

**COMMONWEALTH OF KENTUCKY  
KENTUCKY DEPARTMENT OF EDUCATION  
DIVISION OF EXCEPTIONAL CHILDREN SERVICES  
AGENCY CASE NO. 1617-10**

**XX**

**PETITIONER**

**V.**

**KENTON COUNTY SCHOOLS**

**RESPONDENT**

**FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND ORDER OF THE EXCEPTIONAL CHILDRENS APPEALS BOARD**

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**PROCEDURAL BACKGROUND**

The parents of XX filed a due process request on October 10, 2016 while the child was in eighth grade. The issues to be heard were 1) Whether the District had complied with the Child Find Requirements of 707 KAR 1:300 in the school years prior to November, 2015; 2) Whether the District had failed to properly determine the student’s eligibility for special education and related services in violation of 707 KAR 1:310; 3) Whether the District failed to create an appropriate IEP for the student in violation of 707 KAR 1:320; 4) Whether the District failed to implement the IEP in violation of 707 KAR 1:320 and 5) Whether the District failed to provide the student with a free appropriate public education in violation of 707 KAR 1:290. The parents sought an Order requiring the District to re-determine eligibility; an Order requiring the District to create and implement an appropriate IEP; compensatory education for the time in which substantive and/or procedural violations amounted to a denial of FAP; reimbursement to the parents for out of pocket educational and evaluation expenses; and attorney’s fees.

A hearing ultimately took place on May 22<sup>nd</sup> and 23<sup>rd</sup>, 2017. Thereafter, the parties filed post hearing briefs and the Hearing Officer, Hon. Mike Wilson, entered Findings of Fact, Conclusions of Law and a Final Order on September 26, 2017. The Hearing Officer held that 1) any claims prior to October 7, 2013 were barred by the Statute of Limitations, 2) that there was no violation of Child Find, prior to the 2015 evaluation, 3) that the November 2015 IEP failed to provide FAPE, 4) that the student was not entitled to reimbursement of the cost of tutoring and evaluations, 5) that there was no authority of the Hearing Officer to award attorney's fees, 6) that the IEP should be modified to provide special education services for reading, math calculations, and written expression, reasonably taking into account the recommendations of Hoersting in all of the diagnosed disabilities found by him, and 7) that there was no entitlement to compensatory education, except for instruction in typing.

The student did not file any appeal, but the District filed an appeal on October 25, 2017. The issue for appeal is whether the Hearing Officer erred in his findings regarding the 2015 eligibility determination. This matter was assigned to Hon. Karen Perch, Hon. Paul L. Whalen and the undersigned, Hon. Kim Hunt Price as chair of the ECAB. Subsequently, the parties have briefed their issues and the matter was taken under submission.

### **CHILD'S EDUCATIONAL HISTORY**

The child had been in the District school system since Kindergarten. Beginning in Kindergarten, although the child was developmentally on target, the parents began having concerns about his learning abilities and ability to retain information. The parents have had to work with him at home consistently throughout his education to keep him up with his peers and began discussing his educational difficulties with teachers in 1st grade. The 1st grade teacher told the parents that the child did better in a one on one environment than in a regular classroom setting

where he had trouble keeping up with his peers. At the end of his 1st grade the child had only mastered 46% of expected sight memory words despite having been given one on one assistance of reading intervention. Math struggles also began in the 1st grade.

In the 2nd grade the child was diagnosed with ADHD due to hyper activity and school difficulties. He was placed on medication. At that time the parents took the child for an independent evaluation with psychologist Stan Heck to determine if there were any learning disabilities. His report showed that the child had average academic skills and intelligence, and he did not diagnose the child with any disabilities. Consideration was given in the 2nd grade by the child's teacher to having a student assistance team meeting due to his inconsistent educational performance. However, the meeting never occurred. The parents allege that they gave the results of the Heck independent evaluation to a teacher and that nothing was done in response. The District states that that evaluation was never a part of the child's file. At the end of 2nd grade all areas of math, except for one, were of concern to the parents, as well as reading comprehension.

In 3rd grade the child had increasing problems with writing, reversing his letters, and not being able to retain information per his parents. In addition, math was particularly difficult for him as he could not perform calculation steps from one problem to the next. At the end of that year the skills that were to have been mastered prior to moving to fourth grade were only in the developing stage.

