

**KENTUCKY DEPARTMENT OF EDUCATION  
DIVISION OF LEARNING SERVICES  
AGENCY CASE NO. 1819-17**

████████████████████

**PETITIONER**

v.

██████████

**COUNTY SCHOOLS**

**RESPONDENT**

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**FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
FINAL ORDER**

This Due Process Hearing was requested by letter filed with the Kentucky Department of Education (KDE) by Counsel for the Petitioner on February 15, 2019 pursuant to the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. Section 1400, et. seq.) An administrative hearing was conducted in LaGrange, Kentucky on May 9, 24 and 30, 2019. The Honorable Marianne Chevalier represented Petitioner; the Honorable Dana Collins and the Honorable Katherine Reisz represented Respondent. The hearing was conducted pursuant to 34 CFR Part 300, KRS 13B and 707 KAR 1:340. During the course of the hearing, 15 witnesses testified and a number of exhibits were entered into the record. The briefing period ended with submissions on August 8, 2019.

At issue in this proceeding is whether the school district failed to create and/or implement an appropriate Individualized Education Program (IEP) for Petitioner/Student, whether it made appropriate placement decisions, and whether it denied Student a free appropriate public education (FAPE).

## FINDINGS OF FACT

1. Student was a 10th grade student enrolled in [REDACTED] High School during the 2018-2019 academic year.

2. Student was adopted by his mother at 14 months of age from an orphanage in the [REDACTED]. He has been diagnosed with Fetal Alcohol Syndrome (FAS) and Attention Deficit Hyperactivity Disorder (ADHD). Student has also been diagnosed with mild cerebral palsy and intermittent explosive disorder. He has encopresis and enuresis, which means he has toileting issues with both urine and feces. Because of this, Student wears Pull-Ups disposable training briefs. (Transcript of Evidence or “TE” Vol. II, pp. 312-315, 362, Vol. I, p. 226).

3. Student has tantrums and can get violent, but he doesn’t exhibit this behavior at school. Mom has reported that Student fixates on violence and violent images, but this fixation has not been witnessed by Student’s teachers. Student has a good long-term memory but a poor short-term memory. His expressive and pragmatic language skills are severely delayed. He typically responds to questions with one or two words and struggles with complete sentences. According to Student’s mother, [REDACTED] (“Mom”), he learns best through repetition and in a structured environment. Mom has educated herself about FAS and sought support and therapy for Student in the hopes that he can succeed and be as independent as possible. (TE Vol. II, pp. 316-321, Vol. I, pp. 189, 191).

4. Student left the [REDACTED] County school district and began attending [REDACTED] County schools during his sixth grade school year, which was the 2014-15 school year. He attended [REDACTED] Middle School where he received IDEA services under the disability category of “Other Health Impairment” (OHI). Student remained at the middle school for his seventh grade

school year (the 2015-16 school year) and his eighth grade school year (the 2016-2017 school year).<sup>1</sup> (TE Vol. 1, p. 183; TE Vol. II pp. 321-322).

5. [REDACTED] is a special education instructional coach who works with [REDACTED] County middle and high school teachers to assist with instructional programming and supports for students with disabilities. She has been involved in supporting Student's IDEA needs throughout his time at the district. [REDACTED] conferenced with Student's family members and a teacher during his sixth grade year and observed Student in classes to provide input on ways to instructionally meet Student's needs. She observed Student to be a quiet child who needed extra processing time and guided practice. [REDACTED] recommended a variety of ways to support Student's learning, including but not limited to extra prompting, allowing for verbal responses and visual supports. (TE Vol. I, pp. 182-187).

6. [REDACTED] described Student as follows:

In the classroom, [Student] does what he's asked to do. Now, he may need prompts, he may need a little extra time, he may need some cues, but he does what he's supposed to do. He can be independent with getting out his materials and copying something down if you tell him. He knows how to navigate buildings and get from point A to point B. He's done all those things, and he's done them independently.

(TE Vol. 1, p. 188).

7. As the result of an Admissions and Release Committee (ARC) meeting on November 10, 2015, Student's IEP was designed with the following specific annual measurable goals in mind:

Goal #1: Given word problems, [Student] will be able to set up and correctly solve one step and two step equations with 85% accuracy over 4 consecutive trails as measured by authentic weekly assessments.

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<sup>1</sup> These dates are relevant to this proceeding as there is a general three year statute of limitations applicable to IDEA due process hearings in Kentucky. KRS 157.224(6). So, although evidence was presented as to Student's sixth grade school year, Petitioner presented it as background information only. This proceeding does not adjudicate any issues that arose prior to the second semester of Student's seventh grade year.

Goal #2: Given computational problems, [Student] will apply the correct algorithm with 85% accuracy to solve 80% of the problems presented in a 12 week period.

Goal #3: In all school settings, [Student] will engage in conversations with peers and adults at least one time in each setting as measured by teacher observation.

Goal #4: [REDACTED] will maintain organization of his materials 90% of the time as measured by teacher checklist.

Goal #5: Communication: When given five opportunities for natural conversation, [Student] will initiate a conversation appropriately and ask at least two questions related to the topic on 3 out of 5 trials, across three consecutive sessions, as measured by direct measures (frequency count).

Goal #6: Language: When given factual text including 2-3 paragraphs, [Student] will identify the main idea and key details and formulate a 2-3 sentence summary on 2 out of 3 trails, across three consecutive sessions, as measured by direct measures (frequency count).

Goal #7: When given a writing prompt, [Student] will demonstrate use of all 10 fingers to produce work at a rate of 22 WPM with an accuracy of 85% across 4 sessions as demonstrated by work samples.

Goal #8: Given writing prompts, [Student] will produce a proficient piece that utilizes at least five paragraphs with 90% correct writing conventions for 3 out of 4 consecutive pieces using direct measurement of writing rubric.

(P. 17-33)<sup>2</sup>

8. When the ARC constructs goals, it is important to make sure they are attainable throughout the year and individualized to the student. According to [REDACTED]:

[W]hen I analyze my data and stuff, if I see that a student is struggling in a specific area and that that kid needs to work on a specific concept, we might revise that goal to really force, basically, what that kid needs to work on...So sometimes when we have these meetings, we have to sit down and say, "Okay. What's working for this child right now? What's not working for this child? And how can I go on and make progress with this kid?.And so based on that, then I write the goal.

