

KENTUCKY DEPARTMENT OF EDUCATION  
AGENCY CASE NO 1112-19

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BY: .....

[REDACTED]

PETITIONER

V

DECISION AND FINAL ORDER

[REDACTED] COUNTY SCHOOLS

RESPONDENT

BACKGROUND

The student in this case has an inoperable brain tumor called an optic nerve glioma. She has received chemotherapy and radiation, and the "late effects" from that treatment affected her ability to attend school beginning in 2009. A 504 plan was adopted for the student in October of 2010. In December of 2011, the student's mother requested an IEP and that the student be put on "home hospital." Respondent evaluated the student's eligibility for an IEP and determined in February of 2012 that the student was not eligible. In the meantime, the student withdrew from [REDACTED] County on January 4, 2012, and enrolled in [REDACTED] County to participate in an online program available through [REDACTED] County.

A ruling by this hearing officer in the summer of 2012, based upon documents submitted by the parties and arguments but not based upon full testimony on the matter, found that the student was eligible for an IEP as "other health impaired." This hearing officer had ruled that the student was eligible for special education services based upon his understanding that the student's condition made her *unable to attend school at all* and that as a consequence she would require specially-designed instruction. Subsequently, it was discovered that the student was in

fact attending school at a private school. Because of this new information, the issue of eligibility was reopened per orders of November 6, 2012 and November 20, 2012, and both eligibility and denial of FAPE were at issue at the hearing.

An administrative agency unquestionably has authority to reconsider and change its orders during the time it retains control over any question under submission to it. *Secretary, Labor Cabinet v. Boston Gear, Inc., a Div. of IMO Industries, Inc.*, 25 S.W.3d 130 (Ky.,2000). Accordingly, this hearing officer ruled that the hearing in this case would address the issue of eligibility. In addition, it would be contrary to public policy favoring judicial efficiency if a hearing officer could not correct his or her own mistakes while he or she retains jurisdiction over the case.

A hearing was held in this matter over three days on February 13-15, 2013. After reviewing the evidence and the briefs of the parties, this hearing officer finds that the student is not eligible for special education services and there has been no denial of FAPE.

Before setting forth findings of fact and conclusions of law, some description of the procedural background is necessary as this hearing officer earlier in this proceeding had ruled in favor of the student on the issue of eligibility but this Final Order finds that the student is not eligible for special education services.

#### FINDINGS OF FACT

1. . **The student has average to high average academic skills and no cognitive or academic deficits.**

The student, at the time of the hearing, is a 16-year old female (TE 14) without cognitive or academic deficits (TE 136), having average to high average academic skills (TE 140) and average to high average IQ (TE 144). ~~██████████~~, the school psychologist, testified that testing

showed that the student's reading skills were high average (TE 570) and her math calculations skills were just below high average (TE 578).

**2. The student has a medical condition that Respondent concedes affects vitality and alertness, and suffers from chronic headaches.**

The student was diagnosed in 2007 with optic pathway glioma, a cancerous tumor inside the optic nerve for which she was treated with six weeks of chemotherapy using a medical port followed by five weeks of radiation therapy (TE 36-39). It is the side effects or "late effects" of the radiation that produces health impairments that are the basis for the student's claim to be disabled under "other health impairments." In the OHI Eligibility Determination Form, Respondent's Exhibit 8, acknowledges that the student has an impairment that affects vitality and alertness, and that the student has "chronic migraines due to late effects of chemotherapy and radiation; Irritable Bowel Syndrome due to late effects of radiation; insomnia; depression."

The student's mother testified that the student continues to get headaches (TE 44) and is tired a lot and has joint pain (TE 45), and has anxiety, depression and nausea (TE 47-48). The mother testified that the student vomits three times a week because of the headaches. (TE 51). The mother testified, as of the date of the hearing, that there has not been any improvement in [REDACTED] symptoms (TE 50). The student sees doctors at Children's Hospital once or twice a year (TE 56-57). The student's grandmother testified that the student has a lot of headaches, which sometimes lead to vomiting, and lacks energy (TE 252). The grandmother testified that the student often was frustrated over [REDACTED] difficulties in achieving what [REDACTED] wanted to achieve in school. (TE 254-255).

**3. The student's medical condition has remained roughly the same over the past few years.**

According to the mother, there has been no improvement in [REDACTED] health condition from the time [REDACTED] was attending [REDACTED] and the time [REDACTED] subsequently began attending [REDACTED]. (TE 108) The student testified that [REDACTED] symptoms have "plateaued." (TE 480).

**4. The student, while [REDACTED] was receiving services from Respondent, was provided accommodations through a 504 plan.**

On October 1, 2010, a meeting was held at which the district determined that there was no need to evaluate for an IEP but that a 504 plan would be implemented to help the student, and the mother agreed with this plan. (TE 190-191). The 504 plan provided accommodations that included taking water into classrooms, going to the clinic to take medication or lie down, extended time and reduced classwork, and at least one audible book. (TE 61-62; TE 209) [REDACTED] was the student's guidance counsel and the chair of [REDACTED] 504 committee, (TE 370-371).

**5. Respondent communicated well and extensively with the student's mother.**

[REDACTED] testified that he was diligent in responding to communications from the student's mother (TE 372). Mr. [REDACTED] kept a detailed and thorough contact log. (See Respondent Exhibit 5 and TE 447) The mother testified that [REDACTED] had multiple communications with the mother about the student, responded to her questions, offered assistance to the student, and worked out a plan so the student could have third period free to catch up on missed assignments. (TE 182-183, 185) When the mother requested a meeting regarding an IEP on December 5, 2012, Mr. [REDACTED] responded within 24 hours (TE 186) and explained the IEP process to the mother (TE 187).

The student's testimony regarding communications is quite different. The student testified that [REDACTED] emailed [REDACTED] and that "my mom was always e-mailing him too. We never

really got responses from him.” (TE 511). The student testified that [REDACTED] “would ask [her mother] all the time will you e-mail Mr. [REDACTED], has he replied, has he replied. It was always no.” (TE 511-512). The student’s testimony on this point, so contrary to the believable and documented testimony of [REDACTED] as well as the testimony of [REDACTED] own mother, is one of several examples where the student’s testimony conflicts with that of even [REDACTED] own witnesses.

**6. The accommodations provided the student under the 504 plan did not constitute specially-designed instruction and were appropriate to deal with the student’s absences.**

Accommodations were in place that, according to Special Education Director [REDACTED], included “either extended time or they excused [REDACTED] from assignments, just choosing what was more important, due to the fact of [REDACTED] illness.” (TE 308). [REDACTED] explained the difference between accommodations and specially-designed instruction:

One-on-one, that’s an accommodation; extended times, those are accommodations; you know, helping a child get caught up, you know, that’s an accommodation, it’s not specially-designed instruction. ...[Specially-designed instruction] would be a change in the curriculum or a change in the instruction of the curriculum. Like for a student with a learning disability, the instruction we may give them is completely different for reading than, you know, they would get in a regular classroom.

(TE 327-328). The fact that a student is on Home Hospitalization is not, in itself, specially-designed instruction but instead is placement. (TE 327-328). Regarding the periods that were not during Home Hospitalization, [REDACTED] testified that “extended time and reducing the classwork were appropriate accommodations for” numerous absences due to medical reasons. (TE 335-336).

