

COMMONWEALTH OF KENTUCKY  
KENTUCKY DEPARTMENT OF EDUCATION  
DIVISION OF EXCEPTIONAL CHILDREN SERVICES  
AGENCY CASE NO. 1516-17

[REDACTED]

PETITIONER

VS.

[REDACTED]

RESPONDENT

**DECISION AND ORDER**

**Introduction**

A Due Process Hearing under the Individuals with Disabilities in Education Act (IDEA), (20 U.S.C. § 1400, et seq.) in this matter was initiated with the Kentucky Department of Education (KDE) by letter from the Petitioner's Counsel dated January 16, 2016 and received by the KDE on January 19, 2016.

Within Petitioner's Due Process request, Petitioner alleges that Respondent has not provided FAPE through the IEP proposed by Respondent after August 2015. It also alleged that Respondent's contractor could not meet Petitioner's educational needs. As a result, Petitioner requests that Respondent reimburse Petitioner's Parents all or part of the tuition paid to [REDACTED] as well as attorney's fees expended by Petitioner's Parents.

The Parties are in agreement that Respondent provided FAPE prior to the 2015-16 school year.

After attempts at resolving the appeal without a hearing, this matter was heard on March 29, 30, and 31, 2016. There are 3 volumes of hearing transcript (T.T.) containing 692 pages of testimony, a joint exhibit file containing 47 exhibits (JE), a Petitioner exhibit file containing 84 exhibits (P) and Respondent's exhibit file containing 2 exhibits (R).

The Parties submitted simultaneous briefs and reply briefs.

Due to possible privacy or FERP issues in the future and the need for redaction, the student or Petitioner, [REDACTED] will be referenced as the Petitioner or the Student. [REDACTED] Schools will be referenced as the Respondent, the School District or the District.

[REDACTED] Schools will be referenced as [REDACTED] [REDACTED] will be referenced as [REDACTED] Other references include ARC for Admissions and Release Committee, IEP for Individual Education Program or Plan, KDE for Kentucky Department of Education, LRE for Least Restrictive Environment, FAPE for Free Appropriate Public Education, ABA for Applied Behavior Analysis, LEA for Local Education Agency, and [REDACTED] for [REDACTED] Public Schools.

### **STANDARD OF REVIEW**

#### **Burden of Proof**

The burden of proof under *KRS 13B.090 (7)* is as follows. "The party proposing that the agency take action or grant a benefit has the burden to show the propriety of the agency action or entitlement to the benefit sought, unless otherwise provided by statute or federal law". In this instance, the Petitioner is proposing that the agency take action and that he is entitled to a benefit sought. Petitioner therefore, has the burden of proof to show by the

preponderance of the evidence that the IEP and the services provided by the Respondent School District were not adequate or otherwise inappropriate to satisfy the requirement of FAPE (Free Appropriate Public Education).

It is the position of the Petitioner that the Respondent failed to provide the Petitioner a "free appropriate public education" or FAPE and therefore, it would be appropriate to have the Student placed at [REDACTED]. Under IDEA, the burden of showing whether or not a school district provided FAPE rests with the Petitioner; who is usually the parents on behalf of the student who is challenging or otherwise disputing the effectiveness of the student's proposed independent educational program or IEP. *Board of Educ. of the Avon Lake City Sch. Dist. V. Patrick M.*, 9 F. Supp.2d 811, 820 (N.D. Ohio 1998) (citing *Doe v. Board of Educ. of Tullahoma City Schs.*, 9 F.3d 455, 458 (6<sup>th</sup> Cir. 1993)). See also *Schaeffer v. Weast*, 546 U.S. 49 (2005) in an administrative hearing, party seeking relief has burden of proof.

The Petitioner alleges the Respondent's proposed options with the [REDACTED] are inappropriate for the Petitioner. Because of this, the Petitioner seeks to have a determination that the appropriate placement for the Petitioner is the [REDACTED] with an order for the Respondent to pay for such placement.

### **Relief Requested**

Petitioner through Counsel has requested the following relief as a result of this Due Process Hearing. It includes the following as set forth below.

1. Respondent should be required to take the lead in making sure Petitioner is being educated in compliance with [REDACTED] IEP.
2. Respondent should be required to pay for private placement of Petitioner at [REDACTED] retroactively and henceforth.
3. Attorney fees

### **PETITIONER'S ARGUMENTS**

1. The Respondent School District Violated IDEA By Pre-Determining the Student's Placement and Failing to Provide Prior Written Notice
2. Respondent School District Failed to Offer the Student FAPE
3. The [REDACTED] Has Provided and Continues to Provide the Student With An Appropriate Education
4. The Petitioner's Parents Are Entitled To Reimbursement For Costs of Sending the Student to [REDACTED] and Attorney Fees

### **RESPONDENT'S ARGUMENTS**

1. Respondent Has Provided FAPE to Petitioner
2. The July 8, 2015 IEP Was Appropriate to Meet Petitioner's Needs
3. Placement in a General Education/Special Education Setting Was Appropriate for Petitioner
4. [REDACTED] Is An Inappropriate Placement for Petitioner

### **FINDINGS OF FACT**

1. The Parents of the Petitioner filed the request for the Due Process Hearing with the Kentucky Department of Education (KDE) on or about January 16, 2015 which was received by KDE on January 19, 2016.
2. Within Petitioner's Due Process request, Petitioner requests
  - a. That Respondent take the lead in making sure Petitioner's IEP needs are being met; and

