

COMMONWEALTH OF KENTUCKY  
DEPARTMENT OF EDUCATION  
DIVISION OF EXCEPTIONAL CHILDREN SERVICES  
AGENCY CASE NO. 1112-23

[REDACTED]

APPELLANT

v.

**DECISION AND ORDER**

[REDACTED]

APPELLEE

**INTRODUCTION**

This case comes before the Exceptional Children Appeals Board panel (hereinafter "ECAB," following a six day hearing conducted by Hearing Officer Paul Whalen. The panel, consisting of Karen L. Perch, Mike Wilson, and Kim Hunt Price, was appointed on May 14, 2013 to consider the appeal of the student. Having reviewed the record in its entirety, this ECAB first provides some general background for the case and then issues some additional findings of fact in support of its ultimate conclusions. One panel member has issued a dissent as to one item only, which is also discussed herein below.

On appeal, the student has raised nine issues for this appeal. The issues raised by the student are:

1. The Hearing Officer incorrectly found that the Respondent school district implemented the Petitioner's IEP.
2. The Hearing Officer incorrectly found that the Respondent school district designed an appropriate IEP.
3. The Hearing Officer incorrectly found that the Respondent school district made appropriate placement decisions with regard to the Petitioner's educational placement.

4. The Hearing Officer incorrectly found that the Respondent school district provided the Petitioner with a free appropriate public education.
5. The Hearing Officer failed to make findings regarding or address the Petitioner's allegations of improper ARC membership.
6. The Hearing Officer failed to make findings regarding or addressing the Petitioner's allegations of the Respondent's failure to offer a continuum of alternative placements.
7. The Hearing Officer failed to make findings regarding or address the Petitioner's allegations of the Respondent's good faith efforts to assist the Petitioner in achieving IEP goals.
8. The Hearing Officer incorrectly found that the Petitioner is not entitled to compensatory education.
9. The Hearing Officer incorrectly found that the Petitioner is not the prevailing party and not entitled to attorney fees.

### **BACKGROUND**

This case involves a student whose disability category is Other Health Impaired. The student has been diagnosed with epilepsy. Some witnesses say the student has severe apraxia and severe dysarthria (TE 116-117). The childhood apraxia expert hired by the parents to do an evaluation reported that the student does not have apraxia, only dysarthria. A psychologist involved in a functional behavior assessment, diagnosed the student with ADHD. The student also has cognitive deficits severe enough to make the student eligible for special education in the category of mildly mentally disabled. The student is not yet able to articulate speech that is understandable to others and the record does not reflect what potential the student has to achieve

functional articulable speech as a primary mode of communication. The student is not deaf or hard of hearing but has been taught some sign language (Manually Coded English) as a means of expressive communication. However, the student has motor skill issues and physically can only make approximations of signs.

The student was enrolled in public school and during pre-school, for an hour and a half each day (TE 917), was taught in special education classes by a deaf and hard of hearing (DHH) teacher who signed and spoke instruction. During November of the first semester of kindergarten in 2010, the student was removed from the caseload of the DHH and began receiving instruction from a special education teacher who did not sign. However, a para-educator who signed was assigned to the student and the IEP provided for feeding non-signing teachers and service providers some sign language that could be used during instruction. The following school year, 2011-2012, the same manner of instruction continued, but with a couple of changes. First, the student was assigned a different para-educator who signed fluently. Second, there was some shift in focus to incorporating some of the therapies and practices being taught in OT and speech into the classroom setting.

While there are a number of issues raised by the parents in support of their argument that the student has been denied FAPE, two major contentions have to do with methodology. First, the parents contend that this non-deaf student must be instructed (if not entirely then largely - see p. 543) by teachers who both sign and voice simultaneously in order to have a free and appropriate public education. The parents requested that the student be placed (and subsequently unilaterally placed the student) in a private school for the deaf where all of the teachers both sign and voice. An alternative placement offered by the school at a special public school where deaf

students are "clustered" and provided special ed classes by signing teachers and regular education by speaking teachers with interpreters who stand beside the teacher and sign what the teacher is saying (TE 371) was rejected by the parents. Second, the parents argue that the student's speech therapy must use a specific method called PROMPT.

The term "total communication" was used by witnesses for both sides. However, it means something different to each party. For the parents, total communication seems to mean that teachers should communicate with the student by simultaneously voicing and signing. Appellant repeatedly asserts in briefs that the student is unable to receive oral speech without signing, but there is no evidence to support that assertion.

For the school, total communication means that the student should develop the ability to expressively communicate to teachers and other students in a variety of ways - through speech, sign, and iPad.

#### **FACT FINDINGS**

- 1. The student is not deaf or hard of hearing.**

This is undisputed.

- 2. The student has severe dysarthria, which makes it extremely difficult for the student to articulate speech; instead, the student articulates "approximations" of speech.**

This is not disputed.

- 3. The student has cognitive deficits severe enough to qualify the student as mildly mentally disabled.**

This is not disputed.

- 4. The student has motor skills or motor planning issues that prevent the student**

**from making recognizable sign language; instead, the student makes approximations of signs.**

This is undisputed.

**5. The resource teacher who taught this non-deaf student special education in 2009-2010 preschool was a deaf and hard of hearing (DHH) teacher who both voiced and signed.**

This is not disputed. However, this was a staffing decision. The IEP did not require that special education, regular education or therapy be simultaneously voiced and signed.

**6. The justification given by the ARC for staffing the student's special education classes with the DHH during 2009-2010 preschool was to help the student develop a foundation for expressive communication with others by using sign language.**

See p. 7 of ARC summary for 9/29/10.

**7. The student has motor skill issues that physically prevent the student from signing properly; instead the student signs "approximations" of sign.**

This is undisputed.

**8. As the 2009-2010 school year approached an end, the student's communication performance was inconsistent, notwithstanding that special ed instruction had been taught to the student by a DHH who both voiced and signed.**

The DHH signed and voiced special education instruction during the 2009-2010 school year, but that staffing decision changed in the fall of 2010, due to a change in the student's eligibility category. Parents have contended that declines in the student's performance were caused by the staffing change and that this is evidence that the student must receive instruction in

sign and voice simultaneously. However, the record reflects that even during the period when the student was receiving special education simultaneously signed and voiced, the student's performance was inconsistent.

According to assessments that appear with the 4/13/10 IEP, the student had recently been exhibiting a decline in communications skills. It was reported that at the last progress report, the student was using two-word sign combinations but now no longer was. It was also noted that at the last progress report, the student spontaneously used the phrase "I want more" but now rarely used the phrase and the majority of the student's verbalization were now limited to one word phrases. Also, at the last progress report, the student had been observed to use signs or words to ask questions but had not been observed doing so since the last progress report. Thus, during the period in which special ed was simultaneously signed and voiced, the student's performance declined at times, suggesting that there is no correlation between simultaneous speaking and signing and the student's performance.

**9. An IEP was adopted on 4/13/10 that identified three modes of expressive communication for the student - verbal, sign, and keyboarding.**

See the 4/13/10 IEP under "Does the child have communication needs?" where the IEP states that the student "expresses himself verbally, and also with Manually Coded English. He is beginning to learn keyboarding skills."

