

**COMMONWEALTH OF KENTUCKY  
KENTUCKY DEPARTMENT OF EDUCATION  
DIVISION OF EXCEPTIONAL CHILDREN SERVICES  
AGENCY CASE NO. 1718-10**

████████████████████

**PETITIONER**

**V. EXCEPTIONAL CHILDRENS APPEALS BOARD DECISION**

████████████████████

**INDEPENDENT SCHOOLS**

**RESPONDENT**

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**PROCEDURAL BACKGROUND**

This case comes before the Exceptional Children Appeals Board (hereinafter “ECAB”) following a timely appeal by the Respondent.

On January 19, 2016, the Petitioner filed his first request for a Due Process Hearing seeking reimbursement for the Petitioner's tuition at the private behavior clinic he attended, (BCA) alleging the Respondent failed to offer FAPE to the Petitioner.

On July 5, 2016, the hearing officer issued a Decision and Order concluding that the Respondent had offered the Petitioner FAPE and that BCA could not provide an appropriate education. The Petitioner appealed to the Exceptional Children Appeals Board (ECAB), which issued a Final Decision and Order on November 14, 2016, finding (1.) the Respondent has no duty to consider a private placement unless it is unable to provide FAPE through a contract with a public school, (2.) The process of developing the IEP had not been completed and consequently, the case must be remanded to the LEA to convene an ARC meeting, and (3.) If the

Respondent cannot implement the IEP, BCA would be an appropriate placement for the Petitioner.

On December 14, 2016, the Petitioner appealed the findings of ECAB to the United States District Court for the Western District of Kentucky. On October 11, 2017, the District Court dismissed the Petitioner's complaint because the Petitioner had not exhausted his administrative remedies. Concurrently with the district court proceedings, the parties participated in meetings to develop an IEP for the Petitioner. A final ARC meeting was held July 21, 2017, and the Respondent finalized an IEP for the Petitioner. On July 24, 2017, the Petitioner notified the Respondent that it rejected the IEP.

On December 4, 2017, the Petitioner filed the second Request for a Due Process Hearing. A hearing was held April 17 - 20, 2018, and the parties filed briefs thereafter. On September 6, 2018, the hearing officer issued "Findings Decision and Order of the Due Process Hearing Officer." On November 9, 2018, the Respondent School filed a timely appeal to the ECAB which is the subject of this decision.

**JURISDICTION BEFORE THE EXCEPTIONAL CHILDREN APPEALS  
BOARD IS ESTABLISHED**

This is an appeal of a hearing officer's decision as permitted by 707 KAR 1:340 Section 12 which provides:

- (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) days of the date of the hearing officer's decision.

The Respondent School's appeal was timely requested.

## **THE STUDENT BEARS THE BURDEN OF PROOF**

The party seeking relief bears the burden of proving their entitlement to relief by a preponderance of the evidence. In this case, the student bears the ultimate burden of persuasion on the elements of the student's claims. *Schaffer v. Weast*, 546 U.S. 49, 57-58 (2005); KRS 13B.090. *See also*, *City of Louisville, Div. of Fire v. Fire Serv. Managers Ass'n by and Through Kaelin*, 212 S.W.3d 89, 95 (Ky. 2006) providing, "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".

## **ECAB IMPARTIALLY REVIEWS THE RECORD DE NOVO AND MAKES AN INDEPENDENT DECISION**

ECAB reviews the record de novo and can make fact-findings it deems necessary to address legal issues raised on appeal. Where a state has established a two-tier administrative process, the appellate review is to be conducted pursuant to 20 U.S.C. § 1415(g). Kentucky has adopted such a two-tier system. See 707 KAR 1:340 § 12. ECAB is required to conduct an impartial review of a hearing decision and make an independent decision upon completion of such review. 20 U.S.C. § 1415(g).

34 CFR 300.514(b)(2) provides that the appellate panel is to examine the entire hearing record before making its independent decision. The only limitation on the de novo review is that ECAB must give deference to a hearing officer's fact findings based on credibility judgments "unless nontestimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion." *Carlisle Area School District v. Scott P.*, 62 F.3d 520, (3d Cir. 1995). Such deference applies only to those situations involving record-supported credibility determinations. *Id.* at 529. This panel is free to make

fact findings contrary to the hearing officer's findings so long as they are supported by substantial evidence and are not based upon different views about credibility of witness testimony. *Id.* at 529. The existence of conflicting testimony does not, by itself, warrant concluding a related fact finding was implicitly a credibility determination of evidentiary facts by the hearing officer rather than differences in overall judgment as to proper inferences. *Id.* at 529.

### **ABBREVIATIONS OR ANACRONYMS**

Acronyms or abbreviations include ABA (Applied Behavior Analysis), ARC (Admission and Release Committee), BIP (Behavior Intervention Plan), BCA (██████████ Center for Autism), CFR (Code of Federal Regulations), DRO (Differential Reinforcement of Non-occurrence of Behavior), FAPE (Free and Appropriate Education), IDEA (Individuals with Disabilities Education Act), █CPS (██████████ County Public Schools), JEX (Joint Exhibit and Respondent's Exhibits), KDE (Kentucky Department of Education), KAR (Kentucky Administrative Regulations), IEP (Individualized Educational Plan), LEA (Local Education Agency), MSD (Moderate to Severe, Disabilities), OT (Occupational Therapy), SCM (Safe Crisis Management Plan), and T.T. (Trial or Hearing Transcript). The Student in this matter will be referenced as the Student, Petitioner and/or Student Petitioner. The School District will be referenced as the District, the Respondent and/or the Respondent School District.

## **MOTION TO STRIKE**

### **THE HEARING OFFICER CORRECTLY HELD THAT THE KENTUCKY DEPARTMENT OF EDUCATION MANAGEMENT AUDIT FINDINGS AND RECOMMENDATIONS OF STATE MANAGEMENT ISSUED APRIL 30, 2018 AND ATTACHED TO PETITIONER'S TRIAL BRIEF AS EXHIBIT B AND PETITIONER'S PROPOSED FINDINGS OF FACTS AS EXHIBIT C SHOULD BE STRICKEN FROM THE RECORD**

Petitioner attached a complete copy of the Kentucky Department of Education Management Audit Findings and Recommendations of State Management issued April 30, 2018, as an Exhibit to their Trial Brief and to their Proposed Findings of Fact and Conclusions of Law. The Respondent filed a Motion to Strike said Exhibits and references thereto from the record on the basis evidence could not be introduced after the hearing and that the audit and accompanying documents were irrelevant and immaterial. Petitioner sought for the Hearing Officer to give conclusive and determinative weight to the audit findings by taking judicial notice of the findings contained in said report. Respondent argued judicial notice was not appropriate. Petitioner did not raise the ongoing audit as an issue in this Due Process Request.

The request for due process hearing does not make any reference to the Kentucky Department of Education audit. There was no request at the end of the hearing by either party to supplement the record.

34 CFR § 300.511(d) Subject matter of due process hearings states:

“The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under § 300.508(b), unless the other party agrees otherwise.”

█ CPS's audit problems were well publicized during the course of this hearing in various media outlets and the audit had been ongoing since February 14, 2017. The request for due process was filed on December 4, 2017. Therefore, if the Petitioner had concerns or wanted to include issues that were addressed in the audit, these should have been set forth in the Request

for Due Process hearing, or the Petitioner should have amended his request for due process hearing when the preliminary results came out and prior to the hearing. The Petitioner did not include any preliminary audit findings or witnesses in their Exhibit and Witness Lists.

