COMMONWEALTH OF KENTUCKY
KENTUCKY DEPARTMENT OF EDUCATION
DIVISION OF EXCEPTIONAL CHILDREN
AGENCY CASE NO. 1617-20

[redacted] APPELLANT/PETITIONER

V.

LIVINGSTON COUNTY SCHOOLS APPELLEE/RESPONDENT

DECISION AND ORDER OF THE ECAB PANEL

Introduction

This case comes before the Exceptional Children Appeals Board panel (hereinafter "ECAB") following a hearing on July 17, 2017 conducted by Hearing Officer Mike Wilson. This panel consisting of Paul L. Whalen, Karen L. Perch and Kim Hunt Price, was appointed November 15, 2017 to consider the appeal of the Student. Having reviewed the record in its entirety and the briefs of the Parties, this ECAB issues this "Decision and Order".

In a letter dated November 14, 2017, addressed to the Kentucky Department of Education; Office of Legal Services; Exceptional Children's Appeals Board the Mother of the Petitioner/Appellant wrote one sentence after the "Dear Sir" salutation. "This letter is my formal request to appeal the decision of the hearing officer for case no. 1617-20".

At the bottom of the letter there is a caption, "Notice of Service". The third line under that caption states "Chuck Walter, Attorney for Petitioner, emailed on 11/14/17.

That was followed by the name of "Teresa Combs, Attorney for the Respondent", emailed on 11/14/17.

There was some delay in scheduling the initial teleconference due in part to confusion of whether Petitioner was represented by Counsel or Pro se by his mother. Counsel for the Petitioner for the Petitioner formally withdrew from this matter on December 22, 2017.

On December 19, 2017, the undersigned Chair of this ECAB held a teleconference for the purpose setting up a briefing schedule. At that meeting, in addition to the ECAB Chair; the Petitioner/Appellant's Mother was present as was Counsel for Respondent School District. During that meeting, it was explained to the Mother of the Petitioner/ Appellant more specific information was needed for the ECAB to understand the reasons for the disagreement with the Hearing Officer's Decision.

At the close of the teleconference call, it was agreed that the Appellant/Petitioner would set out the grounds for the appeal in the initial brief. Due to the Christmas/New Year's break, Mother for the Petitioner/Appellant said she would need time after the end of the break to prepare a brief. Petitioner/Appellant's initial brief was due on January 19, 2019. Counsel for Respondent/Appellee had until February 8, 2018 to file a brief. The Petitioner/Appellant then had until February 22, 2018 to file a reply brief.

Between the time of the teleconference and January 16, 2018, the Mother for the Petitioner/Appellant contacted the KDE and the undersigned Chair. On or about January 16, 2018, Petitioner/Appellant's Mother indicated that she wanted a decision based upon the pleadings in the record. (01/16/2018; 8:11:56 a.m.) As a result she indicated that she was not filing a brief on behalf of the Petitioner/Respondent. Via

email dated January 19, 2018, 8:46 a.m., Counsel for the Respondent/Appellee indicated she was going to file a brief for the school district. Later on January 19, 2018, the Mother for the Petitioner/Respondent wrote that she still wanted to reply to the School District's brief. Petitioner/Appellant had until February 22, 2018 to reply to the School District's brief which was filed on February 8, 2018. However, the due date of February 22, 2018 came and went and there was no reply submitted on behalf of the Petitioner/Appellant.

Having reviewed the record in its entirety and the only brief submitted, this ECAB issues this "Decision and Order".

PROCEDURAL

On January 24, 2017, the Student by Counsel filed a "Request for a Due Process Hearing". The Hearing was originally scheduled for June 23, 2017. It was later re-scheduled and the Hearing was held on Monday, July 17, 2017 at the Livingston County High School in Smithland, Kentucky. Following the Hearing, the Hearing Officer received the transcript on August 11, 2017. By Order dated August 18, 2017, the Hearing Officer scheduled initial briefs due on September 11, 2017 and response briefs due on September 26, 2017.

Hon. Mike Wilson, the Hearing Officer, issued the "Findings of Fact, Conclusions of Law and Final Order" on October 16, 2017. It was received at the Kentucky Department of Education (KDE) on October 17, 2017. It contained eighteen (18) Findings of Fact and three (3) Conclusions of Law.