**10. The first goal on the 4/13/10 IEP is for the student to speak.**

See 4/13/10 IEP.

**11. The 4/13/10 IEP provides for "ongoing job embedded training in Manually Coded English for staff."**

See 4/13/10 IEP.

12. **The embedded sign training contemplated in the 4/13/10 IEP was that a para-educator-educator would feed signs to the teachers.**

At the hearing, cross-examination of some witnesses by Appellant created an impression that the school had adopted a plan to formally train all of the student's teachers to sign and voice simultaneously. Accepting this misapprehension that the IEP required such training, the hearing officer ruled that he could not order the school to provide such training. ECAB believes that if an IEP requires training, the school can be ordered to provide it. However, a review of the testimony of persons involved in creating the student's IEP establishes that the IEP was not intended to create the kind of training obligation asserted by Appellant.

The student had a para-educator assigned to him who was able to sign. The school facilitator testified that the intent of the communication plan in the 4/13/10 IEP was that the para-educator would feed the teacher sign for use with the student during instruction. (TE 673).

Teachers had complained that the student paid more attention to the para-educator signing than to the teacher, so "part of the reason that the para-educator was feeding signs to the teacher was so [the student] wouldn't have to track back and forth." (TE 674).

There was other testimony that "training" could include other things, but the testimony of the facilitator and the school's subsequent actions prove that "ongoing embedded training in Manually Coded English for staff" meant having the para-educator feed some signs to the teachers at the time the plan was adopted. It was not intended to require teachers or therapists to provide services simultaneously in sign and voice.

13. **The 4/13/10 IEP does not specify that teachers simultaneously voice and sign.**

See the IEP. Though the staffing decision for 2009-2010 school year had the DHH teaching special ed to the student, and she did both voice and sign, the 4/13/10 IEP does not specify that any instruction must be provided by someone who simultaneously voices and signs. There are some, not all, goals that required information be presented in both sign and voice but there is no requirement that presentation be simultaneous. It must be remembered that this student can hear and understands spoken communication.

**14. At the beginning in the 2010-2011 school year, most of the student's communication with adults was still in sign, but the related services provider after reporting observations of the student recommended that there be more emphasis on total communication rather than such over-reliance on sign.**

See p. 7 of summary of the 9/29/10 ARC meeting. The related service advisor who oversees speech, OT and PT testified that upon being asked to observe the student

I did suggest a more total communication approach be used with [the student] rather than Manually Coded English exclusively. The goal would be for [the student] to be able to communicate without an adult.

(TE 748) The reason for this suggestion was to make sure a child is:

able to communicate with their peers, with adults, with the community, in the world that they're going to be facing.... I'm preparing [the student] to be able to participate out in the community, to be self-sufficient, use basic communication skills.

(TE 749).

**15. At the 9/29/10 ARC meeting, the director of special education announced that it would be necessary to seek a waiver from the Kentucky Department of Education if the DHH were to continue providing services to the student, who was then eligible as**



**developmentally delayed, because the DHH was teaching outside the DHH's area of certification.**

This is not disputed. However, the special education director also warned the ARC that they would have to reconsider using the DHH in the future because the student is not deaf.

**16. At the student's triennial reevaluation of eligibility, the student was found eligible as other health impaired.**

At the 10/22/10 ARC meeting was to go over the triennial reevaluation results to consider continued eligible. Prior to this date, the student had been qualified as developmentally delayed. After reviewing the data, the categories under consideration were mild mental disability and other health impaired. A statement from the student's doctor said the student had been diagnosed with epilepsy and apraxia, and that children with epilepsy have a higher prevalence of learning disorders, ADHD and behavior difficulties. The ARC agreed that the data supporting OHI was more definitive than the scores supporting MMD.

**17. The director of special education determined that a waiver allowing the student to be instructed by the DHH under the OHI eligibility would be inappropriate.**

At the 11/17/10 ARC meeting the special education director explained that the DDH could no longer serve as teacher of special education classes to the student but would consult with staff 30 minutes daily. Regarding inability to do a waiver under the new OHI eligibility classification, the special education director testified that

once [the student's] disability changed, I mean teachers are trained differently. [The DHH's] training is totally different from a special ed teacher that's learning behavior disorders, and that's where that disability falls under. So, you know, there could have been liability with not going with the correct certification because teachers are trained differently.

And the other issue is if we left [the student] on and did - left [the student] on [the DHH's caseload] and did another waiver, how as director can I justify that when I have a teacher in that building that is certified to meet [the student's] needs and [the DHH] is not certified ....

(TE 1205-1206).

This staffing decision was strongly objected to by the parents. However, it did not violate any provision of the IEP because there was no requirement that the student be instructed by someone who signed and spoke simultaneously. The student had other signing support in place.

**18. The evidence does not establish a correlation between simultaneous sign and voice instruction and the student's behaviors.**

Prior fact-finding herein above was that the student was having significant problems at the end of 2009-2010 school year, notwithstanding that the DHH was signing and voicing special education instruction. The parents argue that when the DHH stopped providing these services, the lack of simultaneous sign and voice in special ed accounts for a subsequent downturn in the student's behaviors. Also, the parent's lay advocate testified that, in the advocate's opinion, bad behaviors decreased when the student was given a para-educator who was fluent in sign. The theory behind these contentions is that the student becomes frustrated if he is not with persons who fluently sign and this causes bad behaviors. The evidence, however, suggests that absences of the student and adjustments to new instruction accounted for the behaviors, and that it was remedied by implementation of the new BIP.

At the 11/17/10 ARC meeting the parents reported that the student would be missing 1 and ½ weeks of school due to a family vacation. Then Christmas break occurred. Then there were numerous absences in January. The special education director testified negatives in

behaviors and academics from November 17, 2010, when the new IEP was developed, until February of 2011, when things began improving, had to do with the student having 22 to 24 absences during that period. (TE 1255-1256). The special education teacher theorized that the student's temporary downturn also likely was simply an adjustment to the new instruction. (TE 944).

Data shared at the 3/30/11 ARC meeting supports the school's theory. At the 3/30/11 ARC meeting it was reported that although a BIP had been in place all year, it took time to find the right intervention that worked. After the Behavior Intervention Plan was implemented using this intervention, the severe behavior problems dropped dramatically. This was illustrated with data on a chart.

Data presented at the 3/30/11 ARC meeting also indicated that student was now making progress in many areas. The speech therapist, reported that now that the student was attempting more verbalization and was initiating signing less. The student was also was using picture prompts and beginning to use the iPad to make requests. Content on the iPad is based on academic core content curriculum. The DHH reported that the student's signing approximations are very difficult to understand, that the student is not physically able to form all signs, and that the student's verbalizations were growing more than signing. The student also was reported to be receptive to speech without requiring that it be signed. The student's regular education teacher, stated that the student does not pay attention to the para-educator's signing while the classroom teacher is speaking. The student signs when speaking but, when being talked to, the student listens more to the person speaking than attending to the person signing.

