by teachers and related services providers

PROCEDURAL DEFICITS

To find FAPE was not provided because of Respondent's procedural deficits, Petitioner must show there was substantial harm to [redacted] or [redacted] parents. Substantial harm has been interpreted to mean procedural violations which "seriously infringe" on the parent's opportunity to participate in the development of a child's IEP. *N.L. v. Knox County Schs*, 315 F.3d 688 (6th Cir. 2003). See also *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 764 (6th Cir. 2001).

In determining if procedural violation substantially infringes on a parent's opportunity to participate, courts have considered whether a parent fully participates in the IEP team meetings, whether they are an active participant in the determination of a child's eligibility, whether they had the opportunity to express their views to school staff outside of meetings via letter, telephone calls or other means. *N.L. v. Knox County Schs*, 315 F.3d 688 (6th Cir. 2003); *Burilovich v. Board of Educ.*, 208 F.3d 560 (6th Cir. 2000); *Kings Local Sch. Dist. v. Zelazny*, 325 F.3d 724 , (6th Cir. 2003).

FACTS AND DISCUSSION

Petitioner was age [redacted] at the time of the hearing. [redacted] left Respondent in August 2018 after [redacted] graduated from [redacted] ("[redacted]") through [redacted]. Petitioner was receiving services as a child with a disability under the category of multiple disabilities. [redacted] multiple

disabilities include deaf/blind and attention deficit hyperactivity disorder ("ADHD"). (Transcript 9/26, p. 16).

Petitioner attended Respondent for all of [redacted] in-person education. Before elementary school, [redacted] attended [redacted]. Petitioner then attended [redacted] Elementary School. After [redacted], Petitioner attended [redacted] Middle School for two years; then [redacted] returned to [redacted]. [redacted], Petitioner's mother, testified [redacted] excelled during [redacted] early years at [redacted], [redacted] Middle School and [redacted] (Transcript 9/26, pgs. 21-22).

2014-15 was Petitioner's first year of high school; 2015-16 was [redacted] second year; 2016-17 was [redacted] third year; 2017-18 was [redacted] fourth year; and [redacted] completed [redacted] final credits in August 2018 at the beginning of [redacted] fifth year of high school. (Transcript 9/26, pgs. 78-80).

On November 25, 2015, Petitioner was involved in a [redacted] accident. (Transcript 9/26, p. 75). Petitioner received Homebound Services for a short time after the accident. Petitioner returned to [redacted] during the second semester of the 2015-2016 school year.

ISSUE ONE: Whether the Respondent failed to develop an adequate transition plan for the Petitioner in violation of 34 CFR 300.43 and 707 KAR 1:320, Sec 4.

34 CFR § 300.43 Transition.

(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.

707 KAR Section 4.

Parent Participation. (1) An LEA shall ensure that one (1) or both of the parents of a child with a disability are present at each ARC meeting or are afforded the opportunity to participate. Except for meetings concerning a disciplinary change in placement or a safety issue, an LEA shall provide written notice to the parents of a child with a disability at least seven (7) days before an ARC meeting. The meeting shall be scheduled at a mutually-agreed-on time and place.

The purpose of transition is to focus on improving the student's academic and functional achievement to facilitate his/her movement from school to post school activities. Petitioner alleges Respondent adopted an impermissible minimal approach by simply providing information to community agencies that might help Petitioner. Petitioner cited *In Yankton Sch. Dist. v. Schramm,* 900 F. Supp. 1182 (D.S. Dak. 1975) to support [redacted] position.

Petitioner's Closing Argument states there was no evidence Respondent made any effort to assist [redacted] with [redacted] post-graduation goal of attending college to become a lawyer (Petitioner's binder, p. 344). However, at trial Petitioner testified Respondent did not fail to prepare [redacted] for college. (Transcript 9/27, p. 159). Petitioner remembered someone from Respondent talking to [redacted] about how to get into college. (Transcript 9/27, p. 160).