The student’s French teacher from [REDACTED] testified that [REDACTED] never used modified instruction for the student because the student did not need modified instruction. (TE 631).

**7. The student went on Homebound in latter part of [REDACTED] freshman year.**

The school does not, on its own initiative, put students on Home Hospital. Instead, a

parent who wants her student to be on Home Hospital submits an application supported by a doctor's statement. (TE 300-301). Once a student has requested Home Hospital, and a doctor states that it is needed, the school does not attempt to keep the student in school but relies upon the doctor's finding. (TE 303-304). At the end of January in 2011, an application for Homebound was submitted and the school put the student on Homebound. The medical reason given to justify homebound was that the student was unable to concentrate during episodes of migraine headaches. (See Petitioner Exhibit C). There was no mention of insomnia and the medical recommendation for Homebound was not made by the student's doctors at Children's Hospital, who encouraged [REDACTED] to attend school.

**8. At the time the student went on Homebound, [REDACTED] was passing all of her classes.**

The student testified that before [REDACTED] went on Homebound [REDACTED] freshman year, [REDACTED] was "barely passing some classes. I think I was failing a class or two....I know I had horrible grades." (TE 490). However, Exhibit B attached to "Petitioner's Brief Regarding Eligibility" indicates that while there were a couple of exams in which [REDACTED] scored 72 and 73, all of [REDACTED] semester, term and final grades were As, Bs or Cs. The student's testimony that [REDACTED] was failing classes is contradicted by the grades.

**9. The student successfully completed [REDACTED] Freshman year from home using Compass.**

The student completed [REDACTED] freshman year from home using a program, provided by the school, called "Compass." Mr. [REDACTED] testified that the student had to finish [REDACTED] freshman year during the summer because there were some gaps in learning caused by [REDACTED] absences, and the school "wanted to give [REDACTED] the best opportunity to come back as a tenth grader and be on track." ([REDACTED], TE 407). The extension of time to complete Compass was consistent with

her 504 plan, which provided for extended time. (See TE 395 and Respondent's Post-Hearing Brief, p. 5).

The student's parent also paid for tutoring during the summer. (TE 65-66). However, this was not required in order to complete [REDACTED] Freshman French I class, but was offered as an option in order to create a strong foundation to succeed in [REDACTED] Sophomore French II Honors class. (TE 518). The tutoring consisted of 5 1-hour sessions at \$20 per session. (TE 636).

The student testified that Compass "was very childish" and was "really easy." (TE 491), although [REDACTED] also testified that [REDACTED] could only do it at a slow pace, which accounts for why Compass extended into summer. (TE 493). In contrast, the school testified that the Compass program was tailored by [REDACTED] teachers for [REDACTED] to cover material that [REDACTED] had missed (TE 392-395), although there were some problems initially coordinating Compass with the student's teachers (TE 419).

Although the student had to use Compass during the summer, [REDACTED] earned all six credits for [REDACTED] freshman year. (TE 446). Compass scores are average in with the student's grades. They are taken from the Compass system and the teacher averages them just like a normal grade and the the teacher posts them into the grade card system. The final average in the final report card reflected the Compass grades. (TE 465-466).

**10. Respondent provided the student with many opportunities for extra help, one-on-one assistance and tutoring.**

[REDACTED], Director of Special Education, testified that Mr. [REDACTED], the school counselor, "was always looking for ways to give [the student] opportunities to - by changing [REDACTED] schedule, by working things out with [REDACTED] schedule, opportunities to get some extra help when [REDACTED] was able to come to school." (TE 297). She further testified that

I know in regards to [the student Mr. ██████████] did something with third period to give ██████████ a time for ██████████ to do - just focus on ██████████ work, you know, work that ██████████'s missing in ██████████ other classes. I know during the RAP, which is offered to all kids, but kind of really letting -- because I think that in one of the forms it had indicated that ██████████ was a little reserved in going and asking for help, so he kind of set it up that, you know, you'll go for math help at this time. So those are some of the things that I know he did off the top of my head.

(TE 297-298).

Among the options for tutoring that were available to the student were an afterschool tutoring program from 2:30 to 3:30 p.m. three days a week, Tuesday, Wednesday and Thursday (TE 383-385) and a 35-minute window of study time every day of the week called ██████████ Academic Program, or RAP, at which the student can get assistance or even go to the relevant teacher's classroom for instruction, which included a math classroom. (TE 375-377). The student was not given "mandatory RAP" for a particular subject but was given the flexibility to choose what subjects to work on depending upon circumstances and needs. (TE 381-382). As the student was frequently tardy, and RAP was from 8:30 to 9:10, on days the student was tardy ██████████ would not arrive in time to take advantage of RAP. (TE 439). A French tutor, Mrs. ██████████, was available to help students after school as well. (TE 471). Teachers also are required within 24 hours to respond to email questions from students. (TE 472). There also is a pre-school tutoring service for math available for 40 minutes each day (TE 387-388).

During the student's sophomore year, in addition to arranging the student's schedule so that third period ██████████ could be in the library to catch up on work (TE 398), the student also had the freedom to sit in on another Algebra 2 class during the third period if ██████████ wished, or see an Algebra tutor, Mrs. ██████████. (TE 397-398)

Except for ██████████ French teacher, whom the student testified would give notes from missed classes as well as tape recordings (TE 483), the student had nothing but exaggerated criticism for the teachers at ██████████. The student testified that when ██████████ missed class at ██████████ and went back



"[t]here was never one-on-one catch up... they never sat down with me to explain everything." (TE 482). The student testified that [REDACTED] would ask other students for notes and their help to catch up "but it was never the teachers that would help me." (TE 483-484). The student testified that a teacher named Ms. [REDACTED] "wouldn't actually teach me. A few times she had come over to help me with, I think it was World Civ., but never actually taught me." (TE 509). The student testified that "I would say, I don't understand this, and [the teachers] would tell me to come back either after school or during Wednesday RAP." (TE 485). Regarding [REDACTED] freshman English teacher, Ms. [REDACTED], the student testified "I'm just saying she never sat down with me to help review with me. I would ask her sometimes, you know, what does this mean, what does that mean. It wasn't enough to help me get through." (TE 534).

The student testified that "there was only one day a week that you could go to get Wednesday RAP tutoring" (TE 486). The student testified that although RAP was every day of the week, you could only get tutoring on Wednesday because teachers were not available (perhaps what was meant was that the teachers of this student's classes were not available, not that no teachers for the subject matter were available). (TE 487).

The mother testified that the student was unable to take advantage of voluntary tutoring available after school on a regular basis due to the mother's work schedule. (TE 209-210) However, the grandmother testified that she lived five miles away from the student and was available two days a week during 2010-2011 to transport the student to or from after-school tutoring if the student wished to take advantage of it. (TE 265). In July of 2011, the grandmother testified that she moved 50 miles away from the student but was at the student's house as much as she had been when she lived nearby because she no longer was working. (TE 264) This

suggests that the grandmother would have been available part of the time to facilitate after-school tutoring.

The student testified that [REDACTED] took up the offer to receive tutoring after school or during RAP "as much as I could." (TE 485). Regarding after-school tutoring, the student testified that "[t]he days that I was there, I would try and stay if I could. If I wasn't in too much pain, if I could, I would stay for math." (TE 486). The student testified that during a one-hour session of afterschool tutoring, the tutor could only spend 5 minutes with the student. (TE 487).