At the 3/30/11 ARC, the special ed teacher, presented a graph that showed how the

student's academically engaged time has improved as inappropriate behaviors decreased. The student progressed from being able to practice 8 objectives to 37 objectives. The father reported that at home the student signing skills were increasing.

The foregoing indicate that after an initial adjustment, and once the student was attending school regularly and there was time to implement the BIP, behaviors improved as well as skills, notwithstanding the fact that the student was no longer receiving simultaneous voice and sign instruction from the DHH.

**19. The IEPs were individualized on the basis of the student's assessment and performance, administered in the least restrictive environment, and the services were provided in a coordinated and collaborative manner by the key stakeholders.**

The specialized education provided took into account, appropriately, the student's inability to articulate speech. At all times the student had a para-educator who signed and an effort was made to help teachers learn sign as well. The student had the ability to be in the general classroom at least part of the time and was provided that in addition to special classes. The record indicates that the teachers and therapists worked together to implement the plan and that efforts were made to embed therapy strategies into the classroom experience.

**20. Signing instruction and signing support required under the IEP were provided by the school.**

The parents had requested an interpreter when the student started preschool (TE 610), but this request was denied. The parents also requested, but the school did not agree, that teachers should have a minimum amount of signing expertise. (TE 618). Although the parents' requests were not granted, the IEPs did incorporate signing as part of the total communication approach.

The student was assigned a para-educator who signed. The parents take issue with the fluency of the para-educator assigned to the student in 2010, but the DHH testified that that para-educator was a "basic signer, but good" (TE 903), though she could not voice and sign at the level the DDH could. (TE 922). According to the special education teacher who replaced the DHH, this para-educator could sign every word of an entire conversation. (TE 953). It is not disputed that the para-educator assigned to the student in the fall of 2011 was fluent in sign.

The para-educator was with the student continuously throughout the entire school day:

I would help [the student] with any work that [the student] needed to get done at the teacher's direction. I would escort [the student] from class to therapy to the resource room to the restroom. If [the student] needed assistance in the restroom I would help with that. Take [the student] through lunch. Just whatever [the student] needed throughout the day....

(TE 170). Thus, throughout the day the student was accompanied by a para-educator who signed.

The para-educator's job was to facilitate communication, not to serve as an interpreter as such. "[A] para-educator who signs would help with the communication. An interpreter is taking what the speaker is saying and using sign to communicate with a deaf child." (TE 1213).

However, some interpreting was going on, both vis-à-vis the student and the teacher or therapist. The para-educator would sometimes interpret the student's signing for teachers who did not understand the student's signs. (TE 176). The student's para-educator, testified that she also interpreted the student's signing to facilitate interactions with other children. "In the beginning I would have to interpret a lot of what [the student] said, but as the year progressed I just sat back and they would communicate with each other." (TE 174) The para-educator also interpreted some of the teachers' instructions or explained them to the student in sign.

As stated elsewhere herein, the 4/13/10 IEP provided for embedded training in sign for staff, which consisted of the signing para-educator-educator feeding signs to the teachers. Implementation of signing by the teachers did not work well in some instances. The para-educator reported that the speech therapist sometimes made mistakes when she tried to use the signs the para-educator showed her, which confused the student "[b]ecause what [the student] was hearing did not match what [the student] was seeing ...." (TE 177). While this indicates that the embedded signing instruction was not working well for this speech therapist, it also implies that the student was able to understand what was heard without having it signed.

The father testified that the student's regular classroom teacher told him in February or March of 2011 that the teacher was no longer signing and voicing because it was too difficult to do it and that the student wasn't paying attention, so they went into a plan where the teacher would teach and the para-educator would sign. (TE 457). However, in all instances the student still had a para-educator with the student who could sign, regardless of whether any particular teacher or therapist signed well.

After the DHH stopped providing direct special education services to the student, the DHH continued "to work with [the student] daily to teach the student sign language, to teach the faculty sign language so that they could be more prepared for the student in the classroom on a daily basis." (TE 898-901) The DHH served as consultant to the teachers "to make sure that ... if [the teachers] are using signs, they're using the correct signs." (TE 775). Under the new IEP developed October or November of 2011 after the student was reclassified as OHI, there was also pre-teaching of sign vocabulary relevant to core content that the student would be encountering in the curriculum.

Weighing all of the evidence, ECAB finds that the signing instruction and signing support required under the IEPs was provided.

**21. The evidence does not establish that instruction by one person who both voices and simultaneously signs helps the student process information better than instruction given in voice alone or by one person voicing and another signing.**

Appellant repeatedly asserts that the student is unable to receive oral speech without signing, but there is no evidence that the allegation is true. At most, there is some evidence that signing might aid in processing speech, but the evidence is inconclusive.

A teacher at the private school where the student now attends states that sign language helps apraxic students process "speech that is heard by offering visual input." The student is enrolled in a program at that school where all the students are apraxic and everybody signs. The testimony of the teacher at the private school, who invented the school's sign n' say program, was that she believes sign language may help apraxic students process oral speech:

When we first started using sign language, it was very controversial. It's now become accepted. For instance, David Hammer, a number of the big names in the people who work with apraxia, they recommend and they do use sign language. And the reason and what I've discovered as a teacher, and I'm unique in this because I'm a teacher. So often the people who talk on this are primarily therapists and more in the medical fields.

But what I've just noticed as a teacher working with the children with sign language, when I first started I thought that I was giving them an alternative language to speak in, and that is true for many of the children. But what we've also noticed is that for some of the children when they start signing, a lot of times they'll start voicing more and then after a while we'll see a fading of the signing but they continue to use the sign language.

And what I began noticing was that they are using the sign language for processing because a big part of apraxia has to do with the processing of language.

And so if a child is - the child might - I have one child in my class who articulates fairly well but is using sign language primarily because he has trouble processing what the oral speech that is coming to him and the sign language helps him to do that.

(TE 11-12). All the children in this program touted by the private school are identified with apraxia. (TE 65).

The student in this case, however, may not even be apraxic. The childhood apraxia expert, who is not associated with the school and who was hired by the parents to evaluate the student, stated in her report that

[b]ased upon my assessment, [the student] **really possesses dysarthria, not apraxia.**" (emphasis added). According to the credentials of this person, submitted with her report, her "primary specialty is childhood apraxia of speech.

The record does not reflect that any of the other experts in the record who gave an apraxia diagnosis are specialists in apraxia or whether they conducted the kind of assessment conducted by the childhood apraxia expert, or rather simply adopted a diagnosis they had been told had been made by others.

Regardless of the diagnosis, other evidence possibly suggesting that signing helps the student comprehend spoken instruction is that when the student was administered an auditory comprehension subtest as part of the student's triennial evaluation, first orally and then again using sign, the student answered three more questions when sign was used during the second administration of the test. There was no testimony, however, to give any perspective on the meaning and significance of this outcome. The deaf and hard of hearing teacher also thought the student understood better when she both spoke and signed. (TE 921).