[redacted] worked with transition services for Respondent during the time at issue. (Transcript 9/27, p. 8). [redacted] doctorate is in "organizational leadership" specifically "transition of youth with disabilities." (Transcript 9/26, p. 121). [redacted] testified she attended quite a few meetings with Petitioner where transition services were discussed. [redacted] said Petitioner received the same transition services other students received who were either visually impaired, deaf or both deaf-blind. [redacted] stated Respondent's role was to make contact with organizations such as Office of Vocational Rehabilitation and the Deaf-Blind Project, refer Petitioner and facilitate the connections with the students and these organizations, all of which Respondent 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 Petitioner. Respondent helped Petitioner complete forms for assistance from these organizations. (Transcript 9/26, pgs. 106-08).

[redacted] testified Respondent assisted Petitioner academically and with [redacted] IEP to prepare [redacted] for college which at times was a realistic goal. [redacted] testified, "So I think when 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." (Transcript 9/26, pgs. 140-43).

[redacted], the achievement and compliance coach ("ACC"), testified she was involved in transition planning for Respondent as part of her job. [redacted] also stated Respondent 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. (Transcript 9/26, p. 9).

[redacted] attended multiple meetings with Petitioner where [redacted] College was discussed. At this time, [redacted] College was a program that allowed juniors and seniors to work on obtaining college credit. (Transcript 9/26, p. 24).

Petitioner did not sustain [redacted] burden of proof on this issue. For the reasons stated herein, **Respondent did not fail to develop an adequate transition plan for Petitioner.**

ISSUE TWO: Whether the Respondent failed to provide related services of braille, sign language, and orientation and mobility.

Petitioner was classified as a student with multiple disabilities - ADHD and Deaf/Blind. Consequently, Respondent determined Petitioner needed related services to implement [redacted] IEP. (Respondent's Exhibits 15 and 16). Petitioner alleges Respondent failed to provide sufficient related services of braille, sign language, and O&M to [redacted].

Braille. Petitioner alleged Braille assistance was to be provided, but this was never offered in a meaningful manner. However, the record indicates Respondent provided Braille instruction to Petitioner to a significant degree. For example, Petitioner's IEP states [redacted] has learned the majority of the braille literary code, but has trouble because of [redacted] tactile deficits. Petitioner mastered [redacted] objectives for reading/writing the final letter group signs (dots 46 and 56). [redacted] made inconsistent progress on [redacted] fluency objective. Petitioner currently reads between 12 - 25 words per minute on an unread passage at [redacted] instructional level. [redacted] made good progress on [redacted] punctuation objective but still needs to learn the parenthesis and quotation marks. Petitioner learned the mathematical symbols for numbers 0 - 9, number indicator, addition, subtraction, multiplication, division, etc. (Respondent's Ex. 16, p. 12).

American Sign Language. Petitioner testified [redacted] knows a little bit of Braille and American Sign Language ("ASL"). (Transcript 9/27, p. 160).

Orientation and Mobility. Respondent acknowledges there were 27 hours of O&M that were never provided to Petitioner. (Page 6 of Respondent's Response to Petitioner's Closing Argument). Petitioner argues [redacted] is owed more than 27 hours of O&M.

In Petitioner's Closing Argument, Petitioner states [redacted] did not receive any night O&M. However, this statement is not supported by the record. [redacted] attended the ARC meeting on October 18, 2017, and stated Petitioner has not been receiving nighttime O&M services. [redacted], the O&M teacher, provided daytime O&M services but not nighttime. [redacted] said she needed a signed consent form to take Petitioner out of the school building. She gave a large copy of the consent form to Petitioner three weeks earlier which [redacted] refused to sign. [redacted] stated Petitioner has now signed the consent form. (Respondent's Ex. 19, p. 3).