The student testified that the Homebound teacher did not bring work to [REDACTED]. (TE 492). This conflicts with the testimony of the grandmother and mother that described, albeit critically, the Homebound teacher as more or less a courier delivering and picking up work. It also conflicts with the arguments of [REDACTED] attorney (See Petitioner's post-hearing brief, p. 7).

The student's testimony regarding [REDACTED] efforts to take advantage of available help was inconsistent. The student testified that [REDACTED] was not comfortable approaching [REDACTED] teachers and asking for work and help. (TE 498). Regarding afterschool tutoring, the student testified "I don't remember staying after school freshman year too much." (TE 537). Regarding the sophomore year, the student testified [REDACTED] did not utilize afterschool tutoring every week but "remember staying a few times." (TE 537)

The student testified that [REDACTED] never emailed [REDACTED] teachers with questions (TE 489) and didn't attempt to do so because, in [REDACTED] opinion

I have a problem learning just by reading. I can learn so much better if I'm actually talking to someone or seeing it. I need a visual. And to be able to like comprehend it - or math - be able to comprehend math over an e-mail, it's like trying to read another language.

(TE 489). The student testified that [REDACTED] RAP teacher caused [REDACTED] additional stress when there was an issue involving a rip in [REDACTED] English book. The student described the event as follows:

One day my book for English had ripped, and I needed to go up to [my RAP teacher's] desk and ask her for tape. And she said, [student's name], I know you have medical problems and that's why you're missing a lot of school, but you're making taping your book priority right now, and you need to be working on all of this work and bringing your grades up because you're failing.

(TE 499). While the student's focus in recounting this incident was how uncaring the teacher was, this hearing officer believes the teacher was giving [redacted] good advice.

At the hearing of this matter the student, during cross-examination, without explanation or permission dramatically left the room in tears. There was nothing inappropriate or overly aggressive in the questioning that preceded [redacted] "break down." When [redacted] returned, the student testified, prompted by a leading question by counsel, that [redacted] felt "upset and belittled almost every day at [redacted]." (TE 544). This hearing officer found the entire episode did not enhance the credibility of the witness regarding the efforts teachers at [redacted] made to help [redacted].

A compilation of teacher comments reflected in a document distributed at the December 14, 2011 ARC meeting, exhibit A, p. 20, reflects the views of the student's teachers. [redacted]

[redacted] states:

[the student's] main concern is absences - [redacted] is capable of completing the work - does well when [redacted] is in class - misses too much - doesn't complete missed assignments, or takes longer than the allotted time to complete them. But a very detailed plan has been laid out for [redacted] - but, apparently, once again, [redacted] has not been using the suggestions, accommodations, etc. [redacted] has a list of emails of teachers to contact whenever [redacted] needs help with assignments - a list of tutors to see during RAP or at other times depending on [redacted] needs, etc. - a study topics class, etc. There are many services already in place - [redacted] just needs to use them!

[redacted], math teacher, states:

[the student] is smart and very capable and, if [redacted] was here more often, I think [redacted] would be doing just fine. I think what would really benefit [the student] is a tutor who can give [redacted] direct instruction out of the class to help [redacted] learn the material that [redacted] is not present for. There's just not enough time, at school, even with RAP or after school tutoring, to be able to provide enough in-depth instruction for [redacted] to get caught up.....

[redacted], [redacted] social studies teacher states:

[the student] is an incredibly successful student in [redacted] world civ class based upon [redacted] absences. [redacted] is consistent in making up [redacted] work. I would like to state [that the student] doesn't need any accommodations to achieve academic success....

[redacted] and [redacted] state:

We are very concerned about [the student's] attendance. This is the only reason [redacted] currently has a 76% or D grade in biology. We feel [redacted] current 504 plan is adequate for [the student] to gain access to the course curriculum..... With [redacted] many absences, [redacted] should take advantage of voluntary tutoring, either during rap or after school.

[redacted] states:

[the student] currently has an 87% in English II Honors.... Despite [redacted] frequent absences, [the student] generally is able to get all of [redacted] work completed. When appropriate, I have exempted [the student] from certain assignments due to [redacted] absences.....English II Honors has an extremely heavy work load with multiple assignments taking place at one time. I believe that these in combination with the frequent absences create a great deal of stress for [the student] as [redacted] attempts to keep up with [redacted] work.

The student's math teacher thinks the student would benefit from a tutor because there is not enough time for [redacted] to get caught up during RAP or after-school tutoring, but it is not clear whether he knew (a) whether the student was actually using RAP or after-school tutoring, or (b) that the student also now had the entire third period free to work on [redacted] math, sit in on another Algebra II class, and access to a collaborative teacher for additional instruction in math.(See TE 396-398). Other teachers exhibit awareness that the student was simply not taking full advantage of the tutoring that was available. Weighing all of the evidence, this hearing officer finds that ample assistance and one-on-one help was made available to the student by Respondent, whether or not [redacted] took advantage of it.

**11. The student generally has not attended school consistently and regularly.**

The mother testified that in the middle of eighth grade, the 09/10 school year, the student started missing a lot of days of school and went on home bound during the middle of the school year, but passed eighth grade without having to go to summer school. (TE 58).

During [REDACTED] sophomore year, in the mother's opinion the reason the student was having trouble with algebra 2 was because [REDACTED] was missing class, and therefore missing the instruction in class, which made it difficult for the student to catch up. (TE 71). The mother testified that the accommodations provided by Respondent didn't really help much because

[the student] couldn't go to class. So that was the issue, that [REDACTED] couldn't go there. And so then they wanted [REDACTED] to get caught up, so they would send work home, but then it just kept piling up and... [REDACTED] could get it caught up.

(TE 63).

According to the mother, the student was often told by teachers and others that the school that the student should simply come to school more. (TE 72) According to the mother, in the meeting held during [REDACTED] sophomore year when the parent requested an IEP meeting "[t]he underlying theme was - is that [REDACTED] is smart, and if [REDACTED] came to school, [REDACTED] wouldn't fall behind, that absences were the cause of [REDACTED] grades slipping." (TE 79)

**12. While the student does have debilitating migraines that cause [REDACTED] to miss school, the student's absences and tardies may be exacerbated by the student's own choices or poor sleep habits.**

The student testified that [REDACTED] has a headache every day, all day long. [REDACTED] testified that "[s]ometimes I'm screaming, crying, because it's so bad. There's no pattern to them. I'll get migraines, which keep me in bed for only a few days, hours, a few days." (TE 476-477).

The student testified that, in the morning, it takes 10 minutes to an hour for [REDACTED] nausea

medication to kick in and about half an hour for the medication to affect [REDACTED] headaches. (TE 478-479). Student testified that [REDACTED] "goes up to [REDACTED] room at 9:30 or 10:00, but I cannot sleep because I am in so much pain some nights." (TE 479) [REDACTED] testified that "I'm up all night in pain most nights, so I'm getting five hours of sleep. If I got even less sleep, I'll have even worse pain, and it will take even longer to reduce the amount of pain in the morning." (TE 479).

The student testified that "[i]f I do miss school, it's because of the pain, a migraine, or extreme stomach pain. So it's not like I can take my emergency medication and to got school. It's I have to take my emergency medication and go to bed...." (TE 480).