On the other hand, attempting process sign and voice simultaneously may have a negative



effect. At the October 17, 2011 ARC meeting when the psychologist who performed a FBA was asked whether voicing without signing was sufficient for the child, the psychologist stated that "you have to read the child. Attending to voice and sign together can take extra energy/concentration. This may be difficult for [the student] especially at the end of the day when [the student] is already tired." The record is replete with evidence that the student frequently became fatigued by the middle of the day and needed to rest. Even when the same person was signing and speaking, sometimes it was counterproductive. The para-educator, testified that normally she both spoke and signed simultaneously (TE 169) but sometimes the student had difficulty processing both signing and saying and she would have to "turn off her voice" and only sign. (TE 211).

The sign and say method has not been researched to determine whether instruction received in that manner is processed better, worse, or the same as purely oral instruction or oral instruction accompanied by a separate interpreter.

With all of the evidence and testimony about signing, it is easy to forget that this student hears and signing is not necessary for receptive communication. As observed in what the parent described as "a very important report provided by a behaviorist in psychology who used sign language and had a lot of experience with kids with apraxia" (TE 491), the psychologist stated that the student "really doesn't need [the speech teacher] to sign during speech work, as the signing is to reinforce [the student's] learning of signs for expressive communication rather than receptive communication." (emphasis added).

Weighing all of the evidence, the evidence does not establish that instruction by one person who both voices and simultaneously signs helps this student process information better

than instruction given in voice alone or by one person voicing and another signing.

**22. If signing and speaking both were necessary for the student to process oral instruction or gain other benefits, it is sufficient that an interpreter stand near the speaker.**

The parents procured an evaluation from an ocular development doctor who, operating on the premise that the student relied upon an interpreter to understand instruction, and observing that the student has limited fixation skills, stated in his report that "[h]is interpreter will have to be mindful to minimize the spatial division of [the student's] visual attention between a speaker and the interpreter's signing... Getting [the student] to move visual attention easily from one to another will greatly improve instructional ability."

When this report was presented to the ARC, it was agreed that these accommodations could be provided under the IEP. In addition, as stated elsewhere herein above, the parents were offered an alternative placement at a public school where deaf students are "clustered" and provided special education classes by signing teachers and by speaking teachers with interpreters who stand beside the teacher and sign what the teacher is saying (TE 371). This, also, would accommodate the recommendations of the ocular development doctor.

**23. The student was offered the opportunity to attend a cluster program where deaf students are taught together with sign or an interpreter.**

This is undisputed. The 3/6/12 ARC minutes reflect that the DHH stated that at this cluster school there is a resource room with 3 signing teachers delivering content and that if the student went into the regular classroom, the student would be accompanied by an interpreter.

**24. If socialization and expressive communication opportunities of educating the student outweigh other considerations, the "clustered" school that was offered to the**

**parents can provide such opportunities.**

One demand often made by the parents was that the student should spend more time in the regular classroom with non-disabled peers. However, the student was withdrawn from public school and enrolled in a private school for the deaf. A reason for doing so was the opportunity it would provide to communicate with others who also do not speak.

There is value in being in an environment where one is not at a disadvantage due to inability to speak. The psychologist who performed a FBA observed in his report that

[t]he social skills needed to become the class president or a natural leader requires expressive language skills to negotiate, defend, persuade, and effectively interrupt others in ways that are seen as effective leadership. In a class with other apraxic children, these leadership skills can be developed. In a school without other children using sign language, these skills do not develop.

He also stated that “[h]aving experiences with other apraxic children is very important for [the student] to realize [the student] is not alone and that [the student] is not “the worst” at voicing and expressing [himself or herself].”

One of the attractions of the private school for the deaf favored by the parents is that everyone signs at that school. All persons in this private school for the deaf, including administrators, cafeteria workers, and maintenance workers sign. (TE 25). The primary concern of the teacher at the private school was not a lack of academic progress on the part of the student but a lack of opportunity to interact with peers in the public school. (TE 47-49). As memorialized in the words of the father at the 3/6/12 ARC meeting, if educated with speaking peers the student would not have the “opportunities for rich intellectual conversation of original thoughts” that “is inherent to the program at [the private school] where students and teachers are fluent in sign language.”

Educating the student with non-speaking peers might represent a shift away from giving the student tools to function in a speaking world. The related service provider testified

when they're unable to express themselves verbally, [the iPad is] their voice. That it needs to be available any time that they're not able to produce the verbalization and they have to be able- that's their voice....it's an assistive technology and it's his voice..... I want him to know it is his voice at home, at school, during specials, music, library. We take our voice with us everywhere we go. That's his ability when he can't verbally express or indicate what he needs, using other pieces of total communication, that's his - that's his mode."

(TE 762-763). The student had been making progress on using an iPad to communicate with others. At the 4/21/11 ARC meeting the para-educator-educator stated that the student had been using the iPad and signs to talk with friends and that the iPad had been instrumental, especially in special ed classes, and the words had been added to the iPad to allow the student to participate in the class. At the 11/1/11 ARC meeting, the school speech therapist reported that the student was generating about 5 sentences using words on his iPad and that he was able to find the words to formulate sentences. The student's regular classroom teacher testified that the student and classmates were "signing, using iPad. [The student] has a reading pal, playground buddy, constantly interacts with peers during lunch." (TE 770, referencing ARC summary of 5/6/11).

At the private school, where the student presently attends, no use of the iPad is made for communication because everyone is communicating with the student through signing. (TE 97). Emphasis on communicating through signing also may represent a shift in goals. The related services advisor testified that "[a]s a speech pathologist, we use signing as a support to facilitate oral speech. ... I do not see [the student] as a signer as [the student's] - I see it supporting oral speech." (TE 760) She also testified that [t]he reason for not just saying "let's just sign" is that [the student] was showing more verbalization. Our goal is for [the student] to be

self-sufficient as much as possible and the best way to communicate or our natural way of communication is oral speech, and [the student] was making progress. And to say that just sign and reduce our expectation or without the speech component, quite frankly, is unethical in my opinion and detrimental.

(TE 773). The related services advisor also testified of the modes of communication the student had to choose from (oral, sign, iPad), oral was preferred and if student signed instead of speaking, student would be prompted to speak. (TE 831).

Another potential difficulty with emphasis on signing as the student's expressive mode of communication is that the student is physically unable to make signs due to motor issues. At the 11/28/11 ARC, occupational therapist 1 stated that the student does not have the motor skills to form the signs. "We are asking [the student] to do something that [the student] currently motorically is not able to do, but are working on through [the student's] IEP." The student makes approximations of signs that the DHH testified are difficult to understand.

Educating the student with non-speaking peers would be more restrictive environment than the one enjoyed in public school. At the private school for the deaf, "everybody in the school at least has a disability." (TE 25). The same would be true to the extent the student was educated with non-speaking students at the clustered school offered by the school system. Nonetheless, if placement with non-speaking students is necessary to provide an educational benefit, the clustered school offered by the school system would have been sufficient to educate the student among non-speaking peers and provide the communication and socialization opportunities of concern to the parents.

