

**KENTUCKY DEPARTMENT OF EDUCATION  
DIVISION OF LEARNING SERVICES  
AGENCY CASE NO. 1819-27**

████████████████████

**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 May 6, 2019 pursuant to the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. Section 1400, et. seq.) An administrative hearing was conducted in ██████████, Kentucky August 27, 2019 through August 30, 2019. The Honorable Marianne Chevalier represented Petitioner; the Honorable Claire E. Parsons 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, 12 witnesses testified and a number of exhibits were entered into the record.<sup>1</sup>

Petitioner argues that Respondent school district denied Petitioner/Student a free appropriate public education (FAPE) by: 1) failing to create and/or implement an appropriate Individualized Education Program (IEP) for Student and failing to make good faith efforts to assist Student in achieving his IEP goals; 2) taking inappropriate disciplinary actions against Student

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<sup>1</sup> At the outset of the hearing and in accordance with the parental rights set forth in 34 CFR 300.512(c), Petitioner requested that the hearing be closed to the public. However, during the testimony of the second witness, Petitioner requested that the hearing be made open to the public. The request was granted.

which were not in accord with procedural safeguards; and 3) failing to make appropriate placement decisions regarding Student.

### FINDINGS OF FACT

1. Student is currently an 11<sup>th</sup> grader attending ██████████ High School ██████████. He has been diagnosed with autism, generalized anxiety disorder, and attention deficit hyperactivity disorder (ADHD). Student is being served with an Individual Education Plan (IEP) under the disability category of autism. (Transcript of Evidence or “TE” pp. 55 and 60; P 1-13, P 97).<sup>2</sup>

2. According to Student’s mother, ██████████ (“Mom”), Student exhibited anxiety and social difficulties at an early age. He was being treated for ADHD prior to his fourth-grade year of school and was diagnosed with anxiety disorder and autism during that school year. He was placed on an IEP after these diagnoses. (TE pp. 727-731).

3. Student had behavioral problems during his middle school years, particularly his eighth-grade year. He was disruptive in class and impulsive. Student does not always have the capability of distinguishing between appropriate and inappropriate interactions and is not always capable of responding appropriately when he becomes frustrated. Student also exhibited these behaviors at home and in the community. On the recommendation of Student’s psychiatrist, Mom reached out to ██████████, a positive behavior support specialist. ██████████ began to work with Student and his family to improve his behaviors. (TE pp. 732-746).

4. ██████████ specializes in providing behavior supports, social skills training, programming and tutoring based on behavior analysis. She works with individuals with disabilities and developmental delays. ██████████ conducted a functional behavior session with Student’s family to

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<sup>2</sup> Both party’s exhibits were marked by tab numbers as well as Bates stamp numbers. For simplicity, this decision will reference only Bates stamp page numbers.

identify concrete problematic behaviors to target for reduction. She also observed Student in a variety of settings, both at home and in Student's middle school. [REDACTED] decided to prioritize Student's protest behavior, disruptive behavior, verbal aggression and global skill deficits. She developed a behavior support plan for Student and those around him to address the targeted areas. (TE pp. 51-64; P 454-458)

5. Student entered the 9<sup>th</sup> grade year at [REDACTED] in the 2017-2018 school year. An ARC meeting was conducted in April of 2017 to discuss Student's transition to the high school. Student and his parents were present at the meeting, as was [REDACTED]. Student's IEP for the school year was developed in April of 2017 and included plans for Student to be provided visual and verbal prompts, supports and social skills instruction. It also called for the provision of Supplementary Aids and Services (SAS) in the form of scheduled breaks, modified assignments, extended time and other supports. Student was slated to participate in a co-taught English class and have adult supervision in his regular education classes as needed due to behavior issues. (P 113-119; P 57-64).

