

KENTUCKY DEPARTMENT OF EDUCATION  
DIVISION OF EXCEPTIONAL CHILDREN SERVICES  
AGENCY CASE NO. 1213-15

[REDACTED]

PETITIONER

Represented by:

[REDACTED]

RECEIVED  
JUL 21 2014  
BY: KDE

V.

\*\*\*\*\*

DECISION AND ORDER

\*\*\*\*\*

[REDACTED] COUNTY PUBLIC SCHOOLS

RESPONDENT

Represented by:

[REDACTED]

DECISION DATE: July 18, 2014

*Karen L. Perch*

KAREN L. PERCH, HEARING OFFICER

## PROCEDURAL HISTORY

The Student resides within the borders of the Respondent School District (hereinafter "LEA"), and had previously received special education services in another county. The LEA found the Student eligible for services under the categories, "Other Health Impaired" (OHI) and "Specific Learning Disability" (SLD).

On June 5, 2013, the Kentucky Department of Education received the Petitioner Student's due process hearing request. The request raised alleged violations of the child's rights under the IDEIA and corresponding state regulations have been ongoing for the past three academic years.

1. Whether the LEA failed to evaluate the child in all areas of suspected disability in violation of 707 KAR 1:300;
2. Whether the LEA failed to adequately evaluate the child in order for him to be eligible for services in violation of 707 KAR 1:300;
3. Whether the LEA failed to educate the child in the least restrictive environment, in violation of 707 KAR 1:350;
4. Whether the LEA failed to adequately develop a Behavior Intervention Plan to address the child's unique individual educational needs in violation of 707 KAR 1:320;
5. Whether the LEA failed to recognize the child's parents as equal partners in the Admissions and Release Committee meeting, in violation of 707 1:340;
6. Whether the LEA failed to allow the parents' request for an independent educational evaluation, in violation of 707 KAR 1:340;
7. Whether the LEA failed to adequately train all service providers who would be responsible to implement the child's Individual Education Plan, in violation of 34 CFR

300.156 and 707 KAR 1:320; and

8. Whether the LEA failed to provide the child with a Free and Appropriate Public Education.

As required by law, the Petitioner also proposed the following remedies, which are outlined herein because of an additional issue that arose during the hearing:

1. That independent testing be performed in all areas of suspected disability at the LEA's expense,
2. That a Functional Behavior Assessment be performed by a qualified and independent behavioralist who can assist in developing a Behavior Intervention Plan at LEA expense,
3. That the LEA contract with an independent agency to conduct an assistive technology evaluation,
4. That the child be offered related services, to allow the child to be more socially productive in the school environment,
5. That the IEP be implemented in the child's neighborhood school,
6. That the child be awarded three years of compensatory education for denial of FAPE during the three years in question, and
7. That the parents receive reasonable attorney fees.

Two additional remedies were permitted to be added to the original hearing request. These are:

9. That the Petitioner be reimbursed for the evaluation performed by Federici; and
10. That the Petitioner be reimbursed for private school expenses.

Following several pre-hearing conferences, an unsuccessful attempt at mediation and a continuance requested by the Petitioner, the undersigned conducted a hearing on March 18, 19,

20 and May 14-15, 2014. The Petitioner moved orally for permission to amend the requested remedies to include reimbursement for expenses related to tuition and transportation, to which the Respondent objected on grounds that it was too late to do so. At the conclusion of presentation of its prima facie case, the Petitioner also moved for a directed verdict, on grounds that the LEA had not responded to the due process hearing request in a manner that comports with the requirements of 34 CFR 300.508(e). After considering the Motion for Directed Verdict, the Hearing Officer overruled the motion on March 20, 2014. TR 695-698. Anticipating a motion for default judgment, the Hearing Officer also denied that. TR 698-699. Ruling on the Petitioner's motion to amend the requested remedies to include tuition and transportation expense reimbursement, the Hearing Officer sustained the oral motion. TR 699-702.

**NOTE: The Hearing Officer, in a pre-hearing order, required the parties to establish a set of Joint Exhibits, to which both parties agreed. The parties were also given the opportunity to introduce additional exhibits about which they could not agree. The Exhibits labeled RA through RE are actually the Joint Exhibits. The Petitioner also submitted nine separate exhibits, labeled P1 through P9.**

#### **FACT FINDINGS**

1. **The Student was adopted as an infant by his parents through an agency in the [REDACTED] TR 34. The family has limited knowledge of the medical history of the biological parents, the Student's prenatal care or his birth. According to a 2008 evaluation, however, the Student was [REDACTED]. There is presumed fetal exposure to [REDACTED]. [The Student] was a term baby born by [REDACTED]...[The Student's] neonatal**

- course was thought to be unremarkable." P3 at 23.
2. **The Student has a long history of social skills deficits, anxiety, and behavioral issues, as well as delays in development of gross motor skills, and academic difficulties, going back at least as far as kindergarten. See, e.g., P3. He also had speech and language difficulties. A LCSW who has worked with the Student in a clinical setting, but not in class, has also reported anxiety. TR 357.**
  3. **A 2009 evaluation, conducted when the Student was 7 years, 9 months of age, showed numerous ongoing deficits and some gains from previous testing. P4. On the one hand, the examiner found the Student to have low average verbal functioning (Std. Score 88), average nonverbal reasoning (Std. Score 95) and low average spatial processing (Std. Score 84). Some areas examined showed that the Student has dysgraphia, selective mutism and significant deficits in working memory. On the other hand, the Student did actually speak more than at prior evaluations, and demonstrated good visual reasoning and visual memory abilities. It was also reported that the Student has exhibited increased aggression and oppositional defiant behaviors, which were thought to occur most often in situations where "structure is changed, if there are expected social demands, or he is overly stimulated." P4 at 29. The evaluation was shared with the LEA.**
  4. **The writer of the March 2009 evaluation report found that the Student did not meet the IDEA eligibility criteria for an Expressive Language Disorder, nor did the Student meet the criteria for Autism Spectrum Disorder. P4 at 29. This was true, despite the existence of adaptive behavior test scores that indicated major delays in**

socialization.

5. **The Student's full scale IQ scores range from 72-87. P4 at 33-34. This is in the low average range and has remained consistent over the years.**
6. **In April of 2010, the parents requested additional assessment in the area of reading because of concerns that the Student may have dyslexia. TR 58. The parents did not reject the assessment performed by the LEA. Rather they asked for an additional assessment which was performed by a different school psychologist than the one who performed the earlier assessment. TR 1388-89.**
7. **The Student's 4/23/2010 Individual Education Program ("IEP") contains goals that are not measurable. RA 12-13. At that time, the Student exhibited a mild articulation delay, but fluency and voice skills were not a concern. RA 10. One of the Student's measurable annual goals nevertheless focused on voice skills and articulation, without any indication of how it would be determined whether or not the Student had made progress on the goal.**

The Student also had difficulty staying on task. RA 10-11. The goal to address this issue required the Student to explain and describe things that seem related to being a good citizen, so to speak, and to learn to follow routines with minimal supervision. RA 12. The Student was to receive direct instruction, have assignments broken into smaller units, use organizers and have only the necessary materials out, but nothing describes how the Student's success or failure or progress will be assessed. RA 13.

