KENTUCKY DEPARTMENT OF EDUCATION
DIVISION OF LEARNING SERVICES
AGENCY CASE NO. 1819-16

[redacted] PETITIONER

V ORDER

[redacted] COUNTY SCHOOLS RESPONDENT

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PROCEDURAL HISTORY

A prior due process hearing was held in May and June of 2017 on the initial case with a decision being entered by the Hearing Officer on November 1, 2017. An ECAB Order in said case was filed in May 2018 and specifically ordered the following: (1) that an ARC conduct a manifestation determination; (2) that a written BIP be created to include procedures for and location of de-escalation and the roles of teacher and staff in de-escalation; (3) behavior data using objection measures, rather than subjection impressions, should be collected systematically and from time to time as determined by the ARC, documenting how, by whom, and when collected, and regularly analyzed to ascertain improvement or decline over time; (4) all persons involved in educating, de-escalating, or discipling the student should receive training concerning this student's IEP and how it affects their roles as teachers, administrators, or staff; (5) that the student was denied FAPE for approximately six (6) months due to failure to implement IEP. The ECAB clarified that the Hearing Officer's Order of ten (10) days of compensatory education meant sixty (60) hours total of tutoring to be offered by the school before classes, after classes, or during the summer at the option of the student; (6) the school shall provide the student with four to six hours of direct instruction in technology; and (7) the student prevailed on most issues, but the Hearing Officer and ECAB lack authority to award attorney's fees.

Next, both parties filed appeals to the US District Court. The student filed an appeal, Case No. 18-CV-91 and the District filed an appeal, Case No. 18-CV-92. On August 21, 2018 a settlement conference was held in District Court, and the parties reached an agreement. In pertinent part, the District agreed to pay attorney's fees to [redacted], attorney for the parents; to provide sixty-six hours of compensatory education on Fridays during a four hour window that he has at school; to pay for his admission into the [redacted] program of around $700.00, not to hold a manifestation determination hearing as indicated in the ECAB Order but doing so by agreement, and complying with all other portions of the ECAB Order in terms of implementation of the student's IEP (Respondent's Exhibit 4, pages 21-29). The Judge at said settlement hearing specifically asked the parents if they understood that the suit was dismissed appealing the ECAB decision and that they were closed out on anything in respect to that prior school year, and specifically stated "anything that may or may not have been ordered by either the Hearing Officer or the ECAB, that's all going to be closed at this point, based upon the settlement." (Respondent's Exhibit 4, page 30) Both parents indicated that they so understood the agreement.

On February 15, 2019, the student filed the within Request for Due Process Hearing with the issues being framed as (1) whether the three criminal referrals to juvenile court constitute unilateral changes in placement and per say violation of "students" right to a Free Appropriate Public Education in violation of 707 KAR 1:290; (2) whether the school district failed to provide the student with the procedural safeguards provided by 707 KAR 1:340 each time it failed to provide the juvenile court with his complete education record; (3) whether the school district failed to properly implement the student's IEP in violation of 707 KAR 1:320; and (4) whether the failure to implement the student's IEP has denied him his right to a Free Appropriate Public Education in violation of 707 KAR 1:290. Student sought relief as follows: (1) a "stay-put" being invoked to

prevent the school district from making any further unilateral changes to student's placement; (2) an Order requiring the school district to begin fully implementing student's IEP; (3) an Order prohibiting the school district from making any further referrals to juvenile court for manifestations of the student's disabilities; (4) an Order prohibiting the school district from utilizing law enforcement to intervene in the student's disability manifestations; and (5) that the student be awarded compensatory education for the time in which he was denied a Free Appropriate Education.

The school district filed a Motion to Dismiss and Objections to the Sufficiency of the Due Process Complaint on March 1, 2019.

The Petitioner filed a Motion for an Expediated Hearing and Stay Put Provisions on March 5, 2019. The school district filed a brief in opposition to the Motion for Expediated Hearing on March 5, 2019. The school district filed a supplemental brief in opposition on March 6, 2019.

The Hearing Officer issued an Order on March 8, 2019 that the matter was not appropriate for an expediated hearing as there had been no change of placement pursuant to IDEA. Specifically, there had not been a ten day or more suspension and there had not been any change in placement under the student's IEP. The Hearing Officer discussed 34 CFR Section 300.536(a) and noted that although she believed referral to the police of the student due to calling a teacher a name was an action initiated by the school, no disciplinary action occurred as a result of same which caused a ten day or more suspension. In said Order, the Motion to Dismiss the Due Process Complaint was overruled. The Petitioner was granted until March 18, 2019 to file a more definite statement.

