

**KENTUCKY DEPARTMENT OF EDUCATION
AGENCY CASE NO 1920-15**

█

PETITIONER

V

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

█

COUNTY SCHOOLS

RESPONDENT

This case concerns a due process request filed December 9, 2019, seeking “stay put” and other relief for a █-year-old student facing expulsion who, at the time of the filing, had not been identified as a student eligible for special education. The complaint also sought compensatory education and evaluation for suspected disabilities. While on the docket of a previous hearing officer herein, the request for stay put was denied based upon failure to establish basis of knowledge that the student was a child with a disability pursuant to 707 KAR 1:340, Section 16.

Subsequently, various events occurred relative to the student and remaining issues in this case. Among those events were evaluation for disability under categories of Emotional Behavior Disorder (EMB) and Other Health Impairment (OHI), qualification under OHI, and rejection of an IEP offered by the school.

A hearing date was set, and the case was assigned to the undersigned hearing officer, Proof regarding the remaining issues was heard on October 19, October 31, and November 1-3 of 2022, at which time the student was █ years old, being home-schooled, and, according to the parent home-schooling █, on track to complete the credits needed to earn a high school diploma. At issue is whether Respondent failed to identify the student as eligible for special education services, failed to provide those services, and, if so, the remedy to which Petitioner is entitled. The parties have filed post-hearing briefs and responses to same. Having reviewed the

record and briefs of the parties, and being sufficiently advised, the hearing officer makes the following findings of fact, conclusions of law, and final decision.

APPLICABLE LAW

The student herein alleges ■ is entitled to, but the school has not provided, FAPE. 707

KAR 1:290, Section 1, (1) requires a school district to

make a free appropriate public education (FAPE) available to all children with disabilities aged three (3) to twenty-one (21) residing within its district's boundaries who have not received a high school diploma, including children with disabilities who have been suspended or expelled for more than ten (10) school days in a school year.

The fact that a student is passing from grade to grade does not mean a student with a disability is not entitled to FAPE:

FAPE shall be provided to each child with a disability even though the child has not failed or been retained in a course and is advancing from grade to grade based on the child's unique needs and not on the child's disability.

707 KAR 1:002, Section 1, (1). Additionally, the district's obligation to locate children who may need special education services extends to children residing in the district who are in private school or home-schooled. 707 KAR 1.300, Section 1, (1)(b). To qualify for special education services, a student must be a "child with a disability," which is defined in 707 KAR 1.280,

Section 1,(9) as follows:

a child evaluated in accordance with 707 KAR 1:300, as meeting the criteria listed in the definitions in this section for autism, deaf-blindness, developmental delay, **emotional-behavior disability**, hearing impairment, mental disability, multiple disabilities, orthopedic impairment, **other health impairment**, specific learning disability, speech or language impairment, traumatic brain injury, or visual impairment which has an **adverse effect** on the child's educational performance and **who, as a result, needs special education and related services.**

(emphasis added).

The legal requirements to establish eligibility under OHI or EBD are discussed elsewhere in the fact-findings below. Regardless of category two other facts must be found – “adverse effect” and “needs special education and related services.” Adverse effect means, according to 707 KAR 1:002, Section 1, (2), that “the progress of the child is impeded by the disability to the extent that the educational performance is significantly and consistently below the level of similar age peers.” Under the regulation on eligibility determination, 707 KAR 1:310, Section 1,(1), whether a disabled child needs special education turns upon whether the disability so impacts the student that “specially designed instruction is required **in order for the child to benefit from education.**” (emphasis added).

If a student is entitled to FAPE, the District, whether it has been adequately provided is measured through standards identified in case law. The Court in *Board of Education of Fayette County v. L.M.*, 478 F. 3rd 307, 314 (6th Cir. 2007) states

[u]nder the IDEA, the School is required to provide a basic floor of educational opportunity consisting “of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” *Rowley*, 458 U.S. at 201, 102 S. Ct. 3034. There is no additional requirement, however, “that the services so provided be sufficient to maximize each child’s potential commensurate with the opportunity provided other children.” *Id.* at 198, 102 S. Ct. 3034.

The U. S. Supreme Court revisited the *Rowley* decision in *Endrew F. V. Douglas City School District*, 137 S. Ct. 988 (2017) and opined that to “...meet its substantive obligation under the IDEA, a school must offer an IEP reasonable calculated to enable a child to make progress appropriate in light of the child’s circumstances.” 137 S. Ct. 999.