The Student's parent had reported that the Student was exhibiting at risk levels of aggression and clinically significant levels of withdrawal. At school, however, teachers

reported that externalizing problems were within normal limits at school and that the Student "is *no longer* aggressive to self or others." RA 11, emphasis added. This would suggest a history of some aggressive behaviors. A goal that may have been an attempt to address such behaviors indicates that the Student "will demonstrate social interaction skills, work and play collaboratively in large and small groups and use appropriate means to express needs, wants and feelings." As written, as long as the Student demonstrated *any* social interaction skills, that goal may be said to have been achieved. No short term benchmarks are provided in the IEP and no indication of how to measure the annual goal is provided. What is "appropriate?" Is it sufficient to do this once?

8. **A document identifying itself as a Behavior Intervention Plan addresses only the issues of attention, following directions, task completion and organizational skills.**

RA 16. It does not address any form of social skills training.

9. **As of 9/2/2010, the Student received services for OHI due to ADHD and speech language impairment.** RA 8. The parents requested additional services be provided in reading, and that accommodations be provided in the areas of reading, writing and math, as a result of some testing performed by an outside specialist at the request of the parents. The Student, a third grader, was reading at the second grade level at that time. The parents also requested assistance for dysgraphia. The conference summary seems to suggest that, although the Student was classified as eligible under OHI and had executive function deficits, the only changes needed were to utilize technologies to accommodate the Student's needs for reading and to allow the spelling sounds to be sent home whenever the parents requested it. RA 8-9. The parents were not comfortable with

- leaving things that way unless another meeting was to be held soon. RA 9.
10. **On 10/4/2010, the Student was determined to have a speech/language impairment.**  
RA 34.
  11. **A month later, on 11/15/2010, the ARC met to discuss new reports and to review data due to concerns about the Student's reading and writing, and determined that the Student was not making sufficient progress.** RA 43. The Student qualified for services for Specific Learning Disability (SLD) in the areas of reading fluency and written expression. RA 37-44, 54. This determination took into account the results at school and the amount of extra support the Student was receiving at home and from outside agencies. The 4/23/2010 IEP was amended to address these concerns, though the goals are still not measurable as written.
  12. **The parent again raised the issue of aggression at home.** RA 43. A teacher also indicated that the Student was exhibiting emotional difficulties. These concerns were discussed but the IEP does not reflect any changes to address behavior or aggression.
  13. **At the end of fourth grade, the Student continued to exhibit delays in expressive language, pragmatic language skills and articulation skills, but had made progress, and was also found to have made progress in interacting with peers, but not with his regular education teacher.** RA 59-60. Although the Student had also made progress in reading fluency, ■ was still reading at the 2.7 grade level.
  14. **The student's fourth grade teachers for the 2010-2011 school year were not familiar with the term functional behavior assessment and believed there were no consistent triggers to the Student's behaviors.** TR 582-585, 626. One of the Student's fourth



- grade teachers reported that the Student's behaviors were so out of control at the beginning of that year that the focus was on behavior and not academics. TR 598-599.
15. **An IEP developed for the fifth grade year, included goals for articulation, class participation, attentive listening, development of basic manipulative skills, writing, good sportsmanship and conflict resolution skills, organizational skills, following directions, and reading with expression.** RA 62-66. The goals in this IEP were written in a manner that would allow progress on them to be assessed.
  16. **The BIP was revised to include not only organization issues but also social competence skills.** RA 71. Of particular priority were difficulty with expressing wants, needs and feelings and difficulty identifying ways to handle and manage stress and frustration.
  17. **Most of the Supplementary Aids and Services in the IEP developed for the fifth grade year centered around task completion and staying focused, but a few could also be said to relate to assistance with managing behaviors.** RA 89. The supplementary aids and services that might support behavior management included using behavior charts for rewards, preferential seating, no peer graders, and allowing structured breaks to assist attention and focus.
  18. **A meeting of the ARC on 9/26/2011 resulted in a referral for emotional behavioral assessment and revision of the IEP.** RA 100. The Student had already been suspended for two days for making sexual comments and it was decided that the BIP needed revision. It was also suggested that benchmarks should be added at that time to the IEP. The Specially Designed Instruction, although more detailed than prior IEPs, is not

special or unique to the needs of the Student, at least in some instances. Examples of this finding include such things as: teach capitalization, overall organization, punctuation and spelling, teach the Student to listen to the ideas of others or to join in a group, or to write a complete sentence, or to look at the speaker. Some, but not all, of the goals on the IEP are measurable. RA 116-120.

19. **The ARC decided to provide additional supports to the Student in less structured settings.** Additional adult supervision and supports were provided on the playground and in the cafeteria. TR 887-88, 890. One to one supervision was not provided.
20. **One of the Student's teachers reported that the Student's inappropriate behaviors occurred as many as 5 times in a 50 minute block.** RA 100. These behaviors occurred despite having as many as four adults supervising the Student and the Student's peers. RA 110.
21. **For the first time, on October 5, 2011, the ARC discussed collecting data to attempt to identify antecedents, behaviors and consequences of the Student's inappropriate behaviors.** RA 109. Teachers began to collect data on behaviors to try to ascertain what preceded the behaviors and what the functions of those behaviors might be for the Student. TR 801. The data collected, however, does describe what the Student did, but not the antecedents or consequences and certainly not the functions of the behaviors for the Student, nor was there data-based discussion of functions by the ARC. RC 17-23.
22. **The ARC subsequently determined that the Student has an emotional behavioral disorder that adversely affects educational performance.** RA 131, 135. The Student was also determined to have continued eligibility under OHI, due to ADHD. RA 133-

134. These determinations resulted from a psychoeducational evaluation conducted by the school psychologist. RB 57-79. She presented her findings to the ARC, which then concluded that the Student required the additional supports of the special class placement. RA 125-36. 138-51.
23. **By the middle of the Student's fifth grade year, at least one teacher believed that the Student required constant adult supervision. RA 143.**
24. **During the middle of the Student's fifth grade year, the Student changed schools within the school district, following a hospitalization in December. See RA 103 and 125. The hospitalization followed a suspension and court proceedings. P6, TR 737-738. The Student had engaged in behaviors that caused concern for the safety of another student.**
25. **A school psychologist conducted a psychoeducational evaluation and presented her findings to the ARC, which led to ARC to determine that the Student qualified for services for EBD. RB 57-59.**
26. **Changes were made to the IEP to begin on 2/8/2012 and to provide more structure in a special (formerly EBD) classroom. RA 143. This IEP documents that the Student still struggles with articulation and may use a mumbled or "weird" voice. RA 152. It was also noted that the Student is either totally silent or talking nonstop, often speaking repetitively, or explicitly sexual in nature. RA 154. The Student appeared to engage in such behaviors to provoke negative consequences and also refused to accept positive feedback. *Id.* The ARC agreed that the Student required the additional supports of the special classroom. TR 892, 894.**