The parties were required by Order dated February 8, 2018, to exchange Witness and Exhibit Lists on or before March 8, 2018. Said document did not exist at that time and was not included in the Petitioner's list of exhibits. 707 KAR1:340 §11(4) provides, "The procedures included in KRS Chapter 13B and IDEA Subpart E shall apply to a due process hearing." KRS 13B.090 § (1) states, "In an administrative hearing, findings of fact shall be based exclusively on the evidence in the record." KRS 13B also gives any party the right to inspect, at least five (5) days prior to the hearing, a list of all witnesses every other party expects to call at the hearing, and the available documentary or tangible evidence relating to an administrative hearing either in person or by counsel. Subpart E of IDEA sets forth similar requirements by providing that any party to a hearing has the right to (2) present evidence and confront, cross exam, and compel the attendance of witnesses; (3) prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five (5) business days before the hearing. Thus, same cannot be considered. The audit findings are immaterial and irrelevant.

KRS 13B.090 § 1 states that "a hearing officer shall exclude evidence that is irrelevant or immaterial." The audit covers the efficiency and effectiveness in the governance or administration of the school district as a whole. It addresses problems of IDEA implementation as a whole, but not specific to the Petitioner. IDEA's requirements relate specifically to each individual child and absent any findings concerning this child, the audit would be irrelevant. Most of the issues in the audit that were discussed in the brief concerned physical restraints and seclusion, which are not required for Petitioner. The findings also found that many of the

problems concerning restraint in seclusion policy centered on alleged discrimination to African American students. Petitioner is a Caucasian.

Further, Kentucky Rule of Evidence 403 requires that evidence be excluded unless its probative value is substantially outweighed by the danger of undue prejudice or confusion of the issues. █ CPS has appealed the issues in the audit and it was ongoing during the time the Hearing Officer entered his decision in this matter. Therefore, there was a substantial danger of undue prejudice to █ CPS as those findings had not been adjudicated by any fact finder. Thus, it cannot properly be considered by this ECAB. It is not proper to take judicial notice of the audit findings.

Lastly, it would not be appropriate to take judicial notice of any of the audit findings as they are in dispute. KRS 13B.090 specifically provides:

The hearing officer may take official notice of facts which are not in dispute, or of generally recognized technical or scientific facts within the agency's specialized knowledge. The Hearing Officer shall notify all parties, either before, during the hearing, or in preliminary reports or otherwise, of any facts so noticed and their source. All parties shall be given an opportunity to contest facts officially noticed.

As stated, █ CPS was disputing and appealing the findings of the State at the time of the hearing. These are not technical or scientific facts within an agency's specialized knowledge, but are based upon a factual investigation by KDE. Further, the Hearing Officer did not have knowledge of this prior to the hearing and could not have given notice to the parties, nor an opportunity to contest those facts as set out in KRS 13B.090 prior to the hearing.

Considering all of the above, the Hearing Officer correctly struck the Kentucky Department of Education Management Audit Findings and Recommendations of State Management issued April 30, 2018, from the record.

## ISSUES FOR DECISION

The issues are:

1. Whether the Respondent School failed to provide FAPE to the Petitioner regarding (1.) movement breaks, (2.) one-on-one speech services, (3.) goals related to preposition and pronoun usage and/or (4.) vocational and transitional needs.
2. If the Respondent failed to provide FAPE to the Petitioner, whether the Petitioner is entitled to reimbursement for expenses for the private placement to BCA.

**For the reasons stated herein, the Petitioner is not entitled to reimbursement from the Respondent for tuition expense at any time before July 24, 2017. However, the Petitioner is entitled to reimbursement of tuition expense for 2017-2018 and 2018-2019.**

## FINDINGS OF FACT

1. The Respondent School District is an independent public school district within the Commonwealth of Kentucky which educates students in grades kindergarten through the eighth grade. Additionally, it has a contract with the █CPS to educate its high school students. The Respondent School District began contracting with █CPS in 1950. (T.T. Vol. II, pp. 138-9)

2. The Student Petitioner is presently an eighteen-year-old who was diagnosed with autism at the age of eighteen months. (T.T. Vol. I, pp. 28-29)

3. When the Student Petitioner attended the Respondent School District, he was placed in part-time general education and part-time special education. (T.T. Vol. II; pp. 136)

4. While at the Respondent School District, the Petitioner received some instruction in general education classes in the areas of science and social studies. These classes were modified to be appropriate for the Petitioner. (T.T. Vol. II p. 137)

5. When attending the Respondent School District, the Petitioner participated in electives with regular education students one hour each day. (T.T. Vol. II, p. 136)

6. At the time the Student Petitioner graduated from the Respondent School District in 2015, he was able to transition or move from one class to another independently. (T.T. Vol. II; p. 137; T.T. Vol. III, p. 32)

7. When the Student was attending the Respondent School District, he participated in school assemblies. (T.T. Vol. II; p. 137)

8. The Student Petitioner has many educational needs. He has an IQ of 59, very severe communication issues, difficulty with reading comprehension, is prompt dependent and had significant sensory issues. (Vol. II, pp. 106-107, Vol. I p.96, 98; JEX# 63, pp.4-7.)

9. The Student Petitioner engages in physical stereotypy by flapping his hands and running his fingers across his body. (T.T. Vol. I, pp. 41-42; PEX# 12A)

10. The Student Petitioner engages in vocal stereotypy by periodically speaking a string of unrelated words. (T.T. Vol. I, pp. 41-42; PEX # 12A)

11. In environments with loud or unexpected noises the Student may have outbursts or engage in maladaptive behaviors. (Vol. I, p. 40; Vol. II, pp.180-182.)

12. The Student Petitioner wears noise cancelling headphones to muffle sounds, reduce unexpected loud noises and prevent maladaptive behaviors. (T.T. Vol. II, pp.40-41)

13. The Student Petitioner is minimally verbal, cannot engage in conversation and has a behavior plan. He communicates in very short utterances, using primarily nouns and verbs (Vol. I, p. 277).

14. The Student Petitioner cannot take a shower by himself. He can brush his teeth but cannot floss. He can retrieve a vegetable from the refrigerator, but cannot cut or peel it. He can dress himself but is unaware if he puts his clothes on backwards. (T.T. Vol. II, pp.82-83)

15. The Student Petitioner's social skills are significantly delayed. He does not relate to peers or model his peers' behavior. (JEX #77, p.7)

### **The Student's Education at the Respondent School District**

16. Applied Behavior Analysis (ABA) is a “systematic approach using principles of science from behavior and learning to make socially significant behavior changes that can increase or decrease behaviors.” (T.T. Vol. II, p. 77)

17. The Student Petitioner has received ABA therapy since he was first diagnosed with autism, and it has been part of his school and home based therapy programs. (T.T. Vol. I, pp. 31-32)

18. When the Student Petitioner was in the first grade, the [REDACTED] Principal approached the Student's Mother about working with the School's staff to design a program for students with autism. STRIVE, was designed as an ABA program for low-incidence students (with autism or Down syndrome). (T.T. Vol. I, pp. 36-38)

19. The Student Petitioner participated in STRIVE during his time at the District. (Vol. I, pp. 37-38)

20. The District does not have a high school, so the Student is required to transfer to another school district beginning in the ninth grade. (T.T. Vol. I, p. 42)

### **The 2015 ARC Process**

21. When the Student graduated from the eighth grade at the Respondent District, the Respondent had contracts with two school districts: ██████ County and ██████ County. (T.T. Vol. I, p. 41-46)

22. The Student's Parents toured South ██████ High School, but were advised that ██████ County would have to change the Student's "intensive level" of services in his IEP if he were to attend. (T.T. Vol. I, pp. 44-45)

23. ██████ County reported to the District's Special Education Director that there was no room in its entire district for the Student Petitioner. (T.T. Vol. I, p. 46)

24. The Student's Parents turned to the District's other contractor, ██████ County (CPS). The CPS placement coordinator contacted the Student's Parents. (T.T. Vol. I, pp. 46-47)

25. The Placement Coordinator informed the Petitioner's mother that three school sites had space available for the Student during the fall of 2015. (T.T. Vol. I, pp. 46, 47)

26. The Student's Parents toured a classroom at ██████ High School. They were disappointed with the school as there were students wandering around and one student was asleep in his chair. (T.T. Vol. I, p. 47)

27. The Student's Parents requested that the District place the Student at BCA. (T.T. Vol. I, p. 48)

### **The ██████ Center for Autism**

28. The Student Petitioner has attended BCA since leaving ██████ in 2015. (T.T. Vol. I, p. 57-59)

29. The ██████ City Campus (██████) where the Student Petitioner attends has about 20 students between the ages of 12 and 23. (T.T. Vol. II. p. 13)

30. The Student Petitioner's present classroom at BCA has four students where he receives almost entirely direct one-on-one instructor support. (JEX#77, p. 9)

31. BCA has two full-time BCBA's on-site, lead instructors who are certified registered behavior technicians, and a team of instructors who are trained on both BCA's instructional system as well as each student's behavior plan. (T.T. Vol. II, pp. 16-17)

32. At BCA, the Student is situated in a cubicle for most of the day and works there with a technician. (T.T. Vol. III, pp. 31-33.)