**25. Related services provided by the public school were appropriate.**

The student's dysarthria is very severe. As stated in the childhood apraxia expert's report

[i]t can be very overwhelming and challenging for a speech-language pathologist without specific training to work with kids with a severe motor disorder like [the student's]. [The student's] muscles are very fixed and this really makes a speech language pathologist's job difficult. [The student] needs help moving [his or her] facial muscles appropriately since [the student] cannot do that independently and due to the fact that [the student] utilizes them for purposes of bodily stabilization. [The student] needs assistance to learn the true function of facial muscles.

PROMPT is a tactile mode of speech therapy recommended by this expert and is what the parents have been providing privately. The school is aware of PROMPT. The related services advisor testified that "I have a speech pathologist [in this district] that is certified in PROMPT and one speech pathologist [who was the student's speech pathologist] has had the first level of PROMPT training." (TE 735)

However, there are other forms of tactile cuing. The related services advisor testified that "PROMPT has tactile cues. They put - but I do too and I am not PROMPT trained. It is very different tactile cues." (TE 813). She testified that

PROMPT-trained or not, you know by the virtue of our training that there has to be correct position, placement, your oral motor structures have to be working in a line or you're not going to get the correct sound.

(TE 815). At the 2/6/12 ARC meeting, when the father stated he wanted more tactile kinesthetic modalities in speech therapy, the speech therapist reported that she had been using such modalities.

There is no empirical research showing that PROMPT is better than any other methodology. (TE 816; 834). The speech therapist testified that she had contacted colleagues she had met during her own PROMPT training who had completed the training and they had told her that "they did not continue using PROMPT because they didn't feel like that was the one methodology that would work, you know, with students with apraxia that they had there...." (TE

1121).

Regarding the need to stabilize the student's jaw, emphasized in the childhood apraxia expert's report, the related services advisor testified that the school's speech therapist does so. Failure to stabilize the jaw "wouldn't be appropriate therapy. We would always make sure that the mandible or articulation, that they're doing correctly placement." (TE 836).

Another concern the childhood apraxia expert identified in her report was core weakness. She stated:

[The student] is currently not utilizing [the] abdominal and thoracic muscles to keep [himself/herself] vertical. Instead [the student] is compensating by using [the] accessory muscles.....This could lead to compression of [the] organs creating the potential for internal problems.....[The student] must start using [the] abdominal and thoracic muscles to allow proper respiratory function and speech.

Occupational therapist 2 was very aware of these problems and had been working on them. She testified that the OT the student had prior to coming to the public school "was working a lot on core strengthening and respiration to improve speech production." (TE 1049). She continued that work, working with the student on goals that needed postural control, core strengthening, and respiration related to his speech therapy. (TE 1023). She provided 45 minutes per week direct services and 30 minutes per week consultation

working with staff, giving them strategies. I mean when I was working with them we had ...a notebook that I provided activities for. I worked with the speech path and provided her strategies. I worked with the deaf and hard of hearing teacher and provided her strategies. I sent information home with the parents.

(TE 1043). In other words, in addition to directly working with the student, she was teaching the student's teachers how to implement OT in the classroom.

The speech language pathologist at the private school had observed a therapy session at

the public school. She testified that in her opinion the student wasn't given enough time to respond (TE 133). Upon receiving this criticism, the record reflects that the public school speech therapist started giving the student more time to respond. (See ARC minutes, 11/28/11). The speech language pathologist at the private school also criticized the absence of motor drilling sessions but subsequent testimony established that the student received regular motor drilling at a time of day different than that the time the speech language pathologist at the private school sat in and observed. See 5/23/12 ARC meeting minutes.

A video of a discussion between the father and the childhood apraxia expert, which was not introduced at the hearing, was shown at the 2/6/12 ARC and cited by the parents as evidence that methods used by the public school speech therapist were harming the student. However, the related services advisor testified that she was concerned that the video opinions were based upon assumptions about the speech pathologist's practices based upon the non-speech pathologist father's description of them. (TE 813). The related service advisor said there was nothing about the information in the video which she disagreed. The father argued that requiring jaw height greater than 2.5 when teaching sounds leads to unnecessary compensatory strategies that the student will have to unlearn. The related services advisor said that students learn compensatory skills that an SLP later will re-teach. To the extent this differs from the approach the parent's expert would take, it appears to be differences in methodology about which professionals disagree.

The para-educator testified that a retired speech therapist (who was not called as a witness at the hearing) told her that "she couldn't understand why the school's regular speech therapist] insisted on teaching [the student] to make [the] sounds with an open mouth because then [the



student] couldn't transition to the next sound." (TE 194) This was cited by the para-educator (who is not a speech therapist) during an ARC meeting as evidence, along with the above-mentioned video, that she thought justified suspending all speech services.

Yet, none of the parents' experts (or any expert) testified or stated in a report that any of the methodologies or practices of the school's related service providers were wrong or were harming the child, and some were asked that question directly at the hearing or when they attended an ARC meeting at the request of the parents.

The student received a lot of services. The parents wanted more services and viewed allocation of some service time towards integrating the services into the student's classroom as a reduction in services. The service providers were professionals, certified in their respective fields, had developed knowledge of the student and the student's capabilities, and exercised their professional judgment in recommending how much service time would be productive and the best way to deliver the services.

**26. The student received a meaningful educational benefit from the special education and related services provided at the public school.**

Parents argue that the student made no meaningful progress. The record reflects that the student met some IEP goals and did not meet others. Testimony and ARC notes also support the conclusion that some progress was made. Some examples appear below.

The teacher at the private school acknowledged that the student was making progress while enrolled in the public school, stating in her February 10, 2012 report regarding her observation of the student at the public school on January 19, 2012, that in the area of expressive communication "[the student] showed improvement from when [the student] was observed by

this consultant during the summer," (TE 81), that [the student] was doing well in reading (TE 38), and that she was impressed with [the student's] teacher, the PT and the aide. (TE 47-48).

Also, see T.E. 38.

The psychologist who performed a FBA stated in his report that "[the student's] improved behavior this year compared to last year is likely due to [the student's] improved communication, reflecting the hard work by his school staff and [the student's] parents."

At the 3/30/11 ARC meeting the special education teacher presented a graph that showed how the student's academically engaged time had improved, progressing from being able to practice 8 objectives to 37 objectives. The father reported at that same meeting that at home the student signing skills were increasing.

At the October 17, 2011 ARC meeting it was reported that based upon the MAP reading test, the student read at the 78th percentile for the student's grade level. At the November 11, 2011 ARC, the private occupational therapist stated that she really liked the school approach - addressing motor planning as a foundation for handwriting. She said the student seems happy and loves learning except when it gets hard, [the student] does start shutting down. The public school speech therapist reported that the student was generating about 5 sentences using words on the iPad and was able to find the words to formulate sentences. The teacher at the private school observed that it "seems that [the student] has the idea of how to construct a sentence and may be ready to move toward generating [the student's] own sentences without being prompted first." Special education teacher 2 said that the student was now able to orally read a sentence independently and match it to the correct picture. The student had been doing this pretty consistently over the past 4-6 weeks. At the 11/29/11 ARC meeting, the father stated that the

student could handle all the signs of the curriculum and understands hundreds if not thousands of signs receptively.