27. **The Student's educational setting was in a more restrictive placement after the move from one school to another in 2012.** Prior to the move, the Student spent 305 minutes per week in the regular education classroom and after the move, no time was in the regular education classroom. RA 90-91, RA 160. From that point on, the Student never returned to a regular education classroom setting while enrolled in schools of the LEA.
28. **In making the change to full time special class, the ARC considered the potential harmful effect upon the Student.** RA143. The Student's mother expressed the concern that the Student may see the move as another failure. The other ARC members decided that the teachers would work to make the Student feel comfortable and welcomed in the class.
29. **The LEA also collected data for Spring of the 2011-2012 school year.** See RC 79. The data collected here is in the same format as the data collected in the 2010-2011 school year. Both suffer from scoring systems that make the information not very useful. For both years, the highest score was a 4 for the day and the lowest was a 1. In order to earn a 4, the Student had to satisfy the criteria for working with others *and* attitude *and* task completion *and* expressing feelings appropriately. For anything less than a 4, one is left to wonder about which area the Student was not completely successful. Also, because multiple goals were assessed on a single chart, it is not possible to ascertain the Student's actual progress on these goals. As shown, for example, on RC 79, the Student received a score of 3 on 4/20, with a notation that the Student was "not on task" and had to be "redirected several times." This would suggest a score of 2 or 3 for task completion alone that day. How did the Student perform in the other three areas? If he scored a 4 in

all of them, his overall average for the day should have been higher than 75%. If not, what happened?

RC 86a-f at least show behaviors one per page or chart, with data recorded approximately once per week. The data on these pages, while not useful for an FBA type analysis, do allow one to see each area of concern separately. It is easy to see that the Student remained in the appropriate area more consistently than he worked cooperatively with others.

30. **The 2/8/2012 IEP shows that the Student was still reading at the beginning second grade level, for purposes of improving reading fluency. RA 158. The goals on this IEP are greatly improved as compared to prior IEPs, in terms of measurability.**
31. **A new BIP was developed because of the sexual comments, inappropriate language to others and talking about subject matter appropriate for the Student's age or the school setting. RA 162. It is not clear whether this BIP was ever implemented because the conference summary does not mention it, nor does it indicate whether the BIP was accepted by the ARC.**
32. **Although the ARC met on April 20, 2012 to plan for the Student's transition to middle school and to revise the IEP for the following year, the Student was home schooled for the Fall semester of the sixth grade year. See RA 170, 181 and TR 172.**  
The service plan states that the parents elected to reject the IEP and FAPE and to enroll the Student in a private school setting (home school) at their own expense, making the Student ineligible for many services that could have been provided. A service plan signed by the parent acknowledging this is not contained in the evidentiary record, and

- although conference summary notes for the 9/17/2012 ARC meeting indicate that the parent discussed her reasons for deciding to home school the Student, the rationale is not in the summary notes. RA 190.
33. **The Student returned to the public school setting for the Spring of the sixth grade year and, after a period of six or seven weeks, was moved to another school within the school district. P8. The Student's placement was again the special class. RA 201. The Student was also suspended for two days and Child Protective Services was contacted, and that agency contacted the parents, because of the Student's behaviors at school. The decision to change schools was made, due to safety concerns for another student, by a committee chaired by the assistant superintendent of the LEA's Board of Education, with no input from the ARC or from parents.**
34. **A "team" met on February 27, 2013 to discuss the history of the Student's behaviors. RE 79. Neither the ARC as a whole nor the parents were part of this team.**
35. **The Student received a two day out of school suspension for profanity, vulgarity, pornography beginning 3/14/2013. RE 41.**
36. **Also on March 14, 2013, a team, again not including the full ARC or even the parents, met to discuss serious threats to staff, with the result that another two day suspension, beginning March 15, 2013. RE 85-87.**
37. **Upon the Student's return to public school, it was decided by the ARC that it would be necessary to provide all but 45 minutes per week of instruction in the special classroom, with the remaining 45 minutes in the resource room. RA 211.**
38. **The LEA collected data on various IEP goals, especially those related to social**

**interactions, in the Spring of 2013.** RC 104-113. These data, like the data from the prior two years provide summary information, and, like the 2011-2012 school year data, give information about each goal or task individually. Summary data for each separate area of concern, collected while the Student attended schools of the LEA, seem to show extreme variability in performance. RC 108-113. However, the summary data shown on RC 104-107 were collected while the Student received Homebound services and are not representative of how the Student would perform on a typical school day.

The LEA also collected data on various social behaviors, by date and time of day. RC 115-145. This allows one to see much more clearly if time of day, subject matter, less structured time, etc. may impact Student behaviors. Although not immediately obvious, the data could also be used to see if day of the week made a difference, such as Monday (after a weekend?), or Friday (tired?). Data collected this way is much more informative than that collected for the 2010-2012 school years.

39. **The LEA prepared a behavior occurrence scatterplot, showing dates, time of day and type of behavior exhibited by the Student during the 2012-2013 school year, between March 25, 2013 and April 30, 2013.** RA 295-296, RC 201-202.
40. **The Student received a two day out of school suspension for threats to a teacher, to begin after school on April 22, 2013 and end before school on April 24, 2013.** RE 91.
41. **For the first time, on April 24, 2013, the LEA asks, "Triggers? What are they?"** RE 95. The LEA got close, but never quite collected data that would allow one to answer these questions.
42. **The Student's aggressive behaviors towards others resulted in five of six half hour**

- blocks of time spent by the Student in seclusion in a small room on April 25-26, 2013. RA 295. The sixth block of time spent in seclusion occurred on April 25<sup>th</sup> and was due to running that led to concerns for the Student's safety and whereabouts.**
43. **On April 29, 2013, the Student spent virtually the entire day in either teacher directed time away or seclusion in a small room, with the majority in seclusion. RA 295. Although three such blocks of time were for running and safety concerns, the rest were for physical aggression or physical aggression plus threatening comments. The Student spent four of ten half hour blocks in seclusion, and a fifth in teacher directed time away, before leaving school at mid-day to be hospitalized on April 30, 2013. While in the seclusion room, the Student had sufficient time to write all over the walls.**
44. **Also on April 30, 2013, the Student was suspended for May 1 and 2, 2013 as a result of writing obscenities and threats to a female student on the wall of the seclusion room and for writing a story that was threatening in nature. RE 108.**
45. **By May 6, 2013, the Student was on homebound/home hospital per the recommendation of a treating physician. RA at 215. The Student continued on homebound for the remainder of the school year due to anxiety and received two hours per week of educational services from May 1, 2013 through the end of the school year. RA at 219, TR 1426.**
46. **In the Summer of 2013, [REDACTED], Psy.D., evaluated the Student. See, P9. Based upon extensive testing, [REDACTED] diagnosed the Student with Cognitive Disorder NOS, Pervasive Developmental Disorder NOS, Severe Mixed Receptive-Expressive Language Disorder, Learning Disorder NOS, Developmental Reading Disorder, Disorder**



of Written Expression, Mathematics Disorder, Developmental Motor Coordination Disorder/Visual-Motor Dysgraphia, Organic Mood/Affective Disorder with Brief Reactive Psychotic episodes, and a history of Selective Mutism. P9 at 102-103. Dr. Federici also found the Student to have low average intellectual functioning, static Encephalopathy/Impairments in frontal executive functioning, possible subcortical neurological difficulties related to high risk pre- and post-natal factors, and motor and sensory dyspraxias. P9, 103. Although several of [REDACTED] diagnoses reflect findings similar to those of the LEA, the LEA has rejected [REDACTED] report due to differences between medical uses and educational uses of test results, as well as the fact that [REDACTED] used out of date tests. See TR 916-917, 933, 1342, 1354-1358.