In fourth grade the child's regular educational teacher was on maternity leave for much of the school year and the parents continued to see difficulties in math and reading comprehension and writings. However, the class grades did not necessarily reflect those difficulties with them ranging anywhere from A's to F's. State and National testing evaluations did reflect lower performing scores which was also consistent with what the parents observed at home. He scored

in the lowest category in reading and math on the K-Prep, in the 14<sup>th</sup> percentile Nationally on the Stanford 10 in mathematics, and at the 22<sup>nd</sup> percentile in language mechanics. His Lexile reading score at the end of fourth grade was 615, which placed him in the 2<sup>nd</sup> to 3<sup>rd</sup> grade proficiency level.

In the 5<sup>th</sup> grade the parents expressed their increasing concerns directly to the school principal. The district uses a Response to Intervention (RTI) model to determine eligibility. The child had been receiving RTI services in reading and math since 1<sup>st</sup> grade. He continued to have lower scores than those of his same aged peers on standardized testing. The parents also noticed a struggle to get work turned in and had to assist him constantly with his organizational abilities.

The parents requested an evaluation for the first time from the school district in February 2014 (the child's fifth grade year) and the district called an Admissions and Release Committee (ARC) meeting. At the time his MAP test scores for Winter had been 19 in Math, 17 in Reading and 7 in Language. The school conducted the evaluation in the spring of 2014 and another ARC meeting was held on May 15, 2014 to determine eligibility. District staff conducted two behavioral observations for no more than one class period each evaluation. By the time this ARC meeting occurred the child's grades had gone from F's to B's and his MAP Spring test scores had gone from single digits and teens to close to average scores. Specifically, the Math raised to 26, Reading to 45, and Language to 37. The parents later learned that during that time period that the child had been given the opportunity to retake the MAP testing to improve his scores. Interestingly, the child's MAP scores never reached those Spring 2014 levels again through the end of seventh grade year and before the filing of the Due Process request.

Based upon those inquiries and test scores and progress in the RTI reading and math programs the ARC determined that the child did not qualify as a student with a disability. The

ARC found that although the child had a clinical diagnosis of ADHD, the data did not show that his disabilities caused an adverse effect on his educational performance. At the ARC meeting the child's teacher did state that he struggled with organization and frequently forgot to take materials to other classes as well as stating that he had difficulty remembering math concepts and process.

In the 6th grade the child went from elementary school to middle school and the parents continued to see struggles with the child academically, especially in math and continued missing assignments. During his sixth-grade year the child attended after school tutoring in math along with other students in the district. Ms. Due, the math teacher for the class in which the child received his lowest grade for the year, testified that the child did not stand out as a student who struggled excessively or needed a lot of additional help. She stated that the child did not always put forth a great deal of effort in her class.

The child's physician recommended that he be evaluated again to determine why he was struggling academically. At that point the parents obtained an independent evaluation prior to his seventh-grade year at a cost of approximately \$3200.00 from Steve Hoersting. As a result of that evaluation he was diagnosed with Dyslexia, Dysgraphia, ADHD and Working Memory Impairment. In that evaluation the child was scored academically in math and reading. He scored below where he should have been given his cognitive abilities, scoring in the single digits to teen percentile on every subtest in math and in phonics. Hoersting acknowledged that he never observed the child in the classroom and never obtained any information from any of the child's teachers. He also did not do a complete review of all the child's educational records. He verified that the testing that he did was clinical in nature and although it would give an ideal of the child's limitations it would not necessarily show how he actually performed in a classroom setting. He

felt the testing provided more insight than him doing a classroom observation. He did not offer any opinion as to whether the child was eligible for special education services.

If the school would have used the discrepancy model for eligibility, the child would have been identified as having discrepancies between his cognitive skills and scores in the areas of basic reading, mathematics and math fluency. His working memory was in the 2<sup>nd</sup> percentile. Hoersting recommended that he child receive a reading specialist for direct instruction and basic phonetic skills. He stated that he would not expect the child to be able to perform well in the classroom given his low percentile scores in the academic testing. Hoersting had a work history of providing services to both parent and school districts.