The Petitioner bears the burden of proving, by a preponderance of the evidence, entitlement to relief. In this case the student filed the Due Process Complaint and bears the ultimate burden of persuasion on the elements of the student’s claims. *Schaffer v. Weast*, 546

U.S. 49, 57-58 (2005) and KRS 13B.090(7). As the complaint was filed December 9, 2019, the applicable period of limitations extends to claims arising December 9, 2016, and thereafter.

FINDINGS OF FACT

1. The student did not have any significant behavior or academic problems prior to seventh grade.

Student began attending ██████████ County Schools at age █ (TE 10/31, 12). According to the father █ did well in elementary school and enjoyed it (TE 10/31, 13). The student attended sixth grade at the ██████████ School in 2016-2017. Respondent's Tab 1, a compilation of contacts between the school and the parents, reflects four phone calls with parents in January and February of 2017 regarding student's inappropriate language in the classroom. Respondent's Tab 2 reflects a couple of corresponding behavior detail reports. During fifth grade 2015-2016 there was a single behavior report regarding an unkind comment to another student, and no behavior reports for fourth grade 2014-2015. (Respondent's Tab 2). It was in seventh grade at ██████████ Middle School when, according to the father, "the problems actually started to arise. (10/31, 13).

2. Student's grades in seventh grade remained good and were commensurate with those of █ similar-age peers.

According to the father, the student's grades in seventh grade (2017-2018) were "great" (TE 10/31, 15). Respondent's exhibit 4, the student's report card for that year, corroborates father's assessment and reflects overall a B average. The student was also a star on the track team. (TE 10/31, 110; (TE 11/2, 6).

3. Student's misbehaviors in seventh grade was generally minor except for three instances resulting in out-of-school suspension and were not atypical for a student transitioning into Middle School.

The parents testified they were often called by the school for behavior issues the father characterized as “mostly talking in class. A lot of talking in class and -- nothing other than -- it was talking in class” and “[t]here was nothing major at this point. It was, like, ■■■ wouldn't remain in ■■■ seat. ■■■ would go to that -- somebody else's desk and hang out...” (TE 10/31, 14).

Petitioner makes the point that the number of suspensions in seventh grade is high (TE 11/2,80), but most were in-school suspensions for minor infractions and resulted in being sent to the ASP classroom for an hour or two. Multiple students at the school exhibited this kind of behavior. (TE 11/2, 81). The student's difficulties were clustered during the first few months of seventh grade, culminating in an out-of-school suspension at the end of November for an incident involving sexual language. After that, ■■■ behavior pattern changes. There are no behavior reports until February, when student used explicit sexual language and received another out-of-school suspension. Then there are no behavioral reports after that until the end of April in 2018, when student received out-of-school suspension for fighting. Regarding the significance of this flurry of misbehavior in the fall of 2017 followed by three instances of misbehavior widely-spaced without misbehavior in between them, the principal testified as follows:

Q. If we go from November -- end of November to end of February and then end of February to end of April as a separation between events, would that have been typical for you? Would that have been a student making progress with their behaviors, that we're having decreased severity? How do you review that?

A. I think a two-month span would be indicative that we were not having major ongoing issues. It wasn't something that was happening weekly or daily.

(TE 10/31, 20-21).

4. There was not evidence sufficient to prove the student had a disability having an

adverse effect or the school should have suspected [REDACTED] had a disability having an adverse effect (as defined by applicable regulations) during seventh grade.

The student had not, at this time, been evaluated by any mental health care professional or diagnosed with any psychological condition. Regarding Petitioner's argument that disability should have been inferred from the student's misbehavior, the Middle School principal testified that Student's misbehavior was not atypical for a seventh grader entering Middle School and did not require the principal's involvement except once in relation to an incident involving sexually explicit language that upset the parent of another student. (TE 11/2, see 6-20). Had the student had been perceived as a major disruption or a major problem during seventh grade, it would have come to the principal's attention, and [REDACTED] would have been placed in an alternative school within the middle school. (TE 11/2, 25-26). As found elsewhere hereinabove, [REDACTED] grades were commensurate with [REDACTED] same-aged peers. Weighing the evidence as a whole, there is not evidence sufficient to find the student had a disability causing an adverse effect or that the school should have suspected such a disability in the seventh grade.