- b. That since Respondent's contractor [REDACTED] cannot meet Petitioner's needs the Petitioner's Parents believe that [REDACTED] can meet Petitioner's needs; and
  - c. Respondent reimburse Petitioner's Parents all or part of the tuition paid to [REDACTED]
3. The Petitioner's mother was the first witness. (TT Vol. I; p. 20-177)
  4. The Petitioner was diagnosed with autism when [REDACTED] was 20 months of age. [REDACTED] is now 15 years old. (TT Vol. p.23)
  5. The Petitioner has an IQ of 42, severe communication and reading comprehension issues as well as sensory issues. (TT. Vol. I, p. 24, 32, 39-40)
  6. Petitioner engages in physical stereotypy by flapping [REDACTED] hands and running [REDACTED] fingers across [REDACTED] body. (T.T. Vol. I p. 116 & p. 113)
  7. Petitioner engages in vocal stereotypy by periodically speaking in a string of unrelated words. (T.T. Vol. I p. 116-118 & p. 318)
  8. Some of Petitioner's most pronounced deficiencies are related to critical communication skills. As part of ongoing evaluations by Respondent's staff and in state required evaluations, Petitioner shows significant gaps when compared to typically developing peers. (J.E. #12)
  9. Petitioner's Mother testified that Petitioner needs regular periods of intense vestibular input in order to reduce the occurrences of stereotypy and maladaptive behaviors. (T.T. Vol. I p. 70-79)
  10. Petitioner often wears headphones particularly in loud environments to muffle sounds, reduce unexpected loud noises and prevent maladaptive behaviors. (T.T. Vol. I; p-39-40)

11. Petitioner demonstrates anxiety and has difficulty coping with changes in [REDACTED] routine. (Vol. I, p.39-40)
12. Petitioner generally does not initiate conversation unless [REDACTED] wants something. (T.T. Vol. I, p. 257)
13. Applied Behavior Analysis (ABA) is a method of examining or otherwise considering the causes of a student's behaviors, developing programming to address those behaviors and then engaging in rigid data collection to track and measure progress. (T.T. Vol. I, p. 52-53 and p. 299)
14. Petitioner has received ABA therapy since being diagnosed with autism. It has been the cornerstone of [REDACTED] school and home based programs. (T.T. Vol. I, p. 61)
15. Petitioner is a 15 year-old resident of Respondent School District who attended the Respondent District from age 3 until he graduated from 8<sup>th</sup> grade. (T.T. Vol. I, p.27-28)
16. The Respondent School District serves students in grades Kindergarten through 8<sup>th</sup> Grade in its school building. (T.T. Vol. II, p. 443)
17. The Respondent's is Petitioner's LEA for purposes of placement in high school. (J.E. # 42 & T.T. Vol. II p. 443)
18. Respondent contracts for services of its high school students (9-12) through [REDACTED] and [REDACTED]. (T.T. Vol. II, p. 443 & 445)
19. Respondent School District provides services to preschool students who qualify through either low income or disability at [REDACTED]. (T.T. Vol. II, p. 443)
20. R [REDACTED] B [REDACTED] served as the Petitioner's speech-language pathologist for the last six years [REDACTED] was a student at Respondent. (T.T. Vol. II., p. 419)

21. I [REDACTED] K [REDACTED] served as the Petitioner's OT while [REDACTED] was a student at Respondent.  
(T.T. Vol. II, p.379)
22. C [REDACTED] S [REDACTED] served as Petitioner's special education teacher for three years while [REDACTED] attended the Respondent School District. (T.T. Vol. II p. 274)
23. Prior to serving as Petitioner's special education teacher, C [REDACTED] S [REDACTED] served as [REDACTED] aide. (T.T. Vol. II p. 274)
24. K [REDACTED] C [REDACTED] is the Respondent's Director of Special Education and served in that position during the last four years when Petitioner was a student there. (T.T. Vol. II, p. 472-3)
25. Respondent has an autism consultant who works with the District one day a week providing training for staff, conducting observations, offering strategies and working with students. (T.T. Vol. II. p. 474).
26. During the Petitioner's last year or 8<sup>th</sup> grade year with Respondent, [REDACTED] placement was part-time special education and part-time general education. (J.E. #4).  
Petitioner worked in the morning in a special education room. There [REDACTED] did a combination of small group work and one-on-one work doing math, reading, social skills, functional skills, science and social studies. [REDACTED] also did work on [REDACTED] alternate assessment. (T.T. Vol. III, p. 397). During reading, Petitioner's class would do small group reading together and then discuss that article. Petitioner would independently do the assessment thereafter. (T.T. Vol. III, p. 400-1). In math, Petitioner was doing some functional math skills with money and working on time intervals. (T.T. Vol. III, p. 402)
27. At [REDACTED], Petitioner is involved in discreet trial training most of each and every day.  
(T.T. Vol. II, p. 324)

28. By the time Petitioner graduated 8<sup>th</sup> grade at Respondent, [REDACTED] was independently able to walk in the hallways, sometimes go to the restroom on [REDACTED] own with some follow on help, as well as go to [REDACTED] locker and speech therapy. (T.T. Vol. III, p. 402)
29. On or about November 17, 2014, the Respondent's Director of Special Education, K [REDACTED] C [REDACTED] sent an email to parents of all 8<sup>th</sup> grade special education students informing them that if they were interested in sending their students to [REDACTED] they should contact her to assist in making the transition. (T.T. Vol. I, p. 79; Vol. II, p. 476; J.E. #17)
30. In an email with the date of Jan. 9, 2015, K [REDACTED] C [REDACTED] shared with Petitioner's Mother that she had received information from "Dee Dee" that Petitioner's Parents would like to have some information about [REDACTED] and [REDACTED] Schools. Ms. Clark provided contact information for [REDACTED] and noted that [REDACTED] would send a placement specialist to Respondent's school to observe the Petitioner in order to begin the transition process. (J.E. #18)
31. [REDACTED] is divided into different geographical regions of [REDACTED] County. It has a placement specialist assigned to each region to assist with the transition process for students with disabilities to high school. The placement specialist for Respondent's region was R [REDACTED] P [REDACTED]. (J.E. #17)
32. Petitioner's Mother shared with Ms. C [REDACTED] that they were interested in looking at [REDACTED] and [REDACTED] for a possible placement for the Petitioner. (T.T. Vol. II, p.477)
33. Petitioner's Parents received information that there were openings at 3 high schools in the [REDACTED] system. They were [REDACTED] [REDACTED] and [REDACTED] if transportation was needed. (J.E. #27; T.T. Vol. I p. 88)