Prior to the hearing, the parties moved for a ruling on whether the student qualified as a student with a disability. In support of same, the parties introduced reports of Dr. [REDACTED], a clinical neuropsychologist at Cincinnati Children's Hospital, (Petitioner Exhibit D, Respondent Exhibit 1); an undated (but apparently created in January of 2012) summary of a neuropsychological report by neuropsychology fellow Dr. [REDACTED] of Cincinnati Children's Hospital (Petitioner's Exhibit E); and the report of [REDACTED], certified school psychologist, January 11, 2012 (Petitioner's Exhibit F, Respondent Exhibit 7). (Note: references to these reports are as they were labeled when submitted with the respective parties' briefing on the issue of qualification).

Neither [REDACTED] nor [REDACTED] were called as witnesses at the hearing.

Dr. [REDACTED]'s report stated that the student

continues to experience functional impairment such as poor school attendance and a decline in grades. This is thought to be the result of a number of more diffuse factors, most notably pain, insomnia, and depression, that are associated with [REDACTED] medical history. Most notable at the time of the evaluation were reported difficulties with pain and insomnia, as well as depression and anxiety, expressed by both [the student] and [REDACTED] mother verbally and on standardized questionnaires.

The mother admitted that not only the staff members at ██████ County but also the student's medical team at Children's Hospital recommended that the student try to attend school as much as possible. (TE 200; also, see Resp. Exhibit 21, p. 82). This implies that Children's Hospital thought the student was capable of attending school. Dr. ██████'s report indicates that the insomnia should be treated by properly managing sleep and diet. One of Dr. ██████'s recommendations states:

With respect to positively impacting upon [the student's] sleep, sleep hygiene is very important, and a regular schedule coupled with nine hours of sleep each night will increase [the student's] energy level during the day. [The student] will benefit from a regular sleep schedule with a consistent bedtime employed both on weeknights and weekend nights. Additionally, maintaining health eating habits (i.e. three meals per day with several snacks will also be beneficial for [the student's] physical stamina and cognitive functioning during the school day. If more assistance is needed, contacting medical providers to medically evaluate/address sleep concerns is recommended. ....If fatigue is disrupting school, addressing ██████ sleep is the most appropriate and effective intervention, and it will remain important for [the student] to attend school. .... Referrals are available upon request.

There was no medical proof that the insomnia was not manageable through the measures recommended by Dr. ██████, that referrals offered were followed up on, or that other medical professionals found that the insomnia was not manageable.

██████, the school psychologist, stated in his report that

a summary report of ██████'s condition seems to indicate that the professionals at Children's Hospital feel that ██████ situation is personally manageable and they encouraged ██████ to return to regular school attendance as much as possible.

██████ testified that "there were concerns about [the student's] attendance patterns and sleeping patterns being, at that point, the biggest issue and the biggest area of concern." (TE 598)

██████ testified, regarding whether headaches actually kept the student from attending school as follows:

It's difficult to determine with 100 percent accuracy, is it completely psychosomatic, these headaches, or just made-up symptoms, right? Versus a medical basis to them, which [the student] has that history. I do recall part of our discussion, though, we had evidence or information, if you will, from the Children's Hospital people, from their previous stuff, that had said in their opinion [redacted] had gone through the medical treatment, [redacted] was receiving the treatments for the migraines, and in their estimation should be able to attend school, and they were recommending attending school as much as [redacted] could.

(TE 607-608). [redacted] testified that in the Fall of 2011, the student had demonstrated "the ability to come to school, attend in accordance with a regular class schedule." (TE 613).

[redacted] testified that there likely was a connection between lack of sleep and the student's failure to attend. [redacted] testified, regarding improving sleep habits, that

I would focus on, again, looking at developing regular sleep patterns. I would focus more on, let's change our environment to make sure we try to go to bed at a certain time and provide reinforcement or systems, if you will, for following that go-to-bed pattern, if you will, on a regular basis. And also try to look at incorporating various types of reward systems for sustaining sleep throughout the night.

(TE 615). When asked how he would handle a student who didn't go to school in the morning and was "hovering over the toilet with dry heaves," [redacted] testified that if the student's physician did not identify a physical cause "we would, again, need to look at is [redacted] using that behavior to avoid going to school or doing something that morning, is what I'm assuming." (TE 617).

The student's attendance, at least with regard to tardies, appears in part to be a function of choice. At [redacted], where [redacted] currently attends, the student goes in late *every day* (TE 106). According to Exhibit M, the student as of February 11 had been absent 38 days and late 63 days. By way of comparison, during approximately the same period during the previous year of [redacted] attendance at [redacted], the student had been absent 37 ½ days but tardy only 13 days. (TE 107).



As there had been no change in her medical condition, this hearing officer infers that the reason [REDACTED] tardies at [REDACTED] nearly quadrupled over what they were at [REDACTED] is because the student has chosen to be late every day and there are no negative consequences to doing so.

The mother requested "full Home Hospital and online classes" in December of 2011 because she believed that the student couldn't go to school (TE 82-85). The mother thought online classes would be more convenient for the student because the student could do classwork when [REDACTED] felt like it, even if it was late at night. (TE 85) This reveals that the mother knows the student is staying up late at night, even though [REDACTED] doctors have recommended regular bedtimes, and the mother knows the student's physical condition at night, at least on some nights, is good enough for [REDACTED] to be able to perform school work.

Sleep hygiene and proper diet was been a concern of the student's doctors as early as 2008. (See Exhibit C, p. 1-5). While this hearing officer believes the student does indeed have migraines, and that they can be extraordinarily painful and debilitating, this hearing officer finds that the student's absences and tardies may be exacerbated by the student's own choices or poor sleep habits. This finding is made as it may be relevant to the discussion of emotional or behavioral disability elsewhere hereinbelow.

**13. The student did not experience significant deficits at school due to pain or insomnia and the student was very engaged and interacted well at [REDACTED] when [REDACTED] attended class.**

[REDACTED] stated in her report that as a theoretical matter that "[p]roblems such as pain and insomnia can often interfere with a child's ability to adequately express and utilize intact skills, especially in unstructured environments" and recommended "modifications and accommodations to help [the student] compensate for the deficits experienced due to pain, insomnia, and depression." However, there was not sufficient evidence to find that the student experienced

significant deficits in [REDACTED] ability to perform when [REDACTED] attended school. There was testimony that the student was very engaged and interacted well at [REDACTED] when [REDACTED] attended. (TE 598).

**14. The first time the mother requested an IEP was in a December 5, 2011 email to Mr. [REDACTED] after retaining counsel.**

([REDACTED], TE 429-430; Petitioner Exhibit L, p. 56). Mr. [REDACTED] kept a detailed and thorough contact log. (See Respondent Exhibit 5 and TE 447) There is no entry indicating a request for an IEP prior to December 6, 2011. (TE 448, Respondent Exhibit 5). [REDACTED] is absolutely certain no request for an IEP was made to him prior to that date. (TE 470). An ARC meeting was set up within 10 days of [REDACTED] receiving a request for an IEP. (TE 449).

It is not the duty of the parent to ask for an IEP or know to ask for one. The date when the parent asked for an IEP is relevant, though, to whether the school had reason, prior to December 5, 2011, to think the student should be evaluated. This hearing officer does not accept Petitioner's argument that the mother's general concerns expressed in 2010 (TE 67-69) constituted a request for an IEP. [REDACTED], Director of Special Education, testified that evaluation of the student for eligibility for special education began at the December 14, 2011 ARC meeting. (TE 293).