33. The Behavior Services Assessment sent to █CPS by BCA in the spring of 2017 indicated that BCA had been using the same behavior goals with the Student Petitioner since he enrolled in 2015. (T.T. Vol. p. 69)

34. Progress monitoring data from the March 30, 2015, ARC meeting was reviewed at the January 20, 2017, ARC meeting. (JEX#56, p. 5; T.T. Vol. II, p. 147)

### **Historical Background**

35. This was the second due process hearing in this case and is now the second appeal to the ECAB. The first hearing was held March 29-31, 2016.

36. The Hearing Officer entered an Order dated July 5, 2016. In that Order, the Hearing Officer concluded that the Respondent School District had offered the Student Petitioner FAPE.

37. The Student Petitioner timely appealed that decision to the ECAB.

38. The ECAB found that the IEP process was not complete and the Hearing Officer erred regarding the Respondent School District providing an IEP, which would reasonably be calculated to provide FAPE to the Student Petitioner. One of the major problems was the July 2017 IEP's failure to consider the March 2015 IEP when creating the IEP.

39. On December 14, 2016, the Student Petitioner appealed the findings in the ECAB Order to the U.S. District Court for the Western District of Kentucky.

40. The Respondent School District moved to dismiss the appeal to the District Court on the grounds the Student Petitioner had failed to fully exhaust administrative remedies. On October 11, 2017, the District Court granted the School District's Motion and remanded the case to the ARC to complete the process of crafting an IEP.

41. After the ECAB Decision, there were at least six ARC meetings held in 2017 to develop the Student Petitioner's IEP. (T.T. Vol. I, p. 183; JEX# 56, 58, 65, 69, 75,77, 78)

42. The Respondent's Special Education Director offered to hold an ARC meeting in December 2016 to update the Student Petitioner's IEP and begin developing program and placement options for him. (T.T. Vol. I p. 142)

43. The Parties ultimately agreed to hold the first ARC meeting on January 20, 2017. (T.T. Vol. II, p. 13)

44. The 2017 ARC discussed transition planning for the Student Petitioner at a JCPS school. (T.T. Vol. IV p. 182)

45. In January 2017, the Student's Parents participated with the School District and █CPS where the Parents, Lauren Elliott (BCA's Program Director at the time), and Johnathan Keefe (his private Behavioral Analyst) gave updates on the Student's present levels. (T.T. Vol. I, p. 73; Vol. 2, p. 102; JEX# 57)

46. It was decided that because the Student Petitioner had not been in public school for over a year, he would need to be evaluated prior to an IEP being developed. (T.T. Vol. I, p. 73; Vol. II, p. 102)

47. The Parties participated in a second ARC meeting on January 26, 2017.

Notwithstanding that only a week earlier the parties agreed that the Student Petitioner needed evaluations, █ CPS presented the Student's Parents with an IEP and an offer for the Student to start at █ CPS immediately. (JEX # 58; T.T, Vol. I, pp. 90-91; Vol. II, p. 105)

48. The Student's Parents did not agree with the draft IEP offered in January 2017. (T.T. Vol. I, p.92)

49. For at least three months during the 2017 spring semester, the Student Petitioner was evaluated and █ CPS personnel observed him at BCA. (JEX #55, T.T. Vol. I, pp. 74-76, and T.T. Vol. II, p. 106)

50. During the process of developing the July 21, 2017, IEP, the draft IEPs included “March 30, 2015, █ Independent IEP Present Level Information; January 2017 Updates From █ SLP (2014-2015 Year End Data); Updates █ Center for Autism SLP; Parent Information Provided January 2017”; and subject specific information for each area. The areas are: Communication Status; Academic Performance; Health, Vision, Hearing, Motor Abilities; Social and Emotional Status; General Intelligence; Functional Hearing, Listening & Communication Assessment. (JEX #70, #73)

51. The Respondent's Special Education Director with the Occupational Therapist went to BCA to observe the Student Petitioner as part of the observation process. The Respondent's Special Education Director was concerned that BCA was more of a clinic than a school. She believed the Student in 2017 was working on some of the same skills he was working on in 2015. She believed there was more emphasis on behavior than academics. (T.T. Vol. II, pp. 158-161; JEX #38)

52. On April 20, 2017, there was an ARC meeting which commenced at 9:01 a.m. and ended at 1:06 p.m. Petitioner's Parents brought a court reporter who recorded the entire proceeding. (JEX #65, pp. 1-167)

53. The Petitioner's March 6, 2017, Occupational Therapy Assessment Summary, states “he received an OT evaluation through ██████ PLACE in August 2016 using the Bruininks-Oseretsky Test of Motor Proficiency, Second Edition (BOT-2). His performance on this assessment was consistent with previous assessments for motor skills. These assessments yielded well below average fine and visual motor abilities at the 4 1/2 to 5 1/2 year level. For this reason, standardized testing was not completed, however, he was observed during his individual daily routine at BCA, which included behavioral sessions, vocational routine, and meal time routine.” (JEX #61, p. 1)

54. The last two sentences of the first paragraph of the Occupational Therapy Assessment Summary (JEX#61, p. 2) state, "He (referring to the Student Petitioner) would benefit from occupational therapy in the educational setting to address his motor and bilateral coordination activities to participate in vocational and self-care routines. He would also benefit from a variety of sensory modulation strategies that are developed and monitored by a licensed occupational therapist embedded into his daily routines to increase his level of engagement and participation.”

55. The Supplementary Aids and Services section of the July 21, 2017 IEP states, “The occupational therapist will provide individual support to the student to address sensory modulation strategies such as movement breaks, heavy work, and motor planning/coordination strategies. (JEX #77 p.21) There is nothing in this section (JEX # 77 p. 21; Supplementary Aids and Services) that states the Student Petition will be provided opportunity for movement breaks throughout the day at specific intervals of “A” etc. On the most recent evaluations (JEX #77, pp.

6-7) the Student required movement breaks. On page 7, "During observation at BCA, he utilized movement breaks during his daily routine while engaged in behavioral therapy, vocational skills and independent living skills".