34. Petitioner's Parents sent Respondent a release form so that [REDACTED] could access the Petitioner's records. (J.E. #19)
35. The Petitioner's Parents arranged a visit to [REDACTED] School on Tuesday March 17, 2015 at 1:00 p.m. (J.E. #21 & T.T. Vol. I at p. 186-188)
36. After the tour of [REDACTED] School, Petitioner's Parents met with the special education director. They presented the director with Petitioner's IEP. In response to examining the IEP, the special education director said it would have to be changed if Petitioner attended [REDACTED] School. (T.T. Vol. I, p. 187-188 & P# 74)
37. The Petitioner's Parents were informed through Ms. K [REDACTED] C [REDACTED] that [REDACTED] did not have a place for the Petitioner. (T.T. Vol. I, p. 87 & Vol. II p. 492.)
38. Petitioner's Parents indicated that their initial interest in [REDACTED] School was due to an [REDACTED] student with a milder form of autism who had a good experience there. (T.T. Vol. I p. 208)
39. The Petitioner's Parents toured [REDACTED] School on Wednesday May 27, 2015. (J.E. #28)
40. Petitioner's Mother had several issues with [REDACTED] School based upon the tour of May 27, 2015. She was concerned about the number of students the speech teacher was providing services (200) and the fact there was not a dedicated OT person. (J.E. #28)
41. Petitioner's Father testified that he was concerned about the emphasis on collaboration and the use of "peer tutors" and of aides for instruction. (T.T. Vol. I; p. 193-95)

42. In her email of May 27, 2015, Petitioner's Mother after visiting [REDACTED] School wrote: "We don't want to see anymore [REDACTED] schools. We have seen what we need. We need to talk about other options including private schools". (J.E. #28)
43. After the tour of [REDACTED] School, Petitioner's Parents made a "Request to Place an Item on the Agenda" for a future meeting of the Respondent's School Board. (T.T. Vol. I p. 200-206 & P# 30)
44. The purpose of addressing the Respondent's Board was to request financial support to send Petitioner to [REDACTED]. On the second page of the request: "We would like (Respondent) to provide the financial support for (Petitioner) to attend high school that could better meet [REDACTED] IEP goals with the preferred choice being the [REDACTED] that provides one-on-one instruction for children with autism including children with conditions as severe as (Petitioner)". (P#30)
45. On or about June 3, 2015, the Petitioner's Parents met with K [REDACTED] C [REDACTED] Petitioner's special education teacher and Respondent's Superintendent [REDACTED] to discuss the transition process. Petitioner's Parents inquired about the possibility of entering into a contract with [REDACTED]. (JE #29 & T.T. Vol. I, p. 199)
46. On or about Wednesday June 3, 2015, Petitioner's Father requested a copy of the [REDACTED] contract that Respondent had provided him for [REDACTED] County. (J.E. # 29)
47. On or about Wednesday June 9, 2015, Petitioner's Mother communicated with Respondent's Special Education Director and Superintendent her concerns about [REDACTED] School after the tour and a conversation with T [REDACTED] G [REDACTED] the [REDACTED] Autism Program Specialist. These concerns were: "The OT is considered related services and is embedded in the classroom via the teacher vs. any pull out with a separate OT. There are not any OT rooms in any of their schools like

Respondent has with I [REDACTED] K [REDACTED] Speech is sometimes 1:1, but mostly group or within the classroom". She compared Petitioner's OT to private services vs. part of normal school services. (J.E. # 33 & T.T. Vol. II, p. 199)

48. The Respondent's Board turned down Petitioner's request to pay tuition in part or full for the Petitioner to attend [REDACTED] (J.E. #14 and T.T. Vol. I p. 207)

49. A transition ARC was held at [REDACTED] School on July 28, 2015.

[REDACTED] was one of three sites offered to the Petitioner based on space availability. (T.T. Vol. I p. 89; J.E. #27)

50. The IEP that was amended on March 30, 2015 was not used as the basis for transition planning for the ARC meeting held on July 28, 2015. The IEP that was utilized for that meeting was the one from January 16, 2015. (J.E. # 45, # 46)

51. The differences between the January and the March 2015 amended version of the IEPs were (1) the March version 2015 amended IEP contained some updated information on the Petitioner based upon assessments that were conducted in the spring semester of 2015; (2) the present level of communication was different on the March version because it mentioned one-to-one speech; and (3) movement breaks for Petitioner in the gym appeared in the March amended version of the IEP. (J.E. # 9; T.T. Vol. II, p. 482)

52. In attendance at the July 28, 2015 ARC meeting where the proposed IEP and placement were developed were the following individuals: Both of Petitioner's Parents; R [REDACTED] P [REDACTED] Placement Specialist; R [REDACTED] B [REDACTED] Respondent's speech/language pathologist; L [REDACTED] K [REDACTED] Respondent's OT; I [REDACTED] C [REDACTED] OT/PT Specialist; C [REDACTED] M [REDACTED] OT; T [REDACTED] G [REDACTED] Autism Specialist; and K [REDACTED] C [REDACTED] Respondent's Director of Special Education. (J.E. 10)

53. The Tuesday July 28, 2015 ARC Meeting was chaired by a [REDACTED] District Representative R [REDACTED] P [REDACTED] (J.E. 10 p. EG-00239) Petitioner's Father expressed reservations about someone from [REDACTED] chairing the meeting. (J.E. # 10 p. 00234)
54. A placement analysis took place at the July 28, 2015 ARC Meeting. (T.T. Vol. II, p. 479)
55. During the July 28, 2015 ARC Meeting, those who had worked with the Petitioner at Respondent School District discussed their work with the Petitioner as well as [REDACTED] progress and [REDACTED] needs. This included [REDACTED] special education teacher C [REDACTED] S [REDACTED] speech teacher Ms. B [REDACTED] and [REDACTED] OT Ms. K [REDACTED] (J.E. # 10, T.T. Vol. II, p. 509 & Vol. II, p. 85)
56. During the July 28, 2015 ARC Meeting, the Parties started with a full-time general education placement which was rejected for reasons set forth in the ARC report. (J.E. #10)
57. The July 2015 ARC determined, after discussing a range of options, that Petitioner the appropriate placement for Petitioner would be part-time general education and part-time special education. [REDACTED] would have special education for core content classes, speech and daily living skills. [REDACTED] elective classes would be general education. (T.T. Vol. II, p. 479. Vol. III, p. 675-678. J.E. # 11)
58. The proposed classroom at [REDACTED] for Petitioner was in the MSD (moderate to severe) classroom. There are 3 such classrooms located next to each other which allows students to change classes like other students and allows teachers flexibility to group students according to their abilities. (T.T. Vol. III. p. 611-612, 650)
59. The July 2015 ARC determined that Petitioner would be provided OT for 30 minutes three times a week. (T.T. Vol. III, p. 543) Everyone in attendance at the