47. [REDACTED] has extensive experience in working with children in institutional setting in [REDACTED] countries and has assumed that the Student was exposed to similar conditions as those he has seen. TR 381-384. In [REDACTED] written report, [REDACTED] stated, "There is absolutely and unequivocally no question that [the Student] was exposed to unspecified high risk pre- and post-natal factors which have affected brain growth and development." P9 at 94. The record contains no reports of medical testing to support this conclusion.
48. At the hearing, the parents also requested reimbursement for the cost of the evaluation by [REDACTED] and for transportation expenses. TR 311. These expenses include \$3,000.00 for the evaluation, \$150 for a hotel, and mileage. TR 313.
49. The Student began the year receiving homebound services. RA 225.
50. At an ARC meeting on 10/3/2013, a functional behavioral assessment was again

**discussed but had not been conducted.** RA at 232. The possibility of eligibility for autism and social skills training for children with autism were also discussed. It was determined, however, that the Student would receive the same services whether the category of disability was EBD or Autism. RA at 233-234. The LEA requested releases from the parents in order to enable the LEA to obtain current information from outside service providers. RA at 235.

51. **The LEA did present a draft BIP that appears to incorporate the most recent behavioral concerns, but it appears to have been based upon anecdotal reports of teacher observation and not on a systematic evaluation of the Student's behaviors.** RA at 261-276. The Student's mother was concerned that the proposed behavior plan contained strategies for reacting to inappropriate behaviors, but not strategies for preventing such behaviors. TR 198-199.
52. **The Student's mother attended the October 3, 2013 ARC meeting and signed that she attended but added a note stating, "attended but not necessarily agreeing to new IEP."** RA 236. The ARC considered and made changes to the proposed IEP for the 2013-2014 school year on the basis of information provided by the parents. RA 249, TR 1411-1412.
53. **The LEA has also prepared scatter plots to show the Student's progress toward academic IEP goals during the Spring of the Student's sixth grade year and Fall of the seventh grade year, but some of the data shown is indecipherable.** RA 277-294. Data for the Spring of Sixth grade, with one exception, contains roughly one data point per week. In looking at RA 277, one can see that given some unknown number of

opportunities the week of 2/4/2013, the Student supported the main idea of a writing with three or more details. The following week, the Student did this perfectly. Were there the same number of opportunities for success each week? Was the Student successful one time out of three in week one and successful one time out of one opportunity in week two? Also, weeks one and three are identical (33% success) and two and four are identical (100% success). Week five just happens to be the same as mathematical average of the prior four weeks, with a reported 67% success. There are many ways to arrive at an average of 67% and the summary of the data, as shown here is not truly informative. Both RA 277 and 278 seem to show that the Student is doing the work, and capable of it, or just not doing it. RA 279,280, 282 seem to show that the Student does use correct spelling and correct phonetic spelling most of the time, as well as correct punctuation at the end of sentences, regardless of how many opportunities are given during a week. Whether or not the Student writes in complete sentences or uses correct punctuation at the beginning of sentences shows more variability, though it is interesting to note that the Student was least successful in both tasks during the same week. RA 281, 283. Data for the Fall, 2013 school year shows only two, and sometimes three data points over a two to three week period in September, 2013. RA 285-290.

54. **The parents placed the Student in the [REDACTED], a private school in [REDACTED], as of November 18, 2013. TR 312, TR 1426. The parents informed the LEA of their dissatisfaction with the proposed IEP for 2013-2014, with specific concerns stated and informed the LEA that they would be enrolling the Student at [REDACTED]. RD 74.**
55. **The parents requested reimbursement for private educational expenses, which the**

LEA rejected in a letter dated November 25, 2013. RD 74, RE 115. The tuition expense for the 2013-2014 school year totals \$16,100. TR 313. If the Student had attended for the full school year, the tuition would have been \$25,000. In addition, the parents also must transport the Student to the school. For the 2013-2014 school year, the parents are also requesting mileage reimbursement for 8000 miles. TR 313. At 50 miles per round trip, with two round trips per day, reimbursement is requested for transportation for 80 school days. For the partial school year, the tuition and transportation total estimate is approximately \$20,000.00. For a full school year, costs would be between \$32,000.00 and \$33,000.00.

56. **A the time of the Hearing, the Student attended school at the [REDACTED] [REDACTED]. TR 492.**
57. **[REDACTED] uses an Applied Behavioral Analysis (ABA) approach to teach students with autism and developmental disabilities. TR 490.**
58. **At [REDACTED], the Student receives one-to-one teaching and had some flexibility as to when some tasks must be completed during the school day. TR 497-498.**
59. **The Student exhibits non-compliance at [REDACTED]. TR 498. Aggression was also an issue four times during a period just over a week long. TR 498-499.**
60. **[REDACTED] has identified probable triggers for some of the Student's behaviors, for example, the room becoming too crowded or too loud. TR 499. [REDACTED] has been teaching the Student to ask for permission to take a walk in those circumstances and has someone accompany the Student for a few minute walk in the school. TR 500.**
61. **[REDACTED] reports less non-compliance and less aggression, but has taken no data to**

document this. TR 503-504, 509. Teachers work with the Student one-to-one.

62. [REDACTED] is not a KY certified school and not all teachers are certified to teach in KY.

TR 505.

### **BURDEN OF PROOF**

It has been clearly established that the party seeking relief has the burden of proof in administrative hearings brought under 20 USCS §§ 1400 *et. seq.*, otherwise known as the IDEA. *See, Shaffer v. Weast*, 126 S.Ct. 528 (US, 2005) (Holding that the burden of persuasion in an IDEA case falls where it usually falls, upon the party seeking relief). In addition, KRS 13B.090(7) informs us that Kentucky follows the federal rule and spells out the level of proof required to meet the burden of persuasion, stating as follows:

In all administrative hearings, unless otherwise provided by statute or federal law, the party proposing 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. The agency has the burden to show the propriety of a penalty imposed or the removal of a benefit previously granted. The party asserting an affirmative defense has the burden to establish that defense. The party with the burden of proof on any issue has the burden of going forward and the ultimate burden of persuasion as to that issue. The ultimate burden of persuasion in all administrative hearings is met by a preponderance of evidence in the record. Failure to meet the burden of proof is grounds for a recommended order from the hearing officer.

The Petitioner must therefore show by a preponderance of the evidence in the record that he is entitled to relief on each issue, because the alleged failures of the LEA.

### **DISCUSSION OF THE ISSUES**

1. DID THE LEA FAIL TO EVALUATE THE CHILD IN ALL AREAS OF SUSPECTED DISABILITY IN VIOLATION OF 707 KAR 1:300?
2. DID THE LEA FAIL TO ADEQUATELY EVALUATE THE CHILD IN ORDER FOR [THE CHILD] TO BE ELIGIBLE FOR SERVICES IN VIOLATION OF 707 KAR 1:300?