56. His classroom at █CPS would have one certified teacher and three instructional assistants. (T.T. Vol. III, p. 30)

57. Evaluations for the 2017 IEP indicated that the Student Petitioner has significant communication issues, significant cognitive issues and an IQ of 59. (T.T. Vol. II, pp. 106-107; JEX #63)

58. Evaluations indicated that the Student Petitioner's nonverbal index score was 59—in the 0.3 percentile (meaning that 99.7% of the students who took the test scored higher). (T.T. Vol. I, p. 96; JEX #63, p. 4)

59. The Student's math and reading scores were well below average. (T.T. Vol. I, p. 96; JEX #63, p.5)

60. For the spring 2017 speech evaluation, the Student was observed at least three times. The Student's speech enunciation had improved. He was easier to understand than when he graduated from the Respondent School District. (JEX # 63, pp. 6-7)

61. There was no evidence presented at the hearing that academic data was provided by BCA to the Respondent School District or █CPS during the spring of 2017 to determine the Student's gains or regression since he graduated from the Respondent School District in 2015. (T.T. Vol. III, p. 81)

62. The Student Petitioner had a BIP developed by BCA and a separate BIP for home developed by his private therapist. (JEX #62, p. 8)

63. In June 2017, the Student's Parents, the BCA's Director, the Student's private therapist, a Special Education Teacher for the Respondent District, the █CPS Special Education Director, the █CPS Autism Specialist, the █CPS Low Incidence Specialists and the Respondent School District Special Education Director met in an informal meeting to develop a Behavior Intervention Plan (BIP) for the Student. The group reviewed the behavior plan from his private therapist, the BIP from BCA and the BIP from the Respondent School District to develop a new BIP. (T.T. Vol. I, p. 172)

64. Much of the final BIP was taken from the BIP that was being used for the Student at BCA as the Respondent School District and █CPS did not have any recent behavior data. (T.T. Vol. III, p. 120) The BIP was finalized and offered to the Student's Parents at the June 27, 2018, ARC meeting. (JEX# 72 and 74)

65. The ARC decided to reduce the DROs on the BIP from sixty-minute intervals to thirty-minute intervals to assist the Student in making the transition from BCA to a █CPS school. Everyone was in agreement with this decision. (T.T. Vol. II, pp.119-121)

66. Safe Crisis Management (SCM) was not part of the Student's BIP as his behaviors never demonstrated that he needed SCM. (T.T. Vol. II, p. 2)

67. Information from the March 2015 IEP was incorporated into the July 21, 2017 IEP offered to the Student Petitioner. (T.T. Vol. I. p. 154), JEX 77, pp. 1-12)

68. The IEP dated July 21, 2017, (Communication Status-fourth paragraph below the heading) states, “(The Student) needs speech services in a one-on-one setting because (the Student) does not model from his peers. A group setting has been tried in the past, but has not been successful. This had also been noted in his March 30, 2015, evaluation. These deficits will

affect how (the Student) communicates his wants, needs, and knowledge to teachers and peers in his classroom and special education setting". (JEX#77, p. 1)

69. After the July 21, 2017, IEP and placement was offered to the Student Petitioner, his Parents emailed the School District's Special Education Director on July 24, 2017, stating "...and I decline the services at the [REDACTED] CPS." (J.E. #54)

70. The Student's Parents declined services/placement at [REDACTED] CPS because they are concerned about the Student's safety at [REDACTED] High School (JEX # 54), the Student was not being offered vocational services similar to those being offered at BCA (JEX #77, p. 14) and concerns about Speech Language Services (JEX # 77, p. 1 and 23)

#### **The July 21, 2017, IEP**

71. Pages 1-14, of the Student Petitioner's IEP, contain present levels of his performance during the spring of 2017. The 2017 levels of performance are set forth after his spring 2015 levels of performance just prior to the Student graduating from the Respondent School District. (JEX #77)

72. Goal #1 on the IEP states: "Given a real-world math task and asked to solve, (the Student) will demonstrate basic money handling skills (i.e. staying within a set budget, choosing the better buy, making a purchase) by completing the task with at least 80% accuracy across 3 consecutive instructional sessions, as measured by teacher data probes". (JEX# 77, pp. 15-16) This goal was based on goals the Student had worked on at the Respondent School District and BCA. (T.T. Vol. II, p. 165; Vol. III p. 12)

73. Goal #2 on the IEP states: "Given an analogue or digital clock and a schedule, (the Student) will demonstrate basic time telling concepts (i.e. tell time from an analogue or digital clock to the minute, tell time to the quarter hour/half hour and independently follow a schedule),

with at least 80% accuracy across 3 consecutive instructional sessions, as measured by teacher data probes". (JEX #77, pp. 16-17)

74. Goal #3 on the IEP states: "(the Student) will demonstrate functional reading skills by increasing his sight word vocabulary and basic reading vocabulary with at least 90% accuracy across 3 consecutive instructional sessions, as measured by teacher data probes". (JEX# 77, p. 17)

75. Goal # 4 on the IEP states: "Given a functional writing task (i.e., write personal information from a model, type 3 to 5 sentences on a topic of interest, and compose a shopping list) and asked to complete, (the Student) will produce the writing tasks with at least 80% accuracy (fewer than 20% errors), across 3 consecutive instructional opportunities, as measured by student work samples". (JEX #77, pp.17-18)

76. Goal #5 on the IEP states: "Given the opportunity to advocate for himself, (the student) will independently request help, or state his needs to a peer or adult on 4 out of 5 opportunities across 3 consecutive sessions, as measured by teacher data probes". (JEX #77, p. 18)

77. Goal # 6 on the IEP states: (the Student) "will follow a task analysis to complete a variety of functional tasks to increase independence with at least 80% accuracy across 3 consecutive instructional sessions, as measured by teacher data probes". (JEX # 77, p 19)

78. Goal #7 on the IEP states: "During structured language tasks and conversational exchange, (the Student) will use intelligible speech (appropriate volume and correct speech production) to request help as needed, initiate conversation with a partner, and use high level sentence structures to describe familiar objects by stating their feature, function and/or class with 80% accuracy across three consecutive sessions as measured by service log data and teacher

reports”. (JEX #77, p. 19) However, there is a notation on page 23 regarding discussing changing one-on-one speech therapy after the first 9 weeks.

79. Goal #8 on the IEP states: “Given vocabulary tasks, (the Student) will demonstrate knowledge of receptive and expressive components with 80% accuracy over 3 consecutive sessions as measured by data collected during drill and practice sessions”. (JEX# 77, p. 20)

80. At [REDACTED], the Student was offered additional space where he could move to in the event there were noises that bothered him. The Student would have been supervised by an adult in a smaller and quieter room if he had chosen to use it. (T.T. Vol. II, p. 185) Supplementary Aids and Services on the IEP listed "Accommodations for high noise level" and “noise cancelling headphones”. (JEX # 77, p. 21)

81. The IEP stated that the Student would be provided OT for thirty minutes, four times per month in a resource room. (JEX # 77, pp. 23-24; T.T. Vol. II, p. 171)

82. The section for Supplemental Aids and Services on the IEP states that OT would provide individual support to the Student to address sensory modulation strategies such as movement breaks, heavy work and motor planning/coordination strategies. In the Program Modifications/Supports section, the IEP provides the OT would educate classroom staff (classroom teachers, instructional assistants, outside teachers) on sensory modulation strategy and activities to promote motor coordination. (JEX # 77, pp. 21, 23; T.T. Vol. II, p. 171)

83. The [REDACTED] CPS OT was involved in developing the IEP goals (T.T. Vol. II, p. 261) Goal #4 on the IEP involved a functional writing task. The Specially Designed Instruction for that goal indicates that an OT would be available to assist with any fine motor strategies, classroom adaptation and adaptive materials that the Student might need to type or write those sentences and produce his work product. (JEX # 77, pp. 17-19; T.T. Vol. II pp. 263-265) Sensory

strategies were embedded in the Student's program with the goal of keeping him calm and regulated in the classroom. (T.T. Vol. II, p. 272)

84. [REDACTED] CPS' [REDACTED] High School was recommended for the Student Petitioner's Placement (T.T. Vol. III, p. 26.) The teacher in the MSD classroom was Christy Boston who is a certified moderate and severe disabilities (MSD) teacher. Ms. Boston has experience teaching students with autism and providing home therapy to autistic students. She has some training in ABA strategies and behavior plans. (T.T. Vol. III, pp. 28, 70-71, & 100-101)

85. In respect to the July 2017 IEP (JEX #77), the Student Petitioner's Father testified: "I think this document, what I am holding in my hand I think is a really good document. I think the goals in there are relevant goals to (Student Petitioner). I think the process of turning this document into a living breathing document that outlines what kind of services and how (the Student Petitioner) is going to receive those services that is where I have major misgivings about this IEP." (T.T. Vol. II p. 117)