**15. The student requested Home Hospital for the spring of 2012.**

While the mother testified that at the December 2011 ARC meeting and the January 2012 ARC meeting, the district did not propose anything for the student other than Home Hospital (TE 226), that testimony is misleading. At the December 14, 2011 ARC meeting, student's counsel told the school district that "full Home Hospital" was what was required. (TE 367). According to the record of the meeting, when asked if intermittent instruction could be an option for the Home Hospital, the student stated that [REDACTED] would rather be doing all of [REDACTED] classes online.

The doctor recommending home hospital at the end of 2011 was not a doctor from Children's Hospital (TE 609). Children's Hospital doctors had recommended that [REDACTED] attend school. In examining Petitioner's Exhibit C, it is clear that the doctor recommending home hospital simply copied, word for word, the prior year's recommendation. Again, there was no mention of insomnia.

**16. During the Home Hospital period in the spring of 2012, the student chose not to use the [REDACTED] County's Compass program.**

At the December 14, 2011 ARC meeting, after student's counsel told the school district that "full Home Hospital" was what was required, the record of the meeting reflects that when asked if intermittent instruction could be an option for the Home Hospital, the student stated that [REDACTED] would rather be doing all of [REDACTED] classes online.

A student on Home Hospital can utilize an online program called Compass that [REDACTED] County offers. (TE 302). Compass

is a program that covers the core content, is designed as subject matters, you class matters. We utilize it in our district for kids that are on Homebound. We utilize it for kids that need to pick up credit because they've fallen behind, perhaps. We utilize, for example, our gifted children who want to get ahead, so they may take a class during the summer on Compass.

(Testimony of [REDACTED], TE 302). During the Home Hospital period the previous year, the student had used Compass and had successfully completed [REDACTED] classes. The Compass program was available to the student without charge but the student's mother opted not to use Compass and instead chose to enroll in [REDACTED] County's BAVEL program. (TE 313).

**17. The BAVEL program is based in [REDACTED] County and the student withdrew from [REDACTED] County to enroll in [REDACTED] County.**

The online program, called BAVEL, is based in ██████ County and cost \$270.00 (TE 92). In order to enroll in BAVEL it was necessary to withdraw from ██████ County (TE 93), which withdrawal occurred on January 4, 2012 (TE 90), and to enroll in the ██████ County school district. (TE 301-302).

18. At the time ██████ withdrew from ██████ County, the student's grades were good.

The student withdrew from ██████ County on January 4, 2012. (TE 316). At the time of ██████ withdrawal, ██████ semester grades were as follows: French 95; Biology I 79; Algebra II 83; English II Honors 86; World Civilization 78.

19. The student did not of necessity incur Internet or computer expense for enrolling in BAVEL.

The mother testified that she had to purchase Windows 7 (TE 96) at a cost of \$110.00 (TE 101) and Internet access at \$50 per month (TE 101) to participate in BAVEL. However, the student testified that ██████ had a home computer and Internet access prior to participating in Compass or BAVEL. (TE 517). The student had had access to a computer at home as well as Internet service and prior to the hearing of this matter had not requested that the school provide a computer or pay for Internet access. (TE 314) Regarding Windows 7, the student did request Windows 7 at a January 4, 2012 meeting, but evidently acquired it on ██████ own. (TE 315-316).

20. BAVEL had available an accommodation "read to text" program that could reduce the amount of eyestrain from reading on the computer.

The student's mother was concerned that the BAVEL online program would increase eyestrain and increase the student's headaches. ██████ inquired of BAVEL and reported to the mother that a "read-to-text" audio program was available through BAVEL. (TE 351-352). There was no testimony from the student or the mother regarding whether ██████ took advantage of

that program. However, the mother testified that the online classes required too much reading, which fatigued the student's eyes and made headaches worse. (TE 104). There was no evidence to show how the mother knew how much reading was required, other than based upon what the student told her, but this testimony suggests that the student did not take advantage of the read to text program.

21. After the student's withdrawal to enroll in BAVEL, the student no longer received services under ██████ County's 504 plan, but nonetheless received some services from ██████ County, including a French tutor, at ██████ County's expense, and a homebound teacher who checked in on the student.

See TE 321-322. While the student argues that it took two months to arrange the French tutor (TE 354), during this period the student was not enrolled in ██████ County. The purpose of having both homebound and online, according to the mother, was so that the student could get ██████ French credit (French 2 was not available through BAVEL - See TE 103) and also have a teacher to help with the online. (TE 88).

22. BAVEL was a program adequate to meet the student's needs but the student withdrew from BAVEL.

The grandmother testified that the online classes through BAVEL required the student to teach ██████ self, but also said her statement was based upon what the student had told her. (TE 287-288). The grandmother testified that she had not reviewed the BAVEL program or observed the student using the program. (TE 267) The student explained why the BAVEL program was inadequate in ██████ estimation:

It started off okay. It was a lot of work. It was like the same amount of work [as at ██████] or more. It was a lot to read. And I had teachers that I would have to call once a week. I could e-mail them. I could do live lessons. And I was like. Oh, this is great, this will really work, but really it didn't work

Q. It didn't work because why?

A. Really it required me to be up and awake all day long to try and work on all of it, which I really couldn't do. My pain was really bad at the time. It was really bad when I started. And I was basically teaching myself. It was just reading a ton of stuff and then taking a test. I could call my teachers and ask them what it was about, but that didn't help at all.

(TE 510). There was no explanation from the student why the fact that [REDACTED] could call [REDACTED] teachers didn't help at all, nor any testimony that [REDACTED] ever called them or emailed them. The student testified that [REDACTED] was reading all of the material on the computer, which caused eyestrain. (TE 510). There was no testimony regarding use of the read to text feature available through BAVEL. The student dropped all but one class in the BAVEL program. (TE 511).

The student's failures in BAVEL played a significant role in this hearing officer's initial decision finding the student was disabled. Based upon the misapprehension that homebound was permanent and online instruction would not work (inferred because the student withdrew from BAVEL), it appeared that specially-designed instruction would be required. However, it was subsequently revealed that the student was attending [REDACTED] and evidence at the hearing, cited above, indicates that the student did not all of the resources that were available through BAVEL.

**23. The school determined that the student was not eligible for an IEP at the February 29, 2012 ARC meeting.**

See TE 305-306.

**24. Prior to the evaluations conducted at the end of 2011 or beginning of 2012, Respondent did not have reason to suspect that the student was a disabled child due to "other health impairment."**

Everyone agrees that the student has a health impairment due to the after-effects of [REDACTED] radiation treatment. However, was no evidence that the impairment caused [REDACTED] to perform

significantly and consistently below the level of similar aged peers or that the student needed specially-designed instruction. Accordingly, accommodations were provided under a 504 plan.

25. Prior to the evaluations conducted at the end of 2011 or beginning of 2012,

**Respondent did not have reason to suspect that the student had an Emotional-Behavioral Disability**

There was no evidence that the student had an inability to learn, or to extent it was impaired that it was not explainable by health factors, to wit, the after-effects of [REDACTED] radiation therapy. There was not evidence demonstrating that the student was unable to build or maintain satisfactory interpersonal relationships with peers and teachers. To the contrary, it appeared that when [REDACTED] attended school, [REDACTED] interacted well and appropriately. There was not evidence that the student that the student displayed inappropriate types of behavior or feelings under normal circumstances or that she displayed a generally pervasive mood of unhappiness or depression. While there was some testimony from the grandmother that the student was depressed at times, there was not evidence that the student exhibited outward behaviors that Respondent should have recognized as signs of depression.