6. [REDACTED] is a special education teacher at [REDACTED]. [REDACTED] served as Student's case manager during his 9<sup>th</sup> grade year and was responsible for facilitating his due process folder and ARC meetings, as well as implementing strategies for behavior and socio-emotional and academic supports. She also teaches resource classes and co-teaches classes. During the school year, Student came to [REDACTED] often when he was having anxiety or needed help navigating a situation. [REDACTED] enjoyed a good relationship with Student and communicated consistently with Mom and [REDACTED] during the school year. (TE pp. 77, 291-295, 298, 364-366; R 175-189).

7. There was no specific behavior intervention plan in Student's IEP for his 9<sup>th</sup> grade year. According to [REDACTED], school personnel utilized various strategies set forth in the IEP, namely

the SAS interventions made available (see Paragraph 4, *supra*). [REDACTED] felt that the SAS services amounted to a behavior plan and that Student's IEP that year was appropriate to meet Student's needs. (TE pp. 340-343, 356; P 117).

8. Student had multiple disciplinary infractions during his 9<sup>th</sup> grade year, beginning in September of 2017 and continuing until the end of the school year in May of 2018. He was cited repeatedly for inappropriate reactions with others, and exhibited harassing, disrespectful and intrusive behaviors. Student was involved in physical altercations as well. He was placed in in-school suspension (ISS) for 19 days and was twice placed in an alternative school setting for at least eight days. These placements were made during the months of September, October and November of 2017 and February, March, April and May of 2018. Student also had several lunch detentions. (TE pp.577-579; P 142-153, R 66-77).

9. Students in ISS are subject to rules and are restricted from talking or sleeping. There is little if any peer interaction. (TE pp. 404-405).

10. According to [REDACTED], Student received special education services while in ISS and the alternative school. [REDACTED] and Student's math and English co-teachers worked with Student when he was in ISS. [REDACTED] met with Student during the first block in the morning to prep him for the day and was in touch with Student throughout the day. A special education teacher provides services in the alternative school. [REDACTED], Director of Special Education Services of [REDACTED] County Schools, testified generally that she understood Student had access to general education curriculum and special education services during his days in ISS and the alternative school setting. (TE pp. 302-311, 366-370, 268-270).

11. No ARC meeting was convened to address Student's behavior and explore whether it called for adjustments to his IEP. Student's parents did not request an ARC meeting during Student's 9<sup>th</sup> grade year. (TE pp. 577-579, 587).

12. According to [REDACTED], the school psychologist for [REDACTED] County Public Schools, the school did not convene an ARC meeting in response to Student's behavioral issues because there was no significant pattern of behaviors until February and March of 2018, which was shortly before the annual ARC meeting would occur to discuss Student's IEP for his 10<sup>th</sup> grade year. (TE pp. 896, 926-927).

13. [REDACTED] also testified that there is no requirement for a separate behavior intervention plan document, as long as the interventions are addressed in a student's IEP. According to [REDACTED], a formal functional behavioral assessment was not necessary for Student during his 9<sup>th</sup> grade year because he had not had the requisite number of school removals. (TE pp. 928-932).

14. [REDACTED] served as Student's guidance counselor at [REDACTED] during the second part of his 9<sup>th</sup> grade year. When Student's grades suffered during the second half of the year, [REDACTED] met with [REDACTED] and Mom on or about April 11, 2018 to discuss weekly check-ins with Student. [REDACTED] counselors at times arranged for such check-ins for students who are struggling academically. [REDACTED] specifically planned to begin conducting 10 to 15-minute meetings with Student to check on his grades, check on the status of his assignments, look at his attendance and discuss anything Student wanted to discuss. The weekly check-ins were not addressed in Student's IEP. While it is evident that at least one check-in did occur during the month of April, it is unclear whether [REDACTED] followed up as the school year was winding down. [REDACTED] believes she had more than one meeting with Student in April, but could not testify as to specific dates. Mom did express

concerns in e-mails with district officials in May of 2018 that only one check-in occurred. (TE pp. 559, 568-578, 349, 602-603; P 343; R 171).