Prior to the 7th grade the parents supplied the Hoersting independent evaluation to the school district and requested an ARC meeting, which occurred on August 30, 2015. The district did additional evaluation at that time. This additional evaluation included review of the child's academic skills, social and emotional status, and two classroom observations. Additional IQ testing was not done. Ashley Smith, the school psychologist, presented the results of the evaluation at the November 16, 2015 ARC meeting. During the ARC the mother brought up the issue of the student's inability to be organized enough to bring his math homework home. Oddly enough despite the ARC's failure to find the student eligible in other health impairment due to his working memory the ARC included an agenda check in the IEP because they were concerned he was not turning in assignments and was not organizing his assignments. The ARC determined that the child qualified as a student with disability only in the area of written expression. The parents disagreed with the determination of the ARC that the child did not meet eligibility criteria in the area of other health impairment (OHI) or a specific learning disability in any other area, specifically math.

Smith testified that because the academic test she administered was norm for the child's age, his scores in the average range meant that he had roughly the same skills that would be expected for someone his age. Smith reviewed the child's performance on assessments and found that in comparison to his reading and mathematics, his writing skills were by far his weakest subject. At the time the child was performing well in math and language art's intervention classes, but had not made that equivalent progress in written expression. The observations and ratings in school did not show any significant problems with the child's behavior, hyper activity or attention. Smith testified that the determination made at the November 2015 ARC on eligibility in written expression only was appropriate.

An IEP was created on November 16, 2015 for writing difficulties and provided for 15 minutes a day of special education in the general education classroom to help with one writing goal. The IEP called for use of technology for writing but did not provide for direct instruction in typing. Evidence at hearing showed no instruction was provided in typing until the child's eighth grade year (after the Due Process Complaint was filed). The method for evaluating progress on this writing goal was authentic assessment of the child's work samples. The parents state that this data was never provided to them. The only data submitted for progress monitoring was a graph with scores starting on November 4, 2015 prior to the IEP being developed and three calendars with scores that did not correspond to the dates and scores on the graph. The parents did not receive progress reports which the school sent home either by the child or his sister. There were eight work samples for August 25, 2016 through October 13, 2016 introduced into evidence. It is unclear how those work samples corresponded with scores on the graph that the parents were provided with in March 2017. A supplementary aide and service was provided in the IEP for agenda checks, but the teachers indicated that this was not done.

At the resolution session held after the due process request was filed the district offered to reevaluate the child, but the parents declined the offer. This offer was reiterated at a March 2017 ARC meeting and again declined by the parents.

The parents explored additional resources and liked a program found at XXXX which specialized in disabilities similar to what this child had and used Orton Gillingham as a method of instruction. This is the same method recommended by Hoersting's independent evaluation. The child's special education teacher at the district was trained in Orton Gillingham, but could not use that with the child because his eligibility was only in written expression. She did not know if the program was utilized for students with dyslexia and did not think it would help him anyway. She was not able to give any other suggested programs that might help him with his academics.

Becky Nixon, Director of Special Education, who has 10 years' experience as a special education teacher and 16 years as the Director of Special Education, testified that the ARC decisions were appropriate.

A summary of the child's testing progress from first through 8th grade is contained in this chart.

TEST		1 <sup>ST</sup> GRADE	2 <sup>ND</sup> GRADE	3 <sup>RD</sup> GRADE	4 <sup>TH</sup> GRADE	5 <sup>TH</sup> GRADE	6 <sup>TH</sup> GRADE	7 <sup>TH</sup> GRADE	8 <sup>TH</sup> GRADE
MAP MATH <sup>2</sup>	FALL				8*	7*	13*	13*	12*
	WINTER		15*	34*	36*	19*	13*	19*	17*
	SPRING		13*	20*	23*	26*	10*	19*	
MAP READING <sup>3</sup>	FALL			20*	26*	33*	42*	39*	88*
	WINTER		3*	24*	35*	17*	31*	28*	53*
	SPRING		3*	17*	35*	45*	43*	25*	
MAP LANGUAGE <sup>4</sup>	FALL			34*	45*	16*	31*	5*	
	WINTER			13*	1*	7*			
	SPRING			11*	24*	37*	9*		
T-PRO READING <sup>5</sup>		10*							
GRADE <sup>6</sup>			24*						
READING COMPREHENSION LEXILE <sup>7</sup>					615 (2 <sup>ND</sup> - 3 <sup>RD</sup> grade level)				771 (3 <sup>RD</sup> -4 <sup>TH</sup> grade level) 19*
STANFORD 10 <sup>8</sup>	MATH			3*	14*	15*	22*	7*	
	READING			19*	35*	24*	45*	24*	
	LANGUAGE				22*		8*		
KPREP <sup>9</sup>	MATH				Novice	Appre ntice	Novice	Novice	
	READING				Novice	Appre ntice	Novice	Apprent ice	
	WRITING						Novice		