86. According to the transcript of the July 21, 2017, ARC meeting, the Student's father near the close of the meeting after expressing the need for more time to decide whether to accept services from [REDACTED] CPS said: "We need time based on the [REDACTED] thing and just, okay, now it's [REDACTED]. Here's all the stuff you talked about, the training, the supplemental stuff, the peer tutor, the pullout, special-the home base, I mean, what we've agreed to is the IEP goals and the behavior plan if those are - I mean, we've agreed upon those. We do not agree upon the - we did not agree yet with the provision of the services at [REDACTED]. Whether it's [REDACTED], [REDACTED], [REDACTED], [REDACTED], it's how [REDACTED] CPS would bring this to life. That's what we need time to discuss." (JEX # 78, p. 204)

87. The Student Petitioner's Mother agreed with the goals set forth in the July 21, 2017, IEP. (T.T. Vol I, pp. 175-177)

88. The Student Petitioner's Parents were concerned about making sure the Student always had adult supervision for safety concerns. The ARC incorporated having an adult always present with the Student for safety concerns. (T.T. Vol. I pp. 186,189; JEX #77, p. 12)

89. After declining the services from █CPS in July 2017, the Student Petitioner continued to attend BCA. (T.T. Vol. I, pp. 58-59, Vol. II, p. 49)

90. The Student Petitioner's position is that his IQ increased from 42 to 59 since attending BCA. However, there is no written record of that. (JEX# 55; T.T. Vol. II, pp. 106-107; Ex. 63)

91. Dr. Karen Frohoff was the █CPS Director of Special Education during the 2016 - 17 school year. She participated in the development of the Student Petitioner's July 2017 IEP. (T.T. Vol. IV pp. 4-12)

92. If the Student Petitioner had attended █CPS in the fall of 2017, the School was going to add an additional full-time instructional assistant to whatever classroom he would have attended to help implement his IEP and his behavior plan. (T.T. Vol. IV p. 58)

93. █ has a peer tutor program where normally developing high school students assist students and teachers in the MSD classrooms. In testifying about the peer tutor program, the Student Petitioner's Mother indicated concerns about the training the peer tutors received at █. (T.T. Vol. I, pp. 122 and pp. 318-322)

94. The behavior technicians assisting the Student Petitioner at BCA are not licensed ABAs. (T.T. Vol. III, p. 63)

95. MSD teachers in █CPS must complete twenty-four hours of professional development each school year. Additionally, training is provided by MSD and autism groups at █CPS who go into the classrooms and identify target areas of growth. These individuals provide modeling, assist with data collection and analysis, and perform fidelity data checks to ensure programs are being implemented with fidelity. (T.T. Vol. III, pp. 34-36 & 39)

96. Within the district, █CPS has an Autism Program Specialist, twenty-five consulting teachers, school psychologists and resource teachers who support the classroom staff working with autistic students. (T.T. Vol. II, pp. 76-76 & 106)

97. The Kentucky and National Certification Board of BCBA's do not require teachers to hold a BCBA certification to use ABA strategies in a classroom. (T.T. Vol. III pp. 69, 111, 142-143)

98. The Respondent School District did not have a certified BCBA on staff when it implemented ABA strategies for the Student Petitioner. (Vol. II, pp. 173-174)

99. Page 23 of the Student Petitioner's IEP provides: "Program Modifications/Supports for school personnel that will be provided; Supports for school personnel included: "Staff trained in the principles of ABA to support implementation of the IEP" and "The occupational therapist will educate classroom staff in all relevant school environments on the use of sensory modulation strategies and activities to promote motor coordination." (JEX #77, p. 23)

100. MSD teachers are trained to take data like that required for the Student Petitioner's BIP. (T.T. Vol. IV, p. 56) They are familiar with taking data on IEP goals and behavior plans, and do so daily. (T.T. Vol. III, p. 122)

101. The Student Petitioner's Father testified he was concerned █CPS was undergoing an audit from KDE. (T.T. Vol. II p. 123)

102. A review of the July 2017 IEP indicates an absence of vocational goals or programs. (JEX #77 check goal 6). A review of the court reporter's transcript of the final ARC meeting indicates that neither of the Petitioner's Parents brought up the subject of vocational training like the Petitioner had at BCA. (JEX # 78)

103. As IEPs are written for a period of one year, the July 2017 expired in July 2018. (T.T. Vol. II; pp. 46-47)

104. The last sentence on page 19 of the ECAB Final Decision and Order states: "ECAB finds that the provisions of the student's March IEP discussed in this decision are necessary to provide FAPE and if [REDACTED] were unable to implement with such provisions that BCA would be an appropriate placement capable of implementing such an IEP."

#### **THERE WAS NO DENIAL OF FAPE REGARDING MOVEMENT BREAKS**

The ARCs used to develop the Petitioner's July 21, 2017 IEP determined that occupational therapy was a necessary related service for the Petitioner. (T 4/18/18, p. 281). As a result, the IEP provided the Petitioner would receive occupational therapy for thirty (30) minutes, four times per month in a resource room. (Joint Exhibit 77, p. 24.) Occupational therapy appears several times under the Supplementary Aids and Services portion of the July 20, 2017, IEP which states, "The occupational therapist will provide individual support to the student to address sensory modulation strategies such as **movement breaks**, heavy work, and motor planning/coordination strategies." *Id.* at p.21. (emphasis added.)

Other Supplementary Aids and Services related to OT include "sensory supports, frequent breaks, sensory processing strategies and activities, motor coordination strategies and activities," among others. *Id.* The IEP also provides under Program Modifications/Supports for

school personnel that, “The occupational therapist will educate classroom staff in all relevant school environments on the use of sensory modulation strategies and activities to promote motor coordination.” *Id.* at p. 23. Finally, the Supplementary Aids and Services portion of the IEP states, “█ will be given an opportunity to choose a movement of sensory activity on a daily basis throughout the day.” *Id.*

The IEP clearly indicates the Petitioner needs movement breaks, and movement breaks are addressed several times in the Supplementary Aids and Services section of the July 20, 2017 IEP. (Joint Exhibit 77, p. 21.) Supplementary Aids and Services are defined in the Guidance Document for Individual Education Program Development issued by KDE as “what the student needs to learn.” (Guidance Document for Individual Education Program Development, July 2018, p. 57.)

The way movement breaks are written on the July 21, 2017, IEP is consistent with the guidance provided by KDE. The Guidance Manual states services “should be integrated into the classroom and school environment to support learning of curriculum content.” (Guidance Manual, p. 27.) The IEP appropriately provides for movement breaks as a supplemental aid and service to allow the occupational therapist and teaching staff to provide these breaks throughout the Petitioner's school day, and not for a set or limited amount of time.

For these reasons, there was no denial of FAPE regarding movement breaks.

### **THERE WAS NO DENIAL OF FAPE REGARDING PRONOUNS/PREPOSITIONS**

There was no violation of FAPE by including short-term objectives on the IEP. At issue are two of the Benchmarks/Short-Term Instructional objectives on the IEP offered to the Petitioner on the July 21, 2017 IEP. Goal #8 provides:

1. Given vocabulary language tasks, [REDACTED] will demonstrate knowledge of prepositions with 80% independence over 3 consecutive sessions.

2. Given vocabulary language tasks, [REDACTED] will demonstrate knowledge of pronouns with 80% independence with 3 consecutive sessions. (Joint Exhibit 77, p. 20.)

The ARC Conference Summary Report indicates the Petitioner was already working on identifying prepositions and pronouns at BCA in May 2017, and this benchmark was requested by the parents. (Joint Exhibit 69, p. 108-113; Joint Exhibit 68, p. 3.) The ARC report states, “[REDACTED] reported [REDACTED] needs foundational skills and these skills should not be embedded in the goals but rather they should be more explicit. The committee added another goal to address this concern-Goal #8.” (Joint Exhibit 68, pp. 3, 4) The benchmarks/short-term objectives relate directly to the goal of demonstrating knowledge of prepositions and pronouns and provide a means of measuring progress toward that goal.

Consequently, there was no denial of FAPE regarding prepositions and pronouns.