(TE Vol. II, pp. 598-599).

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<sup>2</sup> Petitioner's exhibits were Bate stamped; Respondent's were not. Petitioner's exhibits will be cited by the Bate stamp page number or numbers. Respondent's will be cited by the tab number.

9. The IEP also provides that Student receive speech therapy services two times a week for 30 minutes and occupational therapy two times a month for 30 minutes. Supplementary Aids and Services (SAS) to be provided to Student included organizational aids, extended time and “chunking” of assignments. In addition, Student was to begin a trial use of an FM system during direct instruction. The FM system is an audio aid that allows a teacher to provide instruction directly to a student using a microphone. It requires the student to use a headset. (TE Vol. II, p. 333; P. 24, 33).

10. ██████████ served as Student’s speech therapist during his 7<sup>th</sup> and 8<sup>th</sup> grade years. ██████████ implemented the FM system and trained Student on its use. Student was to pick the headset up from the special education room in the morning, then return it at the end of the school day so that it could be charged. Over time, Student indicated that he didn’t want to use the headset. ██████████ attempted to provide more support for Student by personally meeting him in the mornings to give him the headset and again in the afternoon to retrieve the headset. Student eventually tore up the headset and refused to use it. (TE Vol. II, pp. 532-535; P. 8-16).

11. After the November IEP was implemented, the teachers transported the FM device from class to class. Student had the opportunity to use the FM system, but did not fully utilize it. It is undisputed that he did not like using the system. ██████████ and Student’s teachers collected data to determine if the FM system was beneficial to Student. According to ██████████: “[W]e looked at different areas: his willingness, his independence, his attention during it, his responses during class, kind of, you know, a multi-viewpoint of the FM system as a trial base to see if it was beneficial to him.” After consulting with Student’s teachers, ██████████ concluded that the FM system was not beneficial. It was easy to use, but Student often refused. The teachers did not see a benefit from its use and found other tools more impactful. For example, teachers found it

effective to get Student's attention and make direct statements to him, pointing out when something is important. (TE Vol. I, pp. 212-213; Vol. II, pp. 352-353, 535-541).

12. At Mom's request, an ARC was conducted on March 22, 2016. Mom wanted to request a reevaluation to get better insight into how Student was progressing during his 7<sup>th</sup> grade year and how he compared to his peers. She was concerned that he may be slipping grade levels rather than progressing. Debbie Gilbert is a parent advocate who works with the Office of Children with Special Healthcare Needs through a federal grant to help parents navigate the special education process. Gilbert attended the March 22, 2016 meeting and subsequent meetings with Mom. [REDACTED] and [REDACTED] were present as well, along with school psychologist [REDACTED] and several other teachers. (R. 2; TE Vol. II, pp. 367-368; Vol. III p. 680-681; Vol. I, pp. 257-260)

13. [REDACTED] and [REDACTED] advised Mom that while a full psychological reevaluation would provide a broad picture of a student and his IQ, it would not go in-depth as to where a student stands grade-level wise or reading-level wise. Moreover, Student had just had full psychological testing at the outset of his sixth grade year. [REDACTED] and [REDACTED] explained that an in-depth testing assessment would be more effective to gauge how Student is performing compared to his peers, and that "classroom-based, norm-referenced, more academic-targeted tests" would be most beneficial to get a picture of how Student is faring in the classroom. (TE Vol. II, pp. 681-683; R. 2).

14. The use of the FM system was also discussed at the March 22, 2016 ARC meeting. [REDACTED] related the history of Student's use of the FM system, the data collection process and the decision that the system was not beneficial to Student. The ARC made the decision to remove the FM system from [REDACTED]'s SAS. (TE Vol. II, pp. 540-541; R. 2).

15. Mom expressed concerns about confusion with homework assignments because at times Student wasn't completing assignments, was erasing them if he thought he could get away with it, or was simply disorganized with bringing home the assignment. The ARC decided to add a technology component to the SAS portion of the IEP. As a result, Student was given an iPad to take pictures of homework assignments and agendas. The SAS portion of the IEP was also revised to include guided questioning, the use of Student's name to get his attention, and the use of direct statements to Student as to important information as the ARC determined it would be beneficial to Student. (TE Vol. II, pp. 357-358; R. 2; P. 42).

16. During the ARC meeting, Mom also requested that a one-on-one aide be assigned to Student. Mom felt that an aide would keep Student on task, review with him, and help him engage in appropriate conversations with peers. During the discussion of this possibility, ██████ noted the importance of Student's independence and the need for him to follow the cues of his peers. According to ██████, Student is "navigating the school, he's functioning in his classrooms, and he is following the lead of his peers." There was no evidence or reports from teachers that supported the need for a classroom aide and no documented need for that level of support. The ARC determined that there was no need for a one-on-one aide for Student. (TE Vol. II, p. 369; TE Vol. III, pp. 687-688; R. 2).

17. On May 24, 2016, towards the end of Student's 7<sup>th</sup> grade school year, an ARC meeting was convened to review the results of the assessments discussed at the prior ARC meeting. ██████'s assessments showed that Student was reading at a 4<sup>th</sup> to 5<sup>th</sup> grade level. She found that his comprehension improved when he read orally. Student made expected or greater than projected growth on MAP scores. Student's math scores were between the 10<sup>th</sup> and 25<sup>th</sup> percentile, but were much lower when ██████ used another assessment tool. Mom expressed concern during the

ARC about the low percentile scores. The ARC found the assessment information helpful in moving forward with individualized educational planning. The ARC committee used the assessment results to amend Student's IEP, adding review of test materials and organizational checks and adjusting some SAS. (TE Vol. III, pp. 688-696; R. 7 and 12).

18. The IEPs in place during Student's 7<sup>th</sup> grade year note that he has a history of soiling himself. Although there is no indication the teachers ever observed any issues, Mom expressed concern. [REDACTED] was Student's special education teacher in the 7<sup>th</sup> grade. She addressed the possible toileting issues by allowing Student to go to the bathroom when he asked and by asking him frequently if he needed to go. [REDACTED] said there was never a time when she was working with Student that she smelt anything or had any reason to think Student soiled himself. Student's IEPs from November 10, 2015 and March 22, 2016 both indicate that no teacher noted concerns about Student soiling himself. (TE Vol. II, pp. 342, 474-476; P. 19 and 36).