Petitioner filed an Amended Due Process Complaint in compliance with said Order on March 18, 2019 wherein it was specifically alleged (1) problems concerning referral of criminal

charges of the student to juvenile court; (2) allegations that the school district was aware that the behaviors on which criminal charges were based were directly related to the student's disabilities; (3) alleging that school personnel had not been appropriately trained in accordance with the previously ordered ECAB Order; (4) transmittal of special education records to the juvenile court was required by IDEA and had not been complied with by the school district; (5) that beginning with the 2018-2019 school year the student's IEP had not been implemented. Said Amended Complaint requested that the school district be ordered to cease utilizing a school resource officer (hereinafter SRO) to intervene in the student's behavior; (6) that no other persons be utilized in the student's behavioral intervention plan than those who had been identified by the ARC as "safe" people and that a danger intervention plan be developed providing for replacement behaviors of the staff and steps for intervention to effectively prevent and manage the student's negative behaviors; (7) that the school district be ordered to have a policy where staff members as private citizens who wish to file juvenile charges against the student may not do so through an SRO contracted by the school district; (8) that training take place with all staff regularly coming into contact with the student, as well as any staff considering filing charges against the student; (9) that the school district enter into an memorandum of agreement with any law enforcement agency that supplies SRO's to the school district limiting their powers only in response to student misconduct to offenses that constitute a substantial and eminent threat to physical safety or serious crime; and (10) compensatory education for each day that the student had to attend a court hearing or meet with a court designated worker, or has missed school to meet with an outside mental health therapist as a result of school difficulties. It was requested that said compensatory education be in the form of one-on-one instruction to reteach the days lessons and assist the student with completing his work from that day and should be provided after school or on the weekends.

The school district filed its response to the Petitioner's Amended Due Process Complaint on March 27, 2019 denying the violations alleged by Petitioner.

The school district filed a Motion for Summary Judgment on April 15, 2019. Said Motion alleged that the Due Process Complaint was barred by res judicata due to the settlement agreement entered in August 2018. Petitioner responded to said Motion for Summary Judgment on April 22, 2019. The Hearing Officer entered an Order on said Motion for Summary Judgment on April 30, 2019 wherein the Motion for Summary Judgment was overruled stating that the Hearing Officer would not consider the January 27, 2017 juvenile court charge and would not consider whether any provisions of the Orders entered by the previous Hearing Officer or the ECAB in said case were followed. However, the issue of training after February 2017 of individuals who came into contact with the student would be considered at the hearing for the sole purpose of whether it caused failure to implement an IEP, violation of procedural safeguards, or a denial of Free Appropriate Public Education to the student.

A hearing took place in this action on February 26 and 27, 2020. Thereafter the parties submitted briefs.

FINDINGS OF FACT

1. At the time of the hearing in this matter [redacted] was a 17-year-old senior at [redacted] school (JE 190). He has since graduated with his peers in May 2020 earning a high school diploma.

2. [redacted] was identified as a student with attention deficit hyperactivity disorder; anxiety; dysgraphia with a learning disability in written expression; learning disability in math; non-verbal learning disorder; sensory integration disorder with motor planning deficit; static encephalopathy; executive functioning disorder; and depression. He has also suffered concussions during the 2016-2017 school year. (TT Volume 2, pgs. 304-311; JX 43-51; Petitioner's Exhibit 23-24)

3. [redacted] was identified as a student with a disability under the primary eligibility category of other health impairment and has been served by an IEP at all times relevant to this litigation (JE 1-5).

4. While very intelligent, [redacted] struggles academically in math and writing. He also struggles socially with transitions, following directions, following a schedule, and responding appropriately to people whom he is not comfortable with or whom he does not have a good relationship. He struggles to communicate and express his feelings, and instead uses inappropriate language, raising his voice, cussing, and punching inanimate objects. (TT Volume 1, pgs. 79, 88 and 100; Petitioner's Exhibit 23-24)

5. [redacted] has an extensive history of behavioral related issues. (TT Volume 1, pg. 139) and his disabilities manifest in such ways as being on edge, talking out, cussing, difficulty with forgiving, perceiving situations and people's feelings toward him inaccurately. He has executive functioning deficits which cause a difficulty with understanding the steps he must take, planning and organizing, and seeing the consequences of his action in the moment. When confronted with difficult situations, [redacted] often has a fight or flight response wherein he may become verbally aggressive, physically aggressive toward inanimate objects, or completely shut down. (TT Volume 1, pgs. 32, 33, 101-103, 141-142, 144-145, 147; Petitioner's Exhibit 23, 24).

6. One of [redacted] coping strategies is walking around in the school building and sometimes this occurs in places where he is not supposed to be. (TT Volume 1, pg. 99). Techniques that are successful in de-escalating [redacted] include time to cool down and process his feelings, speaking to him calmly, and coming at him from a caring perspective. (TT Volume 1, pgs. 101, 140-141)

7. During the 2018-19 academic year [redacted] began taking dual enrollment courses at [redacted] College (hereinafter referred to as [redacted]) on Monday

through Thursday for half a day. (TT Volume 1, pgs. 39-40, 76) [redacted] is a post-secondary educational institution and part of the [redacted] College System. It is one of multiple local colleges at which [redacted] High students may apply to take dual enrollment courses which are then integrated into their high school class schedule. There is a window of time in which the students can enroll in this program and that enrollment is done through the high school. (PE 2; TT Volume 2, pg. 520)

8. [redacted] students may enroll in dual credit courses through [redacted] with said courses being cataloged and approved through the college's regular course approval process and being taught by [redacted] faculty on its campus. (PE 2, pg. 10)

9. Some of the dual enrollment courses are offered exclusively to high school students and taught by [redacted] faculty at the high school's campuses. These students are transported together from their high school campus to [redacted] and then back for completion of their high school classes and dismissal to home. (PE 2, pg 10)

10. [redacted] also provides opportunities for perspective students to enroll in courses taught at one of the [redacted] campuses where high school students are taught along with college students. This is not through the school district. (PE 2)