Because these two issues appear to address the same questions, they are discussed simultaneously herein. 707 KAR 1:300 Section 4 provides:

10) The child shall be assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

(11) The evaluation shall be sufficiently comprehensive to identify all the child's special education and related services needs, whether commonly linked to the disability category in which the child has been classified.

If a student, after evaluation is identified as having "Emotional-behavioral disability" or "EBD," it means that a child, *when provided with interventions to meet instructional and social-emotional needs*, continues to exhibit one (1) or more of the following, when compared to the child's peer and cultural reference groups, across settings, over a long period of time and to a marked degree:

1. Severe deficits in social competence or appropriate behavior which cause an inability to build or maintain satisfactory interpersonal relationships with adults or peers;
2. Severe deficits in academic performance which are not commensurate with the student's ability level and are not solely a result of intellectual, sensory, or other health factors but are related to the child's social-emotional problem;
3. A general pervasive mood of unhappiness or depression; or
4. A tendency to develop physical symptoms or fears associated with personal or school problems.

This term does not apply to children who display isolated (not necessarily one (1)) inappropriate behaviors that are the result of willful, intentional, or wanton actions unless it is determined through the evaluations process that the child does have an emotional-behavioral disability. 707 KAR 1:002, emphasis added.

Even those students who are advancing from grade to grade are protected by identification and evaluation requirements. *Board of Education of Fayette County, KY v. L.M.*, 478 F.3d 307 (6<sup>th</sup> Cir. 2007). In *L.M.*, the Court of Appeals for the Sixth Circuit addressed the question of whether failure of a school district to refer a child for evaluation, a child find procedural requirement, resulted in substantive harm to the student. In adopting the standard for procedural violations that cause substantive harm, first set forth in *Clay T. v. Walton County Sch. Dist.*, 952 F.Supp. 817, 823 (M.D.Ga. 1997), the *L.M.* court stated that a claimant must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate. *L.M.*, at page 313.

The fact that the Student was advancing from grade to grade would not save the school district from an adverse ruling, if clear signs of disability were ignored. At the same time, however, the school district can only be held accountable for facts it knew or should have known, in the circumstances before it. The Court of Appeals for the First Circuit addressed this issue in *Roland M. v. Concord School Committee*, 910 F.3d 983 (1<sup>st</sup> Cir. 1990). In *Roland M.*, the appellate court considered the case of a student known to have disabilities. In evaluating the appropriateness of an IEP for the student, the court said that actions of school systems cannot be judged exclusively in hindsight. *Id.*, at p. 992.

**Emotional Behavioral Disorder.** The LEA knew and had reason to know that the Student had behavioral issues. FF 2, 3. The Student had long term behavioral issues, both at home and at school. The LEA, however, did not conduct any analysis of the Student's behaviors during the 2010-2011 school year which would allow it to determine if, or the extent to which, these had adverse impact on the Student's educational performance. In fact, the Student's

teachers were not familiar with a functional behavioral assessment. FF 14. No recommendation was made by the ARC to evaluate the Student for an emotional-behavioral disorder, despite the fact that at the beginning of the fourth grade year, the Student's behaviors were so out of control that the teachers focused on behaviors and not on academics. FF14.

During the Student's fifth grade year, the ARC did conduct an evaluation of the Student's Emotional Behavioral status. FF 18, 20, 22. Changes were made to the IEP to begin on February 8, 2012. FF 26. These changes reflect the ARC's finding that the Student did qualify for services under the category of Emotional behavioral Disability. FF 22. No functional behavioral assessment was performed during the fifth grade year, although teachers did collect some data about the Student's behaviors. FF 21,29. Some of the data collected were not very useful because, as stated, multiple areas of concern were collapsed together, making it impossible to know what was really going on. FF 29. Other data showed each area of concern separately, but no attempt was made to identify antecedents of inappropriate behaviors or rewards (functions) to the Student for engaging in such behaviors. FF 29.

The Student was home-schooled for the first half of the sixth grade year, 2012-2013. FF 32. Within six or seven weeks of returning to school during the second half of the 2012-2013 school year, the Student was suspended for two days. FF 33. Data was collected during this period and, although the behavioral data was considerably more informative than data previously collected, it still was not collected in a manner that would allow the ARC to see antecedents to, or functions of, the inappropriate Student behaviors. FF 38,39. The documentary evidence shows that not until April 24, 2013, virtually the end of the Student's sixth grade year, did the ARC ask these questions. FF 41.



For the school years 2010-2011, 2011-2012 and the second half of the 2012-2013, the LEA failed to properly evaluate the emotional behavioral status of the Student. The LEA did, however, begin to systematically collect behavioral data in the latter part of the 2012-2013 school year. If the Student had remained in school, however, the ARC may have made additional recommendations for revisions to the Student's behavioral management plan.

**Autism.** The Petitioner also believes the Student should have been evaluated for eligibility for services in the category of autism. See Petitioner's Closing Argument, at 10. By definition, for purposes of the IDEA,

(i) Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

(ii) Autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in paragraph (c)(4) of this section.

34 CFR § 300.8(c)(1).

Early evaluations specifically stated that the Student did not qualify for services for autism. FF4. Autism was not considered again until after the Federici evaluation during the Summer of 2013. FF 46. The Federici evaluation, however, included test instruments that were out of date and which had been re-normed, some of them more than once. FF 46. Kentucky law requires that Assessment tools used shall be technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 707 KAR 1:300 Section 4(12). The LEA did not accept the report of Federici, especially

with respect to autism, both because of the definition cited herein above and because of the testing issues. FF 46. The ARC did, however, decide in a meeting on October 3, 2013, that the Student would receive the same services, whether classified as EBD or Autistic. FF 50.

Having determined that the Student is eligible for services on the basis of EBD, the LEA was not required to evaluate further for autism as a child receiving services for EBD cannot be classified as eligible under the category of autism.

3. **DID THE LEA FAIL TO EDUCATE THE CHILD IN THE LEAST RESTRICTIVE ENVIRONMENT, IN VIOLATION OF 707 KAR 1:350?**

An LEA is not required to educate a student in the least restrictive environment. Rather, an LEA is required to educate a child with a disability in the least restrictive environment appropriate for that child. In determining the environment appropriate for the child, the LEA cannot remove a child from the regular education environment unless education cannot be satisfactorily achieved with the use of supplementary aids and services. As 707 KAR 1:350, Section 1(1) states:

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. 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.

Supplementary aids and services are defined as aids, services, and other supports that are provided in regular education classes or other education-related settings to enable a child with disabilities to be educated with nondisabled children to the maximum extent appropriate. 707 KAR 1:002(61). This definition is quite broad and does not require any particular type of

support. It is clear, however, that the overarching goal is to educate children in the regular education setting, to the extent appropriate in the circumstances.

The Student alleges that the LEA failed to educate the Student in the least restrictive environment because of two changes of schools. The first occurred during the Student's fifth grade year. Parents were not involved in the decision to move the Student from one school to the other. FF24. The move from one school to the other occurred because of safety concerns for another Student. This move did not result in a change of placement because services did not change at that time. In early February, 2012, the ARC met and decided that the Student needed more supports than could be provided in the Student's current placement. FF 26. That revision to the IEP did constitute a change of placement, because it was a move from some time in a regular education classroom to essentially full time in a special class. So the question becomes, "Was the change of placement appropriate?"