The Hearing Officer's Conclusions of Law were:

1. The school had no obligation to conduct a full evaluation of the student, after screening because it did not suspect that the student was a child with a disability in need of special education.
2. The school did not overlook clear signs of disability and did not negligently fail to order testing; the decision not to evaluate was rational and justified.
3. Petitioner failed to prove that the student was eligible for educational services.

The Student appealed the Hearing Officer's Decision and Conclusions of Law.

I.

THE SCHOOL DISTRICT'S OBLIGATION TO CONDUCT A FULL EVALUATION OF THE STUDENT

The Hearing Officer determined that the school was correct in not completing a full evaluation process. However, the ECAB believes that under the pertinent statute and regulations a full evaluation is required. This child had previously received special education for speech, but was terminated from special education eligibility in 2010 as it was no longer needed. The mother made two (2) separate requests which are the subject of this appeal for evaluations, in November 2015 and Fall 2016. Much reliance is made by both parties on letters from the Department of Education and Federal Register. The ECAB recognizes that these are guiding documents. However, the briefing misses the point that the actual binding authority are the statutes, regulations and case law specifically interpreting same.

20 USC Section 1414(a) (1)(A) states

"A State educational agency, other State agency, or other local educational agency **shall conduct a full and individual initial evaluation (emphasis added)** in accordance with this paragraph and subsection (b), before the initial provision of special education and related services to a child with a disability under this subchapter."

This request for an initial evaluation may be initiated by a parent, state agency or local educational agency.

Section 1414(a)(1)(C) establishes the procedure for these evaluations and states (i) "Such initial evaluation shall consist of procedures (I) to determine whether a child is a child with a disability... (II) to determine the educational needs of such a child."

Subsection E further specifically states,

> "Rule of Construction: the screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation **shall not be considered to be an evaluation for eligibility for special education and related services.**" (Emphasis added)

Further, Paragraph 2 of Section 1414 discusses reevaluations. Although there is no definition of what constitutes an initial evaluation or reevaluation within the statute because this child has not received special education services since 2010, it appears to this ECAB that the requirements for an initial evaluation must control in this matter.

20 USC 1414(3) (b) (2) Conduct of Evaluations controls and sets forth the requirements for an evaluation. Said section states

> "In conducting the evaluation, the local educational agency **shall (A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining (i) whether the child is a child with a disability; and (ii) the content of the child's individualized education program, including information relating to enabling the child to be involved in and progress in the general education curriculum…(B) not use any single measure or assessment as the sole criteria for determining whether a child is a child with a disability or determining an appropriate educational program for the child…"** (Emphasis added)

Subsection 3 further requires as an additional requirement that the local educational agency insure that a child is assessed in all areas of suspected disability.

The argument of the school concerning triangulation of data and use of multiple screening tools overlooks the initial requirement of a full evaluation. Until such time as a full evaluation is conducted, the school does not have the appropriate materials with which to determine whether the child is a child with a disability. Much of the school's argument is correct in evaluating some of the items that would have to be looked at and what the legal requirements would be for a determination of disability. However, one cannot overlook the crucial step of having a full evaluation so that all relevant factors are considered in determining whether the child has a disability.

The Respondent School District relies on comments in the Federal Register for its position that the LEA can deny a parent's request for a full evaluation simply by providing the written notice of its refusal, as provided by 34 CFR 300.513(b). The comments in the relied upon portion of the Federal Register do state that if a "*public agency* does not suspect that the child has a disability and denies the request for an initial evaluation, the public agency must provide written notice to the parents consistent with §503(b)" and further states, "a public agency may refuse to initiate or change the identification, evaluation, or educational placement of the child, *or the provision of FAPE to the child*, if the public agency provides written notice." 71 Fed. Reg. 156 46636 (August 14, 2006), (emphasis added).

The ECAB has several difficulties with the relied upon commentary. First, by stating that an initial evaluation can be refused if the *public agency* does not suspect that the child has a disability, the commentary excludes the parent as a person who may have legitimate reason to suspect her child of having a disability. The public agency can, by this interpretation of the

statute and administrative regulations, simply ignore the parent as long as a written notice is given. The parent is an integral part of the IEP team, or Admissions and Release Committee (ARC), as it is called in Kentucky. *See*, 34 CFR 300.322. As part of an initial evaluation, the ARC must review not only existing evaluation data, but also information provided by the parent. *Id*., at §300.305(a) (1)(i). In this case, the parent provided testimony about the extra hours of help provided at home to the Student and that, without such help, the Student would have performed well below his peers. The Hearing Officer acknowledged that this could possibly be the case, but properly declined to speculate. Finding of Fact 3, at page 4 of the Hearing Officer's Findings of Fact, Conclusions of Law and Final Order.