**THERE WAS A DENIAL OF FAPE AS THE RESPONDENT DID NOT  
APPROPRIATELY PLAN FOR THE PETITIONER’S VOCATIONAL AND  
TRANSITIONAL NEEDS**

The July 2017 IEP did not appropriately provide for vocational services for at least a year. (JEX 77, p. 14.) The Student Petitioner was born in July 2000. At the time of the creation of the July 2017 IEP, he was 16 years old. As a 16-year-old with an IEP, vocational education becomes extremely important. *See Letter to Cernosia*, 19 IDELR 933 (OSEP 1993) and *Yankton Sch. Dist. v. Schramm*, 900 F. Supp. 1182 (1995).

Transition services are defined as a coordinated set of activities in the areas of instruction, community experiences, development of employment and post-school adult living

objectives, and, if appropriate, acquisition of daily living skills and a functional vocational evaluation. If the IEP team determines that services are not needed in one or more of those areas, the IEP must include a statement to that effect and the basis upon which the determination is made. (See 707 KAR 1:320(7)(2)(a)(b))

The Petitioner started working on vocational skills at BCA soon after enrolling in August 2015. (T,T. Vol. 1, p. 65.) At BCA, the Petitioner had a clearly outlined vocational program where he learned skills at BCA, and then took those skills off campus and into the community. (TE 305)

The 2017-18 IEP references vocational and/or transitional programming, but it does not contain meaningful and appropriate vocational programming. The IEP did not include specifics about when or where the Petitioner would participate in vocational programming. There were no specific training requirements in the Petitioner's goals or objectives. And importantly, the IEP stated that "Vocational Skills Instruction" is not available in Grade 11, but is only available from Grades 12 and beyond. (JEX 77, p. 14.)

Because the Respondent did not properly provide for consideration of transition services or vocational education in the 2017-18 IEP, the Petitioner Student was denied FAPE.

**THERE WAS A DENIAL OF FAPE BECAUSE THE RESPONDENT COULD NOT IMPLEMENT THE IEPs AS ORDERED DUE TO THE PHYSICAL SETTING AT [REDACTED] CPS**

The record is replete with evidence that the Petitioner requires very specific and consistent behavioral supports to maintain in a school or public setting. He was diagnosed with autism at approximately 20 months old and began receiving services through First Steps. He was enrolled in [REDACTED] prior to kindergarten and was served at the expense of [REDACTED] by [REDACTED], a private preschool that serves typically developing children and special needs

children, including those with autism. (T 1 p 34-35) When he became of regular school age, ██████████ concluded that it did not offer sufficient services to meet his needs, and worked with Petitioner's mother to develop a particular program for him and other similarly situated children with autism and Downs Syndrome. The program was known as STRIVE. (T 1 p 36-38)

The Petitioner has always been provided one-on-one instruction with extensive support services in a very small setting. Even in such settings, his advancement and behavioral maintenance has remained fragile. If the Petitioner's behavioral needs are not addressed, he cannot succeed academically. He has significant sensory issues that can result in aggression, outbursts and maladaptive behaviors when he is exposed to loud or unexpected noises. (T 1 p 40; T 2 p 180-182) Such behaviors include going after someone physically, going after their glasses, biting, pinching, head-butting and other aggressive behaviors. (T 1 p 40-41) To minimize the environmental conditions that trigger these behaviors, he wears headphones to muffle loud sounds and reduce unexpected loud noises even at small facilities such as BCA and ██████████. (T 1, p 195) Even an unexpected visitor can trigger aggressive behavior.

██████████, the BCA Program Director, stated, "If he's currently engaged in a non-preferred difficult activity, and something like that happens (referring to an unexpected visitor), it's definitely going to create a possibility for problem behavior." (T 2, p 41) Likewise, even a door shutting can cause the Petitioner to react toward people near him by going after them. (T 1, p 40) ██████████ has always collaborated when the Petitioner was in its school with his private Behavioral Analyst to ensure that everyone who works with him knows how to control his environment to limit the frequencies of behavioral episodes and how to react to them when they occur. Consistency and continuity are vital as mixed signals can lead to inadvertent reinforcement of negative behaviors.

The Petitioner has always been educated in a small, quiet facility with one-on-one instruction. [REDACTED] Independent Schools has a population of 300-400 students with as few as 12 children in a class. (T 1, p 198) Classroom sizes for regular classes are limited currently to 13 students and were in that range at the time the Petitioner was a student. (T 2, p 225) [REDACTED] did not pass a resolution limiting the size of special education classrooms. (T 1, p 225) [REDACTED] STRIVE class rooms had small size and larger rooms. (T 1, p 43) The Petitioner attended art, music or gym with a lower class for about 20 minutes at a time with adult supervision. (T 1, p 39) BCA is a small school with approximately 20 students in a 7,500 square foot facility that includes an apartment like setting, a kitchen setting, classrooms, a sensory room, and a vocational skills room. (T 2, p 13) The Petitioner works inside a private cubicle with one-on-one assistance. There are four other students in his team. (Joint Exhibit 77, p 9) There are two full-time, board certified behavioral analysts on site, lead instructors who are certified, registered behavior technicians and a team of instructors who have been trained on BCA's instructional system and each student's behavior plan. (T 2, p 16-17) BCA is located inside a small shopping mall off [REDACTED], to give instructors locations where they can work with learners to generalize the skills that they learn at the facility.

The students often, under direct supervision, go to the grocery store, branch library, restaurant and consignment store inside the mall. (T 2, p 19) As part of his transition program, the Petitioner attends supervised vocational sites 2-3 times per week. Each class has four to five children, and each child has an adult instructor. Using this very structured system at [REDACTED] and BCA his entire educational career has allowed the Petitioner to maintain in a classroom and to acquire some skills which can potentially help him transition to limited independent living. Even at home, things must be kept quiet, ordered and scheduled for the Petitioner. (T 2, p 84).

Even a loud television or somebody making a noise sets him off, and can trigger aggression and limit his focus. (T 1, p 85)

In comparison, all classrooms that were considered a possibility through [REDACTED] CPS, ([REDACTED]'s contractor) were large, crowded rooms and chaotic. The classroom viewed at [REDACTED] showed children wandering around aimlessly without instruction and one student asleep in his chair. (T 1, p 47) The physical layout of [REDACTED] CPS schools was also problematic because they are so large that the volume necessarily has to be loud, and there are a large number of people in the classrooms which could easily reinforce the Petitioner's bad behaviors. (T 1, p 114-115) Jonathan Keefe, the Petitioner's private behavioral analyst, stated, "If a learner makes a noise that the Petitioner doesn't like, he may engage in physical aggression in an instance like that." (T 1, p 302) Mr. Keefe opined that if the Petitioner were placed in an environment that is less controlled than at BCA he "would anticipate that those behaviors would be much more pervasive again, just based off of [REDACTED]'s history." (T 1, p 303) [REDACTED] High School, another school that was considered, has over 2,000 students (6 times the size of [REDACTED] and 100 times the size of BCA). Danny White, an [REDACTED] High School teacher, stated he has ten children in his classroom who were mostly verbal and only one had a behavior plan. (T 1, p 117; T 2, p 113)

[REDACTED] High School, the school that was ultimately offered as the site for services, also showed a crowded MSD classroom with a lot of desks. A teacher at [REDACTED] described the room as "squishy", meaning that it could get tight when all the children were there. (T 1 p 122) The rooms were very small and the hallways very narrow. All desks were in rooms facing forward. (T 1, p 315) Most of the children in her classroom were verbal and none had a behavior plan. (T 1, p 120; T 2, p 115) She stated they worked on behaviors all day including "quiet

mouth” and “nice hands”. (T 1, p 120) She further stated there was one student in the classroom who repeatedly screamed, something that could trigger aggression from the Petitioner. (T 1, p 121) The teacher stated this could be mitigated because the child whistled before screaming. However, periodic screaming with no apparent plan in place to deal with that, or even whistling would be a major issue. In addition, both [REDACTED] and [REDACTED] High Schools had peer tutoring programs with normally developing high school students assisting teachers with instruction in the classroom. (T 1, p 122; T 1, p 318-322) Although an admirable program, this would be detrimental to the Petitioner. These peer tutors would further physically crowd the room and create more noise which could result in the Petitioner acting out aggressively and interrupting his education.