ARC agreed with this OT proposal for Petitioner for the 2015-16 school year if [REDACTED] attended a [REDACTED]. (T.T. Vol. II. p. 389; Vol. III p. 545)

60. Petitioner's last IEP (before July 2015) was created as a result of the March 2015 ARC meeting. (J.E. #9 and Vol. II., p. 274)

61. Some of Petitioner's current academic challenges are in the area of "speech".

According to [REDACTED] current IEP—"(Petitioner) has difficulty with vocabulary/concepts, speaking in complete sentences, saying things not repeated after someone, making word associations for answering questions, and answering those questions (literal and inferential) without echolalia. (J.E. # 9 p. 1; T.T. Vol. II at p. 275)

62. Petitioner's last or current IEP was for the period 01/16/2015 to 01/15/2016. (J.E. #9)

63. There was an ARC Meeting held on 03/30/2015. The purpose of the meeting was to review recent evaluation results and revise the IEP. "The ARC amended the IEP based upon the evaluation results." (p. R-000128) (J.E. #5)

64. The updated IEP is found at J.E. #9.

65. The updated IEP states that Petitioner needs speech services in a one-on-one setting as [REDACTED] does not model from [REDACTED] peers. A group setting has been tried in the past, but has not been successful. (J.E. #9 at p. EG-0198)

66. K [REDACTED] C [REDACTED], Petitioner's special education teacher for the Respondent said [REDACTED] needs movement breaks such as using a swing or other types of vestibular movement. Respondent, according to [REDACTED] IEP, is only able to work for about 20 minutes without a break. (T.T. Vol. II p. 289-290)

67. K [REDACTED] O [REDACTED] is the Director of Special Education for Respondent when Petitioner was in attendance there. (T.T. Vol. II, pp. 472-3)
68. In response to Petitioner's Parents rejecting [REDACTED] School as placement for Petitioner, Petitioner's Parents requested a meeting of the ARC. (J.E. #46) Within the hearing transcript and exhibits, evidence was not presented that another ARC was held following the one held on July 28, 2015.
69. Respondent has an autism consultant who works with the Respondent District one day a week providing training for staff, conducting observations offering strategies and working with students. (T.T. Vol. p. 474)
70. On June 9, 2015, Petitioner's Parents spoke with T [REDACTED] G [REDACTED] Autism Specialist regarding their concerns about [REDACTED] and to discuss other options within the [REDACTED] system. (T.T. Vol. I, p. 199)
71. In examining IEPs created in 2015, all contain references to "Least Restrictive Environment (LRE) Environment".
72. Ms. C [REDACTED] M [REDACTED] is the Occupational Therapist for [REDACTED] School. She serves 3 students at that school (T.T. Vol. III p. 540)
73. Ms. M [REDACTED] does not know the Petitioner. (T.T. Vol. III, p. 548-549)
74. Ms. M [REDACTED] testified that she had spoken with the OT who worked with Petitioner at the Respondent School District. She was told that Petitioner's writing skills were good. [REDACTED] writes well on lined paper. The Respondent's OT saw the Petitioner 3 times a week in a resource room. The swing was used during her work with the Petitioner. (Vol. III at p.541)
75. Ms. M [REDACTED] testified that [REDACTED] did not have a swing but vestibular input could be provided in other ways. (T.T. Vol. III p. 541) She gave examples of other

- ways for providing vestibular input for the Petitioner. They included vocational activities such as working with the recycling cart, sitting on therapy balls, and watering plants. She also mentioned use of the trampoline. (T.T. Vol. III p. 542)
76. Ms. M [REDACTED] mentioned that the "swing" may not be age appropriate for someone Petitioner's age. (T.T. Vol. III, p. 543)
77. Dr. T [REDACTED] G [REDACTED] is the [REDACTED] Autism Program Director. Among her responsibilities are deciding on curriculum for autism classroom and social communication programming in the classroom. She also does professional development at the district level. (T.T. Vol. III , p.560)
78. Dr. G [REDACTED] testified that she had reviewed Petitioner's file at [REDACTED] (T.T. Vol. III p. 572)
79. After reviewing Petitioner's file from [REDACTED] Dr. G [REDACTED] has concerns about "the discrete trial training throughout the majority of Petitioner's day and [REDACTED] ability to generalize skills from that training". (T.T. Vol. III at p. 572)
80. Dr. G [REDACTED] was concerned about the ABLLS Curriculum at [REDACTED] She believes that ABLLS is for students up to 72 months. (T.T. Vol. III at p. 573)
81. Petitioner's Parents notified the Respondent through Ms. K [REDACTED] that Petitioner would be enrolled at [REDACTED] during the 2015-16 school year. (T.T. Vol. II p. 481)
82. All of the students at [REDACTED] have special needs. (T.T. Vol. II, p. 337)
83. On or about August 24, 2015, Petitioner's Parents requested to schedule an ARC Meeting with the Respondent to discuss their concerns about "the transitions meeting with [REDACTED] and why their placement was not appropriate..." (J.E.#46)
84. The Petitioner's Parents unilaterally enrolled the Petitioner at [REDACTED] in July 2015. (T.T. Vol. I, p. 113)