At the time the decision was made by the ARC, the Student had an IEP developed on April 11, 2011, near the end of the prior school year. FF 15. According to the conference summary from that ARC meeting, the Student had made considerable progress in social interactions, but was having difficulty staying on task. The supplementary aids and services focused primarily on attention and focus, rather than on behaviors. FF 17.

Very early in the fifth grade year, The Student was suspended due to unacceptable behaviors at school. FF 18. The ARC met and discussed the suspension and behavior issues. The ARC met again a week or so later, and again discussed the behavior issues, noting that as many as four adults are in the classroom to supervise the Student and the Student's peers. FF 20. The ARC revised the IEP to increase the amount of time spent in the resource room and decrease

the amount of time in the regular education setting, but made no changes to the supplementary aids and services. FF 16,17.

A couple of months later, one teacher believed the Student required constant adult supervision. FF 23. The ARC agreed and did change the Student's placement to a more restrictive setting. FF 26,27. The ARC seemed at a loss as to how to assist the Student further in the regular education setting but did consider potential harmful effects to the Student for making this change. See FF 28. In part, this can be attributed to the nonexistent or very poorly written behavioral goals and in part to the lack of an adequate behavioral management plan.

During the 2012-2013 school year, the Student was moved from one school to another, without including parents or ARC in the discussion, but no changes to the Student's placement occurred. FF 33. All services remained the same.

4. **DID THE LEA FAIL TO ADEQUATELY DEVELOP A BEHAVIOR INTERVENTION PLAN TO ADDRESS THE CHILD'S UNIQUE INDIVIDUAL EDUCATIONAL NEEDS IN VIOLATION OF 707 KAR 1:320?**

In the case of a child whose behavior impedes his or her learning or that of others, in development an IEP, the ARC must consider, if appropriate, strategies, including positive behavioral interventions, strategies and supports to address the behavior. 707 KAR 1:320, Section 5(2)(a). The regulation does not define what these positive behavioral interventions, strategies and supports must look like, nor does it provide any rules for how these things must be determined. Similarly, 34 CFR § 300.530 requires, but does not define or describe, a functional behavioral assessment in very limited circumstances. If an LEA determines that behavior that violates a code of student conduct was a manifestation of the student's disability, the LEA may make disciplinary changes in placement, but must conduct a functional behavioral assessment

and implement a behavioral intervention plan or, if such an assessment has already occurred, review the behavioral intervention plan and modify it. 34 CFR § 300.530(f).

For the fourth grade year, a document called a Behavior Intervention Plan addressed issues of attention, following directions, task completion and organizational skills. FF 8. The items in the BIP were clearly needed supports for the Student. It did not address, however, needed social skills training at all. The Student's teachers that year were unfamiliar with functional behavior assessments, so they would not have been able to conduct one or even to decide whether it might be helpful, even if not required. The IEP developed at the end of fourth grade for the following year, did not include goals to address social skills training, either.

The Student's problem behaviors escalated in the fifth grade year to the point that ■ was suspended in September, within weeks of the beginning of the school year, for two days. FF18. The BIP was amended on October 5, 2011 to include social competence skills. FF16. Also in October, teachers began collecting rudimentary data and began to identify the types of behaviors exhibited by the Student. FF 21. By February, 2012, the Student was found eligible on the basis of EBD and placement became more restrictive - the special classroom. The LEA did continue data collection following the move to the new classroom, but as stated elsewhere herein, much of the data is not useful.

In the case at hand, the change of placement to the special class was not for disciplinary reasons. It was for additional supports for the Student, despite having followed a suspension and court proceedings. FF 33. Although a formal functional behavioral assessment would therefore not be required, in a situation such as this, where the Student's fourth grade teacher stated that at the beginning of the year, the Student's behaviors were so out of control that the focus had to be

on behavior, rather than academics, it would seem that one and one-half years later, something should have been in place to address those continuing and escalating behaviors. The IEP was required to include positive behavior interventions, strategies and supports to address the behavior.

Although the administrative regulations do not describe how data must be collected or how it must be presented, there is no point in collecting and reporting data in a manner that does not allow the ARC to identify and evaluate specific behaviors of concern or progress toward reducing the problem behaviors. Most of the data collected during the Student's fourth and fifth grade years suffers from this problem. As a result, the behavioral interventions, and the Student's access to the general education curriculum and social development all suffered during those years.

When the Student returned to the public schools in the Spring of 2013, the LEA began collecting behavioral data in a more systematic and useful manner. FF38,39. The Student, however, almost immediately began engaging in behaviors serious enough to result in suspensions in March and April. FF 39, 42, 43. The LEA did not have the opportunity to evaluate the data or make further refinements to it or to amend the BIP on the basis of the new data because the Student was suspended for serious aggressive behaviors and threats and then began receiving homebound/home hospital services. FF 40. This Hearing Officer finds that the BIP for the 2012-2013 school year, if implemented, did not reduce inappropriate Student behaviors, but cannot say that the plan was inadequate under the facts of this case, where the Student had been out of school for a substantial period of time and the LEA was just beginning to work with the Student again..

5. DID THE LEA FAIL TO RECOGNIZE THE CHILD'S PARENTS AS EQUAL PARTNERS IN THE ADMISSIONS AND RELEASE COMMITTEE MEETING, IN VIOLATION OF 707 1:340?

The Petitioner's due process hearing request alleges that the parents have not been treated by the LEA as equal partners in the Student's ARC meeting. 707 KAR 1:340, Section 1 (1)(b) requires an LEA to afford a parent of a child with a disability an opportunity to "participate in all ARC meetings concerning his child." The documentary evidence shows that one or both parents attended all ARC meetings. FF 54. Not only did they attend, but they actively participated in the decision-making process. When the parents asked whether accuracy rates could be lowered for behavioral goals on an IEP, the ARC agreed to do so. FF 55. The Student's father acknowledged that both parents were allowed to voice their opinions and the other members of the ARC made changes to behavior plans in response. FF 55. The ARC made changes to the proposed IEP for the 2013-2014 school year on the basis of information provided by the parents. FF 52.

The two instances in which the parents were not included in decision making occurred on February 27, 2013 and March 14, 2013. FF 27, 29. Neither of these were ARC meetings. These were meetings about location of services to the Student when issues of safety for another student became involved.

The parents have had the opportunity, and have fully participated in ARC decision making as required by 707 KAR 1:340.

6. DID THE LEA FAIL TO ALLOW THE PARENTS' REQUEST FOR AN INDEPENDENT EDUCATIONAL EVALUATION, IN VIOLATION OF 707 KAR 1:340?

According to 34 CFR § 300.502(b):

- (1) A parent has the right to an independent educational evaluation at public expense *if the parent disagrees with an evaluation obtained by the public agency*, subject to the conditions in paragraphs (b)(2) through (4) of this section.
- (2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either:
  - (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or
  - (ii) Ensure that an independent educational evaluation is provided at public expense, *unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.*
- (3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.
- (4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.