This hearing officer does not accept Petitioner's argument that the mother's general complaints should have put the school on notice that the student might have an emotional-behavior disability. (Petitioner post-hearing brief, p. 11). Petitioner argues that "letters from [the student's] doctors" should have put the school on notice, but there was no testimony regarding when those were given to the school (see TE 32-33), nor are they mentioned in the ARC summary. Regardless, if the 2008 Children's Hospital report or Dr. [REDACTED]'s 2010 report was given to the school prior to beginning the evaluation process, those reports reflect concerns and

recommend monitoring mood but are insufficient to raise a suspicion that the student had to a marked degree generally pervasive depression or somatization.

Had an emotional-behavior problem been suspected, there was no reason to suspect that it caused the student to performed significantly and consistently below the level of similar aged peers.

**26. Respondent erred in concluding that emotional-behavior disability (EDB) could not be considered because the student's difficulties could be explained by medical issues.**

Among the evaluations performed at the end of 2011 was a psychological evaluation by ██████████, the school psychologist. In his report, ██████████ stated in his report and in his testimony at the hearing that EBD would not be appropriate to consider if the condition could be explained by medical issues. (See TE 597). This is an incorrect interpretation of the regulations.

**27. The student has not exhibited over a long period of time and to a marked degree a generally pervasive mood of unhappiness or depression.**

In the OHI Eligibility Determination Form, Respondent's Exhibit 8, Respondent acknowledges that the student has depression. Although ██████████ incorrectly decided that EBD could not be considered, psychological evaluations pertinent to determining the existence of such a disability were performed. Thus, though the ARC did not "check the boxes" on EBD, the ARC did create a record from which eligibility as EBD can be determined.

Dr. ██████████'s 2010 report found "new but mild, mood concerns." Dr. ██████████'s 2012 report (Exhibit E to Petitioner's Brief Regarding Eligibility) found that the student suffered from depression and that, in her opinion, the student was

eligible for an Individualized Educational Program (IEP) as factors associated with ██████████ medical history undercut academic performance (via pain and mood problems). We support an IEP that includes modifications and accommodations to help [the student] compensate for deficits experienced due to pain, insomnia, and depression.



██████' report (Exhibit F, p. 3 in Petitioner's Brief Regarding Eligibility) found

Anxiety and Depression which each received an extremely high "Clinically Significant" score which represents a major level of concern for atypical emotional functioning.

However, the depression is not generally pervasive, which is what is required to qualify as a disabled child under applicable law. The student's day-to-day functioning at school indicated that the student is not withdrawing and is engaged in school when ██████ attends. (TE 598-599).

**28. There is insufficient evidence to conclude that student has exhibited over a long period of time and to a marked degree a tendency to develop physical symptoms or fears associated with personal or school problems.**

The student reported feeling stressed by the academic demands at ██████ and the pressure of catching up. There was some evidence that the student may be experiencing physical symptoms associated with school problems. In Dr. ██████'s report (Exhibit D in Petitioner's Brief Regarding Eligibility) based upon evaluations in March of 2010, ██████ recommended that the student's

mood and emotional regulation be closely monitored, as data collected as part of this evaluation suggest ongoing somatization that may be explained by ██████ medical condition(s) but may alternatively reflect underlying emotional distress. In addition, new but mild mood concerns were also apparent in the present behavioral data. If these concerns are impairing in [the student's] daily settings, intervention should be considered.

However, the record does not reflect that any of the student's doctors found the condition serious enough to require intervention. Dr. ██████'s recommended as follows:

With respect to positively impacting upon [the student's] sleep, sleep hygiene is very important, and a regular schedule coupled with nine hours of sleep each night will increase [the student's] energy level during the day. [The student] will benefit from a regular sleep schedule with a consistent bedtime employed both on weeknights and weekend nights. Additionally, maintaining health eating habits (i.e. three meals per day with several snacks will also be beneficial for [the student's] physical stamina and

cognitive functioning during the school day. If more assistance is needed, contacting medical providers to medically evaluate/address sleep concerns is recommended. ....If fatigue is disrupting school, addressing [redacted] sleep is the most appropriate and effective intervention, and it will remain important for [the student] to attend school. ....

[redacted]' 2012 report (Exhibit F, p. 3 in Petitioner's Brief Regarding Eligibility) also found possible evidence of somatization:

Anxiety and Depression which each received an extremely high "Clinically Significant" score which represents a major level of concern for atypical emotional functioning. Of even greater significance is the "Clinically Significant" highly problematic T-Score earned in the individual category associated with Somatization, which indicates that [the student] reports experiencing an elevated amount of physical aches and pains without having legitimate physical causes. This high tendency for somatic complaints is very consistent with the youngster's behavior patterns in recent months which have led to significant levels of school absenteeism.

However, somatization is not the only possible explanation to account for why the student might report physical symptoms for which there was no medical explanation. The student also could be exaggerating [redacted] symptoms to avoid going to school. [redacted] testified that

It's difficult to determine with 100 percent accuracy, is it completely psychosomatic, these headaches, or just made-up symptoms, right? Versus a medical basis to them, which [the student] has that history. I do recall part of our discussion, though, we had evidence or information, if you will, from the Children's Hospital people, from their previous stuff, that had said in their opinion [redacted] had gone through the medical treatment, [redacted] was receiving the treatments for the migraines, and in their estimation should be able to attend school, and they were recommending attending school as much as [redacted] could.

(TE 607-608). [redacted] testified that in the Fall of 2011, the student had demonstrated "the ability to come to school, attend in accordance with a regular class schedule." (TE 613). [redacted] testified that if the student's physician did not identify a physical cause for the student's poor attendance "we would, again, need to look at is [redacted] using that behavior to avoid going to school or doing something that morning, is what I'm assuming." (TE 617) Currently the student is very happy at [redacted] and reports feeling less stress than [redacted] did at [redacted], yet is tardy even more than

█████ was at █████ and reported no change in █████ physical symptoms as a result of the changing schools.

Finally, there could be a medical explanation for the symptoms - failure to follow proper sleep hygiene and diet, an ongoing concern of the student's doctors at Children's Hospital since 2008.

Weighing all of the foregoing, there is insufficient evidence to find that student has exhibited over a long period of time and to a marked degree a tendency to develop physical symptoms or fears associated with personal or school problems.

29. The student enrolled in ██████████ without consent from or advance notice to Respondent.

The student's mother was notified on August 13, 2012 that Respondent was prepared to develop an IEP for the student. (TE 168) The student decided to attend ██████████ on or about August 15, 2012. (TE 166). It is undisputed that ██████████ offers no special education services. The student enrolled at ██████████ with consent from or advance notice to Respondent. See TE 340.

30. To the extent the student is performing better at ██████████, it is because the academic work there is less demanding than the it was at ██████████.