The written record reflects Petitioner began to receive nighttime O&M services after this meeting. The Conference Summary Report dated November 15, 2017, states, "[redacted] is currently receiving 90 minutes once a week of orientation and mobility during the school day and 90 minutes once a week of orientation and mobility in the evening." (Respondent's Ex. 20, p. 4). At the trial, [redacted] testified she provided daytime O&M services to Petitioner. She did not say nighttime O&M services were not offered to Petitioner; she said she was not sure who provided them. (Transcript 9/27, p. 248.)

When asked if [redacted] wanted more O&M, Petitioner answered "a little bit but not much. I mean, I don't really need it much." [redacted] said, "I did not do much of O&M". (Transcript 9/27, p. 153).

There was more than one effort made in this case to clarify the issues. Eventually, through various pleadings and pretrial conferences, the issues set out above were scheduled to be heard. In the pleadings and pretrial conferences, Petitioner alleged Respondent failed to provide appropriate related services of braille, sign language, and orientation and mobility. But, in Petitioner's Closing Argument, [redacted] also alleged [redacted] was not provided a Scribe or auditory books, issues [redacted] never raised before trial.

The issues in due process hearings are limited to the issues raised in the complaint. 34 CFR 300.511 provides, in relevant part, as follows:

> *(d) Subject matter of due process hearings.* The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under § 300.508 (b) unless the other party agrees otherwise.

Specifically, Petitioner stated there was no data presented that [redacted] ever had use of a Scribe to assist in writing assignments. [redacted], guidance counselor, testified Petitioner was exempted from the writing piece, which was common. (Transcript 9/29, p. 42). Petitioner acknowledges in [redacted] Closing Argument that [redacted] was provided a laptop, but states there was no evidence [redacted] was provided with auditory books. But, it is Petitioner who bears the burden of proof on this issue.

The Notice of Due Process Hearing was filed January 3, 2019. Petitioner has never complained before about not being provided with a Scribe or auditory books. Consequently, the undersigned finds it is too late for Petitioner to raise new issues of not having use of a Scribe and auditory books. In the alternative, assuming it is not too late for Petitioner to raise new issues, the undersigned finds Petitioner has not sustained [redacted] burden of proof regarding a Scribe and/or auditory books.

Except for Petitioner's rather vague self-assessment, the record does not contain any testimony regarding Petitioner's level of functioning in O&M, ASL, Braille, transition needs, assistive technology, or academic subjects and academic skills. Similarly, there was no testimony or documentary evidence regarding what level of functioning Petitioner should have achieved in these areas. Finally, there was no testimony or documentary evidence showing what services Petitioner needs to go from where [redacted] was to where [redacted] should be.

In *Board of Educ. of Fayette County, Ky. v. L.M.*, 478 F.3d 307 (6th Cir. 2007), the Court discussed the burden of proof necessary to sustain an award of compensatory education. The Court held that in determining an appropriate remedy under the IDEA, the finder of fact must identify the particular evidence which supports a specific award of compensatory education on the basis of **where the student would be but-for an alleged deprivation of services, and what compensatory services are reasonably geared toward ameliorating that deficit.** The *L.M.* Court held, "[C]compensatory awards should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA." In the case at bar, Petitioner did not show where [redacted] would be but-for the loss of O&M services, and what compensatory services are reasonably aimed to remedy that deficit.

Petitioner did not carry [redacted] burden of proof on these issues. Respondent stipulated it owes 27 hours of O&M services to Petitioner. Other than this concession by Respondent, the record reflects **Respondent provided appropriate related services of braille, sign language, orientation and mobility, etc. to Petitioner.**

ISSUE THREE: Whether the transfer to [redacted] was a change of placement. In the post-hearing briefs, both parties acknowledge **Petitioner's transfer to [redacted] was a change of placement.**

ISSUE FOUR: Whether the Petitioner's transfer to [redacted] by the Respondent was arbitrary.

ISSUE FIVE: Whether the Respondent properly notified the Petitioner of the ARC meeting.