Emphasis added.

The Kentucky Administrative Regulations mirror the federal regulations. A parent therefore has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the LEA. This right is not, however, unlimited. If a parent requests an IEE, the LEA must either request a due process hearing or pay for an IEE unless the LEA proves at a due process hearing that the evaluation obtained by the parent does not meet LEA criteria.

In 2010, an Independent educational evaluation (IEE) was requested. FF 6. Instead of paying for an IEE, the LEA had a different school psychologist perform additional testing. The parents also obtained additional testing at their own expense. The parents have not requested



reimbursement for this evaluation.

In the summer of 2013, the parents obtained an evaluation by ██████████. They did not consult with the ARC before obtaining the evaluation and the record does not seem to show that they obtained this evaluation because of objections to an evaluation performed by the LEA. Rather, the parents seemed to be looking for additional or different answers than what were available to that point. If one assumes that the parents objected to an LEA evaluation and requested an IEE, though, the IEE obtained by the parents must still meet the criteria of the LEA. Clearly the ██████████ evaluation does not. FF 46. The parents are not entitled to reimbursement for the Federici evaluation.

7. **DID THE LEA FAIL TO ADEQUATELY TRAIN ALL SERVICE PROVIDERS WHO WOULD BE RESPONSIBLE TO IMPLEMENT THE CHILD'S INDIVIDUAL EDUCATION PLAN, IN VIOLATION OF 34 CFR 300.156 AND 707 KAR 1:320?**

The LEA did not properly train all staff working with the Student to properly address the Student's behavioral issues. See FF13. 707 KAR 1:320, however, is silent as to teacher qualifications and training, other than to require that the LEA must inform teachers of a student's IEP and how to implement it. In addition, although 34 CFR 300.156 does require an LEA to have properly qualified personnel to provide IDEA services, nothing in this part shall be construed to create a right of action on behalf of an individual student or a class of students for the failure of a particular SEA or LEA employee to be highly qualified, or to prevent a parent from filing a complaint about staff qualifications with the SEA as provided for under this part.

The parents are not entitled to relief for failure to train personnel.

8. **DID THE LEA FAIL TO PROVIDE THE CHILD WITH A FREE AND APPROPRIATE PUBLIC EDUCATION?**

Pursuant to 707 KAR 1.290, Section 1, an LEA must make a free appropriate public education (FAPE) available to all children with disabilities aged three (3) to twenty-one (21) residing within its district's boundaries who have not received a high school diploma, including children with disabilities who have been suspended or expelled for more than ten (10) school days in a school year. FAPE shall 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. FAPE is denied if these are flawed to the extent that a student receives only trivial benefit, even if the student is advancing from grade to grade.

This does not mean that the LEA must maximize the educational benefit to the Student. *See Cypress-Fairbanks Indep. Sch. Dist. V. Michael F.*, 118 F.3d 245, 247 (5<sup>th</sup> Cir. 1997). It 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.

Except in cases where a student has poor social skills or where a student has exhibited behavioral difficulties, most courts seem to focus on academic performance in determining whether or not adverse effect on educational performance exists. In *Corvallis Sch. Dist. 509J*, 28 IDELR 1026 (SEA Or. 1998), for example, a student with Asperger's syndrome was found ineligible for special education and related services because she had earned high-average grades, demonstrated satisfactory progress in social skills, work habits, study habits and had achievement

test scores showing [REDACTED] was at least at grade level in all areas. The court also found that the student was also satisfactorily served by a Rehabilitation Act of 1973 Section 504 plan.

*Corvallis* is easily distinguishable from the matter before this Hearing Officer. Although the *Corvallis* court found an Asperger's student not eligible for services under the IDEA, the ARC here found the Student eligible in the categories of Other Health Impaired and Specific Learning Disability. The Student in *Corvallis* had demonstrated satisfactory progress in social skills and was also served by a Rehabilitation Act of 1973 Section 504 plan that met [REDACTED] needs. The Student here has not been served by any Section 504 plan and has not made satisfactory progress in social skills. In fact, the Student has repeatedly engaged in behaviors that posed safety concerns for two other students and has engaged in aggressive and threatening behaviors toward teachers and staff. In this case, therefore, the fact that the Student has passed from grade to grade is not dispositive of the issue of whether FAPE was provided.

In developing an IEP for a student, an ARC shall consider the strengths of the child and the concerns of the parents for enhancing the education of their child, the results of the initial or most recent evaluation of the child, the results of the child's performance on any general state or district-wide assessment programs; and the academic, developmental, and functional needs of the child. An ARC shall also, in the case of a child whose behavior impedes his or her learning or that of others, consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior. 707 KAR 1:320, Section 5.

The IEP must be reasonably calculated to promote progress, by providing a basic floor of opportunity which, when supported by additional services, will permit a student with disabilities to benefit from the instruction. *See, Board of Education of the Hendrick Hudson Central School*

*District v. Rowley*, 458 U. S., 176, 201; 102 S.Ct. 3034 (1982). In addition, the Court of Appeals for the First Circuit has held that in deciding whether or not an IEP is appropriate, the issue is not whether the IEP would achieve perfect results but whether it was reasonably calculated to provide FAPE. See, *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983,992 (1<sup>st</sup> Cir. 1990).

The IEP developed in April, 2010 for the 2010-2011 school year contained goals that cannot be measured to allow the ARC to determine the Student's progress or lack thereof. FF 7. The IEP lacks measurable goals and an adequate behavioral intervention plan for that year, and the ARC did not revise the IEP despite the fact that the Student's behaviors were so out of control that academics had lower priority. FF 14. Taking all these things into account, the LEA did not provide FAPE to the Student for the 2010-2011 school year.

For the 2011-2012 school year, the ARC added to the IEP goals for good sportsmanship and conflict resolution skills. FF +15. The BIP was modified to include supports to teach the Student some social competence skills, especially with respect to expressing wants, needs and feelings, and identifying ways to handle and manage stress and frustration. FF16. Because the Student had behavioral difficulties severe enough to result in a suspension very early in the year, the ARC added additional adult supervision in less structured settings. FF19. The LEA evaluated the Student for an emotional-behavioral disorder (EBD). By the time the results were received, the Student's behaviors had deteriorated to the point where the ARC decided the Student required a change of placement to the special class. FF26. He was no longer in the regular education setting. Still, very little useful monitoring data had been collected.

During that year, the LEA did evaluate the Student for EBD and found him eligible. Such

a determination, by statutory and regulatory definition, requires a finding that the Student has severe deficits in social competence or appropriate behavior which cause an inability to build or maintain satisfactory relationships with adults and peers. These must exist across settings, over a long period of time and to a marked degree, even when provided with interventions to meet instructional and social-emotional needs. The problem here is that the Student was not provided with adequate or timely interventions to support obvious social-emotional needs during the fifth grade year.

The Student was home-schooled for the first half of the sixth grade (2012-2013) and was not entitled to receive the full array of services that would have been available if the Student had remained in the public school. FF 32. Within a very short time after returning to the public school setting, the Student was suspended and was placed in seclusion, where [REDACTED] had time to write on all four walls of the room, and to try to erase what [REDACTED] had written, without staff realizing what the Student was doing. FF 43,44.