85. At the time of the hearing, [REDACTED] was not implementing Petitioner's IEP. (T.T. Vol. II, p.338)
86. At the time of the hearing, [REDACTED] was not providing OT services as required by Petitioner's July 2015 IEP. (T.T. Vol. II, p.336)
87. [REDACTED] uses a curriculum developed by its director based on ABLLS, a program designed for students with skills up to 72 months of age. (T.T. Vol. II, p. 483, & Vol. III, p. 573)
88. [REDACTED] did not contact Petitioner's teachers at Respondent's school or observe [REDACTED] there. (T.T. Vol. II, p. 337)
89. Tuition for Petitioner at [REDACTED] is \$26,250.00 per year. (T.T. Vol. I p. 115)  
Petitioner's Parents asked the Respondent's Board if it would pay the \$26,250.00 or the \$18,000 it would pay to send a student to [REDACTED] or [REDACTED]
90. [REDACTED] indicated that it could implement the Petitioner's IEP. (T.T. Vol. III, p. 572, 622)
91. Respondent's special education personnel indicated that [REDACTED] could provide an appropriate placement for Petitioner and implement [REDACTED] IEP. (T.T. Vol. III, p. 480)
92. [REDACTED] staff use evidence based practices with students including, but not limited to, applied behavior analysis (ABA). (T.T. Vol. III, p. 570)
93. All of the Parties involved including the Petitioner agree that the Respondent provided Petitioner FAPE for grades pre-school and K through 12. (T.T. Vol. I, p. 231-232)
94. Nothing was presented to indicate that Respondent responded to Petitioner's Mother's request of August 24, 2015 of an ARC meeting with only Respondent's Personnel. (J.E. #47 and #48)



95. L [REDACTED] E [REDACTED] the Program Director for the [REDACTED] testified. (T.T. Vol. II p. 296-348)  
She described [REDACTED] as a center-based ABA (applied behavior analysis program) with two campuses. One for students ages 3 to 11 and another for students 12 to 21. She is a Board Certified Behavior Analyst. (P#30)
96. No one from [REDACTED] contacted Petitioner's classroom teachers at the Respondent or observed the Petitioner in the classroom setting prior to [REDACTED] enrollment. (T.T. Vol. II; p. 406)
97. I [REDACTED] E [REDACTED] testified that Petitioner is not receiving OT at [REDACTED] (T.T. Vol. II, p. 335-336)
98. All of the students at [REDACTED] are disabled. [REDACTED] does have programs to teach students to work in the community with non-disabled peers and students from local schools work with [REDACTED] students one day a week. (T.T. Vol. II p. 305 & 327)
99. Ms. E [REDACTED] testified that the Petitioner has demonstrated progress in [REDACTED] physical and vocal stereotypy which is down significantly and [REDACTED] is less aggressive since attending [REDACTED]. (T.T. Vol. I p. 117-120; Vol. II p. 313-323 & PE# 34-36)
100. The teaching staff at [REDACTED] are not teachers certified by the state. (T.T. Vol. II, p. 336-337)
101. J [REDACTED] K [REDACTED] is a BCBA. He was hired by Petitioner's family as his "Program Supervisor". He testified that he provides private consultation services to Petitioner's family. He performs direct assessments and observations with the Petitioner. Occasionally, he will do some direct work with the Petitioner. (T.T. Vol. II p. 350-354 & P# 11)
102. J [REDACTED] K [REDACTED] has 201.5 direct face to face hours with Petitioner. (T.T. Vol. II p. 355)

103. Mr. K [REDACTED] believes that Petitioner's IEP is "pretty standard" and there is "nothing extraordinary about it". (T.T. Vol. II p. 359)

104. Mr. K [REDACTED] observed Petitioner at [REDACTED] in a small group activity using a SMART Board. (T.T. Vol. 359-360)

105. Mr. K [REDACTED]'s biggest objection to attending [REDACTED] School is the use of "peer tutors". He believes that Petitioner learns best in a "one on one setting". (T.T. Vol. II p. 365-369)

106. L [REDACTED] K [REDACTED] was Petitioner's OT at Respondent's school. On March 2015, she helped determine that Petitioner should have 30 minutes of OT, 3 times a week. (T.T. Vol. II p. 383-384)

107. According to Ms. K [REDACTED] Petitioner made improvements with being able to tolerate being around other students over the previous year. (T.T. Vol. II p. 384)

### **DECISION**

This is an appeal that has many dimensions based upon the issues raised by the Parties during litigation. The focus of this decision is the proper placement for the Student based upon law and the facts presented. After due consideration of the evidence presented during the three days of hearing, Exhibits and the Arguments of the Parties, this Hearing Officer issues the following decision based upon the issues contained in the Due Process Hearing Request with the date of January 16, 2016.

#### **I.**

#### **Whether Respondent Violated IDEA by Pre-determining Petitioner's Placement and Failing to Provide Prior Written Notice**

The Petitioner cites *P.C. v. Milford Exempted Village Schools, No.1:11-CV-, 2013 WL 209478 at \*7* (S.D. Ohio Jan. 17m 2013) which relies on *Deal v. Hamilton County Board of Education*, 292 F.3d 840, 857(6<sup>th</sup> Cir. 2004) in respect to the pre-determination issue. A predetermined change of placement in violation of the IDEA has to be borne out by the record. The standard of review here is de novo because "predetermination is . . . a mixed question of law and fact". *Deal*, 392 F.3d at 857; *Knable v. Bexley City Schools*, 238 F.3d 755 at 766 (6<sup>th</sup> Cir. 2001). Petitioners contend, that the preponderance of evidence shows that Respondent's school officials did not walk into the first IEP meeting with open minds because they had already made up their minds about Petitioner's placement for high school.

The record in this appeal presents a contrary picture. The Respondent informed the Petitioner's Parents that as a public school, they contracted with neighboring county districts [REDACTED] and [REDACTED]. The Petitioner's Parents initially were interested in [REDACTED] School. Petitioner's Parents were told that in the [REDACTED] District there were openings in [REDACTED], [REDACTED] and [REDACTED]. (F.F. 33) They also expressed an interest in [REDACTED] School. Petitioner's Parents indicated that their initial interest in [REDACTED] School was due to an [REDACTED] student with a milder form of autism who had a good experience there. (F.F. 38)

When the records and testimony is examined regarding the ARC meeting of July 28, 2015, there is significant discussion about a potential education plan for Petitioner's first year in high school. There was discussion of whether [REDACTED] should have a full-time general education placement, which was rejected. (F.F. 55) There was a discussion of a range of options that resulted in determining that the appropriate IEP for Petitioner would

contain special education for [REDACTED] core content classes such as speech and daily living skills. [REDACTED] elective classes would be general education class. (F.F. 57)

There is no indication in the record provided this Hearing Officer that a special education only placement would be appropriate for the Petitioner. There is also no indication that the Petitioner decided to attend [REDACTED]

Therefore, this Hearing Officer rules that the Respondent did not predetermine a placement for Petitioner.