The February 13, 2012 ARC summary notes “[the father] thinks student is accelerating and is using lots of signs. The para-educator says she's able to step back and allow student to communicate with peers independently. PT says student getting more stable and has come far.” Also, see TE 654-657.

At the 3/6/12 ARC meeting the para-educator said that because signs have been introduced to the student, peers can talk to the student related to weather and specials classes of the day. The para-educator also reported that “[t]eachers are also beginning to pick up some signs. There are a few sentences peers and the student can sign together.” The para-educator reported that the student was “picking up on words all day long that are not a part of the vocabulary list.” The DHH stated that “it is obvious from the data that [the student] is progressing.”

The weight of the evidence supports finding that the student received a meaningful educational benefit from the special education and related services that were provided.

**27. The monitoring data was inadequate, but given other proof of progress in the record as discussed herein above, such inadequacy is a procedural violation of IDEA that does not rise to a denial of FAPE.**

The student has not specifically alleged inadequacy of monitoring data, but has, alleged much broader issues: the denial of a free appropriate public education and failure to properly develop and implement the student's IEP. The finding regarding monitoring data goes to the issue of proper development and implementation of the IEP and, but for significant other

evidence in the record of progress, could have resulted in a finding of denial of, FAPE in this case. The student's IEPs had numerous annual goals, with supporting benchmark objectives. Monitoring data must be kept to show progress toward the benchmarks and on the annual goals. Only the educators have the ability to collect such data as they implement the IEP. A parent's ability to question or challenge the data is only as good as the data that is kept.

The monitoring data in this case was at best inadequate to trace the specific writing goals and any alleged progress on them. The data monitoring sheets introduced into evidence only showed summaries of the monitoring. These data monitoring sheets did not identify the particular areas tested in order to determine whether the goals had been met. For example, on Goal 1 of "improving [the student's] communication skills" benchmark A stated, "When presented with verbal and visual age appropriate concepts, (student) will demonstrate understanding by completing the task with 4/5 trials over 5 sessions with 1 prompt provided." See Respondent's Exhibit 1E. The progress data should include simple descriptions of the concepts presented to the student, what task(s) the student completed, and the prompt given.

By way of another example, Benchmark A (Respondent's Exhibit 1A) states, "When presented with verbal and/or visual materials, [the student] will correctly produce the long vowels "E" and "A" in isolation and syllables 4/5 trials over 5 sessions with moderate prompts presented." Again, the data should include which sounds the student produced individually and in syllables and what prompts were presented. Nearly every goal and benchmark could be documented in such a manner.

Without such background materials, the parents had no way to determine how to further assist their child at home or to compare if the student's progress at home was consistent with

progress at school. More importantly, neither the school district nor the parents could accurately assess the progress made by the student on the basis of the data as it was reported to the parents.

On a related issue, because of the wording of the benchmarks, it is not always possible to know what is meant and what is required in order to show progress. On Respondent's 1-G Goal 1 benchmark C, for example, the goal required 4/5 opportunities across 4 school weeks. The data presented did not show there was measurement of 4/5 opportunities across 4 different weeks. There were never 5 attempts on the goal in any one given week. So, was the data to be collected every day for four weeks, and the student to be successful, four out of five times each week, or was the data to be collected at least five times over a four week period and the student successful four of those five times? Or is there yet another interpretation? If it is not possible to know from the language of the IEP, when and how the data is to be collected and how to measure student success, the data cannot show progress or lack of progress.

Another example of this same issue pertains to the monitoring data that is for the 11/28/11 IEP for goal 12 benchmark C (The exhibit number or page is not visible due to the Exhibit Tabs not being copied so the ECAB does not have the Exhibit information), the goal requires "80% of the time for 4/5 days for 3 consecutive weeks." The data presented for benchmark D of goal 12 is likewise insufficient as there is not data for 4/5 days for any 3 consecutive weeks. The same is true for Goal 12 benchmark B, with no monitoring for 4/5 days for any 3 consecutive weeks.

Again, the Exhibit number is not clear to the ECAB, but on the monitoring data that has the date 1/0/1900. (an obvious error which was never corrected on that entire set of monitoring

data) The monitoring data appears to be from 2012. The data does not show monitoring for any 4/5 days of any 3 consecutive week period.

On the monitoring data for the IEP dated 11/17/2010 for goal 5 benchmark 1, the goals is "given opportunities for 4 consecutive weeks." All the data is lumped into one month periods with no break down on week by week collection. There is no explanation to show which directions were given, which prompts were given, or the result.

There is also writing on another set of monitoring data apparently for the 11/28/11 IEP that says "can't determine". (Possibly Respondent's Exhibit 2-4 as marked at the upper right hand of the Exhibit page) That notation creates questions which are not answered by the monitoring data. Goal 17 indicates "with faded prompts." Again, there is no indication of what prompts were given or how they were faded.

Another set of data for the 11/28/11 IEP for goal 12 benchmark C required 4/5 days monitoring for 3 consecutive weeks and no such monitoring exists. Further, there is a notation under methods of "excluding Tired". There is no indication of what that means or what consideration is given in the monitoring when the child is tired.

The point of this discussion is not to tell the school district what data to collect. The IEP itself, if clearly written, should tell the school district what monitoring data to collect and when and how to collect it. The evidence in this case fails to show that the school district properly kept the monitoring data that would show progress on the annual goals and individual benchmarks, as indicated by the examples given above. At a minimum, the method of data collection must be one that makes it clear for all members of a student's ARC whether, and the extent to which, a student is making progress toward his or her IEP goals. The majority acknowledges that there is

no suggestion here of falsified data. The issue for the majority is that it is illogical to permit a school district to either fail to collect monitoring data at all, or to do so in a manner that does not comply with the stated goals and benchmarks of an IEP, and then also to require the student to bear the burden of proof of lack of progress on the goals and benchmarks.

Despite this lack of adequate monitoring data, the record showed significant other evidence of progress. See, for example, the discussion of Finding of Fact 26 herein above. The ECAB, therefore, does not find the inadequate monitoring data is sufficient to cause a denial of FAPE in this particular case.

The majority agrees with the dissent that it may have been reasonable for the school to decline to discuss monitoring data at an ARC meeting on short notice, especially in a situation, such as this, where ARC meetings were tense, *if* the parents wanted to present new information not already in the possession and control of the school district. Here, however, the school district not only had created the data the parents wanted to discuss, but it had also reported that the student was making progress on the basis of the data. If the data exists, the school district should have had no problem discussing data generated by the school district and upon which it relied.

**28. The school made good faith efforts to help the student achieve goals and to accommodate parental wishes and participation.**

Appellant has requested a fact finding on this question, though it seems to be more a question of law. The record reflects that the school provided the services and special education it was supposed to provide and worked hard to help the student achieve goals. An unusually large number of ARC meetings were held, and the views and reports presented to the ARC by the parents were considered by the ARC, though there was not always agreement with the content. A

great deal of training was given teachers at the request of the parents. Personnel from the private school for the deaf were invited to the public school. Such personnel were permitted to attend ARCs at the request of the parents. Some suggestions of the parents or their experts were adopted by the school. Overall, the record reflects that the school district made good faith efforts to help the student achieve goals.