\* Scores are denoted in percentiles

### CREDIBILITY DETERMINATIONS

It is uncontroverted that in first through 5th grade the child received passing grades while receiving response to intervention assistance and being in response to intervention class the entire time. The child's reading intervention program is a program called Expert 21 which is an intervention program below the platform used for children reading at or above grade level. MAP scores in reading for seventh and 8th grade ranged between the 39<sup>th</sup> and the 88<sup>th</sup> percentile and he had approached scores similar to students on grade level. Angie Boerger was the child's regular math teacher for the 7<sup>th</sup> and 8<sup>th</sup> grades and he received passing grades in her class both years. She testified that the child payed attention in class and usually did his assignments generally showing comprehension of the concepts and ability to do the work. She explained that he usually rushes through quizzes and test and often fails to check his work. She felt that his math grades were

reflective of missed points caused by small mistakes in rushing rather than fundamental problems understanding math concepts. Despite his low percentiles in MAP and other testing in mathematics (interestingly never reaching above 19 after his testing at 26 in the Spring of fifth grade) she testified that the child had shown growth on his MAP scores in the areas of math and that the gap between him and other student on grade level was closing.

The math intervention teacher for 7<sup>th</sup> and 8<sup>th</sup> grades, Brad Ernst, testified that the child had shown growth in his class. He uses a software program to teach and assess math concepts. The intervention class that the student is in is not the lowest performers in math, but also not the highest. He stated that the child had progressed nearly all the way through the computer program and had earned mastery or proficiency in each area. He felt that the child rarely appeared to struggle with concepts and rarely requested help. He noted that the child had inconsistent efforts and took less time on his assessments than other students. He did not believe the child required special education assistance in the area of math. Given that the child's MAP scores through seventh grade continued to be in the teens in math, between 25 and 39 in reading, and 5 in language and the fact that the student was permitted to retake tests, to turn in homework late without deductions in points, and to redo homework, the teachers' testimony that his passing grades were evidence of progress is given little credibility.

The 2015 TOVA test shows that the child has ADHD. He has taken medication for this over the years and was tested both on and off the medication. His results were in the range of individuals independently diagnosed with ADHD while he was off the medications and while he was on the medications his results were actually worse. The school discounted this test. The school psychologist did not administer this test when she was doing her 2015 evaluation testing because she did not have it available and said that she would not have used it anyway because the

input from the people who see him on a daily basis needs to be the biggest factor as long as it came from both parents and teachers. She ignored the fact that the parent's reports of observations report exactly the disorganization that would be reflected by ADHD diagnosis. She testified that the child, in the area of inattention, was absolutely normal despite the fact having not administered such test. Her opinion was based solely on observations by school personnel. This again calls into the teacher's credibility on reporting of other problem with this child has already been discounted as above and this affects the credibility of the entire finding of Smith's evaluation report which was relied upon by the ARC in not finding the child eligible in mathematics.

There is no doubt that the student does not always give 100% effort. However, this is a symptom directly related to his disability of ADHD and poor working memory. Teachers who testified that they did not observe dysgraphia or dyslexia signs or working memory issues state that the child is not scoring well because he is not taking the time. One teacher was unwilling to acknowledge that he might just be giving up because he was struggling in those areas. She simply stated that as a teacher with 11 years of experience you pick up on when it's not effort versus disability. The more plausible explanation for this perceived lack of effort in attitude which has increased in recent years is the child's increased frustration resulting from his disabilities.