11. [redacted] is not on [redacted] School campus and [redacted] was required to travel to one of [redacted] campuses for class. (TT Volume 1, pg. 130) During the 2018-19 academic year, the school district provided transportation for [redacted] to travel between [redacted] School and [redacted] campus, apparently as part of the automotive repair cohort. (TT Volume 2, pg. 513)

12. During the 2018-19 academic year, after [redacted] returned from [redacted], he would eat lunch in [redacted] room and participate in social school skills activities there. (TT Volume

1, pgs. 39-40) During 2018-19 school year, [redacted] IEP called for 10 minutes per day Monday through Thursday of social skills instruction and 50 minutes per day on Friday provided by [redacted] (TT Volume 1, pgs. 40, 49) In addition to his social skill instruction from [redacted], [redacted] would also come to her room approximately once a week to calm down because he was frustrated. He had unlimited access to her classroom at any time for these de-escalation and behavior supports. (TT Volume 1, pg. 41)

13. During 2018-19 school year, [redacted] would attend regular classes for math and writing special education minutes and [redacted] would attend with him to facilitate collaborative support in a regular classroom. (TT Volume 1, pgs. 76-77)

14. During the 2018-19 school year, [redacted] was very successful in his classes taught at [redacted] and in his [redacted] courses and progressed well on his goals. (JE 13, pg. 130) [redacted] also reported that he had shown a lot of improvement in the area of behavior.

15. Collaborative support services are administered when a certified general education teacher and a special education teacher work together in a single classroom composed of students in special education and students who are not so enrolled. (TT Volume 1, pg. 157)

16. Resource model services require that special education students be removed from a general education classroom into a room with a small group of special education students and a special education teacher. (TT Volume 1, pg. 75)

17. In December 2018, [redacted] parents noticed an increase in his negative behaviors after reduction of special education services minutes. In January and February 2019, district personnel also expressed concerns about his behaviors. Thereafter, there were two significant behavior incidents in which [redacted] was criminally charged. (TT Volume 2, pgs. 339-345, 441-442) [redacted] has never been charged with any criminal offenses outside of school. (TT Volume 2, pgs. 345)

18. Beginning with the IEP dated December 18, 2018, [redacted] post-secondary goals were to complete an automotive technician program at a local community college to be able to gain employment as an automotive technician at a local automotive repair shop. (JE pg. 46) His transitional services were listed as multi-year course of study, ILP (individual learning plan), and referral for OVR (office of vocational rehabilitation). (JE pg. 46) Said IEP provided that teachers will be provided with information with [redacted] diagnosis. (JE pg. 50)

19. Said IEP defined the least restrictive environment as collaborative math and writing support in the general education classroom with behavioral support throughout the school day as needed and access to a separate location as needed for de-escalation and self-regulation. (JE pg. 50)

20. Following a string of behavioral incidents, the ARC met on March 22, 2019 and revised [redacted] Behavior Intervention Plan. (JE pg. 149) [redacted] experienced external stressors preceding this time period including the birth of his child. (TT Volume 2, pg. 381) The ARC decided to provide extra support and amended the BIP to include more time with preferred staff members. Although there had been some behavior spike in early 2019, by all accounts the 2018-19 school schedule of dual enrollment and collaborative classes at [redacted] School worked well for [redacted] (TT Volume 2, pg. 423)

21. [redacted] tested on the ACT at 32 in English and thus was eligible for a dual enrollment English class at [redacted]. (TT volume 1, pgs. 83-84) (JE pg. 132)

22. During the spring 2019 semester, [redacted] enrolled himself in classes at [redacted] for the Fall 2019 semester. He missed the deadline for the automotive cohort program through [redacted]. (TT Volume 2, pgs. 274, 511-512) Said [redacted] schedule was done without any input from the school district's personnel and did not provide for any class time at [redacted] School. (PE 3, pgs.

16-17) The schedule also required [redacted] to travel between three different [redacted] campuses located in three different cities throughout the day to attend all his scheduled [redacted] classes. Prior to the beginning of the 2019-20 school year, the school district became aware of [redacted] enrollment in solely [redacted] courses. (TT Volume 1, pg. 158-159)

23. Discussions began for forming the 2019-20 IEP with attempts to contact the mother on August 6, 2019. Said ARC meeting occurred on September 5, 2019. (JE 15; PE 13, pg. 145) During this ARC meeting it was determined that [redacted] current minutes were not compatible with the [redacted] schedule he created. (JE 157) Principal [redacted] explained that the District was still willing and able to provide special education services under his IEP, but [redacted] would have to come to [redacted] campus to receive those services because [redacted] would not permit District employees to provide services during dual enrollment courses. (JE 157)

24. All District students with disabilities who participate in dual enrollment courses at [redacted] are required to return to a District campus to receive their special education services. (JE 158) The district offered [redacted] several options to remedy incapability of his IEP minutes and his desired dual enrollment schedule exclusively at [redacted]. (TT Volume 2, pg. 418) One such option was for him to return to [redacted] for resource minutes. (TT Volume 1, pg. 158-159, Volume 2, pg. 395)

25. [redacted] parents wanted him to remain fulltime at [redacted] and receive his special education services at [redacted]. (TT Volume 2, pg. 418)

26. [redacted] did not attend class at [redacted] or receive any services from the District during the 19-20 academic year. (TT Volume 1, pgs. 158-159) He apparently received dual enrollment credit for his [redacted] classes which allowed him to graduate from [redacted] and obtain college credits simultaneously.

27. No IEP of [redacted] ever provided for dual enrollment or transportation services as a special education related service or accommodation.