5. Student was home-schooled beginning in eighth grade.

The mother testified that the parents pulled the student out of school and decided to homeschool [REDACTED] because they were getting a lot of calls from the school regarding behavior during the seventh grade. (TE 11/1, 11-12). However, the hearing officer observes that the student also had friends, including one involved in "the incident" discussed elsewhere hereinbelow, who were being home-schooled (TE 11/1, 296). And as found elsewhere hereinbelow, the student was not turning in work to [REDACTED] mother during this period of homeschooling. Whatever the reasons, the student ceased attending Middle School and began eighth grade as a homeschooler. (TE 10/31, 8).

6. “The incident” occurred on Halloween in 2018, while the student was being home-schooled in eighth grade.

An incident occurred on Halloween night of 2018. (10/31, 72). The incident will not be described, but it was of an order different than previous misbehaviors at school and involved law enforcement, juvenile court, Child Protective Services, and other students of the District. Prior to the incident, the student had never been diagnosed with any sort of psychological condition. (10/31, 72).

7. The student “ran away” from home after the incident, resulting in a stay at a residential facility where she received ■■■ first psychological evaluation.

The involvement of CPS and fear of the potential consequences of ■■■ disposition in juvenile court prompted the student to “run away.” The mother testified as follows:

Q. It says these documents indicate ■■■ was admitted for out-of-control behaviors. The next line talks about running away. That's the same thing you said?

A. Yes.

Q. ■■■ was not running away, trying to hitchhike across the country. ■■■ was just going to a friend's house to avoid being at home?

A. Yes.

Q. I think your husband testified all of this was -- anytime CPS came to the house, ■■■ wanted to leave?

A. Yes. ■■■ was scared. Yes.

Q. So the running away was avoiding being in the place where CPS was coming?

A. That's correct, yes.

Q. That's a fair summary of his testimony?

A. Yes.

(TE 11/1, 114-115). The student corroborated the mother's testimony:

Q. You ended up having to go to court and spend some time with a judge sitting up on the bench talking to you a few times; is that true?

A. Yes.

Q. And then I understand there's been some discussion by your parents of what other people called "running away," but it sounds like you were just going to a friend's house to get away from home when CPS was at your house, right?

A. Right.

Q. I keep asking, and everybody says the same thing. You weren't trying to hitchhike --

A. No.

Q. -- to California; you were just trying to stay out of your parents' house while CPS was there, right?

A. No, I was not trying to hitchhike.

(TE 11/1, 291-292). A consequence of running away was that the student was admitted to a residential facility for a short stay, where ■■■ was evaluated. The student's mother testified as follows:

So [the student] ran away. And so after that, ■■■ behavior kind of increased. And, you know, ■■■ wasn't listening and becoming more defiant. So we sent ■■■ to [the residential facility]. I think ■■■ stayed there five days. I'm not positive about that length. But I dealt with a psychologist there who I would talk to. And ■■■ would kind of -- we would talk it out if [the student] was ready to come home. And ■■■ could see [the student's] issues with authority there. So we talked about that. And, you know, I -- and so ■■■ finally came home.

Q. Let me ask you now. There's been a lot discussion about a diagnosis of oppositional defiant disorder, ODD. Do you remember when ■■■ got that diagnosis?

A. I feel like ■■■ got that diagnosis from ■■■■.

Q. Okay.

A. But that [residential facility] -- I would have to look over my notes. But it felt like ■■■ got a diagnosis there --

(TE 11/1,13).

8. Records from the stay at the residential facility reflect that ■■■ was evaluated for problems related to “the incident” and conflicts with ■■■ parents, not behaviors at school.

The student's admission to the residential facility occurred when ■■■ was being homeschooled and was prompted by reactions to “the incident” and problems with ■■■ parents, not school behavioral issues. Integrated Psychological Evaluation Report prepared by the school, dated February 26, 2020, reflects the following:

Documents from [the residential facility] indicate [the student] was an inpatient from 01/19/2019 until 1/24/2019. These documents indicate [the student] was admitted for out of control behaviors. It was reported, “The patient ran away to a friend's house and then was staying with ■■■ friend and not following rules at home and was running away from home repeatedly. The patient in October [the incident is described] and ■■■ had legal

issues because of that as well.” Documents indicated upon discharge [the student] was diagnosed with Adjustment Disorder with Disturbance of Conduct by Dr. [REDACTED], M.D. and was prescribed [medication] to help with mood and irritability. Lastly, those records indicated that upon discharge [the student] was able to perform activities of daily life and was given follow-up appointment with therapist and psychiatrist for medication management.