## II.

### ***Whether Respondent Failed to Give Written Notice of Its Refusal to Change Petitioner's Placement to [REDACTED].***

Petitioner raises an issue which was not raised in [REDACTED] Due Process request nor was it raised during the three days of the hearing. However, this Hearing Officer will discuss this issue and make a ruling.

Petitioner cites **34 CFR 300.503(a)** which concerns the change of educational placement of an existing placement of a student. This situation is different than what was anticipated under the regulation. It does not concern a situation where a student is transitioning due to completion or graduation from K-8 to 9-12. This is a situation where the Petitioner has been educated by Respondent for K-8. (FF 15) [REDACTED] is graduating from the Respondent's 8<sup>th</sup> grade program. This case concerns a transition from K-8 to high school. As public school, Respondent has contracted with two neighboring public school districts to educate students in grades 9-12 within its geographical district. (FF 18)

On or about November 17, 2014, the Respondent's Director of Special Education, K [REDACTED] C [REDACTED] sent an email to parents of all 8<sup>th</sup> grade special education students

informing them that if they were interested in sending their students to a [REDACTED] high school, they should contact her to assist in making the transition. In an email with the date of Jan. 9, 2015, K [REDACTED] C [REDACTED] shared with Petitioner's Mother that she had received information that Petitioner's Parents would like to have some information about [REDACTED] and [REDACTED] Schools. Ms. C [REDACTED] provided contact information for [REDACTED] [REDACTED] School and noted that [REDACTED] would send a placement specialist to Respondent's school to observe the Petitioner in order to begin the transition process.

(FF 29, 30)

Petitioner's contention that this was a situation where Respondent failed to give written notice of its refusal to pay for Petitioner's placement at [REDACTED] is misplaced.

### III.

#### ***Whether Respondent Abdicated Its Role As Local Education Authority or LEA.***

This is an interesting accusation against the Respondent. Petitioner makes a three page argument in its original brief on page 15-18.

In reviewing the record, it seems that the Respondent notified the Petitioner's Parents of the need to begin transition planning for high school as early as November 2014. (F.F. 29) Petitioner was given a choice of going to high school in [REDACTED] or one of the high schools in [REDACTED]. (F.F. 30)

There was only one instance where Respondent seemed to abdicated its responsibility. After the Petitioner's Mother requested an ARC Meeting with only Respondent's Personnel, there was no response to that request. (F.F. 94)

In respect to the allegations within this argument regarding the IEP, they will be discussed in the in the section below regarding FAPE.

## IV.

### ***Whether Respondent Failed to Offer Petitioner FAPE.***

As set forth by Petitioner, all students in this nation are guaranteed FAPE under IDEA.

- The term "FAPE" means special education and related services that---
- (A) Have been provided at public expense, under public supervision and direction and without charge;
  - (B) Meet the standards of the State educational agency;
  - (C) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
  - (D) Are provided in conformity with the individualized education program required under section 1414(d) of this title. **20 U.S.C. § 1401.**

There are several dimensions to providing FAPE including LRE and "Educational Benefit". The first dimension that will be discussed is LRE or placement in the Least Restrictive Environment.

#### LEAST RESTRICTIVE ENVIRONMENT

The least restrictive environment (LRE) requirements of Part B of the IDEA have been included in the law in their present form since 1975. This provision, which states IDEA's strong preference is for educating students with disabilities in regular or general classes with appropriate aids and supports, is found in the statute at **20 USC 1412(a)(5)** and is implemented by **34 CFR 300.114-300.120**. School districts must have in place procedures assuring that, "to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such

that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

The Federal regulation is set forth below.

**§ 300.114 LRE requirements.**

**(a) General.**

(1) Except as provided in § 300.324(d)(2) (regarding children with disabilities in adult prisons), the State must have in effect policies and procedures to ensure that public agencies in the State meet the LRE requirements of this section and §§ 300.115 through 300.120.

(2) Each public agency must ensure that—

(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily

In Kentucky the applicable regulation is **707 KAR 1:350. Placement Decisions—**

It is as follows---

Section 1. Placement Decisions. (1) An LEA shall ensure that to the maximum extent appropriate, children with disabilities, including children placed by the LEA in public or private institutions or other care facilities, **are educated with children who are nondisabled (emphasis added)**. The LEA shall ensure that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if education in the regular education environment with the use of supplementary aids and services cannot be satisfactorily achieved due to the nature or severity of the disability.

(2) An LEA shall ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

(3) The continuum shall include the alternative placements of:

(a) Instruction in regular classes;

(b) Special classes;

(c) Special schools;

(d) Home instruction; and

(e) Instruction in hospitals and institutions.

(4) The LEA shall make provision for supplementary services to be provided in conjunction with regular class placement.

(5) **In determining the educational placement of a child with a disability, the LEA shall ensure that the placement decision is made by the ARC in conformity with the least restrictive environment provisions. (Emphasis added)**

(6) A child's placement shall be:

(a) Determined at least annually;

(b) Based on the child's IEP; and

(c) As close as possible to the child's home.

(7) Unless the IEP of a child with a disability requires some other arrangement, the child shall be educated in the school that he would attend if nondisabled.

(8) In selecting the least restrictive environment, consideration shall be given to any potential harmful effects on the child or on the quality of services that he needs.

(9) A child with a disability shall not be removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum.

(10) In providing or arranging for the provision of nonacademic and extracurricular services and activities, an LEA shall ensure that a child with a disability participates with nondisabled children in those services and activities to the maximum extent appropriate to the needs of the child.