19. [REDACTED] described an array of classroom modifications in place to support Student during his 7<sup>th</sup> grade year, including preferential seating, extended time and organizational work. [REDACTED] tried to be in constant communication with the general education teachers to let them know what resources were available for Student. [REDACTED] also had quite frequent e-mail contact with Mom. [REDACTED], the team leader for Student's special education needs, also stayed in contact with Mom. (TE Vol. II, pp. 475-483).

20. [REDACTED] was one of Student's 7<sup>th</sup> grade teachers and began to serve as his case manager during his 8<sup>th</sup> grade year. [REDACTED] was responsible for writing Student's IEP, analyzing his progress, and communicating with Mom and Student's teachers regarding that progress. [REDACTED] participated in the November 7, 2016 ARC meeting to revise Student's annual IEP. Mom and advocate Gilbert attended the meeting, as did [REDACTED] and several teachers from



the middle school. [REDACTED], the [REDACTED] High School ([REDACTED]) ARC chair, attended the first part of the meeting to discuss Student's transition to high school. (TE Vol. II, pp. 591-594; R. 25).

21. [REDACTED] reviewed Student's speech/language progress and baseline data, reporting that he has made overall progress towards all of his speech/language goals. (R.25).

22. [REDACTED] reviewed data she gathered from the beginning of the school year. She reported on a variety of baseline data, including that on math, written expression, socioemotional issues and organization. The data indicates that Student was making progress on several of his goals, but struggling with others. (TE Vol. II, pp. 594-597; R. 25).

23. The ARC approved goals in math calculation, math reasoning, written expression, vocational skills, social/emotional skills and speech/language. It specifically developed the following goals for Student's 8<sup>th</sup> grade year:

Goal #1: Given a writing prompt, [Student] will be able to produce a proficient writing piece that utilizes at least three paragraphs, that includes an introductory paragraph, a supporting paragraph, and a concluding paragraph and contains proper paragraph structure (topic sentence, supporting detail, concluding sentence) at an accuracy rate of 75% on 4 out of 5 assessments, as measure by a 4 point rubric.

Goal #2: Given one step real world math problems at his instructional level, [Student] will be able to solve multi-digit one step problems at an accuracy rate of 75% across 3 consecutive weeks.

Goal #3: Given computational math problems, [Student] will be able to independently compute computational problems at his instructional level, at accuracy rate of 70% on 4 out of 5 assessments, measured by teacher made assessments.

Goal #4: Given direct instruction on organizational skills, [Student] will be able to organize and maintain his materials at an accuracy rate of 75% as measured by weekly teacher checklists and anecdotal notes.

Goal #5: Given direct instruction on social interactions with peers and adults, [Student] will ask one question per class, at an accuracy rate of 75% average accuracy across 3 consecutive weeks, as measured by weekly rubrics.

Goal #6: Speech/Language: When given 5 new content vocabulary words, [Student] will independently explain the definition and use it in a sentence with 80% accuracy across two consecutive sessions, as measured by direct measures (frequency count).

Goal #7: Speech/Language: When given five different social scenarios, [Student] will independently state if the comments/questions are on-topic and formulate two questions related to the situation with 80% accuracy across three consecutive sessions as measured by direct measures.

(R. 25 and 26).

24. In terms of placement, [REDACTED] wanted to use a “push-pull” model, which would involve pulling Student out of science and social studies classes for 30 minutes for more intense and specialized instruction. Mom objected to this, wanting Student to be with his peers for longer periods of time. After weighing the least restrictive environment, the ARC ultimately decided to compromise and use a co-taught setting to allow Student to spend more time with his general education peers. (TE Vol. II, pp. 610-611; R. 25).

25. The ARC decided to stop Student’s occupational therapy. Mom disagreed with this decision as she had concerns about his handwriting and felt that he still needed those services to improve it. [REDACTED], the middle school occupational therapist, worked with Student for about a year and a half. Before she began working with him, [REDACTED] reviewed an occupational therapy assessment that was conducted on Student before he started middle school. Aside from one borderline score of visual motor integration, Student was performing on par with his peers. After working with Student, [REDACTED] attended the November 7, 2016 ARC meeting to report on his progress. She presented graph data that indicated Student was making steady progress with typing and was using technology consistently in the classroom. As to handwriting, Student demonstrated legible handwriting and he had the skills necessary for improved handwriting, but he wasn’t using them consistently. The intent was to focus on typing skills so that Student could use those tools to

put his thoughts in writing and produce longer passages. Because Student had the skillset to use technology and strategies were in place for his teachers to assist him with that, ██████'s skillset was no longer as valuable to Student and it no longer seemed necessary to call him out of class for therapy. (TE Vol. II, pp. 338, 354-355, 572-579; R. 25, R. 23).

26. As referenced in the ARC meeting conducted on November 7, 2016, ██████ was continuing to work with Student on his speech/language therapies as well as socialization. Student continued to make progress towards his social and language goals, practicing conversation and asking questions, using his graphic organizer and walking with ██████ into different environments so he could make practice socialization outside of the classroom. He made progress towards his language goals, but still struggled with formulating multiple sentences. (TE Vol. II, pp. 542-547).

27. ██████ said she worked with Student on his socioemotional skills "all the time." She utilized x-block period not only to work with Student on organization but also to role play with him to get him to better handle specific social situations such as speaking with teachers and other students in an appropriate manner. She also helped him use his iPad to take pictures of his assignment so that Mom could see them. In the co-teaching and resource environment, ██████ also helped Student with organization, prompting him to file his papers in the correct location. According to ██████, she and other of Student's regular and special education teachers prompted Student to organize. (TE Vol. II, pp. 601-603, 611-612, 623).

28. As Student's 8<sup>th</sup> grade Language Arts teacher, ██████ took advantage of the SAS available to Student. She created a specific graphic organizer for Student to use in her and other classrooms. She also modified and chunked assignments almost weekly so they would be more manageable and Student would not be overwhelmed. (TE Vol. II, pp. 604-605).