The student testified that, beginning in eighth grade, ██████████ would get "extremely behind" in ██████████ schoolwork at ██████████ and

I would have so much work to catch up on that I would be spending all night trying to get it done. There was loads and loads of work to try and catch up on. I didn't know what they were talking about in class when I did go back because I missed two days and they had move on so quickly. It's very fast pace at ██████████.

(TE 482). The student also was taking honors classes at ██████████.

**[REDACTED]**, a private school, emphasizes religious instruction. **[REDACTED]**, who is in charge of **[REDACTED]**, testified that "I guess I might be getting myself in trouble, but, you know, I could care less whether they learn algebra, but if their soul is right..." (**[REDACTED]** dep. 26).

The student enrolled in honors classes at **[REDACTED]**, but **[REDACTED]** does not have honors classes. (TE 530). Nonetheless, the student testified that the classes at **[REDACTED]** are "challenging" (TE 530). However, the evidence suggests otherwise.

The student's attendance at **[REDACTED]** has involved more tardies than at **[REDACTED]**. The student's first class at **[REDACTED]** each morning is math (**[REDACTED]** dep. 28). As testified to by the student, **[REDACTED]** is late every day, so **[REDACTED]** either receives no in-class math instruction or less in-class math instruction than the other students. Nonetheless, the student had an A in Algebra 2 in the first quarter at **[REDACTED]** (**[REDACTED]** dep 54). Regarding the difficulty of the work at **[REDACTED]**, **[REDACTED]** testified "to be honest with you, you know, it's not hard to do the work. It's workbook work...." (**[REDACTED]** dep. 46, emphasis added).

**31. . [REDACTED] provides accommodations but does not provide special education services to the student.**

There are only 11 students in the entire junior class at **[REDACTED]**. (TE 522). The mother, who is not an educator, attributes the student's success at **[REDACTED]** to smaller classrooms which, she speculates, leads to better one-on-one instruction. (TE 109) The mother testified that the student gets "one on one" instruction at **[REDACTED]** (TE 229-230) but no foundation was laid to show how she could know this. The mother agreed that whether at **[REDACTED]** or at **[REDACTED]**, the student only received one-on-one instruction when **[REDACTED]** was at school. (TE 163) In response to leading questions, the mother testified that **[REDACTED]** offered the student "instruction to meet **[REDACTED]**

unique needs” and “adapted [redacted] work to help [redacted] learn” (TE 229) but no foundation was laid to show how the mother knew this or was qualified to give such an opinion.

The grandmother testified that the student gets one-on-one instruction at [redacted] (TE 270), but it was clear that she had not observed the student at [redacted] (TE 284) or been told this by [redacted] personnel. The grandmother testified that when the student misses school at [redacted], “they immediately address what [redacted] missed so that [redacted] doesn’t get behind. They better accommodate [redacted] needs...” However, no foundation was laid to show how the grandmother knew what took place at [redacted] or that she was qualified to give opinions evaluating the accommodations [redacted] made. The grandmother testified that she had never gone to [redacted] to observe the instruction the student was receiving. (TE 283-284).

The student is happy with the instruction [redacted] receives at [redacted], though [redacted] does not send tutors to the student’s house or provide the student with online instruction. (TE 268).

Regarding the instruction [redacted] receives at [redacted], the student testified:

The teachers [at [redacted]] are very proactive to get me through school. They really understand my situation. So they are pushing me through school. They are helping me....They’re reducing my workload, giving me the one-on-one instruction that I need that I was never given at [redacted].

(TE 521-522). According to the student, the English teacher only teaches during part of the class and then will reteach the material to the student until [redacted] can understand it. (TE 523).

This hearing officer is skeptical that the quality of instruction accounts for the student’s success at [redacted]. [redacted], who runs [redacted], testified that only one of the persons teaching the student at [redacted] has a Kentucky teaching certificate. ([redacted] dep. 14). It is more likely that the less demanding academic requirements are what accounts for the student’s success at [redacted].

Regardless, what is being provided is accommodation, not special education. According to [redacted], who runs [redacted], [redacted] provides the student extended time for assignments,

especially math. (██████ dep. 30). Other than with ██████ math class at ██████, there have been no modifications in any of the student's classes. (██████ dep. 43). ██████ testified that the student receives the same amount of attention as all of the other students. (██████ dep. 45). Even the student also testified that the assistance offered the student at ██████ is the same offered to all of the other students at ██████ and the student receives the same assignments and takes the same tests as the other students. (TE 523-524).

██████ testified that ██████ does not adapt the way the instruction is delivered to meet the unique needs of their students. (██████ Dep. 52). ██████ does not offer special education services. (TE 169-170). In the Bible study class, the student is permitted to study in a room by ██████ self because of the noise (██████ dep. 48), but ██████ is not giving the student instruction different from the instruction received by other students and ██████ is not receiving any additional tutoring (██████ dep. 54).

**32. The student has not performed significantly and consistently below the level of similarly--aged peers.**

At the time the student was evaluated for eligibility, cognitive testing by Children's Hospital showed that the student was well within average range; had a high-average IQ of 110; and had mental processing skills in the average range. (TE 324).

The student's grades at ██████ were good, ranging from A's to C's. (TE 148-149). ██████ grades at ██████ are A's and B's. (TE 154-155). The student achieved proficient scores in all core content areas in 2009 and 2010. (TE 158). At ██████, ██████ teacher, Mrs. ██████, said ██████ was "incredibly successful" in World Civics class and did not need a lot of accommodations to achieve academic success, other than extended time. (TE 208). Some zeros that appear on ██████

grade reports from 2010 to 2011 reflect assignments that were excused as accommodations. (TE 307-308; TE 219-220).

There was no objective data that showed that the student was performing significantly and consistently below the level of similarly-aged peers. (TE 331).

The student did not perform successfully during the months that [REDACTED] was enrolled in [REDACTED] County's BAVEL program, but that was a temporary arrangement. [REDACTED] subsequently enrolled in [REDACTED] and is doing well there.

The PLAN test is a pre-ACT test to determine how a student would perform on the ACT. When the student took this during [REDACTED] sophomore year, in September of 2011, [REDACTED] ranked at 92 percent nationally in English among tenth graders, meaning that only 8% of tenth graders throughout the nation rank higher than the student. (TE 441-442). [REDACTED] ranked in the 64<sup>th</sup> percentile in math. (TE 442). [REDACTED] ranked 93<sup>rd</sup> percentile in reading and 89<sup>th</sup> in science. (TE 443). [REDACTED] composite score was 89<sup>th</sup> percentile, meaning that only 11% of tenth graders throughout the nation scored higher than [REDACTED] did (TE 444).

Whatever impairments the student may have, they have not caused [REDACTED] to perform significantly and consistently below the level of similar age peers.

#### CONCLUSIONS OF LAW

**1. Compliance with the 504 plan is not at issue in this case.**

Petitioner argues in [REDACTED] brief regarding whether Respondent fully executed the 504 plan. However, this proceeding concerns whether the student is eligible for services under IDEA.

**2. Predetermination is not an issue in this case.**

The notion of predetermination came up during the hearing, but it was not alleged in the due process complaint nor any amendment to the complaint. (TE 355-356).

**3. The fact of absences alone does not qualify the student as disabled.**

*Weixel v. Board of Educ. Of City of New York*, 287 F.3d 138 (2<sup>nd</sup> Circuit 2002), held that allegations that a student who was diagnosed with chronic fatigue syndrome and fibromyalgia had disabling physical ailments that limited her strength, vitality, and alertness and made it *impossible* for her to attend school, and as a result of her inability to attend classes, she required special education in the form of home instruction, was sufficient to support claim that student was a "disabled child" within the meaning of the IDEA.