(Respondent Tab 24).

9. The student did not turn in work during the home-schooling and the mother marked the student as absent; consequently, the Cabinet required that the student return to in-person attendance in the District School and have counseling.

The student was not doing [REDACTED] work during homeschooling and the mother was reporting [REDACTED] as truant rather than entering zeros. (TE 11/1, 73). The Cabinet required that the student return to in-person attendance in the District School. The mother testified as follows:

Q. All right. So when [REDACTED] got out -- when [REDACTED] came home from [the residential facility], did [REDACTED] start in with [REDACTED] County Schools?

A. Well, we had to go to court. And then I think that was at the end of 2018. CPS made us put [REDACTED] back in school. And so when we did -- well, we were at court.

(TE 11/1, 14). The father also testified that the reason for re-enrollment was that Child Protective Services and the court required it. (TE 10/31, 66). The court and CPS also required the student to go to counseling. (TE 11/1, 81). Counseling and reenrolling in school were conditions precedent to avoiding a criminal trial and placement in a juvenile detention facility. (TE 11/1, 83).

10. When the student applied for readmission in February of 2019, the school was unaware that any diagnoses had been made by anyone regarding any psychological condition of the student; parents represented to the school that the student had not been diagnosed with any disability or special need.

According to the mother, during court proceedings, there was no discussion of the student's stay at the residential facility or the diagnosis of ODD. (TE 11/1, 14-15). When parents reenrolled the student on 2/7/19, the registration form filled out and signed by the father stated that the student had **not** been diagnosed with a disability or special need. (Respondent Tab 8, TE 10/31, 73-74; TE 11/1, 91). Neither the residential facility stay nor ODD was discussed at the February 9, 2019, meeting concerning the student's reenrollment. (TE 11/1, 19). In the mother's mind, the only reason for the meeting was "the incident" (TE 11/1, 19). Nothing in the record indicates records from the residential facility, or even that [REDACTED] the fact that the student had been in a residential facility, were ever disclosed to the school by anyone prior to the evaluation conducted by the school in 2020.

11. At the time they applied for readmission, parents requested that the student be placed in an alternative school and that [REDACTED] cellphone be taken away from [REDACTED].

The parents requested the student be put in an alternative school. The mother testified an additional restriction was requested by parents. "[M]y husband said, don't let [REDACTED] have a phone right now." (11/1, 97).

12. The student could not be placed at the stand-alone alternative school because one of the victims of "the incident" was enrolled in that school, so upon readmission [REDACTED] was placed primarily in an ASP classroom in the Middle School and during the remainder of eighth grade attended homeroom and math class outside the ASP classroom.

It was the mother's understanding, corroborated by other witnesses, that the student could not be placed at the stand-alone alternative school because one of the victims of "the incident" had been placed there. (TE 11/1, 26) If the student had gone to the alternative school, [REDACTED] would have been in the same classroom as one of the victims of the incident. (11/1, 84).

At the time the student and parents entered into an agreement regarding reenrollment, there was no objection from parents or student regarding the setting (TE 10/31, 76-77). Later, that changed. However, the issues in this IDEA proceeding do not require findings addressing the student's unhappiness at being placed in ASP.

13. After reenrollment, the student began to see the [REDACTED] counselor who had an office in the Middle School from time to time, but the parents directed that no information about the student be shared with the school.

[REDACTED] provides counseling services outside of schools. Additionally, the District provides [REDACTED] office space inside the Middle School. [REDACTED] is not an employee or contractor of the school and works independently, contracting with parents and their children. After the stay in the residential facility, the student saw [REDACTED] outside school and then established a relationship with the [REDACTED] counselor in Middle School. The parents gave permission for the student to see a psychologist at school during the spring of 2019, but on the express condition that the psychologist not provide any information about the student to the school (TE 10/31, 85; 90-91). The first appearance of a diagnosis of ODD in school records is in the evaluation performed by the school in 2020, which refers to a diagnosis in March of 2019. (11/1, 58).

14. After readmission in February of 2019, continuing through the end of eighth

grade in May, the student continued to misbehave in the same ways ■■■ had in the past, such as talking or using sexually explicit language, but ■■■ behaviors did not escalate to the point of generating Behavior Detail Reports.