In reaching a decision regarding LRE, attention must be given to the testimony of the educational professional. *Hartmann V. Loudon County Bd. Of Educ.*, 118, F.3d. 996 (4<sup>th</sup> Cir. 1997) There must be consideration to the educational professionals.

As set forth in *Hartman*:

*The court failed to mention, let alone discuss, critical administrative findings inconsistent with its conclusions. While making much of the credentials and credibility of witnesses endorsing full inclusion, the court gave little or no attention to the testimony of Loudoun professionals. In some instances the court, without listening to local educators, discounted their views despite the fact that the hearing officer had found them credible. One Loudoun official was dismissed outright as "a philosophical opponent of inclusion" for daring to state that he saw no evidence that Mark had progressed in the regular classroom.*

*IDEA encourages mainstreaming, but only to the extent that it does not prevent a child from receiving educational benefit. The evidence in this case demonstrates that Hartmann was not making academic progress in a regular education classroom despite the provision of adequate supplementary aids and services. Loudoun County properly proposed to place Hartman in a partially mainstreamed program which would have addressed the academic deficiencies of his full inclusion program while permitting him to interact with non-handicapped students to the greatest extent possible. This **professional judgment by local educators was deserving of respect. The approval of this educational approach by the local and state administrative officers likewise deserved deference from the district court which it failed to receive. (Emphasis added)** In rejecting reasonable pedagogical choices and disregarding well-supported administrative findings, the district court assumed an educational mantle which the IDEA did not confer. Accordingly, the judgment must be reversed, and the case remanded with directions to dismiss it.*

In the testimony at the hearing, the local educators indicated that LRE was appropriate for the Petitioner. This included those who had worked with Petitioner while at Respondent's school district and those with [REDACTED] (F.F. 91, 92)



One of the primary issues is the allegation by the Petitioner that he was denied Free Appropriate Public Education (FAPE). This is interwoven with Petitioner's claim that Respondent did not make appropriate placement decisions.

Pursuant to **707 KAR 1.290, Section 1**, FAPE must be provided to each child with a disability even though the child has not failed or been retained in a course and is advancing from grade to grade, based on the child's unique needs, and not on the child's disability. The education provided must be based upon an appropriate IEP, developed after a thorough assessment of the student's unique special education needs.

The Supreme Court has explicitly rejected the argument that school districts are required to provide services "sufficient to maximize each child's potential commensurate with the opportunity provided other children." **Rowley**, at 198, 102 S.Ct. 3034 (internal citation omitted (finding no congressional intent to achieve strict equality of opportunity or services); see **Renner v. Bd. of Educ. of the Pub. Sch.**, 185 F.3d 635, 644 (6th Cir. 1999). At the same time, however, the services provided must be reasonably calculated to confer a meaningful educational benefit. See **Deal** at 862; **Cypress-Fairbanks Indep. Sch. Dist. V. Michael F.**, 118 F.3d 245, 247 (5<sup>th</sup> Cir. 1997). This means that the student will receive a basic floor of opportunity, specifically designed to meet the child's unique needs, *supported by services that will permit him to benefit from the instruction. Id.*, at 247-248, emphasis added. That basic floor of opportunity must be reasonably likely to produce more than trivial progress. See **Michael F.** 118 F.3d at 248.

Two questions must be asked in evaluating any IEP. **Deal v. Hamilton County Bd. of Educ.**, 392 F.3d 840, 853-54 (6th Cir. 2004). First, the finder of fact must determine whether the school system has complied with the procedures set forth in the IDEA. *Id.*, citing **Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v.**

**Rowley**, 458 U.S. 176, 206, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982); **McLaughlin v. Holt Pub. Sch. Bd. of Educ.**, 320 F.3d 663, 669 (6th Cir. 2003). Second, the finder of fact must assess whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefits. **Rowley**, 458 U.S. at 206-07, 102 S. Ct. 3034. The case involved a deaf student who was an excellent lip reader. Her parents asked for an interpreter, but the school said she didn't need one because she was doing well in school. Her parents countered that she could be doing better and wasn't reaching her full potential. In the end the U.S. Supreme Court sided with the school, saying the law requires schools to provide a "basic floor of opportunity." It doesn't require them to "maximize" a child's potential.

Then, in a U.S. Court of Appeals case involving a child with learning disabilities, the court used the following analogy:

[IDEA] requires that ... schools provide the educational equivalent of a serviceable Chevrolet to every [qualified] student.... [Schools are] not required to provide a Cadillac. From **Doe v. Tullahoma City Schools** 9 F.3d 445 at 26 (1993)

Since then, a lot of courts (and schools) have used these exact words. The Chevy vs. Cadillac analogy—and the language of the law—give a rough idea of what students are entitled to.

In reviewing the record herein, the answer Respondent had procedures and followed them to establish the IEP.

**WAS THE IEP CALCULATED TO ENABLE PETITIONER TO RECEIVE AN EDUCATIONAL BENEFIT?**

To be valid, an IEP, as stated herein above, must be *reasonably calculated* to enable the child to receive educational benefit. The IEP generated by the ARC in July

2015, had input from Respondent's personnel and Petitioner's parents as well as [REDACTED] special education personnel. (F.F. 52)

[REDACTED] would have special education for core content classes, speech and daily living skills. [REDACTED] elective classes would be general education. (F.F. 57) The proposed classroom at [REDACTED] for Petitioner was in the MSD (moderate to severe) classroom. There are 3 such classrooms located next to each other which allows students to change classes like other students and allows teachers flexibility to group students according to their abilities. (F.F. 58) The July 2015 ARC determined that Petitioner would be provided OT for 30 minutes three times a week. (F.F. 59)

The private consult hired by Petitioner's family in talking about the IEP said it "is pretty standard" and there is nothing extraordinary about it. (F.F. 103) Based upon the "is pretty standard" comment, it can be surmised that in his opinion the IEP provided FAPE.

From reading the record in this appeal the Hearing Officer, finds the Respondent offered Petitioner an IEP reasonably calculated for him to make educational progress.