In the present case, it is not impossible for the student to attend school and [REDACTED] was, at the time of the hearing, attending school. This hearing officer entered his initial ruling under the misapprehension, based largely on counsel for Petitioner's insistence at the December 2011 ARC meeting that the student be on "full Home Hospital" and the Respondent's acquiescence to that demand, that the student was unable to attend school on a permanent basis. However, the facts have shown that the student is able to attend school. *Wixel* no longer applies under the facts as established through the hearing.

Also, as concluded elsewhere hereinbelow, absences and Home Hospital do not in themselves establish a need for specially-designed instruction.

**4. The student does not have an emotional disturbance.**

34 CFR 300.8(4)(i) defines emotional disturbance as follows:

Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.



(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

There was no evidence that (A) through (C) applied to this student and per fact-finding hereinabove neither (D) nor (E) apply.

**5. If the student had an emotional disturbance, [REDACTED] still would not qualify for special education because such a condition would not adversely affect the child's educational performance.**

707 KAR 1:002(2) 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 the level of similar age peers." In the present case, this hearing officer found that the student was not shown to have performed significantly and consistently below the level of similar age peers.

**6. The student does not qualify for special education as an "other health impaired" student because such impairments as exist do not adversely affect the child's educational performance.**

Under 34 CFR 300.8(9), a student may qualify as a disabled child if the student has limited strength, vitality and alertness that results in limited alertness to with respect to the educational environment, which is (a) due to chronic or acute health problems AND (b) adversely affects a child's educational performance.

Part (a) of the foregoing is satisfied. However part (b) is not because 707 KAR 1:002(2) 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 the level of similar age peers." In the present case, this hearing officer found that the student was not shown to have performed significantly and consistently below the level of similar age peers.

7. Were the student "other health impaired" or "emotionally disturbed" still would not qualify for special education because [REDACTED] does not need specially-designed instruction.

A child with other health impairment or emotional disturbance is not a child with a disability unless by reason of same the child needs special education services. 20 USC 1401(3)(A). Specially designed instruction means

adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

- (i) To address the unique needs of the child that result from the child's disability; and
- (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 CFR §300.39(b)(3).

Per the fact-findings in this case, the student did not receive special education services at [REDACTED] and is not receiving them at [REDACTED]. The placement desired by Petitioner, matriculation at [REDACTED], would not involve the provision of special education.

Frequent absences and placement on home hospital does not by itself prove that a student requires specially-designed instruction. *Brado v. Weast*, 53 IDELR 316 (D. Md. 2010); *Pocono Mountain Sch. Dist.* 36 IDELR 224 (PA SEA 2002); *Dep't Lisbon Sch. Dept.* 33 IDELR 172 (ME 2000).

8. [REDACTED] would not be an appropriate placement, were the student eligible for special education services.

Were the student disabled and entitled to special education services, [REDACTED] would not

be an appropriate placement. [REDACTED] does not provide special education services and provides no services that are not also available at [REDACTED].

**9. Petitioner is not entitled to reimbursement for tuition at [REDACTED].**

Were the student disabled and entitled to services, [REDACTED] would not be entitled to reimbursement for tuition at [REDACTED]. Petitioner gave no notice of [REDACTED] intent to enroll the student at [REDACTED] and [REDACTED] would not be a proper placement for a child that needs special education because [REDACTED] offers no special education services. In addition, [REDACTED] offers no services or accommodations that are not available at [REDACTED].

Placement at and reimbursement of tuition for private schools that do not or cannot provide special education services is not permitted under IDEAA. *Berger v. Medina City Sch. Dist.*, 348 F.3d 513 (6<sup>th</sup> Cir. 2003); *Rome Sch. Comm. V. Mrs. B.*, 247 F.3d 29,33 (1<sup>st</sup> Cir. 2001); *Florence County Sch. Dist. Four v. Carter by & Through Carter*, 510 US 7, 12-13 (1993); *J.G. Kiryas Joel Union Free Sch. Dist.*, 777 F.supp 2d 606 (S.D. N.Y. 2011); *Covington v. Yuba City Unified School District*, 780 F. Supp. 2d 1014 (E.D. Cal. 2011)

**10. The student is not entitled to compensatory education.**

*Reid ex rel. Reid v. Dist. Of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005) provides that compensatory education may be awarded to put a student in the position [REDACTED] would have occupied but for the denial of special education services:

The ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.

Were the student disabled and entitled to services, no evidence was presented to establish that [REDACTED] was denied a Free and Appropriate Public Education. The student is not disabled and does not require special education services. The accommodations being provided at the student's

desired placement, ~~██████~~, do not include special education services. No proof was presented regarding what compensatory education services would be requested by Petitioner.

**11. The student is not entitled to reimbursement of any expenses.**

The student already had a computer and Internet access prior to enrolling in Compass and the costs of French tutoring, enrollment in BAVEL, and Windows 7 were not incurred in order to have special education services. And, as counsel for Respondent points out, KRS 157.270 providing for in-home instruction twice a week for one-hour visits imposes no obligation to make online instruction available.

**12. There is no violation of Child-Find.**

Per the fact-findings herein, Respondent had no reason to suspect that the student was disabled prior to the mother's request for an IEP evaluation. *Board of Educ. of Fayette County v. L.M.*, 478 F.3d 307 (6<sup>th</sup> Cir. 2007) holds that there may be a violation of child find occurs if the school overlooks clear signs of disability and is negligent in failing to order testing, or that there is no rational justification for not deciding to evaluate. The fact that a child struggles in school or requires extra services to assist in staying on pace with classmates does not necessarily mean an evaluation must be made. In the present case, the student was absent frequently, but with accommodations under her 504 plan was earning As, Bs, and Cs. Per the fact-findings herein, the student was not consistently and significantly performing below the level of similar age peers.

It has been determined that the student in fact is not disabled and does not need specially-designed instruction. There cannot be a Child Find violation if the student was not eligible for services. *D.G. v. Flour Bluff Ind. Sch. Dist.*, 481 Fed. Appx. 887 (5<sup>th</sup> Cir. 2012); *In re: Student with a Disability*, 109 LRP 27582 (Ky. SEA July 31 2008).

**DECISION**

Petitioner is entitled to no relief and Respondent is the prevailing party on all issues.

**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, Capital Plaza Tower, First Floor, 500 Mero Street, 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.

Dated June 3, 2013.

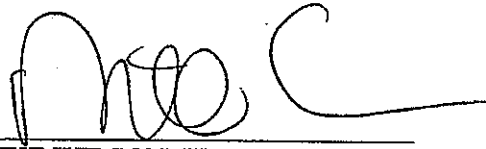
  
MIKE WILSON, HEARING OFFICER

**CERTIFICATION:**

A copy of the foregoing was mailed to the following on June 3, 2013:

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Hon. Kevin Brown  
Assistant General Counsel  
Kentucky Department of Education  
Capital Plaza Tower  
500 Mero St.  
Frankfort KY 40601

A handwritten signature in black ink, appearing to read 'Mike Wilson', written over a horizontal line.

MIKE WILSON, HEARING OFFICER