During ■■■ return to school in eighth grade, the student met with the principal and guidance counselor whenever ■■■ liked, which was about once a week. (TE 11/2, 40) Notes apparently kept primarily by the math and homeroom teacher during this period (Respondent Tab 11) reflect that the student continued to be disruptive, often talking in class or using sexual language. The principal testified that

the use of foul language and being mouthy have a pretty typical occurrence at middle school. I would say that more students than not are experimenting with using some foul language and talkativeness. They are pretty social creatures.

(TE 11/2, 47). The math teacher characterized the student's misbehaviors as seeking attention from ■■■ peers. (TE 11/3, 71). The student's behaviors were not serious enough to generate any Behavior Detail Reports during eighth grade. (TE 11/2, 23).

15. Although the student had effectively received no instruction while being homeschooled from August 2018 to February 2019, ■■■ managed to finish eighth grade with a C average; ■■■ behaviors did not prevent ■■■ from learning.

The student basically had done no work in home-schooling since the time of the incident up until ■■■ reenrolled in February of 2019. (11/1, 74). However, the student managed to pull out passing grades and was prepared for ninth grade. (11/1, 77-78)

It is true that the student made a 54 for the 9 weeks and a 62 for the semester in math in end of 8th grade (TE 11/3, 68). Petitioner, cross-examining the student's eighth grade math teacher, makes the point that the student is capable of earning higher grades than ■■■ did in eighth grade:

Q. In your opinion, would ■ have the capability, or was ■ capable enough in math to do better than a D minus?

A. Yes.

(TE 11/3, 75). However, as described above, the student basically did no work at all during homeschooling and had a lot of catching up to do. Though ■ ended up with a D minus in math, ■ overall ■ grades average C, notwithstanding that ■ did not attend school for most of the eighth-grade year. See testimony of principal (TE 11/2, 48; and Respondent Tab 13, grade report 8th grade). The principal was cross-examined regarding the effect of the student's misbehaviors on ■ learning:

Q. How is this child who is exhibiting these behaviors learning in her academic environment?

A. Because the vast majority of the time, ■ not exhibiting those behaviors, so ■ is learning. In that moment that ■ blurting out, sure, ■ not learning. But it's not a continual habitual everyday behavior in any single class that would prevent that child from learning; [the student] or anybody else.

(TE 11/2, 68-69).

16. There was not evidence sufficient to prove the student had a disability having an adverse effect or the school should have suspected ■ had a disability having an adverse effect (as defined by applicable regulations) during eighth grade.

The student's behaviors *at school* in eighth grade were less serious than during seventh grade and the student managed to pull out an overall C average, notwithstanding that ■ received no instruction for most of the year. The parents affirmatively represented to the school in the reenrollment form that the student had no disability or need for special education, and the school had no knowledge of any psychological diagnoses. While "the incident" was very serious, it occurred outside of school and did not in itself suggest the student needed special education. Additionally, no health professional treating the student had recommended special education,

evaluation for special education eligibility, or accommodations. There is not evidence to support a finding that the student was a child with a disability during eighth grade or should have been evaluated.

17. Student had some minor misbehaviors at the beginning of ninth grade, but nothing serious until the “terroristic threat.”

Behavior Detail Reports reflect that the student had eight reported misbehaviors in August, September, October and the first half of November for things such as skipping class, rude comments, and vaping. (Respondent Tab 2). On November 18, the student was sent home from school for threatening to fight a student who made a comment about ■■■ grandfather. Then, on November 20, assorted events occurred, including a “terroristic threat” which the student does not deny making. This threat led to ■■■ suspension and, ultimately, expulsion. The student chose to be home-schooled after that. The mother testified as follows:

Q. And then beginning January of 2020, after the expulsion hearing, do you recall Dr. ■■■ offering you-all school -- that the school would offer you services while ■■■ was expelled?

A. Yes.

Q. And you declined that from the school, correct?

A. I think that's accurate, yes.

Q. And from that time forward, you have always homeschooled –

A. Yes

(TE 11/1, 78).

18. The student’s grades in the first quarter of ninth grade averaged C.

For ninth grade, 2019-2020, prior to ■■■ expulsion, the student had passing grades that average out to a high C. (Respondent Tab 26, ninth grade report card).