15. Student passed his academic classes during his 9<sup>th</sup> grade year. (R 4).

16. In order to prepare for Student's transition from [REDACTED] for his 10<sup>th</sup> grade year, [REDACTED] prepared a lengthy bullet point document describing Student's strengths and weaknesses and suggesting ways to help him and address his behaviors. She sent the list in the form of an e-mail to Mom and [REDACTED] and put a copy in Student's due process folder for the benefit of Student's next case manager. [REDACTED] acknowledged [REDACTED] summary and expressed appreciation for [REDACTED] knowledge of Student. (TE pp. 298-301; R 138-142).

17. On April 16, 2018, towards the end of Student's 9<sup>th</sup> grade year, the ARC convened to revise Student's IEP for his 10<sup>th</sup> grade year. According to the Conference Summary Report of the meeting, its purpose was to review and revise Student's IEP, make placement decisions, and update Student's behavior intervention plan. The ARC made the determination to change Student's placement to the PASS (Positive Approach to Student Success) program for his 10<sup>th</sup> grade year. It concluded that Student's "Least Restrictive Environment" (LRE) was the regular education classroom with supports of Student's IEP in place. (P 47-56; TE p. 993)

18. Kathy Maciel is a consultant at the Green River Educational Cooperative (GRREC), a regional support entity for public school districts. GRREC provides professional development services and serves as a link between the school districts and the Kentucky Department of Education. It's special education department, of which Maciel is a part, serves 35 school districts and provides training and support for students with autism and behavioral issues. Maciel has a master's degree in education and has a national board certification specializing in

exceptional needs. Maciel described the PASS program, which was newly adopted at [REDACTED] for the 2018-2019 school year. (TE pp. 376, 911, 986-989, 999; R 11).

19. The PASS program was developed as part of a partnership with a school psychologist and a special education teacher in Texas. It has been adopted by a number of schools inside and outside of Kentucky. Kentucky schools have been using the PASS program for approximately 10 years. The goal of the PASS program is to help students be fully successful in the mainstream classroom. Traditionally, students with emotional behavior disorders were served in level-type programs which required them to meet criteria to “earn” their way back into regular education classrooms. It incorporates explicit instruction, functional behavioral analysis, behavior interventions and very consistent corrective feedback and coaching with the student. Neither party alleges that PASS is a regular education classroom. (TE pp. 993-999; R 197-203).

20. A student’s functional behavior assessment is an important part of his participation in the PASS program. According to Maciel, the monitoring piece of the program is very important because it helps staff make data-driven decisions on a daily and weekly basis. Data collection each time a student is in the PASS room is important to assess the child’s programming and help staff hone in on behaviors and triggers so that programming can be adjusted as necessary. (TE pp. 1004-1005).

21. Maciel provided training to [REDACTED] staff to assist it in implementing the PASS program. This included a day of implementation training for school teams to ensure that everyone is on the same page and there are no silos with the students within the school. In addition, there is an extra day of training for the designated PASS coach to dig deeper into the evidence-based principles of the program. [REDACTED] is a certified special education teacher and is the

PASS coach for the school. [REDACTED] received PASS training from Maciel and GRREC and gave his own presentation to the entire faculty at [REDACTED]. (TE pp. 998-999, 456, 461, 465; R 6).

22. The PASS program is an individualized program which allows students to progress at their own pace. The process consists of four phases: preplacement, orientation, inclusion and maintenance, and aftercare. The preplacement determines whether a student is in the PASS program, with orientation done on the student's first day. The inclusion and maintenance phase occur when the students return to their classroom. During that phase, teachers and the PASS coach utilize a magnetic token system to gauge a participant's behavior. The magnets are placed on a metal frame outside of the teacher's door and the teacher is expected to use them to indicate to the PASS team how the student is faring. If a green magnet is displayed, the student is exhibiting appropriate behavior. If a yellow magnet is displayed, it shows the student is beginning to struggle; a red magnet means the student has continued inappropriate behavior and calls for the PASS team to get involved and for the student to go to the PASS room. [REDACTED] and his aides monitor PASS students while they are in their classrooms to see what tokens the teachers are posting for the involved student and take action accordingly. (TE pp. 465-469; R 6).