28. [redacted] IEP called for indirect occupational therapy services to be provided school wide for 20 minutes per month. (JE 50-51) No occupational therapist ever consulted with [redacted]. [redacted] regarding providing [redacted] with sensory input strategies or sensory diet. (TT Volume 1, pgs. 51-52)

29. [redacted] testified that generalized special education training was provided to all personnel at the high school each year. (TT Volume 2, pg. 502) She stated that she conducted special education training specific to [redacted] under his IEP for all of his teachers during each year. (TT Volume 2, pgs. 502, 504-505) She also conducted training specific to [redacted] and his IEP for other school personnel who interacted with him such as a school nurse, librarian or bus monitors. (TT Volume 2, pgs. 502-503, 506-507) [redacted] and [redacted] testified that they had not received any training concerning [redacted] diagnosis. Those teachers both had supervisory roles in the school building. (TT Volume 1, pgs. 32, 50-51, 175, 207-208; TT Volume 2, pgs. 504-506) [redacted] attended court proceedings regarding his criminal charge against [redacted] without using any leave time while being paid by the District, [redacted] [redacted] and [redacted], as well as [redacted], [redacted] School Board Attorney, attended the court hearing regarding charges filed by [redacted] against [redacted]. (TT volume 1, pg. 188, volume 2, pgs. 532-533) [redacted] special education file was not made available to the juvenile court by Principal [redacted] when charges were filed against him. (TT volume 1, pg. 206)

30. [redacted] School has an agreement with the [redacted] Police Department to provide an SRO at the school. Said SRO is employed solely by the [redacted] and is not a district employee. (TT Volume 2, pgs. 467, 468) SRO's do not partake in discipline of

student's or implementation of Behavior Intervention Plans. They are assigned to primarily maintain the safety and protection of students and staff. (TT Volume 2, pgs. 457-459)

31. SRO [redacted] has had occasion to interact with [redacted] and has filed juvenile charges against [redacted]. (TT Volume 2, pg. 461) He filed charges on behalf of teacher, [redacted] and [redacted] due to incidents in 2017 with [redacted]. (JE 22 and 23) These complaints were filed at the request of each of the individual teachers involved. [redacted] testified he never received training regarding [redacted] disabilities or manifestations of such or his Behavioral Intervention Plan. (TT volume 2, pgs. 483, 503, 507)

32. On January 18, 2019, [redacted] called [redacted] teacher, [redacted], a faggot while he was in the restroom. [redacted] is a male English teacher at [redacted] School. He openly identifies as non-binary, wears women's clothing and keeps long painted fingernails. [redacted] expressed to [redacted] that he felt uncomfortable around [redacted] due to this. In the spring of 2019, while wearing female leggings, [redacted] encountered [redacted] and other students in the men's restroom. While exiting the restroom, [redacted] yelled "faggot" back toward the restroom, which was presumably directed toward [redacted] and the basis for the criminal charges [redacted] asked SRO Poynter to file. (TT Volume 1, pgs. 105-106, 121) [redacted] requested that SRO Poynter file a juvenile complaint against [redacted] for this "hate speech" and SRO [redacted] did so. (JE 23; TT Volume 2, pgs. 462-463) After the incident with [redacted], [redacted] was not provided any counseling, debriefing, social skills instruction or otherwise. (TT Volume 1, pgs. 35-36, 118-119)

33. On February 11, 2019, SRO [redacted] responded to a request for assistance on a school bus after school was dismissed to address unruly behavior from a group of students. (JE 205) Although it was not his assigned bus, and he did not have permission to be on it, [redacted] was present on the bus with his girlfriend. (TT Volume 2, pgs. 470-472) [redacted] behavior escalated when

he was asked to get off the bus, resulting in him yelling profanities and violently punching the roof of the bus. (TT Volume 2, pgs. 470-472; JE 205) [redacted] entered the bus where [redacted] was intervening with [redacted]. [redacted] was a preferred person pursuant to [redacted] intervention plan. [redacted] did not interact with [redacted] nor file any charges against him as a result of these actions. After [redacted] arrived on the bus, [redacted] behavior escalated. (Body camera video; TT Volume 2, pgs. 479-481) After this incident, no one provided any counseling, debriefing, or social skills instruction to [redacted] (TT Volume 1, pg. 36, 118-199) However, charges were later filed by the [redacted] after [redacted] parents brought to his attention the incident in a meeting with the Police Chief. (TT Volume 2, pgs. 472-473; JE 25)

34. [redacted], previously [redacted], was [redacted] case manager in 2018-19 and 2019-20. Her role was to provide specially designed instruction to [redacted] in the regular classroom and resource classroom to help him stay organized and focused and give him instruction in de-escalating and calming strategies skills, as well as behavior support. (TT Volume 1, pgs. 69, 72-76)

35. The District has a Memorandum of Agreement with [redacted] College to provide dual credit classes to District students. Said Memorandum of Agreement is silent on how students with disabilities will be served. (JE 9-15) In testifying that teachers from [redacted] County cannot provide collaborative special education services to students while they are attending their dual class credits at [redacted], Director of Special Education, [redacted], relied upon the Memorandum of Agreement. (TT volume 2, pgs. 9-15, 251-252) [redacted] did not make any attempts to contact [redacted] personnel to determine whether special education services could be provided at [redacted]. (TT volume 2, pgs. 250-251)