The LEA did collect potentially useful data regarding the Student's behaviors, but did not have the opportunity to analyze the data before the Student was removed to home hospital. Overall, despite the Student's continued difficulties, it cannot be said that the LEA denied FAPE for that year.

9. **IS THE STUDENT ENTITLED TO REIMBURSEMENT FOR EXPENSES ASSOCIATED WITH PLACEMENT AT BLUEGRASS AUTISM CENTER?**

The Student has requested reimbursement for tuition and expenses at BAC. The applicable Kentucky Administrative Regulation governing this matter is 707 KAR 1:370.

**Section 1. Children with Disabilities Enrolled in Private Schools by Their Parents when FAPE is at Issue. (1) An LEA shall make FAPE available to each**

child with a disability. If a parent decides to place his child with a disability in a private school after the offer of FAPE, the LEA shall not be required to pay for the cost of the private education. Disagreements between a parent and the LEA regarding the availability of a program appropriate for the student and financial responsibility shall be subject to the due process procedures in 707 KAR 1:340.

(2) If a parent of a child with a disability, who previously received special education and related services under the authority of the LEA, enrolls the child in a private school without the consent of or referral by the LEA, a hearing officer or a court may award financial reimbursement to the parent if it is determined that the LEA did not offer FAPE to the child in a timely manner and the private placement is appropriate. This may be awarded even if the parents did not receive consent from the LEA for the private placement and the LEA did not make a referral to the private school. A hearing officer or a court may determine a private school placement to be appropriate even though it does not meet state standards that apply to an LEA.

(3) The amount of the financial reimbursement described in subsection (2) of this section may be reduced or denied if:

1. At the most recent ARC meeting prior to the removal by the parents of their child with a disability to the private school, the parents did not inform the LEA that they were rejecting the proposed LEA placement, including stating their concerns and their intent to enroll the child in a private school at public expense;
2. The parents did not give written notice to the LEA of the information described in paragraph (a) of this subsection at least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child.

The U.S Supreme Court ruled in *School Committee of Burlington v. Dept. of Education of Massachusetts*, 471 U.S. 359 (1985) that a school district would have to reimburse the costs of an unilateral private placement for their disabled child if the following findings were made:

The school district's IEP is found to be inappropriate (i.e. not reasonably calculated to confer meaningful educational benefit to the student), *and* the private program is found to be appropriate

under IDEA.

At the beginning of the 2013-2014 school year, the Student received services as a homebound student. FF 49. The ARC met to revise the Student's IEP, in hopes that the Student might be able to return to school. As part of that meeting the ARC revised the BIP to include the behavioral supports, but the parent believed the proposed strategies would provide staff with guidance for how to react to behaviors but not how to reduce or prevent them. See FF 49.

The proposed IEP did not provide for one-to-one instruction, although as early as fifth grade, at least one teacher believed that the Student required constant supervision. FF 23. It did, however, include at least three measurable goals specifically targeting problem behaviors. The ARC conference summary also reflects that view of LEA staff that the Student could receive the same services, whether classified as EBD or autistic. FF 50. The Student's mother interpreted this to mean that everything would remain the same as it had been.

The Student's mother signed the IEP indicating her attendance at the meeting, with a note added that stated, "attended but not necessarily agreeing to new IEP." FF52. It was not an outright rejection but should have been sufficient to inform other ARC members that the parent still had concerns about the IEP. The parents subsequently informed the LEA that they intended to enroll the Student in the [REDACTED] and requested that the LEA pay for expenses for the Student to attend. FF54. The LEA acknowledged the request and denied it. FF 56.

This Hearing Officer finds that the LEA offered FAPE for the 2013-2014 school year, but did not offer it in a timely manner as required to avoid a finding the it is liable for costs associated with private school. The Student has a history of aggressive and inappropriate social behaviors that predates fourth grade. The Student's behaviors were seriously out of control as

early as that , but appropriate interventions were not in place throughout that year. It was impossible to target specific behaviors, or progress on them, because of the way in which data was recorded. Even when the ARC realized that the Student's behaviors occurred 5 times in a 50 minute class block and that the Student needed so much more in the way of supports that it was necessary to move the Student to a more restrictive setting, not much changed in the way the LEA collected and reported monitoring data.

Having found that FAPE was untimely offered, it becomes necessary to consider whether the private school placement is appropriate. A private school is not required to meet the same state standards that apply to an LEA. It must however, provide services appropriate to the needs of the child.

At [REDACTED], the private school chosen by the parents, the Student has engaged in some aggressive behaviors and some non-compliance, but [REDACTED] has not developed a behavior plan for the Student. FF 60, 62. Nevertheless, [REDACTED] believes it has identified triggers that result in inappropriate behaviors and has developed a strategy to reduce the problem behaviors. FF 61. The Hearing Officer finds that this approach to behavior management has no more to commend it than that used by the LEA. [REDACTED] is not an appropriate placement.

#### **CONCLUSIONS AND ORDER**

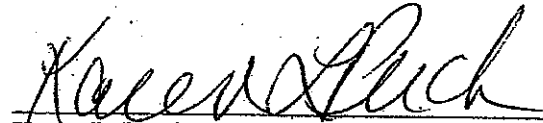
1. The LEA did not provide FAPE for the 2010-2012 schoolyears.
2. The LEA had no obligation to evaluate the Student for Autism for any of the three years in question.
3. The Student cannot recover for failure to adequately train all staff who worked with the Student.



4. The Student is not entitled to reimbursement for expenses associated with the [REDACTED] evaluation.
5. The Student is not entitled to reimbursement for expenses associated with attendance at [REDACTED].
6. There is insufficient evidence in the record to require an assistive technology evaluation.
7. The LEA shall conduct a functional behavioral assessment and the assessment shall be performed by a qualified and independent behavioralist to assist in developing an appropriate BIP at LEA expense.
8. The Student is entitled to two years compensatory education, which the LEA shall provide in a manner that puts the Student in the position [REDACTED] would have had, but for the denial of FAPE. In order to accomplish this, the LEA shall
  - a. provide one-to-one instruction to the Student, unless such is not recommended by the independent behavioralist after completion of the FBA.
  - b. fully implement all recommendations of the the independent behavioralist
  - c. pay for the services of the independent behavioralist to assist with revisions of the BIP no less often than annually, for at least three years
  - d. provide supervised opportunities for the Student to engage in appropriate social interactions with peers, both after school and during the summer months for the next three years, at LEA expense. This order is not based upon a finding regarding need for ESY. Rather, it is intended to provide opportunities outside of school for the Student to use social skills being taught. The ARC may decide the exact nature of these activities, but they must be provided.

9. Although the Petitioner is the prevailing party as to some issues, the Hearing Officer does not have subject matter jurisdiction to award attorney fees.

SO ORDERED this 17th day of July 2014.

  
Karen L. Perch, Hearing Officer

#### NOTICE OF APPEAL RIGHTS

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 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 date of the hearing officer's decision.

#### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Order was served to the above-named representatives, by United States mail, postage pre-paid and first class, to the persons shown below, on this the 17th day of July, 2014.

[REDACTED]

  
KAREN L. PERCH