Steve Hoersting has a degree in special education and experience special education as a teacher and evaluator for schools. He has an MED, LPP, and CBIA. Sixty percent of his practice as a psychologist involves educational evaluation, and he has conducted approximately 6000 evaluations similar to the one in this case. He has also been involved in developing IEP's a couple hundred times. It was Hoersting's opinion that grades were of negligible importance in determining whether disabilities affect a student's classroom performance. It also appeared that Hoersting did rely on what the parents said about a child's performance. The parents did review

his final report before it was issued, but only for informational types of discrepancies, not to the point of any actual conclusions being changed. Hoersting concluded that dyslexia and dysgraphia have an adverse effect on the student's math and reading skills. Dyslexia affects reading skills, but there is some evidence that the child was able to compensate in some areas of his reading. According to Hoersting the child's Weschsler Individual Achievement test scores were below average in math problem solving, pseudo word decoding (phonetic skill) math fluency (addition, subtraction, and multiplication). The progress data records presented by the district in this case did not contain any data that would have significantly affected Hoersting's conclusion that the child's dysgraphia and dyslexia had an adverse effect on his math and reading skills. Therefore, the fact that he used the data from the test he administered which showed an adverse effect, is sufficient to show those two areas affected the child's performance in both reading and math. Given his experience, thorough testing, the MAP scores and the lack of school data to objectively show the child's performance was as high as the school claims, Hoersting's findings and testimony are found credible.

Further, Hoersting's opinion that the Woodcock Johnson results from the school inflated the apparent achievement of the students were credible. Although there was some mixed testimony in this regard, this was Hoersting's opinion. The school's psychologist, Ashley Smith, would not directly acknowledge that the Woodcock Johnson test inflated achievement scores, but did state that it was a common statement from teachers that the test does not align with the curriculum.

This student is clearly in the average range in terms of intelligence having scored 100 on the WISC-V index and ancillary composites which is directly in the middle of the average range of 90-109 and scoring in the 70<sup>th</sup> percentile for verbal comprehension index. There was substantial evidence of the child's observable signs of dyslexia and dysgraphia. Hoersting's report specifically

noted that during his evaluation the child continued to reverse letter's and had difficulty remembering what word to write and displayed poor phonetic skill. He substitutes words and uses fingers for math calculations. He had a very slow reading fluency. The letters primarily reversed were D's and B's, as well as numbers. He had very poor penmanship and spelling difficulties. He did not use phonetic spelling, but displayed irregular spelling. Again, Hoerstring's testing results are credible.

The 6<sup>th</sup> grade teacher had no experience teaching students with dyslexia. The 8<sup>th</sup> grade math teacher, Ms. Hack, testified that she did not observe signs of dysgraphia. None of the teachers who taught the child before the 2015 evaluation testified that they had observed signs of dyslexia or dysgraphia. This affects the credibility of testimony of all such teachers when an evaluator can clearly detect this and teachers within the classroom setting have not observed it.

The fact that a child is scoring in the 88<sup>th</sup> percentile in MAP testing in reading, which he has been allowed to retake in order to obtain such score, and the fact that he is reading on a 4<sup>th</sup> grade level defies any argument that he is making progress. He is entering 9<sup>th</sup> grade reading on a 4<sup>th</sup> grade level which is the same level he was reading on at the beginning of his 7<sup>th</sup> grade year.

Further, at the time of the 2015 evaluation there is evidence that the student had serious writing issues caused by dysgraphia. The TOWL-4 administered by Hoerstring tests various aspects of writing. The child tested in the average in contextual conventions and superior in story composition, but tested in the 9<sup>th</sup> percentile, below average, in vocabulary and spelling. He tested in the 2<sup>nd</sup> percentile in punctuation, the 5<sup>th</sup> percentile in logical sentence, the 1<sup>st</sup> percentile in sentence combining, the 3<sup>rd</sup> percentile in contrived writing, and the 12<sup>th</sup> percentile in writing overall. All scores varied from very poor to below average. The story that the child wrote showed significant problems with his hand writing it was fraught with reversals of letters, letter reversals

within words and atypical spelling errors. Capital letters were frequently intermixed with lower case letters within words and punctuation and capitalization were often absent or incorrectly used clearly representing dysgraphia. Again, the fact that none of the school teachers who worked with this child acknowledged this problem prior to this evaluation cast great concern upon their credibility.

### **ANALYSIS OF TEST RESULTS**

The student exhibited below average scores on Gray oral reading test administered by Hoersting. This is a timed oral reading test where mistakes are noted. The questions and potential answers are asked of the student in a multiple-choice form. This child's scores on the 5 measures of this test ranged between the 15<sup>th</sup> percentile to the 25<sup>th</sup> percentile including below average in accuracy, fluency and oral reading index. Hoersting noted that fluency in reading was weak with the child often substituting words for those in the story and at times revering the order of words in the story.