36. [redacted] offered [redacted] to ride one of the District cohort buses from [redacted] back to the District building, but said bus left [redacted] at 10:30 am and [redacted] and did not get out of his classes until 11:45 am during the 2019-20 school year. (TT volume 2, pgs. 241-247, 328-329) Transportation services were provided voluntarily by the school to and from [redacted] for the dual enrollment classes during the 2018-19 school year, but were not part of [redacted] IEP. These transportation services were withdrawn on September 5, 2019. (TT volume 1, pg. 117) If the parents had wanted [redacted] to receive special education resources services called for in his IEP, the District would have provided transportation for the child from [redacted] to the District building. (TT volume 2, pgs. 240-242, 332)

37. [redacted] parents have paid for the cost of his attendance at [redacted] and incurred transportation cost associated with that attendance for the 2019-20 year. (TT volume 2, pgs. 357-360, Petitioner's Exhibit pgs. 291-295)

BURDEN OF PROOF

Petitioner bears the Burden of Proof Schaffer vs Weast 546 US 49, 62 (2005). Said burden is by a preponderance of the evidence as to both an IDEA violation and entitlement to specific relief.

CONCLUSIONS OF LAW

I. RES JUDICATA DOES NOT PROHIBIT ANY ISSUES WHICH WERE LITIGATED IN THIS ACTION.

Respondent argues that res judicata, claims preclusion as referred to in Kentucky, prohibits re-litigation of actions previously settled. The Hearing Officer agrees that is the law as set forth in Slone vs R&S Mining, 74 SW 3d 259-261 (Ky. 2002). However, the Settlement Agreement that was reached in previous matters in August 2018 specifically stated that the district would comply with all provisions of the previous ECAB, order other than the manifestation determination

hearing. Specifically, on Respondent's Exhibit 4, page 29 [redacted] as counsel for Respondent stated, "the other portion we're complying with." The court specifically asked "so did you say the other portions of the ECAB decision and order, your complying with, right? [redacted] "correct". In terms implementations of [redacted] IEP, this language thus left all remaining orders of the ECAB in effect going forward and those included the following provisions which are alleged as violations in this case; (1) paragraph 4 of the ECAB Order stated in the future, the SRO shall be briefed on the student's IEP and behavioral strategies. The statements by [redacted] made clear that the school district would continue abiding with those terms as part of the Settlement Agreement. The SRO specifically stated he received no training concerning [redacted] disability and manifestations of his behavior intervention plan despite [redacted] testimony that such training had been provided to him. (TT volume 2, pgs. 483, 503 and 507) However, as will be described below, said lack of training did not constitute a substantive or procedural violation IDEA that would entitle the student to any finding of failure to implement an IEP or deprive the child of FAPE.

II. THE DISTRICT APPROPRIATELY DEVELOPED AND IMPLEMENTED PETITIONER'S IEP SO AS TO OFFER FAPE.

Respondent argues in its brief that Petitioner did not allege in the due process complaint that the IEP is inappropriate and could not make a claim for the first time in their post hearing brief. However, the Hearing Officer believes that the Amended Due Process Petition made it clear that Petitioner was alleging the IEP was inappropriate.

707 KAR 1:320 (1) states

> "an LEA shall provide specially designed instruction and related services to each child with a disability in accordance with his IEP and shall make a good faith effort to assist the child in achieving the goals, objectives, or benchmarks listed in the IEP."

Houston Indep. Sch. Dist. v Bobby R., 200 F 3d 341, 349 (5th Cir. 2000) recognized that a student must show more than a de minimis implementation failure by showing that the district "failed to implement substantial or significant provisions of the IEP."

A) **The District's failure to fully comply with this BIP on two (2) occasions was a deminimus implementation failure.** Petitioner's Exhibit 4 is [redacted] Behavior Intervention Plan. The BIP provided for "social skills instruction utilizing reflection, modeling, scripts, and/or role playing on how to better respond to authority figures and how to disagree respectfully." The only two behavior incidents for which there was testimony were the name calling of [redacted] on January 8, 2019 and the bus incident on February 11, 2019. [redacted] had several other behavior incidents during the school year as reflected in Petitioner's Exhibit 2. He received counseling for those. Further, the BIP did not specifically require this instruction after each behavior event. The record is clear that [redacted] received resource support for behavior throughout the year wherein he was instructed in social skills and descalation skills.

B) **The District's failure to show that the SRO was trained in accordance with the previous ECAB order did not result in failure to implement the IEP.**

The SRO's testimony that he was not trained concerning [redacted] needs must be given greater credibility than administrator's testimony to the contrary. This is a violation of the previous ECAB order which was to continue after the Federal Court Settlement Agreement. However, this failure did not create any situation which substantially violated implementation of the IEP or [redacted] receiving FAPE. The only contact the SRO had with [redacted] during the time period of this case was when he came onto a bus, where [redacted] was being disorderly, as a potential backup. At that time a preferred staff member, [redacted], was already on the bus intervening. [redacted] had no

interaction with [redacted] on this occasion. [redacted] or the District did not file any juvenile charges against [redacted] as a result of the situation. Later, after the parents complained to [redacted] Police Department, the Chief of Police investigated and after reviewing the tape of the incident filed charges against [redacted]. No disciplinary action that resulted in any time out of school occurred as a result of the encounter. Accordingly, this violation did not provide any substantive violation sufficient to rise to the level of the District not implementing the IEP or providing FAPE.