## V.

### ***Whether the [REDACTED] Has Provided and Continues To Provide Petitioner with An Appropriate Education***

The Petitioner contends that the [REDACTED] is the appropriate educational placement for the Student and the education being provided by [REDACTED] is appropriate for reimbursement. The burden of proof is on the Petitioner to show by the preponderance of the evidence that the services provided by the Respondent School District were not

adequate or otherwise inappropriate to satisfy the requirement of FAPE and the services provided by BCA were appropriate. In *Forest Grove School Dist. v. T. A.* 557 U.S. 230 (2009) the U.S. Supreme Court decided: *The IDEA Amendments of 1997 did not modify the text of §1415(i)(2)(C)(iii), and we do not read §1412(a)(10)(C) to alter that provision's meaning. Consistent with our decisions in Burlington and Carter, we conclude that IDEA authorizes reimbursement for the cost of private special-education services when a school district fails to provide a FAPE and the private-school placement is appropriate, (emphasis added) regardless of whether the child previously received special education or related services through the public school.*

The question here is, is [REDACTED] providing the Petitioner FAPE?

All of Petitioner's IEPs developed in 2015 indicated a need for the Petitioner to be educated in a LRE setting. The evidence presented during the hearing indicate that all of the students at [REDACTED] have "special needs". (F.F. 82) There is no interaction with general education students.

One of the elements of Petitioner's IEP was the provision for OT. The IEP established that Petitioner was to receive 30 minutes of OT, 3 times a week. (F.F. 106) Ms. E [REDACTED] the [REDACTED] Director testified that Petitioner was not receiving OT. (F.F. 86 & 96)

During the hearing concern was expressed that Petitioner was strictly receiving "special education" services and little or no "general education" services. (F.F. 27, 79, 80 & 87) It was admitted that [REDACTED] was not implementing Petitioner's IEP. (F.F. 85) What is more concerning, is there was no testimony presented that [REDACTED] was attempting to satisfy the elements or services contained in Petitioner's IEP.

However the evidence presented does not indicate that the Student would receive any specific services that he is could receive from the [REDACTED] that the Respondent could not provide. In fact there are indications that [REDACTED] is able to provide services that [REDACTED] is unable to provide.

Therefore [REDACTED] is not providing a program that meets FAPE eligibility for this Petitioner.

## VI.

### PETITIONER'S ENTITLEMENT TO REIMBURSEMENT

One of the issues is whether the Petitioner is entitled to reimbursement for attendance during the 2015-16 school year at [REDACTED]. The applicable law is set forth in **CFR 300.140** which is set forth below.

#### **Sec. 300.148 Placement of children by parents when FAPE is at issue.**

(a) General. This part does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility *if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility.* However, the public agency must include that child in the population whose needs are addressed consistent with Sec. Sec. 300.131 through 300.144.

The U.S. Supreme Court answered the question of whether reimbursement was possible for a parent initiated unilateral placement in its opinion in ***School Committee of Burlington v. Dept. of Education of Massachusetts***, 471 U.S. 359 (1985). The opinion in ***Burlington*** held that a school district would have to reimburse the costs of a parent's unilateral private placement for their disabled child if the following findings were made:

1. The school's IEP is found inappropriate (i.e. not reasonably calculated to confer meaningful educational benefit to the Child), and
2. the private program is found to be appropriate under the IDEA.

In cases where the private school has a teaching method parents deem superior to that in the public school was insufficient to support a reimbursement claim *in D.G. v. Cooperstown, Cent. Sch. Dist.*, 55 IDELR 155 (N.D.N.Y. 2010). The court found that the public school offered a multisensory reading program, just not the one preferred by the parent. It did not matter that the parent believed the private school's program superior and would promote maximum progress, as long as the public school offers a program reasonably calculated to confer educational benefit. In addition, the IEP was properly developed, with appropriate present levels of performance, and proposed an appropriate placement in an integrated classroom with additional small-group instruction.

As the Respondent provided Petitioner FAPE options with its contractor [REDACTED] and Petitioner failed to prove that the unilateral placement by [REDACTED] parents in a private school was appropriate; Petitioner's request for reimbursement is denied.

#### ATTORNEY FEES

Under IDEA, 20 U.S.C. § 1415 the award of attorney fees is under the jurisdiction of the district courts of the United States. Specifically **20 U.S.C. § 1415 (i) (3) (A) and (B)** is set forth below.

#### **(3) Jurisdiction of district courts; attorneys' fees**

##### **(A) In general**

The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

##### **(B) Award of attorneys' fees**

- (i) In general in any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs—  
(I) to a prevailing party who is the parent of a child with a disability;

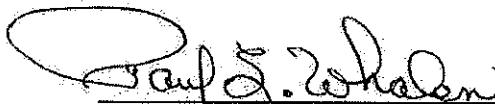
The Hearing Officer is without the ability to award attorney fees to a prevailing party in a Due Process Hearing.

**ORDER**

Based upon the discussion set forth above:

1. There were ARC Meetings during the second semester of the 2014-2015 school year with input from the Petitioner's Parents and those who had worked with Petitioner while he attended Respondent School District. These individuals developed and designed an appropriate IEP for Petitioner's 2015-2016 school year which would provide FAPE.
2. The IEP developed for Petitioner by Respondent in July 2016 was not used or otherwise replicated by [REDACTED] for the Petitioner. [REDACTED] did not many of the services which were to be provided to the Petitioner by Respondent's contractor including O.T.
3. Petitioner failed to prove by a preponderance of the evidence that the Respondent's contractor for high school services [REDACTED] could not provide FAPE to the Petitioner.
4. Petitioner is not entitled to tuition reimbursement for Petitioner's placement at [REDACTED]
5. The Petitioner's request for attorney fees is denied as set forth above.

Therefore, Petitioner's appeal is denied in its entirety.



PAUL L. WHALEN, Esq.  
Due Process Hearing Officer

Entered this 5<sup>th</sup> day of July 2016.

**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) as assigned by the Kentucky Department of Education. 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 the date of the hearing officer's decision.

The address is: Kentucky Department of Education  
Office of Legal Services  
500 Mero Street; 1<sup>st</sup> Floor  
Frankfort, Kentucky 40601

CC: Via Email & U.S. Mail Postage Pre-paid to:

Tina Drury @ KDE