**29. The teacher who read the psychologist's report at the ARC meeting was a person qualified to interpret the educational implications of the report, though she was not qualified to interpret psychological testing.**

The finding is made with reference to the legal issue raised by the parent regarding ARC membership.

**30. The student's para-educator-educator was not permitted to attend one ARC meeting, though the parents had requested it.**

This is not disputed. The finding is made with reference to the legal issue raised by the parent regarding ARC membership.

#### **CONCLUSIONS OF LAW**

**1. Student bears the burden of proof.**

The student has the burden to prove that FAPE was not provided. Among the theories the student puts forth regarding failure to provide FAPE is that the IEP was improperly designed because it did not provide for education in the least restrictive environment. Student argues that the school has the burden to prove that the student was educated in the least restrictive environment. This is incorrect. Least restrictive environment is simply an aspect of the provision



of FAPE, and student bears the burden of proof regarding provision of FAPE.

*Oberti by Oberti v. Board of Educ. of Borough of Clementon School Dist.*, 995 F.2d 1204

(3rd Cir. 1993), cited by student for the proposition that the school has the burden of proving that it has educated the child in the least-restrictive environment is no longer good law, if it ever was, after the decision in *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005).

*Leighty ex rel. Leighty v. Laurel School Dist.*, 457 F.Supp.2d 546 (W.D.Pa.,2006) explains at

552:

In *Oberti* the school district argued that, in the District Court, the burden should have shifted to the party which was challenging the determination made by the administrative agency. *Oberti*, 995 F.2d at 1218. The school district contended that such a shift in the burden was implicit in the Rowley rule, which requires the District Court to give "due weight" to the findings made at the administrative level. *Id.* The Court of Appeals rejected this argument, holding that "the due weight is owed to the administrative proceedings, not to the party who happened to prevail in those proceedings." *Id.* at 1219. The Court of Appeals went on to hold that, with respect to the IDEA's "mainstreaming" requirement, the burden of proof was on the school district. *Id.* at 1219-1220. *Schaffer* did not deal specifically with the IDEA's mainstreaming requirement, but rather with the more general question of which party bears the burden of proof when an IEP is challenged. *Schaffer*, 126 S.Ct. at 531. Nevertheless, the holding in *Schaffer* does not appear to be limited to any particular type of IDEA-related determination. The Supreme Court based its decision on the silence of Congress with respect to the burden of proof, and the fact that the burden "typically" falls on the party seeking relief. *Id.* Therefore, insofar as *Oberti* placed the burden of proof on the school district because of its "better access to the relevant information," it has been abrogated by *Schaffer*. *Oberti*, 995 F.2d at 1219; *Schaffer*, 126 S.Ct. at 536-537. The Court of Appeals has recognized this fact itself. *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 391 (3d Cir.2006).

*L.E. v. Ramsey Board of Education*, 435 F.3d 384, 391 (3d Cir.2006) acknowledged that the 3rd

Circuit's prior position regarding burden of proof could no longer be maintained in light of

*Schaffer*:

We have always placed the burden of demonstrating compliance with the IDEA

on the school district. See *Kingwood Township*, 205 F.3d at 579; *Oberti*, 995 F.2d at 1219. While this appeal was pending, however, the Supreme Court held that the “burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.” *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005).

The student is the party seeking relief and therefore bears the burden of proof.

**2. The school district offered a continuum of placements as required by law.**

707 KAR 1:350. Section 1 (2) states that “[a]n 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.” The regulation goes on to state that the alternatives shall include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. 707 KAR 1:350. Section 1 (3).

The student was placed in a regular school with special education classes. The student also was also offered placement in a kind of special school in which deaf students were “clustered” and provided instruction via sign language or using an interpreter. Appellant in effect argues that the school had an obligation to provide another kind of special school, one in which all persons sign.

This ECAB believes a reasonable interpretation of the “continuum of placement options” is that there should be a placement option that can provide the student with an educational benefit. Whether or not the parent's theories about methodology and socialization in an all-signing environment are correct, the placement options offered by the school did provide an educational benefit.

**3. The IEP was reasonably calculated to provide a meaningful educational benefit.**

*Adam J. ex rel. Robert J. v. Keller Independent School Dist.*, 328 F.3d 804, (C.A.5

Tex.,2003), observes that there are four factors that are "indicators of whether an IEP is reasonably calculated to provide a meaningful educational benefit under the IDEA":

These factors are: (1) The program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key "stakeholders"; and (4) positive academic and non-academic benefits are demonstrated.

*Adam J.*, p. 810. The fact-findings support the conclusion that all four of these factors were met.

**4. FAPE was provided.**

Parents argue that there was no progress. The record demonstrates there was some progress. The issue is whether the educational benefit the student received was meaningful. *In re Conklin*, 946 F.2d 306, 313 (C.A.4 Md.,1991) observed that

a handicapped child who is not receiving passing marks and reasonably advancing from grade to grade is not necessarily being deprived of a "free appropriate public education." Due to the severity of their handicaps, some children, even with herculean efforts by the state, will never be able to receive passing marks and reasonably advance from grade to grade, and the state should not be placed in the predicament of being forced to comply with an impossible burden....

The progress of the student should be evaluated from the perspective of what would have been possible for the student under the circumstances. It is undeniable that the student has serious dysarthria and motor planning issues. Despite great efforts by therapists at school and private therapists over many years, the student has been unable to overcome these limitations. The fact that a student with these limitations as well as cognitive deficits that would qualify him as mildly mentally disabled can read at the 78th percentile for his grade level, has learned to interact with non-disable peers, and in the words of his father knows hundreds if not thousands of signs would seem to be meaningful educational benefits.

**5. A procedural violation in ARC composition occurred, but it did not result in the denial of FAPE.**

Student argues that ARC composition was defective in two ways - failure to include the para-educator on the ARC and failure to include a person who could interpret the instructional implications of evaluation results. We find that the student is incorrect regarding the second alleged defect. Regarding the first defect, failure to include the para-educator, we find a procedural violation but also find it caused no substantive harm.

707 KAR 1:320, Section 3, (1)(f) provides that the ARC shall include "An individual who has knowledge or special expertise regarding the child at the discretion of the parent or the LEA." Student contends that failure to include the student's para-educator at one ARC meeting violates this regulation.

The para-educator did have special expertise regarding the child and her attendance was requested by the parents. Therefore, she should have been permitted to attend. However, this procedural violation did not cause substantive harm. After initially denying the parents' request, the school did allow the para-educator to attend subsequent meetings where the para-educator's knowledge regarding the child was shared. The only possible harm was that the para-educator did not have the opportunity to attend the meeting where the report of the psychologist hired by the parents was discussed, but this ECAB does not believe such harm was significant or not remediable.

We do not interpret as broadly as does the student the language in the regulation that says

the "LEA shall ensure" that the ARC includes a person with knowledge of the child selected by the parent. To "ensure" refers to selecting the composition of the membership of the ARC. It does not mean that the school was obligated to compensate the para-educator for attending meetings after hours. Nor was it unreasonable nor was parental participation significantly compromised when the school required the parents to make some arrangement regarding care of the student so that the student's para-educator could attend a meeting held during school hours, where the mother left the ARC to do so and the father was still present at the meeting and able to participate.