19. There was not evidence sufficient to prove the student had a disability having an

adverse effect or the school should have suspected [REDACTED] had a disability having an adverse effect (as defined by applicable regulations) during ninth grade prior to [REDACTED] expulsion.

Except for the events surrounding [REDACTED] expulsion, student's misbehaviors were not significantly atypical. No expert has testified that such behaviors demonstrate [REDACTED] had a disability requiring special education. While [REDACTED] may be capable of earning higher grades if [REDACTED] wants to, [REDACTED] grades were comparable with [REDACTED] peers. The school had no information that any mental health professional had diagnosed [REDACTED] with any psychological condition. While the school knew [REDACTED] saw the in-school [REDACTED] psychologist between March and May of [REDACTED] eighth-grade year, not all students who see the psychologist are children with disabilities and, at the instruction of the parents, no information concerning the student was shared with the school.

20. Subsequent to the expulsion, the student filed for due process and, based upon the expressed concerns of the parents, the school conducted an evaluation for eligibility in the categories of emotional behavior disorder (EBD) and other health impairment (OHI).

21. The student was correctly found not eligible under the category of EBD.

Emotional Behavior Disorder is defined in 707 KAR 1.002, Section 1(24) as follows:

- (a) "Emotional-behavioral disability" or "EBD" means that a child, when provided with interventions to meet instructional and social-emotional needs, continues to exhibit one (1) or more of the following, when compared to the child's peer and cultural reference groups, across settings, over a long period of time and to a marked degree:
1. Severe deficits in social competence or appropriate behavior which cause an inability to build or maintain satisfactory interpersonal relationships with adults or peers;
 2. Severe deficits in academic performance which are not commensurate with the student's ability level and are not solely a result of intellectual, sensory, or other health factors but are related to the child's social-emotional problem;
 3. A general pervasive mood of unhappiness or depression; or
 4. A tendency to develop physical symptoms or fears associated with personal or school problems.

(b) This term does not apply to children who display isolated (not necessarily one (1)) inappropriate behaviors that are the result of willful, intentional, or wanton actions unless it is determined through the evaluations process that the child does have an emotional-behavioral disability.

Respondent argues, and the ARC found, that the student did not demonstrate over a long period of time and to a marked degree any of the 4 characteristics for EBD. As described elsewhere in these fact-findings, except for the “incident” during eighth-grade home-schooling, and the event in ninth grade that led to ■■■ expulsion, the student’s misbehaviors were not markedly different from other students ■■■ age. No doctor diagnosed ■■■ with EBD, and had ■■■ been so diagnosed, no evidence was presented that specially designed instruction was required in order for ■■■ to benefit from education. Additionally, the two isolated events (the “incident” and the “terroristic threat”) were not proved to be involuntary results of a psychological condition rather than intentional, wanton, or willful actions within the meaning of 707 KAR 1.002, Section 1(24)(b).

22. No health professional treating the student has at any time recommended that the student be provided special education or accommodations; the school psychologist, the only professional with mental health expertise participating in the evaluation of the student, does not believe the student qualifies for special education.

707 KAR 1.002, Section 1(42) states:

"Other health impairment" or "OHI" means having limited strength, vitality, or alertness, including a 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 acquired immune deficiency syndrome, asthma, attention deficit disorder, attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, Tourett syndrome, or tuberculosis; and
- (b) Adversely affects a child's educational performance.

(TE 11/1, 217). At the hearing of this matter more than two years after the due process complaint was filed, there still is no report from any mental health professional recommending or suggesting special education is appropriate or required for this student. There was not evidence that forbidden cellphone use, talking in class, etcetera, was caused by ODD rather than simply being typical teenage misbehavior. Notwithstanding the ARC's determination to the contrary, the school psychologist is correct – there is not sufficient evidence to find the student eligible under OHI.

23. The school found the student eligible under OHI on September 9, 2020, but the student and parents declined to participate in finalizing an IEP.

An evaluation of the student was completed and an integrated report prepared in February 2020. (See R-24). Due to delays caused by the COVID-19 pandemic, the results were not discussed until an in-person meeting on September 8, 2020. (See R-29). The ARC proposed some form of “co-teaching” to help the student with attention issues. The student was not able to attend the ARC. A draft IEP was reviewed with the parents, but no goals were adopted at that time because the parents wanted the student's input first. The notes from the conference summary state “the ARC agreed to obtain input from the student to develop the IEP.” Despite further efforts, the ARC never reconvened with the student present and an IEP to be implemented in school was never finalized. (TE 11/2, 115-116). Petitioner has made clear ■■■ intent to complete ■■■ education being home-schooled and will not return to in-person schooling.