ISSUE SIX: Whether the Petitioner's alleged violation was a manifestation of [redacted] disability. If yes, whether the Respondent conducted a manifestation hearing. Issues four, five and six will be discussed together.

Petitioner was involved in a fairly minor incident in the fall of 2015 and a serious behavioral incident on May 8, 2018. Because of Petitioner's extreme misbehavior on May 8, 2018, Respondent transferred Petitioner to [redacted].

First, in the fall of 2015, Petitioner was walking down a hallway that was restricted from students that day. One of Respondent's security guards yelled for Petitioner to stop. Petitioner did not hear the security guard yell and continued to walk down the hallway. Because of Petitioner's seeing and hearing disabilities, [redacted] did not see

the "Do Not Enter" signs, and [redacted] did not hear the guard yelling for [redacted] to stop. When the guard caught up to Petitioner, the guard placed his hand on Petitioner's shoulder, turned [redacted] around and told Petitioner to "Stop". Petitioner said, "Don't touch me or I'll sue you." But, the guard mistakenly thought Petitioner said, "Don't touch me or I'll shoot you." (Transcript 9/26, pgs. 34-35). The record does not reflect what, if any, discipline Petitioner received for this miscommunication, but for approximately six months after the incident, Respondent searched and "patted [redacted] down" as Petitioner entered the building. (Transcript 9/26, p. 36).

Telling a security guard, "Don't touch me or I'll sue you." is not an extreme behavioral violation. According to Petitioner's mother's testimony, this was a miscommunication, not an actual threat of violence to the guard. If the guard had correctly understood Petitioner, Petitioner may not have gotten into any trouble at all. Petitioner did not see the "Do Not Enter" sign and did not hear the guard yelling for [redacted] to stop. Saying "Don't touch me or I'll sue you" is not a serious misbehavior.

However, the incident that occurred on May 8, 2018, was serious and led to Petitioner's transfer to [redacted]. The Behavior Detail Report dated May 9, 2018, states:

> Student was roaming the hallways after the first period bell had rung. [redacted] proceeded to walk past [redacted] and display [redacted] middle finger, directed towards [redacted]. When teachers and other administrators attempted to redirect student, [redacted] would not listen and kept walking away. Student encountered [redacted] and was asked to stop and talk to [redacted]. Student quickly became extremely agitated and raised [redacted] tone towards [redacted]. When [redacted] asked

> Student to step in his office, so he could contact [redacted] mother, Student ran out of the building. Student proceeded to sit on the curb in the bus lane, and take off [redacted] blue jeans, and throw them towards the school. Student then chose to run down the sidewalk to the middle [and] enter the premises without permission.

(Respondent's Ex. 25).

The Behavior Detail Report dated May 10, 2018, states:

> Student left five voicemails on various school extensions (counseling office, Admin office, Administrator's Assistant) between midnight and [and] 9 AM; in every voicemail, the student made the statement, "[redacted], kiss my [redacted] you [redacted]; go to [redacted], [redacted]." In a voicemail left on the Principal's Assistant's voicemail, the student stated, "if I had a 20 yesterday, things would be different for [redacted]; I got friends down in [redacted] that will take care of you - you better watch it buddy. You better get rid of that civility letter." The student then began laughing and ended the voicemail.

Id.

On May 21, 2018, the Admissions and Release Committee ("ARC") convened a manifestation meeting/hearing. (Transcript 9/26, p. 189 and Transcript 9/28, p. 51). The Petitioner did not attend the ARC meeting and neither did [redacted] parents or a representative on [redacted] behalf. The ARC concluded Petitioner's threatening telephone voice messages were not a manifestation of Petitioner's disability (Respondent's Ex. 29).

[redacted], the achievement and compliance coach ("ACC") for Respondent attended the ARC meeting. (Transcript 9/28, 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. (Transcript 9/28, p. 39). [redacted] testified Petitioner's behavior that resulted in [redacted] removal from [redacted] was not part of a lengthy pattern of similar behavior that started after the car wreck. (Transcript 9/28, p. 48). She said her role was to have a manifestation meeting to look at the specific behavior incident to determine if the student's area of disability is a manifestation of the event that occurred. (Transcript 9/28, p. 46).