The STROOP test administered by Hoersting measures directed attention and mental agility and showed that the student had a poor ability to manage attention at the time of the 2015 evaluations. His score in mental agility and flexibility were below average.

Additionally, Hoersting administered CCTT, a neurological test designed to assess attention processing speed and executive functioning. Those results showed that the student had significant problems with attention processing speed and executive function with a scoring percentile rank of less than one when required to process two elements.

The child's working memory was very low as shown by the 2015 evaluations. Even Heck's 2010 evaluation found some weaknesses in working memory, although not sufficient at that time to create any diagnosis or recommendations. The school's 2014 report shows working memory at

only the 4<sup>th</sup> percentile characterizing it as borderline range of ability. Hoersting's characterization of the 4<sup>th</sup> percentile finding was that of extremely low. Hoersting's 2015 evaluation found the student's working memory was extremely low at the 2<sup>nd</sup> percentile.

All of these diagnosis of ADHD and neurodevelopmental disorder of working memory are further manifested by the child's well establish track record of not turning in work and not bringing homework home. Throughout elementary and middle school he had to be assisted greatly by the parents in order to accomplish compliance in those areas.

### **RESPONSE TO INTERVENTION**

The school uses the child's performance in Response to Intervention classes to say that he is performing with his same aged peers and whether he is eligible for special education. This does not recognize that children who are in the Response to Intervention classes are performing below their similar aged peers in the first place. This student is performing in the mid to upper range of the students in RTI and sometimes in the low range. Therefore, he is significantly below his same age peers who are not in these lower performing classes in the first place. He has been receiving RTI for his entire educational career. The school acknowledged that RTI data is looked at to determine if children are making progress at a sufficient rate with same aged peers. If they are, they are not eligible for special education. The testimony was clear that the same aged peers that they were basing this evaluation upon was other students in RTI classes and not the general school population. They even further testified that if the child was not making progress you would intensify the instruction and frequency of their intervention instruction. If they are making progress, then they are still not deemed to be eligible for special education services according to the school. It seems more than obvious that if the child has had eight years of Response to Intervention services and is still performing in the teens and single digit percentiles on standardized

testing in the areas of math, as well as reading, that the intervention provided are not working. The school could not define any actual formula for determining how long you had to try these intervention services or what rate of progress needs to be achieved before it would be determined that the interventions were not working and that a child needed special education services. The Special Education Director testified that the child was responding to RTI because he was a star in his math intervention class and going through the software. She testified that the program was leveled so that once you master a program it goes up to a different more difficult level. However, the intervention math teacher testified that is not the case. It is not necessary to master the material to move forward in it on the computer program. It seems that the school itself does not entirely understand how these programs work and therefore, they cannot accurately gauge any alleged progress through RTI. In addition, little to no data was submitted from the RTI to determine whether progress had been made throughout the years. Therefore, the only reliable evidence is the testing scores.

#### **CREDIBILITY OF HOERSTING’S REPORT AND SCHOOL PERSONNEL**

A significant part of Appellant/Respondent’s basis for appeal concerns the credibility of the Student’s evaluation by Dr. Steve Hoersting a private psychologist. Appellant School District alleges that the Hearing Officer based his decision “almost exclusively on the opinions of a private psychologist who never observed XX in the classroom or reviewed his records and only did assessments at his private office outside the educational setting. (Appellant’s Brief pp. 13)

Appellant/Respondent states on pp. 18 of its brief: “While credibility determinations of Hearing Officers are entitled to some deference, deference is only owed for “record-supported credibility determinations”. Appellant cites several cases including *In re: Student with a Disability*, 117 LRP 12645(KY SEA 11/14/16)

Within the Final Order pp. 11-16, the Hearing Officer considered the “Credibility of Hoersting’s Report” in section C. In that section, seven aspects of Hoersting’s report and deposition were considered. Within that section, while the Hearing Officer determines that Hoersting’s overall findings are credible, he makes a couple of critical points about Dr. Hoersting.