29. Student made progress during his 8<sup>th</sup> grade year and did better after the IEP was amended. While [REDACTED] notes that he needed modifications and different ways to be assessed, he was able to demonstrate that he understood content. Student may have needed multiple assessments, but he passed them. His MAP and K-PREP scores also show that he was making progress. (TE Vol. II, pp. 600, 605-610; R. 122).

30. Student was supervised by [REDACTED] and the other teachers who taught in the 8<sup>th</sup> grade hallway, especially after an incident where he pursued a female inappropriately. Student's teachers kept an eye on him during hallway transitions in his and other students' best interests. The staff also had a bathroom plan to ensure that Student went to the bathroom during hall transitions. By the end of his 8<sup>th</sup> grade year, Student didn't have a lot of free time during transitions. (TE Vol. II, pp. 606-607).

31. The ARC met again on April 21, 2017, the spring of Student's 8<sup>th</sup> grade year. The ARC approved revised goals and benchmarks in the areas of writing, math computation, math reasoning, social/emotional and vocational skills. All of the revisions were more challenging for Student. The ARC also added a customized organization system under SAS and allowed for the use of a scribe in the case that technology is not available. Mom informed staff that Student had had recent behavioral problems at home. No school personnel reported observing any such behavior. During this meeting, it is noted that staff is looking into blocking Student's access to technology at times. Mom had expressed concerns about Student setting up and accessing social media accounts. She was later told the school was running into difficulties crafting specific restrictions and that the teachers would need to provide more supervision in this area. (TE Vol. II, pp.402-402, 701-706; R. 37 and 39).

32. During Student's eighth grade year, [REDACTED] met with Mom several times to discuss Student's progress. At Mom's request, [REDACTED] met with Mom, Gilbert, Student's behaviorist and [REDACTED] in November, 2016 to review data collection tools and discuss any concerns Mom had. They group continued to meet every six to eight weeks after the November meeting, tweaking issues to improve Student's progress. (TE Vol. I, pp. 190-193; Vol. II, pp. 411-412, 616).

33. In preparation for Student's transition to [REDACTED], [REDACTED] met repeatedly with [REDACTED]. She also met with [REDACTED] ARC chair coordinator [REDACTED] and separately with [REDACTED] the special education teacher who would be Student's case manager. [REDACTED] and Mom also met [REDACTED] and [REDACTED] at [REDACTED] to share the current IEP, and share information about Student so that the high school would be prepared for the transition. This was also an opportunity for Mom to share her concerns about Student's behaviors at home and to get to know the [REDACTED] staff she would be working with. (TE Vol. II, p. 410 and 622; TE Vol. III, p. 706-707).

34. Student began his freshman year at [REDACTED] in the fall of 2017. On August 15, 2017 and at Mom's request, all [REDACTED] staff who would be working with Student participated in FAS Training. (R. 75; Vol. I, p. 55; Vol. III, p. 795, 723-724).

35. [REDACTED] served as Student's special education teacher in the English resource setting and also as his case manager. [REDACTED] has worked with Student for two years and describes a positive relationship with him. He has observed Student growth on both the academic and social side. [REDACTED] believes Student had a good start to his freshman year. Although he does need prompting, Student comes to class on time and prepared to work. (TE Vol. III, pp. 793-799; R. 64).

36. Student's annual review was conducted at an ARC conducted on November 3, 2017. At that time, Student was in a resource room for math and English classes and in a co-taught room for science and social studies. He was in the general education classes for his electives. Student was passing all his classes and making progress towards his goals. [REDACTED] reviewed Student's progress data on current IEP goals. Student was making progress with his paragraph structure and math goals, but was off task occasionally. Since the beginning of the year, Student has shown an improvement at interacting with peers. [REDACTED], the [REDACTED] speech pathologist, reported that Student was making progress on his speech goals, has some strengths in sentence assembly and following directions, but that he has a significant language disability. Among other reports, the ARC was presented with information from a psychoeducational reevaluation reviewed by the school psychologist as well as a communication evaluation. (TE Vol. III, pp. 708, 795-797; Vol. III p. 778; R. 64, R 65).

37. During the meeting, [REDACTED] noted that there have been no issues regarding Student's restroom needs. In fact, [REDACTED] testified that Student is capable of going to the bathroom on his own and has never known Student to soil himself or heard of another teacher reporting that Student soiled himself. (R. 64; TE Vol. III p. 798-799).

38. Student attended the November 3, 2017 with Mom. He shared that he thinks high school has been good. Mom expressed concern that Student was struggling to read body language and to tell the difference between a friend and an acquaintance. (R. 64, R.65).

39. The ARC drafted new goals for Student which continued to involve writing, math, organizational, social and communication goals:

Goal #1: Writing: Given instruction in the writing process, [Student] will produce a complete paragraph that contains an introduction, supporting detail, a conclusion and accurate mechanics (capitalization, punctuation, spelling) with 80% accuracy

on 4 out of 5 consecutive times, as measured by a weekly writing prompt and writing checklist.

Goal #2: Math: Given a series of math problems and provided with teacher prompts, [Student] will solve problems with 85% accuracy on 4 out of 5 consecutive occasions, as measured by a weekly teacher made assignment/quiz/test.

Goal #3: Vocational: Given specific instruction in organizational skills, [Student] will independently be able to organize his binders so that his materials needed for class are readily found 75% of the time on 4 out of 5 consecutive weeks, as measured by a weekly teacher checklist.

Goal #4: Vocational: Given specific instruction in vocational skills, [Student] will maintain focus and answer teacher directed questions and initiate and sustain working on tasks 75% of the time on 4 out of 5 consecutive occasions, as measured by a weekly teacher checklist.

Goal #5: Social/Emotional: Given direct instruction on social interactions with peers and adults, [Student] will ask questions, respond to teacher questions and interact appropriately with peers 85% of the time, for five consecutive weeks, as measured by a weekly teacher checklist.

Goal #6: Communication: When seen in the small group setting, [Student] will participate effectively in a range of conversations and collaborations with diverse partners, building on others ideas and expressing his own clearly and persuasively, monitored weekly through frequency count with 80% accuracy across 3 out of 5 sessions.

Goal #7: Communication: Given direct instruction and support in the small group setting, [Student] will determine or clarify the meaning of content vocabulary monitored twice a month through frequency count with 85% accuracy across 3 out of 5 consecutive sessions.