24. Petitioner presented no factual basis for compensatory education.

Pursuant to *Bd. of Educ. of Fayette Co. v. L.M.*, 478 F.3d 307, 317 (6th Cir. 2007), a claimant seeking compensatory education must present evidence of where the student would be but for the alleged deprivation of services and identify compensatory services reasonably geared

toward ameliorating that deficit. An award cannot be based merely on the duration of the alleged deprivation. The “compensatory awards should aim to place disabled children in the same position they would have occupied but for the school district’s violation of IDEA.” Inquiry into an appropriate compensation education plan “must be qualitative, fact-intensive, and...tailored to the unique needs of the disabled student.” *Branham v. The Gov’t of the Dist. of Columbia*, 427 F3d7,9 (D.C. Cir. 2005). “A Hearing Officer cannot determine the amount of compensatory education that a student requires unless the record provides him with ‘insight about the precise types of education services [the student] needs to progress.” *Mary McLeod Bethune Day Academy Public Charter School. v. Bland*, 534 F.Supp.2d 109, 116 (D.D.C. 2008).

There is testimony from the student’s mother that the student is on target to get [REDACTED] degree. While some witnesses opined the student was bright and capable of making higher grades if [REDACTED] tried, there is no evidence that special education services would have improved [REDACTED] performance. Had a deficiency been proven, there was not evidence establishing what compensatory education would remediate the alleged deficiency. The student testified, in essence, [REDACTED] wants to take an online certification program with a private company because [REDACTED] thinks it would be more impressive than a home-schooled high school diploma. That is not sufficient to establish a basis for compensatory education.

CONCLUSIONS OF LAW

1. PETITIONER DID NOT PROVE VIOLATION OF CHILD FIND

The prehearing order finding no “basis of knowledge” within the meaning of 34 CFR

300.534(b) was correct. The parent did not express concern in writing that the child needed special education, nor did the parent request an evaluation, nor did a teacher or other school personnel express behavior concerns to the director of special education or other supervisory personnel. After the school became aware of a diagnosis of ODD, the student was evaluated.

Regarding the general standard for a child find violation, the student's behaviors were not such that the school should have suspected the student had a disability. Per the fact-findings, the student's misbehaviors were not markedly atypical compared to [REDACTED] peers. Petitioner did not establish that the school "overlooked clear signs of disability and were negligent in failing to order testing." *Board of Educ. of Fayette County, Ky. v. L.M.* 4878 F.3d 307, 313 (6th Cir. Ct. 2007).

2. PETITIONER DID NOT FAIL TO PROVIDE FAPE

Per fact-findings hereinabove, there was not sufficient factual evidence to find the student was entitled to special education at any time during the relevant limitation period. Per the fact-findings, the ARC's decision, after due process was filed, finding the student eligible under OHI was not supported by evidence from a mental health professional. If the student is deemed eligible from September 8, 2020, simply because the ARC so decided, [REDACTED] estopped from complaining about implementation by [REDACTED] failure to participate in development of the IEP. [REDACTED] decision to finish [REDACTED] schooling at home, instead of in-person, also moots any need for co-teaching to overcome distraction in the classroom.

3. PETITIONER IS NOT ENTITLED TO COMPENSATORY EDUCATION

There is no FAPE violation, and were there one, per the fact-findings, there is not evidence sufficient to provide a basis for calculating a compensatory education award.

FINAL ORDER

The hearing officer finds Respondent did not violate any provision of IDEA and Petitioner is not entitled to any relief.

NOTICE

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 at Office of Legal Services, 300 Sower Blvd., 5th floor, Frankfort KY 40601. The appeal shall be perfected by sending, by certified mail, to the Kentucky Department of Education, a request for appeal within thirty (30) calendar days of date of the hearing officer’s decision.

March 23, 2023.

/s/ Mike Wilson

MIKE WILSON, HEARING OFFICER

CERTIFICATION:

A copy of the foregoing was served by email on March 23, 2023 to the following:

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████████████████████

KDE
KDElegal@education.ky.gov

/s/ Mike Wilson

MIKE WILSON, HEARING OFFICER