Here, [redacted] reviewed Petitioner'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. (Transcript 9/28, p. 47).

[redacted] testified she never saw a diagnosis from a medical doctor that Petitioner had a traumatic brain injury ("TBI"). She read in the medical records that Petitioner's parent reported a TBI, but she never saw an actual diagnosis of a TBI by a doctor. (Transcript 9/28, p. 22). The ARC concluded Petitioner's misbehavior was not a manifestation of [redacted] disability and transferred Petitioner to [redacted].

Petitioner argues [redacted] misbehavior was a result of a TBI [redacted] received in an [redacted] accident. However, the [redacted] accident occurred in November 2015 and the extreme misbehavior did not occur until May 2018, about two and a half years later. The record does not contain any evidence that links the accident to the misbehavior. The record does not contain a medical opinion on this issue. Prior to May 2018, Petitioner was generally a well-behaved student.

Petitioner states the ARC/Manifestation meeting considered the Petitioner but did not consider all relevant information. Petitioner states that if a student has been diagnosed with a TBI, Respondent must address whether the TBI had an adverse impact on the Petitioner's education. Petitioner contends that although [redacted] was eligible under an "other" category, the TBI diagnosis triggered the Respondent's Child Find obligation to identify and determine whether the TBI had an adverse impact on [redacted] education. 34 CFR § 300.111(a)(1).

Child Find is not one of the issues in this case. As stated above, the issues in due process hearings are limited to the issues raised in the complaint. 34 CFR 300.511. Petitioner filed this Request for a Due Process Hearing on January 3, 2019, and never alleged Child Find as an issue despite several efforts to clarify the issues. It is too late to raise a new issue at this stage of the proceedings.

As an alternative ruling, assuming it is not too late for Petitioner to raise a new issue, there was insufficient evidence to show Petitioner suffered a TBI and if [redacted] did, there was insufficient evidence to show how long Petitioner had issues from the injury. There was no evidence to show the injuries Petitioner received in an [redacted] accident in the fall of 2015 caused [redacted] to have behavioral or educational issues thereafter, except [redacted] was home schooled for a short period immediately after the accident. There was no evidence presented to show Respondent was on notice, or should have been on notice, of behavioral issues until the misbehavior on May 8, 2018. Petitioner was generally well behaved during the approximately two and a half years after the accident until May 8, 2018. Consequently, Respondent did not commit a Child Find violation. The record shows Respondent considered the Petitioner and all relevant information. Petitioner did not carry [redacted] burden of proof to show otherwise.

Respondent's decision to transfer Petitioner to [redacted] was not arbitrary. It was the correct decision and was made to protect the teachers (particularly [redacted]) and Petitioner. **Petitioner's behavior violation was not a manifestation of [redacted] disability.** Both parties indicated in their post-hearing briefs that **Respondent held a manifestation determination hearing prior to transferring Petitioner to [redacted].**

Notice Issue: Petitioner's disciplinary infractions occurred May 8, 2018. (Respondent's Ex. 25). The ARC/Manifestation was held May 21, 2018. Neither Petitioner nor anyone else on [redacted] behalf attended the meeting. Petitioner asserted the issue of whether [redacted] received adequate notice of the hearing.

[redacted] testified she told Petitioner 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 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.

(Respondent's Ex. 29, pp. 385, 398).

[redacted] said the notice was not in 16-point font because Petitioner could enlarge the font [redacted]. [redacted] testified Petitioner could enlarge the font or manipulate a document as [redacted] wanted with [redacted] iPad. (Transcript 9/26, p. 29). Petitioner did not testify [redacted] was unaware of

the manifestation meeting. For the reasons stated herein, **Respondent properly notified the Petitioner of the ARC meeting.**

ISSUE SEVEN: Whether the Petitioner completed all the classes and tests required to qualify [redacted] for graduation from high school.