The school stated the Petitioner would be provided with headphones to block out noises. He currently uses headphones, even at a facility as small and quiet as BCA, and did so at [REDACTED]. With as large of a school and as many people as there are in the classroom, it is not reasonable to believe the use of headphones would address his behavioral issues at [REDACTED] CPS. Further, the school argues the Petitioner could be moved to another room with an adult if he has behavioral issues. This procedure would interrupt the Petitioner’s education and could inadvertently reinforce his undesirable behaviors if he learned he could avoid certain non-preferred activities by exiting from the regular classroom. (T 1, p 124) Further, [REDACTED] High School is so crowded that the teacher’s lounge might have to be converted to a classroom. (T 1, p 123) Accordingly, there is no reason to believe there is room for such removal if it should become necessary.

Beth Lipe noted about the classroom at [REDACTED] High School, “It would get very crowded and very loud and not very comfortable for many learners especially [REDACTED].” (T 2, p 58)

This was contrasted with the Petitioner's current location at BCA by Ms. Lipe stating, "I mean [REDACTED] wears noise cancelling headphones even at BCA and he only has three other learners in his room and one learner not typically in there very often. I think even if he is even in a contained classroom at [REDACTED] CPS if there are several small groups happening at once, that is a lot of volume that's going to, I think create difficulties in comprehending information being presented to him and then also a lot of distractions and I think that's going to result in frustration for him." (T 2, p 58-59)

*Andrew F ex rel Joseph F v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988 (2017) concluded that an IEP has to be "reasonably calculated to enable a student to make some progress. *Id.* at 1,342. The *Andrew* case further focused on the district's inability to address Endrews' behavioral needs as evidenced by "the district's lack of success in providing a program that would address the Petitioner's maladaptive behaviors." *Id.* at 1,184. The court correctly noted that when a district is unable to appropriately address a student's behavior, their behavior "in turn, negatively impacts his ability to make progress on his educational and functional goals, [that] also cuts against the reasonableness of the ... IEP." *Id.* (citing *Paris School District v. A.H. by and through Harter*, 217 WL 1234151 (WD Ark, April 3, 2017), an unpublished opinion.

ECAB also has reservations about the school's intent and ability to implement the speech therapy. The Hearing Officer's decision, at p. 27, states:

With the Student-Petitioner's history, the ARC should not have limited the related one-on-one speech therapy to 9 weeks. As noted the Student's capabilities have not changed since March 2015 and it is not very likely that that will change within the first 9 weeks of school.

ECAB hesitates to find an IEP defective in its content because it provided for a review after nine weeks. Theoretically, the review could have resulted in a conclusion that therapy

should be continued. What gives pause is that speech therapy was singled out for the review and nothing in the record suggests that the need for one-on-one therapy would change. The Special Education Director testified that the purpose of the nine week review was “to see if that needed to continue” and that moving the student into group would help the student generalize his skills. (T.E. April 18, p. 230). However, no explanation was given about why discontinuing one-on-one was necessary for the student to generalize. The Special Education director testified that the speech therapist currently visits ██████ High School only 90 minutes a week for two MSD classes. (T.E. April 18, p. 118). While it is possible that ██████, a very large school, has little need for speech therapy, another possible interpretation is that speech therapy is a scarce commodity in ██████ CPS.

The parents had concerns that ██████ CPS harbored an intention to convert the promised one-on-one into something else. The father (T.E. April 18, p. 118) testified that:

[T]hey talk about having speech for four times a week for nine weeks and then we’ll revisit. Throughout the process at ██████ CPS during this round of discussions and previously it was told to us that nobody gets that much one-on-one. And it’s not written in the IEP because one-on-one is not guaranteed.

So we didn’t have any real confidence that the level of speech delivery would be continued. In fact, during the last due process hearing ██████ equated a small group classroom experience speech with one-on-one.

The father pointed out that the March 2015 IEP, based upon recent information and evaluations, had one-on-one but the July 2015 IEP presented did not. The father testified that

[the school] repeatedly said ...this change is *de minimus*. The March IEP had one-on-one, this has small group and classroom experience. That’s not a meaningful difference.

(T.E. April 18, p. 119). However, in the first case, ECAB did not think one-on-one was *de*

*minimus*, and this concern played a role in the remand. ECAB agrees with the father that

for someone like [the student] that needs speech in a one-on-one delivery method and has gotten that for...ten years plus now, to equate that with small group and classroom, that's just not right.

(T.E. April 18, p. 119).

**STUDENT IS ENTITLED TO REIMBURSEMENT OF TUITION FOR  
2017-2018 AND 2018-2019 BUT NOT FOR PRIOR SCHOOL YEARS**

The present case is a continuation of a dispute previously appealed to ECAB in Agency Case No. 1516-17. In the first case, the student expressly argued, among other things, (1) the school failed to offer the student FAPE during the school year 2015-2016; (2) the school could not deliver services the student required; (3) BCA was an appropriate placement for the student; and (4) 2015-2016 tuition expenses at BCA should be reimbursed by the school. It is necessary to understand ECAB's rulings in the first case to identify what issues in the present case may not be re-litigated.

In the first case, ECAB did not find in favor of the student on the first two issues. The student failed to prove that FAPE had been denied on any of the grounds asserted or that the school was incapable of providing services the student needed. While ECAB found that a July 28, 2015 IEP could not offer FAPE if it failed to consider information in the IEP developed only a few months earlier and evaluations upon which it was based, ECAB also found that the parents had refused to attend the ARC meeting promptly offered by the school to correct the error. ECAB remanded the case for the parents to attend such an ARC meeting to complete the IEP process interrupted by the parents' non-participation.

Regarding the third and fourth issues, ECAB found that if it turned out the school could not implement an IEP subsequently developed at the meeting ECAB had mandated, BCA would

be an appropriate placement in the future, but did not find that the student had proved entitlement to reimbursement for 2015-2016 tuition expenses that were incurred by the student after refusing to participate in the ARC meeting offered by the school.

The first ECAB case was appealed to federal court and eventually remanded by that court without reversing any part of the decision of ECAB. An ARC was convened in January 2017, but because the student had last attended the school in May 2017, new evaluations were required. The school offered to enroll the student immediately under the last agreed-upon IEP until the new one was developed, but the parents declined. (TE 4/18, p. 153). The school and parents worked on developing the new IEP with extensive input from the parents (TE 4/17 p. 176), culminating in the July 24, 2017 IEP, rejected by the parents, who filed the second due process case which is the subject of the current appeal.

The issues in the current case were, according to the hearing officer's April 7, 2018, order, (1) whether the July 24, 2017, IEP was developed per the order of ECAB in Agency Case No. 1516-17; (2) whether the student was offered FAPE for 2017-2018; and (3) whether the IEP can be implemented by the school's contractor. The hearing officer did not directly rule on the first issue, but remanded the case to the ARC to address shortcomings in the IEP found by the hearing officer. The hearing officer found that the student was not offered FAPE for 2017-2018, an outcome ECAB agrees with but for different reasons, and that the IEP, once "fixed," could be implemented by the school, a finding with which ECAB disagrees.

In the current appeal, the student again seeks a finding of denial of FAPE in 2015-2016 and tuition reimbursement. The hearing officer erroneously construed ECAB's opinion in the first case to have found that FAPE had been denied in 2015-2016 and awarded tuition reimbursement for 2015-2016 and 2016-2017. As explained above, that was not ECAB's

finding. If denial of FAPE had been proven in the first case, ECAB would have said so expressly and would have granted the tuition reimbursement the first time it was sought. ECAB found the IEP process had been interrupted by the parents' refusal to participate.