23. The PASS program is behavior-focused and only monitors behaviors targeted on a student's IEP/behavior plan. It is not designed as a disciplinary setting designed to punish students, but rather a positive way to achieve success. A student's return to the classroom is dependent on his behavior. (R 6).

24. There is no indication that Student or Mom, who both attended the 2018 ARC meeting, had any objection to the placement. On April 12, 2018, [REDACTED] e-mailed [REDACTED] and advised her to add Student to the list of PASS program participants and to remove him from [REDACTED] roster, after revisions were made to Student's "BIP." This was in response to [REDACTED] e-mail



reporting on a positive meeting with Mom which indicates Student was being considered for the PASS program, that it would be a good fit for him, and that there would be a need to “update the behavior plan.”<sup>3</sup> Student remained on [REDACTED] roster until the end of the school year. (TE 347; P 47-55; R 125-126).

25. Student’s April, 2018 IEP lists two annual measurable goals. Goal 1 was stated as follows:

Across all settings, Student will comply with all classroom norms and exhibit safe and appropriate behaviors (appropriate comments, attention to task and work completion) earning an 80% or higher as measured by progress monitoring data and teacher observations on 4 out of 5 school days.

Specially designed instruction for this goal is to be provided by “cueing (verbal, nonverbal, visual, picture, photo) etc.” Goal 2 was stated as follows:

When Student becomes upset, frustrated, or angry, he will use a self-regulation/coping strategy to avoid engaging in an unexpected behavior, with 2 or fewer prompts, on 4 out of 5 opportunities, as measured by observations and documentation.

Specially designed instruction for this goal is to be provided by extended time, cool-down time, prompting, testing in a separate room if needed, and a behavior checklist following the BIP. (P 110).

26. In response to a question on the April, 2018 IEP asking whether Student’s behavior impedes his learning or that of others, the ARC checked “Yes.” A BIP is then listed as a positive behavioral intervention strategy for Student in response to a request for services and/or devices to be provided for Student. Although the other two checked strategies, SAS and specially designed instruction are specifically addressed in the IEP, a BIP is not. The April, 2018 IEP does not include

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<sup>3</sup> “BIP” is the abbreviation for behavior intervention plan. When questioned about this particular e-mail, [REDACTED] testified that she made a mistake and meant to refer to the revision of Student’s IEP. However, in an e-mail sent from [REDACTED] to [REDACTED] the day before, [REDACTED] clearly references the need to “update the behavior plan.” (TE 969-970; R 123 and 126).

a separate BIP, nor was it noted to have been created or attached to the ARC conference summary notes. (P 109-110, 47-56).

27. In the Least Restrictive Environment (LRE) section of Student's April, 2018 IEP, it is noted that students enrolled in the PASS program will attend their scheduled classes, that PASS team members will circulate around the building observing each student, and that if any behavioral issues arise, the student must return to the PASS classroom. At the conclusion of a reorientation period, the student will return to the classroom they were removed from. (P 112).

28. The PASS program is intended to be used to monitor targeted behaviors with the use of the student's IEP. It is not a disciplinary setting designed to punish students but rather a positive way to achieve success. However, the evidence indicates that the PASS program was included on Student's IEP to be used in a punitive manner for behavioral issues. For example, the conference summary from the April 12, 2019 ARC indicates that Student's "behavioral and emotional episodes" resulting in Student spending additional time in the PASS classroom and that he be afforded "de-escalation time" in the PASS program. A multi-disciplinary report dated April 12, 2019 indicates that "as a consequence" for not following directions, Student was required to report to PASS during one block and the following day as well. The report also states that Student "is experiencing some increased difficulties recently, with behavioral and emotional episodes that have resulted in him spending additional time in the PASS classroom." (P 40, 42, R 56, 61)

29. Several of Student's teachers did not understand how the PASS program worked and/or used it to discipline Student. [REDACTED], Student's social studies teacher, described the PASS program as an intervention before students are sent to ISS or a higher discipline level. [REDACTED], Student's physical education teacher, decided to send Student to PASS for two

days of his class after Student and ██████ became angry at each other when Student was called out for being in a fieldhouse rather than on the field. (TE pp. 637-638, 675; R 6).