As [REDACTED], the [REDACTED] County special education consultant, explained, the new IEP expanded Student's writing goals, increased his math goals and continued to focus on his organizational and communication skills. The IEP included a plan for Student to receive specially designed instruction on body language, facial expression and social cues. (R. 65; TE Vol. III, pp. 709-715).

40. [REDACTED] was one of Student's special education teachers during his freshman year. [REDACTED] assisted Student with his writing and vocational goals, helping him to

organize. He also communicated with Mom to e-mail assignments and study guides home. (TE, Vol. I, pp. 52-54).

41. The next ARC meeting was on March 23, 2018. Mom requested the meeting because she had several concerns. Mom expressed frustration with Student's failure to bring work home independently and relies instead on teacher e-mails for assignments. She is also having difficulty getting Student to complete his work in the evenings. Mom also expressed concerns that Student was soiling himself during the school day and that he lacks peer contact outside of the school. (R. 82).

42. ██████ testified that although Mom had concerns about soiling, teachers weren't witnessing any soiling by Student. No student or teacher reported anything about it. (TE Vol. III, p. 716-717).

43. Student's behavior specialist/psychologist attended the meeting at Mom's request. She suggested scheduled restroom breaks for Student and the ARC agreed that Student would have scheduled bathroom breaks during three periods throughout the day. Teachers present also shared that Student has been interacting well with students in his resource class and Creative Literacies class and they are trying to get Student to interact more with his peers. Two teachers encouraged Mom to access Google Classroom online to check for the assignments that are posted daily. Two other teachers shared that they do not give homework. The ARC also discussed the fact that Student's use of headphones was causing a distraction for him and it was determined that teachers would have Student leave his headphones on their desk until he completes his work. (R. 82).

44. Progress data presented during this meeting indicated that Student was progressing at the time. According to ██████, Student's organizational skills improved and he was acting appropriately with peers 79% of the time measured. Student was paying attention to instruction



but needed prompting. He was struggling with his math goal of solving two-step equations. [REDACTED] reported that Student was making progress with his speech therapy, and that she was working with Student on general language, including some vocabulary, understanding comprehension of information, as well as pragmatic language or social language skills for conversation. (TE Vol. III, pp. 803-806, 781; R.82).

45. The ARC committee reviewed the IEP and discussed Student's placement for his sophomore year, specifically whether Student should be in more resource classes. Student, who was present at the meeting, indicated that he liked smaller classes for his core content classes and that he thought he could be more focused. Mom reported that although she believed Student does not like smaller classes, he seems to manage them better. The ARC decided that smaller resource classes for all content areas would better meet Student's needs. Beginning his sophomore year, it was determined that Student would transition to the resource setting for all of his core content classes. (R. 82, R. 83).

46. According to [REDACTED], the decision to change to resource classes was made because Student needed more intensive support. He would receive more direct instruction and more prompting. While a general education class has 30-34 students, there are no more than ten students in a resource class. This allows for much more one-on-one time between a teacher and student. (TE Vol. III, pp. 807-808).

47. Student's annual ARC review was held on October 12, 2018. Mom expressed continued concerns about Student printing out inappropriate pictures. According to [REDACTED], the special education teacher, Student was printing out pictures of skeletons, crossbones and skulls. The school technology coordinator advised that the best solution to this problem was to disable Student's full access to the internet and only allow access between the hours of 9:00 a.m. to 3:30

p.m. Mom also expressed concern that Student had been making inappropriate comments to girls in the hallway. ██████ said he would work with Student about making inappropriate comments to others. According to ██████ there were three instances over the last year where staff has received reports of Student making female students uncomfortable. In those instances, ██████, after conferring with other appropriate staff members, discussed the interaction with Student and modeled appropriate behavior. (R. 98, TE Vol. I, p. 138, Vol. III, pp. 799-801, 812-814).

48. During this ARC meeting, Mom again reiterated her concern about Student soiling himself. Attending the meeting along with Mom and advocate Gilbert was ██████. ██████ is an approved Medicaid waiver provider who independently provides personal care work for Student, including assisting with his daily living skills and providing some behavior modification assistance. During the meeting, ██████ left to check Student's briefs to see if they were soiled and reported back that they were. The teachers and staff present were surprised because they did not see or smell anything and were doubtful Student had soiled himself. The ARC discussed an additional bathroom break during the day as well as allowing ██████ to stop by the school to check Student during the day to be sure he hadn't soiled himself. (R. 98, TE Vol. I, pp. 221-223, 252-252; Vol. II, pp. 361-362).

49. ██████, Student's speech therapist, testified that she works in close proximity to Student and has never had any knowledge that Student had soiled pants. (TE Vol. III, p. 786).

50. During the ARC meeting, ██████ reported that Student met his goal regarding social interactions with peers and adults. He was making progress at solving math problems but was struggling with his organizational goals. Student has improved on maintaining focus and staying on task, but struggling to initiate tasks in a timely manner. ██████ reported that Student was making progress in that he was becoming more vocal, worked well with small groups, needs less

prompting and has improved eye contact. He needs work on reading other people's facial expression, something she is working with him on. (TE Vol. III, pp. 811-812, 782-784; R. 98).

51. At the October 12, 2018 ARC meeting, the goals of Student's IEP were adjusted to include more precise communication goals and to increase the percentages for his organizational/vocational goals. (R. 99).

52. Student's placement for his sophomore year was again discussed. The ARC considered Student's particular needs and the need for him to be educated in the least restrictive environment. The ARC determined that Student's performance data showed a need for specially designed instruction that cannot be effectively implemented in the general education setting, even with accommodations and supplementary aids and services. Student had a need for specially designed instruction in the areas of writing, math, vocational skills, social/emotional skills and communication. The ARC found that a combination of general education and the additional intensity of supports within the special education resource classroom would be best for Student. Possible harmful effects of the placement were discussed and none were identified. (R. 98).

53. Student began his sophomore year in the fall of 2018. At the beginning of the school year, relevant staff again attended a training session specific to FAS. (R. 108).