Second, the respondent did not quote the entirety of the commentary which states, as indicated herein above, that the school district can even refuse the provision of FAPE, if the agency provides written notice. At that point, the parent's only option is to request a due process hearing. A child who has not yet been evaluated cannot be entitled to FAPE, so that statement logically does not apply to initial evaluations, despite the commentary to the contrary. Nor can it logically apply to situations where a child has been found to be a child with a disability, except in circumstances where a child has been re-evaluated and found no longer in need of special education and related services.

Finally, the entire commentary refers to § 300.503(a) and (b). That section of the CFR refers specifically to the notice that must be given to the parents *of a child with a disability* a reasonable time before the public agency takes any of the listed actions. Thus, a child must already have been considered a child with a disability by the school district before ***it*** initiates evaluations or changes services provided to the child and before it refuses to initiate such evaluations, etc. This section clearly applies to a student with a disability and delineates the

content of the required notice a school district must take with respect to that child. Lack of notice is not an issue in this case.

For all the foregoing reasons, the ECAB reverses the portion of the Hearing Officer's Order stating than an initial evaluation was not necessary and Orders that a full evaluation be conducted of this child.

II.

PROOF WAS NOT PRESENTED THAT THE STUDENT/APPELLANT HAD A DISABILITY

This ECAB does not disagree with the Hearing Officer that the parent has not proved that the child is a child with a disability and, like the Hearing Officer, believes it is problematic to speculate on the possible existence of a disability that may or may not have an adverse impact on the child's learning. We believe, however, that in order for both parties in this case to avoid such speculation it is necessary for the school district to conduct a full evaluation of the Student. If this ECAB were to hold that the School District can simply decide on its own to refuse to conduct a parent requested evaluation, we would ignore decades of progress toward identification of children with disabilities who require special education services, as well as parent involvement in the education of such children.

III.

THE PETITIONER/APPELLANT FAILED TO PROVE THAT THE STUDENT WAS ELIGIBLE FOR EDUCATIONAL SERVICES

As set forth above the record indicates that the Student was not a child with a disability entitled to special education services or an IEP.

Within 707 KAR 1:310(1), in order to be entitled to an IEP, it must be proven that

a student is a "child with a disability" as defined in 707 KAR 1:002 and that "specially designed instruction is required in order to benefit from education". 707 KAR 1:310(1). A child with a disability is defined as:

> [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) 707 KAR 1:002(9)

A review of the record indicates no evidence presented to indicate that the Appellant needed an IEP or special education services. Evidence presented indicated that the Student/Appellant made As in geometry without any evidence of the need for special education services. (T.E. 195-196) Testimony from his teachers of Spanish (T.E, 180-181), social studies (T.E. 193), Financial Literacy (T.E. 2013-204), World Civics (T.E. 208-209), English (T.E. 215 and T.E. 220-221) as well as PE and Health (T.E. 218-219) indicate that there was not a need for special education services for the Student/Appellant. However, a full evaluation was not conducted and could present evidence to indicate that child could be eligible for services.

CONCLUSION

We do not reverse the Hearing Officer's findings and conclusions that the child has not been shown to be a child with a disability. We reverse only the portion of the decision pertaining to evaluation of the student. Upon a complete evaluation, the ARC shall convene to determine if the Student/Appellant qualifies for special education services.

NOTICE OF APPEAL

This decision and order 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 or 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 petitioner 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 14th day of March 2018.

Exceptional Appeals Board by:

/s/ Paul L. Whalen
_____
PAUL L. WHALEN, CHAIR

/s/ Kim Hunt Price by PLW
_____
KIM HUNT PRICE, MEMBER

/s/ Karen Perch by PLW
_____
KAREN PERCH, MEMBER

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Order of Exceptional Children's Appeals Board was served by placing same in the United States mail, postage paid and first class, on this 14th day of March, 2018, to:

Todd Allen, Esq.
[redacted]
Tina Drury
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Teresa T. Combs, Esq.
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And Via E-mail

/s/ Paul L. Whalen
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PAUL L. WHALEN, ECAB Chair