30. There is also evidence that teachers were not informed and did not understand the use of the PASS program. ██████ testified that she did not initially realize Student was participating in the PASS program and only became aware of it after making a disciplinary referral. When asked what she did with the magnets on Student's PASS board, she said "nothing," apparently not realizing she was supposed to be using the magnets to communicate with the PASS team. According to e-mail communication between ██████ and ██████ after she sent Student to PASS at his request, ██████ states that if Student finishes an assigned worksheet, "there is no need for him to come back" to the regular classroom as "we do not need his disrupting the class as they attempt to work on the assignment and he is done." In another e-mail from ██████ to ██████, the teacher says "He can be with us [regular classroom setting] today but we are getting tired of [Student] dominating class needing to be heard and seen." (TE 653-655; R 165 and 167).

31. In March of 2019, Student was pulled from his class and placed in PASS simply because there was a substitute teacher. (TE 482; P 40, R 55).

32. ██████ has a good relationship with Student. As the PASS coach, ██████ testified that he provided social skills services to participating students during the 30 minute "Sword" sessions which took place four days per week. ██████ also worked with students as needed under the PASS program to monitor behavior and help to de-escalate students when they have behavioral issues. During PASS, ██████ would help participants with social skills by asking them what they would like to talk about and then conduct a "soft lesson plan" with the class to discuss topics of interest. According to ██████, Student has anxiety about being sent to ISS,

and there was at least one instance that he went to the PASS program as opposed to ISS. (TE 456-459, TE 474-477).

33. The IEP did not specify that training for general education teachers would include how Student's specific disabilities manifest and impact his access to the general curriculum. Aside from the general education session regarding PASS, there was no training or guidance given to Student's teachers, who generally felt that he was inconsistent with his efforts. For example, [REDACTED], Student's 10<sup>th</sup> grade math teacher, testified that Student was sometimes not motivated and had inappropriate outbursts in class but did not know how those behaviors were related to his disabilities. [REDACTED], who in e-mails to [REDACTED] expressed that she doesn't "know why Student can't follow directions," and that "I can't keep giving him a break and looking the other way" testified that she was not specifically aware of Student's autism diagnosis or how it could affect his behavior. When asked what kind of information he has been given to provide interventions when Student needs them, [REDACTED] testified that he would pull Student aside and talk to him like he did with all his other students. [REDACTED], when arguing with Student about PASS, also told Student that he was acting like a "prick." (TE pp. 612-620, 622-625, 673, 677-679; R 164, 167).

34. Student continued to struggle with communicating with his peers and teachers throughout his 10<sup>th</sup> grade year. According to [REDACTED], she and other students were frustrated with Student. Student had continued outbursts and made other students feel they were being robbed of instruction time. He continued to have altercations with other students as well as teachers. (TE pp. 646-647, 650-651, 654).

35. In addition to his PASS classroom assignments, Student was disciplined several times during his 10<sup>th</sup> grade year and was assigned lunch detention and ISS. Student's behavior

detail report indicates that he was disciplined for refusing to follow instructions and that, as a result, Student would spend the next two days of a block in the PASS room. (R 64-66).

36. Student passed all of his classes his sophomore year. (R 8).

37. During Student's sophomore year, he participated in a research project and received an independent evaluation at Vanderbilt Medical Center. As part of the evaluation, Student completed a series of standardized diagnostic and psychological measures. The report issued in response called into doubt Student's autism diagnosis but confirmed diagnoses of communication disorder, anxiety disorder, and ADHD. [REDACTED] reviewed the report but it was not provided to [REDACTED] (R A; TE pp. 180-186, 851-856).

38. Another ARC was conducted on April 12, 2019, the end of Student's 10<sup>th</sup> grade year. Among the stated purposes of the ARC were to make placement decisions and update Student's BIP. The ARC presented a proposed plan that Student continue participating in the PASS program. The ARC determined that the LRE for Student was the regular education classroom. [REDACTED] and Student's parents attended the ARC, but there is no indication they objected to the PASS placement. (P 36-46).