ECAB will not reconsider issues previously raised in the first ECAB case. *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459, 464-465 (Ky. 1998) summarizes the law on res judicata and its two subparts, claim preclusion and issue preclusion:

The rule of res judicata is an affirmative defense which operates to bar repetitious suits involving the same cause of action. The doctrine of res judicata is formed by two subparts: 1) claim preclusion and 2) issue preclusion. Claim preclusion bars a party from re-litigating a previously adjudicated cause of action and entirely bars a new lawsuit on the same cause of action [citations omitted]. Issue preclusion bars the parties from re-litigating any issue actually litigated and finally decided in an earlier action. The issues in the former and latter actions must be identical.

In the present case, the issues about deficiencies in the July 2015-2016 IEP and whether BAC was a suitable placement if the school could not implement an appropriate IEP are the same. If the current case is considered a second case separate from the first case, res judicata bars re-litigating these issues.

However, if the current case is considered a continuation of the first case, then the same result is obtained under the doctrine of the law of the case. *Brooks v. Lexington-Fayette Urban County Housing Authority*, 244 S.W.3d 747 (Ky. App. 2007) provides:

[t]he law of the case doctrine is "an iron rule, universally recognized, that an opinion or decision of an appellate court in the same cause is the law of the case for a subsequent trial or appeal however erroneous the opinion or decision may have been.

*Brooks*, at p. 751, quoting *Union Light, Heat & Power Co. v. Blackwell's Adm'r*, 291 S.W.2d 539, 542 (Ky.1956). The doctrine of law of the case is predicated upon the principle of finality. *Brooks* explains:

[t]he law of the case rule is a salutary rule, grounded on convenience, experience and reason. It has been often said that it would be intolerable if matters once litigated and determined finally could be re-litigated between the same parties, for otherwise litigation would be interminable and a judgment supposed to finally settle the rights of the parties would be only a starting point for new litigation.

*Brooks*, p. 751, quoting *Union Light, Heat & Power Co*, p. 542. *Brooks* at 751 states:

[t]he law of the case doctrine is similar to but distinct from the doctrine of res judicata. “There is a difference between such adherence (the law of the case doctrine) and res judicata. One directs discretion; the other supersedes it and compels judgment. In other words, in one it is a question of power, in the other of submission.” *Southern Ry. Co. v. Clift*, 260 U.S. 316, 43 S.Ct. 126, 67 L.Ed. 283, 284 (1922).

*Sowers v. Coleman*, 4 S.W.2d 731 (1928), enunciates that the doctrine of law of the case considers as settled “all errors lurking in the record on the first appeal which might have been, but were not expressly, relied upon as error.”

ECAB finds that 2015-2016 tuition reimbursement was litigated in the first case and the student failed to prove that FAPE had not been offered because the parents had interrupted the IEP process by refusing to participate. Participation by the parents resumed in January 2017, but due to the delay, evaluations were required. The point at which the school failed to provide FAPE was after the parents resumed participation and the school had the opportunity to offer FAPE. The school is not able to implement the July 24, 2017, IEP it offered, regardless of any small fixes that might be made. From July 24, 2017, forward, claims for tuition expense reimbursement are legitimate and, per the decision in the prior case, BCA is an appropriate placement.

## **ORDER**

For the reasons stated herein, the Petitioner is not entitled to reimbursement from the Respondent for tuition expense at any time before July 24, 2017. However, the Petitioner is entitled to reimbursement of tuition expense for 2017-2018 and 2018-2019.

## ATTORNEYS' FEES

Pursuant to 20 USC § 1415(i)(3), the award of attorneys' fees is under the jurisdiction of the district courts. Therefore, the ECAB does not make a ruling on this issue.

### DISSENT BY ECAB PANELIST DENNIS LYNELLE PICKETT RE SPEECH THERAPY ISSUE

I respectfully dissent concerning the finding that the School violated FAPE regarding speech therapy. It appears everyone, including the School, agrees the Student needs one-on-one speech therapy. The July 2017 IEP states "speech/language therapy shall be provided for thirty minutes, four times per week in a resource room." (Joint Ex. 77, p 24.) There is nothing equivocal or ambiguous about that – pursuant to the IEP, [REDACTED] was to receive individual speech therapy.

The July 20, 2017, ARC report states, "Melissa Weedman, (CPS Speech Specialist) discussed that speech as a related service will be implemented as documented on the IEP. Individual speech sessions will take place in a room that is not his regular special class." (Joint Exhibit 76, p. 9.) She said, "[S]o I can tell you he's going to have that **individual therapy**. We will **guarantee that four times a week**." (Joint Exhibit 78, p. 129.) (emphasis added)

The IEP provided for more speech therapy than [REDACTED] was currently receiving at BCA, and it is what everyone at the ARC meetings, including the parents, and [REDACTED] private therapists agreed. (T 4/18/18, p. 67; 4/19/18, pp. 183, 194; T 4/18/18 p 169; Joint Exhibit 69, p 174.)

Although individual speech therapy, four times a week was included in the IEP, the Hearing Officer determined there was a FAPE violation because the IEP included a sentence stating the School would reevaluate the Student's speech therapy needs in nine weeks. The School did not have to include that sentence in the IEP to reevaluate. It is undisputed a School

has the right, and perhaps the **obligation**, to reevaluate a Student to determine if his/her educational needs can better be met.

The evidence shows the ARC wanted to meet after the first nine weeks of school to review all progress and determine if anything needed to be changed on the IEP. (T 4/20/18, pp. 56-7.) █ CPS had never worked with the Petitioner, so the staff wanted to meet shortly after school started to see how everything was going. (T 4/20/18, pp 56-7.)

Dr. Frohoff, the █ CPS Director of Special Education during the 2016-17 school year, explained during the ARC meeting that she did not want to wait a year to hold another ARC meeting. (Joint Exhibit 68, p. 168.) She wanted to meet after the first nine weeks of school to collect data and **make necessary adjustments in all areas, “[n]ot just speech.”** (Joint Exhibit 68, p. 168.) (emphasis added)

The evidence indicated that if the later ARC decided the Petitioner continued to need one-on-one speech services, those services would continue. (T 4/19/18, p. 175.) █ CPS provided one-on-one speech services to other students, and the testimony indicated it would provide those services to the Petitioner. (T 4/18/18, p. 169.)

Upon reevaluation, the school may have continued speech therapy as planned or increased the amount of one-on-one speech therapy. To assume the school would cut back or eliminate one-on-one speech therapy is speculative, and to hold the School failed to provide FAPE because it wrote it will reevaluate the needs of a Student is erroneous.

## NOTICE OF APPEAL RIGHTS

**This decision and order is a final, 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 does 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 the 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 300.532. 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.

In addition, 707 KAR 1:340, Section 8. Appeal of Decision provides the following information to aggrieved parties, in subsection (2):

A decision made by the Exceptional Children Appeals Board shall be final unless a party appeals the decision to state circuit court or federal district court.

KRS 13B. 140, which pertains to appeals to administrative hearings in general, in Kentucky, and not to civil actions under Part B of the Act (the IDEIA), 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 in the enabling statutes, a party may appeal to Franklin Circuit Court of 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 student upon the agency and all parties of the 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.

Although Kentucky Administrative Regulations require the taking of an appeal from a due process decision within thirty days of the Hearing Officer's decision, the regulations are silent as to the time for taking an appeal from a state level review.

**SO ORDERED** this 8<sup>th</sup> day of March, 2019, by the Exceptional Children Appeals Board, the panel consisting of Mike Wilson, Kim Hunt Price, and Dennis Lyndell Pickett.

EXCEPTIONAL CHILDREN APPEALS BOARD

BY: /s/ Dennis Lyndell Pickett  
DENNIS LYNDELL PICKETT, CHAIR

**CERTIFICATE OF SERVICE**

I hereby certify the original of the foregoing was mailed March 8, 2019, as follows:

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