ISSUE EIGHT: Whether the Petitioner actually passed the final two tests that were given to [redacted] in the fall of 2018. Whether the Petitioner received necessary accommodations while taking the tests.

ISSUE NINE: Whether the Petitioner was properly exited from special education services. Issues seven, eight and nine will be discussed together.

Petitioner alleges [redacted] graduation from [redacted] is not supported by the record. [redacted] states there was no evidence [redacted] testing was modified according to the requirements of [redacted] IEP. Petitioner asserts the argument that [redacted] passed the required courses for graduation while attending [redacted] is unworthy of belief.

Respondent explained that Petitioner had already taken these courses while attending [redacted] and that [redacted] only needed to complete them by obtaining passing grades in Programmed Logic for Automatic Teaching Operations ("PLATO"), an online credit recovery program. After passing these classes, Petitioner obtained the required number of hours to obtain a high school degree. Petitioner's graduation date was August 23, 2018.

[redacted], the current ACC for Respondent, testified she worked with Petitioner at [redacted] and administered the PLATO tests to [redacted]. When she began working with Petitioner, there were five courses [redacted] was failing. All Petitioner's beginning grades were in the fifties. She said a

score of 65 is currently needed to achieve a passing grade (a "D"), but a score of only 60 was required at that time. (Transcript 9/28, pp. 165, 174).

[redacted] testified that because Petitioner's beginning grades were in the fifties, [redacted] was almost at "mastery" when [redacted] arrived at [redacted] as [redacted] only needed to score 60. She said based on these beginning grades, Petitioner had almost completed the entire course. [redacted] had already been exposed to a lot of the content. (Transcript 9/27, p. 175).

[redacted], a guidance counselor at [redacted], testified she did the regular intake process with Petitioner just like she would with any student. She reviewed [redacted] transcript, put together an individualized academic plan, administered that plan and then exited Petitioner from the program due to [redacted] graduation status. (Transcript, 9/29, pp. 7, 10). [redacted] explained that "mastery" of a course using PLATO means the student scored 65% or more on the exam indicating the student understands the basic content of the class. [redacted] verifies when a student has achieved the required credits for graduation. (Transcript 9/29, p. 16). Petitioner was treated the same way every other student was treated while [redacted] attended [redacted], except Petitioner had a one-on-one teacher to assist [redacted] with mobility. (Transcript 9/29, p. 17).

[redacted] testified that she prepares credit recovery forms when a student completes a class through PLATO. (Transcript 9/29, p. 19). In this case, she signed the form indicating petitioner had a graduation date of August 23, 2018. (Transcript 9/29, p. 21).

[redacted] stated it is a common occurrence for students who arrive with a score of 51 to 57 to achieve mastery of a course in a matter of hours after being exposed to that subject matter on PLATO. (Transcript 9/29, p. 25). Based on her experience and familiarity with the PLATO program, [redacted] testified she does not have any doubts that Petitioner achieved those credits during the two days [redacted] attended [redacted]. (Transcript 9/29, pp. 27-28).

Petitioner states the undersigned can take notice of [redacted] mental state during the hearing. The undersigned observed Petitioner during the hearing. However, the undersigned does not know Petitioner's mental or physical condition in August 2018 when Respondent administered tests to [redacted].

[redacted] and [redacted] explained how Petitioner passed the 5 courses at [redacted] in a couple of days that [redacted] needed to graduate. Petitioner was able to pass these courses using PLATO because [redacted] was already quite familiar with the subject matter.

Petitioner writes at page 11 of Petitioner's Closing Argument:

> There was no evidence that [redacted] testing was modified according to the requirements of [redacted] IEP. In fact, [redacted] **stated that she did not review [redacted] IEP** (emphasis added) (Transcript September 29, 2022 p. 38). That begs the question if [redacted] did not review [redacted] IEP, how did she implement the IEP or the accommodations on August 21-23, 2018?