The SRO assisting teachers filing juvenile charges against [redacted] is discussed below.

C) <u>The District made a good faith effort to provide the special education services set forth in [redacted] appropriate IEP.</u>

[redacted] made a schedule for the 2019-20 school year that required that he be at various [redacted] College campuses for his entire day. The District was correct under the law that it can not provide special education services at such a facility. The District made offers to [redacted] to allow him to come to the district for his collaborative models requiring joint effort by a special education teacher and a general education teacher. These were described by [redacted] in her testimony. (TT volume 1, pgs. 150, 157). During the resource model the child is pulled out of his classroom for instruction in a special education class. In and of its nature, collaborative model requires cooperation between regular and special education teachers to administer instruction. It incorporates all students in the classroom into the special education experience. The District can require its own general education teacher to assist in a collaborative model of special education, but does not have the authority to make professors at a college do the same. Further, college level students can not be required to sit through a class that is being co-taught by a high school teacher and their college professor.

Dual enrollment, by its nature, involves high school students taking college level courses for which they receive post-secondary credit while still in high school. This District offers three

ways students can participate in dual enrollment at [redacted] 1) courses exclusively at the high school campus taught by [redacted] facility; 2) a cohort program in the auto mechanic's program at [redacted], specifically for District high school students; and 3) students may independently enroll in courses at [redacted] through the college's regularly approved process with classes taught by [redacted] faculty at [redacted] campuses. During the 2019-20 school year [redacted] enrolled in classes at [redacted] under the third scenario. During the 2018-19 academic year his dual enrollment classes in the morning at [redacted] allowed him to return to [redacted] for math and English classes and allowed his teacher [redacted] to facilitate collaborative support. All parties acknowledge that this worked well for him.

The most recent IEP which he had on December 18, 2018, specifically provided for collaborative math and writing support and had the previous schedule in mind. [redacted] has not argued that anything in the 2018-19 school year was inappropriate under that IEP. It provided for [redacted] needs, and he progressed great with it. The IEP was never changed for the 2019-20 academic year as [redacted] unilaterally enrolled strictly in courses taught at different [redacted] campuses. This essentially was a unilateral change of placement, and when his parents made that decision the ARC did not have any input, nor ability to amend the IEP to accommodate his desire to take strictly [redacted] courses. Once the ARC learned of this incompatible schedule the ARC attempted to remedy the problem by providing other alternatives. During September 5, 2019 ARC the District stated that they were willing and able to provide special education services to [redacted] per his IEP. However, he simply had to come back to the campus to receive those services since [redacted] would not permit the District to provide services during dual enrollment classes. Essentially, the parents refused to allow him to come back to the high school and did not want him to attend another high school within the county either.

Attorney General Opinion 17-0121, sited by Petitioner, does not apply in this case as [redacted] does not educate high school students exclusively as is done with the [redacted] Academy. When a student makes the decision to attend a college dual education program on that campus all day long, that university is not charged with providing FAPE and is not included in the purview of a local education agency.

The District had an obligation to offer [redacted] an IEP that was appropriate. They offered him a program where he would receive special education services per his prior IEP which had allowed him to progress academically and behaviorally at the September 5, 2019 ARC if he would come to campus to receive those services. They also offered to provide resource setting services outside the regular schedule. Either of these offers met the District's burden to offer an appropriate IEP which could be implemented to provide FAPE for [redacted]. These options would still allow him to have his dual enrollment and meet the transition goal of obtaining his certification in automotive mechanics. His IEP never required that he receive all of his classes in a dual enrollment setting and the ARC acted appropriately in making such determination. Petitioner has shown no evidence that shows it was necessary for him to have dual enrollment classes in order to provide him an opportunity to progress.

Colorado Department of Education in Mountain Board of Cooperative Educational Services, 54 IDELR 334 (SEA CO. 2010) held that IDEA does not require that a school district provide special education services to a high school student who is enrolled in a community college course. Colorado Department of Education recognized that a college level course is not contained within the definition of FAPE. FAPE is "an appropriate preschool, elementary school or secondary school education provided in conformality with the student IEP." Accordingly, Districts are not

required to provide special education services to a student with a disability who attends a college level course at that college.

Pursuant to USDOE Guidance September 17, 2019, US Department of Education Q&A titled "Increasing post-secondary opportunities and success for students and youth with disabilities" in order for a District to use IDEA, Part B funds to support students with disabilities who have been accepted into dual enrollment programs, the IEP team must determine the courses offered as part of a dual enrollment program are necessary to provide the student with FAPE. No such determination has ever been made on an IEP in the case of [redacted] His transition goals list that he wishes to obtain a degree in automotive mechanics after graduation. The school has recognized that and attempted to accommodate that by letting him enroll at the [redacted] program during the 2018-2019 and 2019-2020 year. This essentially let him work toward a college certificate while completing high school. However, nowhere in his IEP was it required that he complete the automotive mechanics courses during high school.

The fact that the parents wanted him to be in school off of [redacted] campus all day during his Senior year does not mean that the ARC was wrong in failing to recommend such a program. USDOE Guidance acknowledged that students with disabilities are not precluded from participating in dual enrollment programs simply because such courses are not explicitly detailed in the students' IEP, but recognized if they were not necessary to provide the student with FAPE the District could not be required, and in fact, was prohibited from using Part B funds to pay for same.