The first aspect considered was Hoersting’s background and expertise under Finding 11. He has a degree in special education. He taught special education. (Hoersting dep. P. 37-38) He has performed approximately 6,000 evaluations similar to the one he performed for the Student. He has worked with seven or eight school districts. (Hoersting dep. P. 132-133)

The second aspect considered by the Hearing Officer was that Hoersting’s evaluations and recommendations were made without making or giving any weight to classroom observations.

The third aspect considered by the Hearing Officer were Hoersting’s evaluation and recommendation was reached without considering the student’s educational performance as documented by the school. “He testified that grades were negligible importance to him in determining whether disabilities were affecting the student’s classroom performance”. (Hoersting dep., p. 147)

Within the Hearing Officer’s evaluation of the fourth aspect of Hoersting’s evaluation and recommendation, he is most critical. It is finding 14; “Hoersting’s evaluation procedures raise questions about the independence of conclusions that appear in the report”. This is indicated in the Final Order pp. “Hoersting does not write a report after conducting testing and analyzing data. Instead he meets with parents for an hour before committing anything to writing:”

It is the Hearing Officer’s conclusion in Finding 15 and 16 that Hoersting is credible.

Aspect 5 or Finding 15, “Hoersting’s conclusion that dyslexia and dysgraphia has an adverse effect on the student’s math and reading was credible”. The last sentence of the Hearing

Officer's explanation of his Finding explains his rationale. "Hoersting did not utilize much in the way of data from school to reach his conclusions, the data from the tests he administered was enough to draw a connection between the SLDs of dysgraphia and dyslexia and the student's performance in reading and math".

Aspect 6 or Finding 16, "Hoersting's opinion the Woodcock-Johnson results from the school inflated the apparent achievement of the student was credible. This finding was based on the supporting testimony of school psychologist Ashley Smith. Ms. Smith testified, "I don't think inflated is a word I would use". She then said, "Would say that it a common statement amongst—especially from teachers" (TE 531) and said "the test does not align with the curriculum."

It should be noted that the Hearing Officer wrote that his finding regarding Woodcock-Johnson "in this case regarding Woodcock-Johnson is **not** a finding generally regarding Woodcock-Johnson, is based only on the evidence presented in this case in the context of this particular student, and has not precedential value".

Aspect 7 or Finding 17, the Hearing Officer finds: "Hoersting was uncertain whether his recommendations constituted "special education" within the meaning of applicable regulation". As the Hearing Officer stated within the last sentence of this finding, "What constitutes "special education" is a legal question to be addressed elsewhere herein".

Further, the credibility of the school personnel was thoroughly evaluated by the Hearing Officer as set forth in the Credibility Determinations in the Background section above.

A reading of this section of the Hearing Officer's decision was based upon the record.

In this case, the Hearing Officer went through at least a seven stage process in in evaluating the credibility of Dr. Steve Hoersting. "Credibility determinations... are the province of the factfinder, which in this case is the Hearing Officer, and should not be "recalibrated" absent

compelling evidence” *Andover Sch. Comm. V. Bureau of Special Educ. Appeals of Div. of Admin. Law Appeals*, 2013 U.S. Dist. LEXIS 165647, 2013 WL 6147139 (D. Mass. Nov. 21, 2013). In respect to the credibility of expert witnesses, there is *Sebastian M. v. King Philip Reg’l Sch. Dist.*, 685 F.3d 79 at 86 (1<sup>st</sup> Cir. 2012) “The valuation of expert testimony is precisely the sort of first-instance administrative determination that is entitled to judicial deference by the district court”. In the situation before this ECAB, there is no compelling evidence to warrant disregarding the Hearing Officer’s credibility determinations.

### **CONSIDERATION OF EDUCATIONAL PERFORMANCE**

Appellant argues that the Hearing Officer misunderstood the definition of adverse effect and failed to consider the Student’s educational performance. The IDEIA does not define “educational performance,” nor does it define “adversely affects.” 707 KAR 1:002(2), however, provides that “[a]dverse effect means that the progress of the child is impeded by the disability to the extent that the educational performance is significantly and consistently below that of similar age peers.”