The second objection to ARC membership is without merit. 707 KAR 1:320, Section 3, (1)(e) provides that the ARC shall include "[a]n individual who can interpret the instructional implications of evaluation results who may be a member of the team described in para graphs (b) through (d) of this subsection." Student argues that this provision means the person in question must be able to interpret psychological test results and argues that the teacher (who would be a person described in paragraph (b)) who read the report, not being a licensed psychologist, was not qualified.

However, the regulation does not require that a subparagraph (e) person interpret the results of psychological testing - *that is what the evaluation, performed by a psychologist, did*. Instead, subparagraph (e) refers to a person who can interpret the instructional implications of the evaluation results. There was no evidence that the teacher in question lacked the ability to form opinions about how instruction should be impacted, given the interpretations of psychological testing set forth in the psychological evaluation. Regardless of whether the teacher's opinions about the instructional implications of the report were correct or not, she was qualified to form

the opinions and subparagraph (e) was not violated.

**6. The Appellant is not entitled to compensatory education.**

Because we find that the student did receive a free appropriate public education, the student is not entitled to compensatory education.

**7. The Appellant is not the prevailing party and is not entitled to attorney fees.**

Neither the Hearing Officer nor this ECAB has found for the Appellant on any issue. The Appellant is not the prevailing party. The Appellant would not be entitled to attorney fees, even if this ECAB had the authority to award attorney fees, which it does not.

**DISSENT BY ECAB PANELIST MIKE WILSON REGARDING MONITORING DATA**

I must respectfully dissent from the finding of my fellow ECAB members regarding alleged inadequacies in monitoring data for several reasons.

First, the student did not contend in student's brief or develop evidence to support the notion through examination of witnesses that monitoring data was not adequately gathered. The father did complain about access to the data, testifying that when requested he would receive monitoring data from special education teacher 2 pretty quickly, but had trouble getting the data from the public school speech therapist who said the data had been put in the student's backpack. (TE 496). However, the student's contention has been that the data shows insufficient progress, not that the data was improperly collected. ECAB is making an argument for the student that the student has not made.

Second, while it is true that monitoring data was not collected every day, there was no testimony establishing that monitoring data was to be collected daily. On its face, the language used in the IEPs does not expressly address that question. For example, regarding Goal 12,

Benchmark B, 11/28/11 monitoring data, requiring "80% of the time for 4/5 days for 3 consecutive weeks" and benchmarks similarly worded, one might assume that means that data was to be gathered on every day of a five-day school week. However, another interpretation is that the student should have an 80% success rate at least 80% (4/5) of the days data was gathered over a 3-week period. The latter interpretation is consistent with the wording of monitoring used in other differently-worded benchmarks, the wording used in monitoring for the Summer 2011 ESY, and the actual collection of monitoring data over a two-year period.

Third, it was quite reasonable for the school to decline to discuss monitoring data at an ARC meeting on short notice. Preparation and reflection would make for a more productive discussion than off-the-cuff review, even if the ARC meetings were friendly affairs, a fortiori in the present case where the ARC meetings were tense and polarized. The record reflects that school staff complained to the parents that they felt they were being cross-examined by the parents and their advocate at ARC meetings. The record reflects that the parents were tape-recording the ARC meetings.

Fourth, there was nothing to suggest that the data was falsified or evidence from which one could infer that the data collected did not correspond to the observations of the teachers collecting the data. The monitoring data provided useful information from which the school formed opinions that some goals were met and others were not.

Fifth, and most importantly, the record does not provide a basis for ECAB to direct how a school system should collect and organize monitoring data. There is no evidentiary basis for drawing conclusions about the positive and negative consequences of collecting or organizing data in a manner different than the school collected it. ECAB should hesitate to dictate practices

to educational professionals when we ourselves are not educational professionals.

### NOTICE OF APPEAL RIGHTS

707 KAR 1:340, Section 8, Subsection (2) states that a decision made by the exceptional Children Appeals Board is final unless a party appeals the decision to state circuit court or federal district court. This decision and order, therefore, is a final and appealable decision. Appeal rights of the parties under 34 CFR 300.516 state:

(a) General. Any party aggrieved by the findings and decision made under Sec. 300.507 through 300.513 or Sec. 300.530 through 300.534 who do not have the right to appeal under Sec. 300.514(b) and any party aggrieved by the findings and decision under Sec. 300.514(b) has a right to bring a civil action with respect to the due process complaint notice requesting a due process hearing under Sec. 300.507 or Sec. 300.530 through 532. The action may be brought in any State Court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(b) Time limitation. The party bringing the action shall have 90 days from the date of the decision of the hearing officer or, if applicable, the decision of the State review official, to file a civil action, or, if the State has an explicit time limitation for bringing civil actions under Part B of the Act, in the time allowed by that State law.

Kentucky Administrative Regulations do not specify a time for initiating an appeal from an ECAB.

KRS 13B.140 governs administrative hearing in Kentucky, generally, and not to civil actions brought under Part B of the IDEIA. It provides:

(1) All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the



review is requested. The petition shall be accompanied by a copy of the final order.

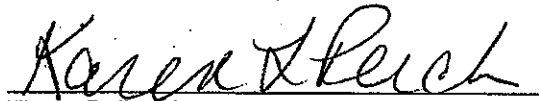
(2) A party may file a petition for judicial review only after the party has exhausted all administrative remedies available within the agency whose action is being challenged, and within any other agency authorized to exercise administrative review.

(3) Within twenty (20) days after the service of the petition, or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the official record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. The court may require or permit subsequent correction or additions to the official record. If the court requests a transcript of proceedings that have not been transcribed, the cost of the transcription shall be paid by the party initiating the appeal, unless otherwise agreed to by all parties.

(4) A petition for judicial review shall not automatically stay a final order pending the outcome of the review, unless:

- (a) An automatic stay is provided by statute upon appeal or at any point in the administrative proceedings;
- (b) A stay is permitted by the agency and granted upon request; or
- (c) A stay is ordered by the Circuit Court of jurisdiction upon petition.

BY Exceptional Children Appeals Board Panel, consisting of Karen L. Perch, Mike Wilson and Kim Hunt Price on behalf of the entire panel, and on behalf of Mike Wilson, dissenting in part.

  
Karen L. Perch, Chair  
Exceptional Children Appeals Board

#### CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was served this 17<sup>th</sup> day of September, 2013, by placing same in the United States mail, postage pre-paid and first class, to:

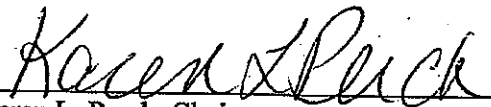
[REDACTED]

and

[REDACTED]

and to the hearing officer, Paul Whalen via electronic mail at:

[plewellinwhalen@aol.com](mailto:plewellinwhalen@aol.com).

  
Karen L. Perch, Chair  
Exceptional Children Appeals Board