20 USC 1412 (a)(1)(A) requires a free appropriate public education be available to all children with disabilities. 707 KAR 1:290 section 1.1 states "an LEA shall make a free appropriate public education available to all children with disabilities." The District's obligation is fulfilled

when FAPE is offered. In NW v Boone County Board of Education, 763 F 3d 611, 615-616 (6th Cir. 2014) FAPE was offered. When the student chose to leave the school system to attend [redacted] dual classes the District did not have a duty to offer anymore than it did.

Further, transportation was never included in [redacted] IEP. The fact the school had voluntarily provided transportation the previous year did not require that it be offered in this case for the 2019-20 school year. 34 CFR 300.34 (c)(16) requires that an ARC is responsible for determining whether transportation between school and another location is necessary for a child to receive FAPE. If the child with a disability has no need for special arrangement or accommodations in connection with the disability or implementation of special education, transportation is not a related service. 71 Fed. Reg. 46,576 (2006) Appendix A to 34 Part 300, Question 33 (1999 regulations). No proof indicated any of [redacted] disabilities required transportation to be provided or that he have dual enrollment classes at multiple college campus locations. Thus, the ARC was appropriate in not including same in the IEP. [redacted] is not entitled to specialized transportation for voluntary participation in the dual credit classes at [redacted]. Letter to Luger and Weinburg, 58 IDELR 199 (OSEP 2011) and Baltimore County Pub. Schs., 61 IDELR 210 (SEA MD 2012) Baltimore County held that because a student did not require a morning carpentry program to receive FAPE he was not entitled to be transported there as a related service.

III. THE SCHOOL OFFERED AN APPROPRIATE LEAST RESTRICTIVE ENVIRONMENT FOR [redacted] UNDER HIS IEPS.

707 KAR 1:250 requires that students with disabilities be placed in the least restrictive environment. Determining what is the least restrictive environment requires a balance of the goal of main streaming with non-disabled peers with the equally important objective of providing an education appropriately tailored to each student's particular needs. P v Newington Board of Education, 546 F 3d 111, 122 (2nd Cir. 2008). The IEP that the child had in 2018-19 and which

was proposed to be continued for 2019-20 did exactly that by mainstreaming him into a collaborative setting for his academic classes, such as math and English, while allocating resource time to deal with his behavioral issues. The District was fully prepared to continue with this program, but when the child elected to attend exclusively dual enrollment programs off campus, the District simply could not make that accommodation and was not required to do so as it was not necessary for the child to attend dual credit classes to obtain FAPE.

Letter to Dude, 62 IDELR 91 (OSEP 2013) recognized,

> "if the IEP team determines that services in a community, technical, or other post-secondary program are necessary to assist the secondary school student in reaching his [or] her post-secondary goals and receiving FAPE, and those services are considered secondary education… the student's IEP team could designate those as transition services and the school district could pay for those services with Part B funds"

This requires two prongs. First, that the post-secondary program is necessary to assist the child in receiving FAPE. There has been no such finding in the IEP in the case at hand as discussed above. Second, the service has to be considered secondary school education. Arguably, since the child is getting dual credit that could be considered as a secondary school education. However, even then the IEP team has discretion as to whether those are designated as transition services required to be provided at the District's expense. The District's obligation was to get [redacted] ready to be able to obtain an automotive mechanic degree, not to ensure that he had such degree up on completion of high school. The IEP had allowed him to advance appropriately from grade to grade and make progress in his behavior. Therefore, it was appropriate. The IEP specifically provided three transition services: multiple year course of study; an individual learning plan; and referral to office of vocational rehabilitation. Participation in dual enrollment for either the automotive cohort or other classes is not provided for in the transition plan.

Petitioner states that a finding against him on this position would be discriminatory. However, this student has been treated no differently than other students at the school as it is a personal decision of the student and family whether the child will participate in dual enrollment, and the District does not pay non-disabled dual enrollment student's expenses for tuition or transportation. Cohort students are transported by the school to [redacted] and back to school, but [redacted] did not timely apply for the auto mechanics cohort. Further, he enrolled in all dual credit classes off campus. Thus, [redacted] is not being treated any differently than non-disabled peers. While the Hearing Officer understands why a family wants their child to participate in dual credit programs, such programs are not always going to be required for an IEP to be sufficient. As with any decision, there are advantages and disadvantages to such decision.

IV. THE REMOVAL OF TRANSPORTATION SERVICES WAS NOT A STAY PUT VIOLATION.

All parties agree that 20 USC 1415 (3) requires that during the pendency of a due process proceeding a student shall remain in their "current educational placement". Honig vs Doe, 484 US 305 (1988). The "term current educational placement" is not statutorily or regulatorily defined. It can be interrupted as meaning the type of program the student is receiving, as opposed to a specific school or classroom. N.D. v State of Hawaii, Department of Education, 54 IDELR 111 (9th Cir. 2010) held that a change in placement occurred when a student moved to a different type of program. The District did not change this child's program at all by not providing transportation services. As discussed above [redacted] IEP never required such services, nor did it require the attendance of [redacted] for the dual credit opportunities. Cordrey vs Eukert, 917 F 2d 1460, 1468 (6th Cir. 1990) held that even if a school has provided a particular service in the past it does not have to provide such in a stay put situation if the services were not required in the governing IEP.