54. [REDACTED] believes the switch to resource classes was a positive one for Student. Student is receiving more direct instruction and is benefitting from resource teachers' ability to keep students focused on the task at hand. In addition, those students who complete their work during the class do not have homework. Thus, students are motivated to finish their work and not have the pressure or stress that homework brings. In Student's case, it is also helpful that teachers in a smaller setting are better able to help with his graphic organizer. (TE Vol. III, p. 810-811).

55. [REDACTED] was Student's resource teacher for social studies, where Student was studying world history. There were between seven and nine students in this particular class. [REDACTED] makes special accommodations for Student in the class by breaking down the content with him, working with him on general organization and keeping him focused. [REDACTED] enjoys a good rapport with Student. He has never seen Student act inappropriately with peers and in fact indicated that Student had a friend in the classroom. (TE Vol. I, pp. 58-61).

56. [REDACTED] was Student's visual art teacher. This class is an elective so Student attended with general education students. Student participated in the class and interacted well with other students. He seemed to understand the subject matter and was receptive to [REDACTED]'s feedback on his work. (TE Vol. I, pp. 42-45).

57. Another ARC meeting was conducted on January 25, 2019, at Mom's request. Mom shared that the resource classes seemed to help Student keep up with his papers and class work. However, she expressed concern about Student's increased aggressive behaviors at home and also that he was picking up inappropriate behaviors from peers at school, specifically that he was apparently encouraged to make inappropriate comments to a girl at school. Mom also requested an aide to help Student navigate his day throughout the building. While Student is supervised when he is in the classroom, he has difficulties with social interactions during unstructured times such as hall transitions and lunch. The ARC decided to provide an escort for Student during class transitions and also to assign him a seat at lunch. In addition, he would wait in the office for classes to begin in the morning and again in the afternoon until he is picked up. A written supervision plan was developed and [REDACTED], an assistant principal at [REDACTED], reviewed the plan with staff. (TE Vol. III, pp. 758-760; R. 111).

58. The ARC discussed the possibility of providing some intentional support to further assist Student with appropriate social interaction with peers. ██████ said she might be able to arrange a “lunch bunch” if there is a peer available that would be able to join the group. ██████ has in the past paired different students in a casual atmosphere when they may benefit from socializing with each other. She was unable to find an appropriate student to match Student’s lunch period, but expressed hope that she could arrange something Student’s junior year. (TE Vol. I, pp. 126-129; R. 111)

59. During this meeting, it was noted that ██████ had been conducting checks on Student’s soiling issues, but that would be discontinued as Student was staying clean. (TE Vol. III, pp. 758-759; R. 111).

60. ██████ and ██████ updated the ARC on Student’s progress. ██████ reported that Student was making steady progress towards his goals and that he had good and bad days on initiating tasks. Student was getting better with his organization and keeping his binder neater. ██████ reported that Student was participating in therapy sessions and coming out of his shell. (TE Vol. III, pp. 820, 787-788; R. 111).

61. The ARC also considered whether Student should pursue a diploma or an alternative certification. A student can qualify for an alternative certification track if he or she has a longitudinal history of an intellectual disability. In this case, Student, who was evaluated when he was admitted into the district in middle school and again before high school, has never qualified as having a mild mental disability. ██████, who has worked with Student since he was in sixth grade, testified that Student has already accumulated high school credits and that he has made progress on his goals, is passing his classes, and teachers are reporting that he can do the work. While Student needs repetition and other supports, he can progress through the general curriculum.

A student with an alternative certification as opposed to a diploma also has more limited education and employment opportunities. During the ARC meeting, the committee discussed the option of fifth and sixth year schedules for completion of a high school diploma. [REDACTED] also discussed transition options after high school and provided information about the Office of Vocational Rehabilitation, which provides supports and services post high school. (TE Vol. 2, p. 418; Vol. III, pp. 719-722; R. 111).

62. During the January 25, 2019 ARC meeting, [REDACTED], Student's ceramics teacher, mentioned that Student was leaving her class multiple times to go to the restroom. [REDACTED] testified that Student left at most two times during a period.<sup>3</sup> [REDACTED] testified that when Student left to use the bathroom, it was for a typical amount of time. She has had students leave class for longer than necessary and worries about these "wanderers." Student was not a wanderer. During the weekend after the meeting, Mom and [REDACTED] were trying to process why Student made such frequent bathroom trips during one class. Mom mentioned that Student had also been bringing food home. When Mom discussed this with Student, he told her that he was being given food in order to perform sexual acts in the bathroom with another boy.<sup>4</sup> (TE Vol. I, pp.42, 228-229; Vol. II, pp. 424-425).

63. After notifying the police, Mom left a voicemail with [REDACTED] and requested a meeting for Monday, January 28, 2019. That day, Mom and [REDACTED] met with [REDACTED] Principal Ms. [REDACTED], Assistant Principal [REDACTED] and either [REDACTED], the [REDACTED] ARC chair or [REDACTED], the school psychologist.<sup>5</sup> During the meeting, a plan was put into place to ensure

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<sup>3</sup> Student's teachers were told at the beginning of the school year to allow Student to go to the restroom whenever he needed so that he didn't soil himself. (TE Vol. 1, p. 34).

<sup>4</sup> Student used the bathroom right across from the main office and right next to the attendance office. All other bathrooms are locked during class time. There is no door on the bathroom. There is constant foot traffic around the entrance to the bathroom because of its location. (TE Vol. I, pp. 42-43, 47-48).

<sup>5</sup> The testimony is inconsistent.

that Student would have adult supervision at all times. Mom asked for an aide to be appointed, but was told that request would need to take place in an ARC meeting. An ARC meeting was scheduled for February 1, 2019. (TE Vol. I, pp. 160-163; Vol. II, pp. 425-426; P 96-97).

64. At the ARC meeting, ██████████ reviewed a supervision plan that would involve Student using the bathroom in the office and an escort taking Student to the bathroom each time. Mom again requested a full time aide for Student, contending that the proposed level of supervision was inadequate. ██████████, the ██████████ Director of Special Education, agreed that a full-time aide could be assigned on a temporary basis while the district goes through its procedure for gathering data and evaluating whether the assignment of a permanent aide to a student is appropriate. The social awkwardness of Student being accompanied by a full-time aide was discussed. The ARC agreed that Student would eat lunch in an alternate location and agreed to meet again in two weeks to discuss progress. The district was able to fill the temporary aide position within 2-3 days of the ARC meeting. The aide continued to work with Student through the rest of the school year. (TE Vol. III, pp. 866-869, 843-844; R. 115).