However, the transcript does not reflect the alleged statement. Page 38 and 39 of the transcript from September 29, 2022, state:

Q: And I'm not asking, but the IEPs, you're familiar with the IEP being implemented at [redacted]?

A: Oh, yes.

Q: And so the IEP that was developed at [redacted] would have been implemented at [redacted] – would have been required to have been implemented at [redacted]?

A: Yes.

Petitioner does not state which, if any, portions of [redacted] IEP or accommodations were not implemented at [redacted]. Petitioner did not introduce any evidence to support [redacted] position that [redacted]

IEP or accommodations were not implemented at [redacted]. Petitioner did not carry [redacted] burden to show Respondent did not implement [redacted] IEP or accommodations.

For the reasons stated herein, the undersigned finds **Petitioner completed all the classes and tests required to qualify [redacted] for graduation from high school. Petitioner actually passed the final two tests that were given to [redacted] in the fall of 2018. (Earlier in the proceedings when the issues were being clarified, Petitioner stated there were two courses at issue. At trial, that was changed to five courses.) Petitioner received necessary accommodations while taking the tests.**

ISSUE TEN: If the Petitioner graduated from high school, whether [redacted] was inappropriately denied an opportunity to participate in the graduation ceremony and related activities.

ISSUE ELEVEN: Whether the Respondent intentionally discriminated against the Petitioner and gave [redacted] disparate treatment under section 504 of the Rehabilitation Act of 1973. Issues 10 and 11 will be discussed together.

The undersigned does not have jurisdiction to decide issues ten and eleven. A graduation ceremony and related activities do not relate to "the identification, evaluation, or educational placement" or "the provision of a free appropriate public education". 20 U.S.C. §1415(b)(6)(2); 707 KAR 1:340, §9(2).

In the alternative, there was no evidence presented to show Respondent discriminated against Petitioner. The decision to not allow Petitioner to attend the graduation ceremony was not a violation of Respondent's policy and was not applied to [redacted] in a discriminatory manner. [redacted], principal, testified there was nothing

different about the way Respondent handled the disciplinary matter with Petitioner as compared to a similar incident with any other student. (Transcript 9/28, pp. 40-42).

Petitioner was not inappropriately denied an opportunity to participate in the graduation ceremony and related activities. Respondent did not intentionally discriminate against the Petitioner or give [redacted] disparate treatment under section 504 of the Rehabilitation Act of 1973.

FINAL ORDER: The undersigned finds Respondent did not deny a Free Appropriate Public Education to Petitioner except when Respondent did not provide twenty-seven (27) hours of orientation and mobility to [redacted]. Consequently, i**t is hereby ordered** that Respondent will provide twenty-seven (27) hours of orientation and mobility to Petitioner.

/s/ D. Lyndell Pickett
D. Lyndell Pickett
Hearing Officer
DLPickett2001@yahoo.com
Dated: September 14, 2023

APPEAL RIGHTS

Pursuant to 707 KAR 1:340, Section 12. Appeal of Decision. (1) A party to a due process hearing that is aggrieved by the hearing decision may appeal the decision to members of the Exceptional Children Appeals Board (ECAB) assigned by the Kentucky Department of Education. The appeal shall be perfected by sending it, by certified mail, to the Kentucky Department of Education at the following address, a request for appeal, within thirty (30) calendar days of the Hearing Officer's decision. The address is:

Kentucky Department of Education
Office of Legal Services
300 Sower Blvd
Fifth Floor
Frankfort, KY 40601

CERTIFICATE OF SERVICE

I hereby certify the foregoing was served via email on September 14, 2023, as follows:

Kentucky Department of Education
KDELegal@education.ky.gov

/s/ D. Lyndell Pickett
D. Lyndell Pickett
Hearing Officer