V. THE CRIMINAL CHARGES BROUGHT AGAINST [redacted] DO NOT CONSTITUTE CHANGE IN PLACEMENT.

Under 34 CFR 300.536 (8) a change of placement due to disciplinary acts only occurs if there is removal of more than ten (10) consecutive school days or a series of removals creating more than ten (10) days removal. The child has only been suspended for one day and in-school for two days. The charges brought against him in juvenile court did not cause any removal from school. His IEP has not changed his placement. Further, 34 CFR 300.535(a) specifically states

> "nothing in this part prohibits an agency from reporting a crime committed by a child with a disability to an appropriate authority or prevents state law enforcement and judicial authorities from exercising their responsibilities with regard to applications of federal and state law to crimes committed by a child with a disability."

KRS 161.190 specifically guarantees teachers and other school personnel the right to file criminal charges for physical and verbal conduct directed toward them when same will disrupt, interfere with or undermine the good order and discipline of the school. Courts have agreed that referring criminal acts by disabled students to law enforcement does not constitute a change in placement under IDEA. Rochester Community Schools v Papadelis, 55 IDELR 79 (Mich Ct. App. 2010) Joshua S v School Board of Indian River County, 37 IDELR 218 (S.D. Fla. 2002). A recent Kentucky Department of Education agency case AC v Boone County Schools, case number 1819-18 also recognized that referring criminal acts did not constitute a change in placement. No violations of 707 KAR 1:340 Section 172 were proven.

707 KAR 1:304 Section 172 does require that if a school reports a crime for a student, they shall ensure that copies of special education discipline record of the child are transmitted for consideration by the appropriate authority to the extent that the transmission is permitted under FERPA. The only evidence offered on this issue was the question to Dr. [redacted] wherein he answered that he had not transmitted [redacted] due process file to the juvenile court for consideration. That does

not mean that the file was not otherwise provided to the juvenile court. Petitioner could have had the attorney for the child in the juvenile matter testify for such records were not provided or have the parents testify that records were not provided at the hearing if that were the case. Further, even if same was not provided there was no proof of any harm to the child from same. The Hearing Officer would have been interested in looking at transcripts or tapes of the juvenile proceeding. Hearing Officer would note that if the District had failed to provide the records, it would be a procedural violation. There was no evidence shown that there was any resulting harm to the child such as to violate FAPE.

VI. THE CHILD WAS PROVIDED FAPE ALL OF 2018-19 AND 2019-20 SCHOOL YEARS.

Endrew F v Douglas County School District RE-1, 137 SCt. 988, 996 (2017) makes it clear that the District obligation to provide FAPE under IDEA is satisfied if the child's IEP sets out an educational program that is reasonably calculated to enable the child to receive educational benefits. As stated in Bd of Educ vs Rowley, 458 US 176, 199 (1982) Districts do not have obligation to maximize a child's potential to seek the parents' preferences. Any review of an IEP must be reasonable, not whether the courts regard it as ideal. [redacted] progressed with the 2018-19 IEP. The ARC offered an IEP for 2019-20 that was consistent with the previous IEP. The family chose not to avail themselves of these services.

VII. PETITIONER IS NOT ENTITLED TO ANY FORM OF RELIEF.

Even if the undersigned had found that the IEP was not properly offered or implemented in this case such that there was a denial of FAPE, compensatory damages would not be appropriate in this case. No compensatory education could be provided in the case at hand. Parentau v Prescott Unified Sch. Dist., 51 IDELR 213 (D. Ariz. 2008). [redacted] graduated from high school after the hearing of this matter and in fact when he so graduated had obtained enough credits to nearly have his

associate degree from [redacted] There is no educational need for compensatory education that has been shown by the Petitioner. There is no allegation that he did not properly progress or that he suffered in his education. In fact, he is in a better position than many non-disabled classmates by having nearly obtained an associate degree while in high school. Smith County Bd of Educ., 52 IDELR 117 (SEA TN 2008) held that a district is not required to provide compensatory education services at the collegiate level since a child has graduated with a regular high school diploma.

VIII. THE HEARING OFFICER DOES NOT HAVE JURISDICATION TO REQUIRE THE DISTRICT TO CONTRACT WITH [redacted] OR TO ADOPT SPECIFIC SITE-BASED POLICY AS REQUESTED BY PETITIONER.

IDEA sets out very limited roles that Hearing Officers can play in those cases and limits the remedies that can be provided. Nothing specifically authorizes; the granting prospectively of relief for other students who are not involved in a case or requires specific policy or programs to be provided prospectively. This is due largely to the nature of the individualized need that is recognized under IDEA.

The Hearing Officer has respect for Petitioner's attempt to expand IDEA to cover potential dual credit and other college opportunities that have become something of a normal in high school in this day and age. However, IDEA has not encompassed this concept of said services being required, and a Hearing Officer cannot make these changes absent a finding that such educational opportunities are necessary to provide FAPE, or a change in legislation which would impose such obligations for school Districts under IDEA.

WHEREFORE, it is ORDERED as follows:

1. The Due Process Complaint of Petitioner is denied in all regards.

_____

[redacted]
HEARING OFFICER

APPEAL RIGHTS

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

The address: Kentucky Department of Education
Office of Legal Services
300 Sower Blvd. 5th Floor
Frankfort, Kentucky 40601

CERTIFICATE OF SERVICE

The foregoing Order was served by electronic mail to [redacted] at [redacted] and [redacted] Hon. [redacted] at [redacted], this ____ day of _____, 2020.

_____
[redacted]
HEARING OFFICER