65. During the afternoon of the same day of the ARC, the school received an interpersonal protective order (IPO) sought on Student's behalf which identified the other student involved in the alleged incident. The school devised a plan to keep the two students apart. The IPO was later dismissed after the case against the other student was closed and no charges filed. (TE Vol. III, p. 884; Vol. I, pp. 163-166; Vol. II p. 168).

### **CONCLUSIONS OF LAW**

1. As this Due Process Hearing is an administrative proceeding in Kentucky, there are two guides for who has the burden of proof. As the party seeking relief, Petitioner bears the burden

of proving his entitlement to relief by a preponderance of the evidence. *Schaffer v. Weast*, 546 U.S. 49, 62(2005). The Supreme Court in *Schaffer* ruled that the party seeking relief has the burden of proof and thus the burden of persuasion as the party seeking relief. In addition, KRS 13B.090(7) provides that 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.” Here, Petitioner is the party requesting action or seeking a benefit. Thus, Petitioner has the burden of proof and must establish, by a preponderance of the evidence, that Respondent violated IDEA and failed to provide an appropriate education to Student.

2. Petitioner specifically has the burden of proof to establish that Respondent failed to create an appropriate IEP for Student, failed to implement an appropriate IEP for Student, made inappropriate placement decisions as to Student and/or denied Student a free appropriate public education.

3. Petitioner first argues that Respondent failed to create an appropriate IEP for Student. Respondent is charged with ensuring that an IEP is developed and implemented for each child with a disability served by it. IEP requirements are set forth in Kentucky regulation at 707 KAR 1:320. As regarding the required content of an IEP, the ARC is to consider:

- (a) The strengths of the child and the concerns of the parents for enhancing the education of their child;
- (b) The results of the initial or most recent evaluation of the child;
- (c) As appropriate, the results of the child’s performance on any general state or districtwide assessment program; and
- (d) The academic, developmental, and functional needs of the child.

707 KAR 1:320, Section 5(1). The IEP for each child shall include:

- (a) A statement of the child’s present levels of academic achievement and functional performance, including how the child’s disability affects the child’s involvement and progress in the general curriculum as provided in the Kentucky Program of Studies, 704 KAR 3:303, or for preschool children, as appropriate, how the disability affects the child’s participation in appropriate activities; and



(b) A statement of measurable annual goals, including academic and functional goals, designed:

1. Meet the child's needs that result from the disability to enable the child to be involved in and progress in the general curriculum as provided in the Kentucky Program of Studies, 704 KAR 3:303, or for preschool children, as appropriate, to participate in appropriate activities; and
2. Meet the child's other educational needs that result from the disability.

707 KAR 1:320, Section 5(7). In addition, an IEP shall include a statement of the specially designed instruction and related services and SAS. There shall also be a statement of the program modifications and supports for school personnel that will be provided for the child to:

- (a) Advance appropriately toward attaining the annual goals;
- (b) Be involved and make progress in the general curriculum;
- (c) Participate in extracurricular and other nonacademic activities; and
- (d) Be educated and participate with other children with and without disabilities.

707 KAR 1:320, Section 5(8).

4. With regard to the creation of the IEP, Petitioner argues that the IEPs created have changed minimally over the years and that the changes that have occurred mainly reduce the expectations for the Petitioner. Petitioner specifically argues that the IEPs have also failed to adequately address Petitioner's socialization needs, speech needs, occupational therapy needs, toileting needs and supervision needs.

5. Petitioner has failed to meet its burden of proof on this issue. First, Student's IEPs met the regulatory requirements set forth in 707 KAR 1:320. The record reflects that the ARCs consistently crafted the IEPs to challenge Student and to cater to his individualized needs as appropriate at each annual review. Much research, discussion and planning took place in the drafting of each IEP. All of the needs Petitioner questions were repeatedly addressed during the conferences and implemented into the IEPs.

6. Petitioner next argues that Respondent failed to implement the IEPs. Petitioner contends that there was insufficient monitoring data in the record, Student has made insufficient progress, and generally that accommodations were only sporadically provided.

7. The record is replete with monitoring data. At each ARC meeting, Student's teachers presented data that had been collected on Student's progress and struggles. That data was discussed and action was taken based on the ARC's discussion. Moreover, there was consistent communication and reporting between teachers and Mom, and staff met with Mom on at least one occasion outside of an ARC to review and explain data that had been collected.

8. Although Student struggled with many of his goals as they were challenging, there is ample evidence that he made appropriate progress during both middle and high school.<sup>6</sup>

9. During the hearing, Petitioner challenged a number of issues concerning the accommodations provided to Student.

- Petitioner took issue with the ARC decision to stop the use of the FM system in middle school. This decision was appropriately made only after Student repeatedly expressed his distaste for the system, refused to use it, and destroyed the headphones. After collecting data from other teachers, [REDACTED], the middle school speech therapist, determined that the system was not beneficial to Student. Teachers used other techniques which were more effective than the FM system.
- The ARC's decision to cease providing Student with occupational therapy was also disputed. After working with Student on his handwriting and keyboarding skills, [REDACTED] determined that Student's handwriting was legible, and that his focus is better spent on increasing his keyboarding skills. Since Student was at a point where he

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<sup>6</sup> See Findings of Fact Paragraphs 17, 21, 22, 25, 26, 29, 32, 35, 36, 44, 50, 54, 56, 57, 60 and 61, *supra*.

could use technology in the classroom and needed to practice that, ██████ reported to the ARC that her skillset was no longer of value to Student and that it was no longer appropriate or necessary to pull him out of class for therapy. The ARC decided to dismiss Student from OT.