Appellant relies on the decision of this ECAB in *Boone County Schools*. 64 IDELR 88 (KT SEA 10/7/13), to argue that the Hearing Officer in the matter presently before the ECAB misunderstood the definition of adverse effect and failed to appropriately consider the Student’s educational performance. *Boone County Schools* is easily distinguishable, however, from the case at hand. The student in *Boone County Schools* had no cognitive deficits and no academic deficits. She had average to high average academic performance and average to high average intelligence. Like the student in *Corvallis Sch. Dist. 509J*, 28 IDELR 1026 (SEA Or. 1998), this ECAB found the student in the *Boone County Schools* ineligible for special education and related services

because she had earned high-average grades, demonstrated satisfactory progress in work habits, study habits and had achievement test scores showing she was at least at grade level in all areas.

As previously stated, in the present matter before this ECAB, there is lack of credible evidence showing educational performance of this Student. Eight work samples were admitted into evidence from the academic period between August 25, 2016 and October 13, 2016, but it is not possible to determine with any certainty how these work samples related, if at all, with the graph provided to parents in March, 2017. The Student began the 7<sup>th</sup> grade school year reading at the 4<sup>th</sup> grade level. He is now entering the 9<sup>th</sup> grade and is still reading at the 4<sup>th</sup> grade level. The only evidence of higher performance in reading was a MAP test, which the Student was allowed to re-take in order to improve his score. The Student has a well-established track record of not completing work, or turning in work or bringing homework home.

Unlike the student in *Boone County Schools*, the Student here has cognitive deficits. As early as 2010, deficits in working memory were noted. The School District, in 2014, found the Student's working memory to be at the 4<sup>th</sup> percentile, but failed to recognize the significance of the problem - and essentially ignored it. By 2015, Hoersting found the Student's working memory to be at the 2<sup>nd</sup> percentile. Working memory helps kids hold on to information long enough to use it. It plays an important role in concentration and in following instructions and can affect learning in many different subject areas, including reading and math. These are areas in which the Student has struggled, but which his teachers characterized as just not putting in enough effort.

The Student's math intervention teacher testified, contrary to the testimony of the Director of Special Education, that a student only need to complete - not master- material to progress in the RTI computer program. If mastery of a concept is not required in order to move on in the program,

it becomes difficult or impossible to ascertain the actual progress of the Student. It also makes course grades suspect.

Finally, as stated at the outset of this portion of our decision, adverse effect means that the progress of the child is impeded by the disability to the extent that the educational performance is significantly and consistently below that of similar age peers. This means that the Student's educational performance is below that of similar age peers in the general education curriculum, not just similar age peers in the RTI program. This Student was reading at a level 3 years below his grade level when entering the 7<sup>th</sup> grade, and 5 years below his grade level now. This ECAB believes that the Hearing Officer appropriately considered the adverse effect on educational performance.

### **RULING**

Based upon the above findings that the Hearing Officer correctly determined the credibility of Hoersting and the school personnel, and correctly determined that the student had disabilities which resulted in an adverse effect on the child's education, the Hearing Officer's Order ruling that the November 2015 IEP failed to provide FAPE is correct. Accordingly, the appeal of the school is overruled.

The student makes an argument for Compensatory Education in the appeal briefing. However, the Student did not appeal from the Hearing Officer's Order that Compensatory Education was not appropriate, other than for typing instruction. Therefore, the ECAB can not grant such relief.

### **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 of the Circuit Court of the county in which the appealing patty resides or operates a place of business. Copies of the petition shall be served by the 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 22<sup>nd</sup> day of February, 2018.

/s/ Kim Hunt Price

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KIM HUNT PRICE, CHAIR

/s/ Karen Perch by KHP

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KAREN PERCH

/s/ Paul L. Whalen by KHP

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PAUL L. WHALEN

**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 22<sup>nd</sup> day of February, 2018, to:

Hon. Marianne S. Chevalier  
Chevalier Law, LLC  
P.O. Box 66  
Walton, Kentucky 41094

Hon. Claire E. Parsons  
Mary Ann Stewart  
Adams, Stepner, Woltermann & Dusing, PLLC  
40 West Pike Street  
Covington, Kentucky 41011  
Attorneys for Respondent

Hon. Mike Wilson  
P.O. Box 4275  
Lexington, Kentucky 40544-4275

and the original to:  
Kentucky Department of Education  
Division of Exceptional Children Services  
300 Sower Blvd. 5<sup>th</sup> Floor  
Frankfort, Kentucky 40601  
Attn: Hon. Todd G. Allen

/s/ Kim Hunt Price

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KIM HUNT PRICE, CHAIR