- A couple of issues were raised concerning Student's use of technology. When Mom reported that Student was printing off images of skulls and crossbones, staff restricted Student's access to printing during the hours he was in school. When Mom expressed concerns that Student was failing to write down assignments, the ARC decided to provide him with an iPad so that he could take pictures of the assignments. Later, again at Mom's request, Student's internet use was limited and ultimately prohibited.
- Mom has consistently reminded the ARC about Student's toileting needs and that he sometimes soiled himself. Although staff repeatedly denied seeing or hearing of any issues with Student soiling himself, they gave him frequent and structured bathroom breaks and gave him verbal reminders to go to the bathroom.
- Petitioner also expressed disagreement with the ARCs attempts to improve Student's social skills and interaction with peers. However, the evidence indicates that there were consistent efforts in this regard. Student had both social/emotional and vocational goals that addressed his interactions with others. Teachers reported role-playing social situations with Student and encouraging him to talk more in class. His speech therapist was also working with him on social cues. When inappropriate interactions in the hallway with peers was reported, staff talked to Student, encouraged appropriate behavior and when needed provided additional

supervision. Student had many opportunities for social interactions with adults and peers and made progress in this area.

- Student's need to learn better organizational skills was also a consistent topic during ARC meetings. Goals were implemented to support Student in this area, and teachers worked continuously with Student on a one-on-one basis to be more organized.
- Student consistently received accommodations such as extra time, the chunking and modification of assignments. He was also assisted with the use of a graphic organizer specifically designed for his needs.
- Respondent appropriately responded to Mom's middle and high school requests for supervision and a full-time aide. The first ARC concluded that there was no documented need for such a level of support and that Student would benefit more from being independent and following the lead of his peers. Although there was no need for a one-on-one instructional aide, the second ARC concluded that more supervision during non-classroom times such as transitions between classes was a possible benefit and they put a comprehensive supervision plan into place. After the allegations of inappropriate encounters in the school bathroom, the ARC provided a full-time aide to Student for the remainder of the year.
- The ARC appropriately determined that it would be in Student's best interests to pursue a high school diploma rather than an alternative certificate. Student's psychoeducational evaluations did not indicate that he had a mild mental disability and so he did not qualify for the alternative certificate track.

The testimony and exhibits indicate that Respondent worked closely with Mom to devise and revise Student's IEPs and that appropriate changes were made as needed, and that the IEPs were appropriately implemented.

10. Petitioner contends that Respondent failed to make appropriate placement decisions for Student. This argument is based on the fact that Student ended his tenth grade year in a resource setting for all of his core classes. He was in general education classes for electives. Petitioner argues that this placement did not educate Student in the least restrictive environment. Petitioner also points to 707 KAR 1:350, Section 1(9), which addresses placement decisions. That regulation provides that a "child with a disability shall not be removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum."

11. Petitioner has failed to meet its burden of proof as to placement. Prior to his sophomore year, Student was placed in resource classes for math and English. Although school personnel in the eighth grade deemed it advisable to pull Student out of science and social studies for intense and specialized instruction, Mom objected and the compromise of co-teaching was reached. The decision to place Student in resource classes for all four of the core classes for his tenth grade year was discussed and reached by consensus at both the March 23, 2018 ARC meeting and the October 12, 2018 ARC meeting. Student and Mom agreed with school personnel that Student would benefit from small class size and more individualized attention. The testimony indicates that Student was more successful in the resource classes when the change was made and that he was able to receive more supervision and direct attention and focus on his work. He continued, of course, to interact with regular education students during his elective classes. All indications are that the placement was a positive change for Student.

12. It is worth noting that the ARC's decision was not made lightly and was discussed at two ARC meetings. The ARC discussed the least restrictive environment as well as potential harmful effects (none were identified). The placement was made to ensure that Student received educational opportunities targeted to his specific needs.

13. Petitioner's final argument is that Respondent has failed to provide Student with a free appropriate public education (FAPE). School districts have a duty to provide FAPE to all children with disabilities in their districts. 20 U.S.C. Section 1412, 707 KAR 1:290. "FAPE" is defined to mean special education and related services that:

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the Kentucky Department of Education included in 707 KAR Chapter 1 and the Program of Studies, 704 KAR 3:303, as appropriate;
- (c) include preschool, elementary school or secondary school education in the state; and
- (d) are provided in conformity with an individual education program (IEP) that meets the requirements of 707 KAR 1:320.

707 KAR 1:002(27).

14. The U.S. Supreme Court has specifically addressed FAPE in two opinions. In *Board of Ed. v. Rowley*, 458 U.S. 176 (1982), the Court found that a child's IEP must be "reasonable calculated to enable the child to receive educational benefits." In *Endrew F. v. Douglas Cnty. Sch. Dist.*, 137 S.Ct. 988 (2017), the Court interpreted *Rowley* to require a general approach, holding that in order to meet its substantive obligation under the IDEA, "a school must offer an IEP reasonably calculated to enable a child to make progress in light of the child's circumstances." The Court held that an IEP must be "appropriately ambitious" in light of the child's circumstances, that every student should have the chance to meet challenging objectives, and that the correct standard is "markedly more demanding than the 'merely more than *de minimis*'" test applied by the lower court. The Court made it clear that "the IDEA cannot and does

not promise ‘any particular [educational] outcome.’” The Court also rejected the argument that FAPE requires that a child be provided opportunities to achieve academic success, attain self-sufficiency, and make societal contributions substantially equal to the opportunities afforded children without disabilities, noting the need to defer to the expertise and exercise of judgment by school authorities.

15. Petitioner argues that Respondent failed to consider Student’s unique needs when designing his program. The evidence indicates otherwise. Rather, it is clear that Respondent offered Student IEPs that enabled him to make appropriate academic progress and that they were developed based on evaluations, data and input from Student’s general education teachers, special education teachers, occupational and speech therapists, a special education consultant, administration, parent, student, parent advocate and private providers. The IEPs contained specific plans to improve Student’s progress and address areas where he was struggling.

16. Student’s IEPs were crafted with consideration of his individual circumstances, were appropriately ambitious, and were reasonably calculated to enable him to make appropriate progress. Petitioner has not met its burden of proving that Respondent failed to provide FAPE.

### **FINAL ORDER**

The undersigned concludes that Petitioner failed to prove by a preponderance of evidence that Respondent failed to create or implement Student’s IEPs, failed to make appropriate placement decisions and failed to provide FAPE.

### **APPEAL RIGHTS**

In accord with that regulation and pursuant to 707 KAR 1:340, Section 12, a party to a due process hearing that is aggrieved by the hearing decision may appeal the decision to members of the Exceptional Children Appeals Board (ECAB) assigned by the Kentucky Department of