39. The two measurable goals set forth in the April, 2019 IEP are by verbatim the two goals from the April, 2018 IEP. There is a difference in the "specially designed instruction" to be provided to address the achievement of the goals, as "cueing, prompting and PASS room access" are listed under Goal 1 and "extended time, cool down time (PASS), behavior modification (PASS)" are listed under Goal 2. (P 102).

40. Again, in the IEP, a BIP is listed as a positive behavioral intervention strategy for Student. A BIP is also checked in that portion of the IEP that requests a statement of services to

be provided. The April, 2019 IEP does not include a separate BIP, nor was one noted to have been created or attached to the ARC conference summary notes. (P 97-104, P 36-46).

41. Student's LSE is again listed as the general education setting. His participation in the PASS program and its description is the same as was presented in the April, 2019 IEP. (P 103-104).

42. The IEPs produced in April, 2018 and April, 2019 are nearly identical. IEPs are broken up into several different sections. In Student's case, the topics addressing "Present Level of Academic Achievement and Functional Performance (PLAAFP)," "Transition Service Needs," "Consideration of Special Factors for IEP Development," "Measurable Annual Goals and Benchmarks," "Supplementary Aids and Services," and "Least Restrictive Environment" contain almost identical language. The 2019 IEP PLAAFP subsection addressing Students social and emotional status is clearly a cut and paste from the 2018 IEP as it again states that Student "is a current 9<sup>th</sup> grader that qualifies for services under the eligibility of Autism." Student was nearing the end of his 10<sup>th</sup> grade at the time. (P 97-112).

43. The conference summary notes developed as a result of the April, 2018 ARC and the April, 2019 ARC also contain multiple instances of identical language with regard to Student's current progress regarding sources and strengths, teacher input, progress monitoring for behavior and statement of affect. Much of the language mirrors that used in a multidisciplinary assessment report dated April 12, 2019. The 2019 assessment report likewise mirrors language used in both the 2018 and 2019 IEPs, despite having been written one year after the 2018 IEP. (P 39-42, 51-51, 97-98, 105-106; R 56, 60-61).

44. A Functional Behavior Assessment (FBA) was never performed for Student during his 8<sup>th</sup> – 10<sup>th</sup> school years at ██████████ County Public Schools. There is no evidence to indicate that

Mom or [REDACTED] specifically requested an FBA, but Mom testified that she trusted school staff to take the necessary actions to help Student. (TE 578-583, 741; P 36-56).

45. [REDACTED] continued to serve Student during his 9<sup>th</sup> and 10<sup>th</sup> grade year and was quite involved in communication with faculty concerning Student. [REDACTED] was allowed to provide services to Student at [REDACTED] prior to March of 2019. At that time, Student's mother was advised that [REDACTED] could no longer accommodate [REDACTED] schedule by permitting her to meet with Student on-campus for therapy sessions during the school day. This occurred due to a lack of available space and [REDACTED] inability to keep Petitioner from sitting behind administrator's desks during meetings as requested by school staff. Pursuant to district policy, [REDACTED] staff reserved the right to revoke [REDACTED] privileges to meet with Student at any time. Since that time, Student has been accommodated by allowing [REDACTED] to check him out for an hour so that the sessions could be conducted off-site. (TE 589-602; R 153-155; R 205).

46. According to [REDACTED], Student would benefit from a schedule that would allow him to attend school for part of the day to allow him to continue working on his social skills and behaviors, while completing some course work at home through a collaborative special education teacher. (TE 1020-1022).

### 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 and/or implement an appropriate IEP for Student, took inappropriate disciplinary actions against Student in violation of procedural safeguards, and made inappropriate placement decisions concerning him.

3. Petitioner’s overarching 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).

4. 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 “reasonably 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.

### **IEP CREATION AND IMPLEMENTATION**

5. 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). The definition of an IEP and its required contents are also set forth in 34 CFR 300.320.

6. With regard to the creation of the 2018 and 2019 IEPs, Petitioner argues that they do not include academic goals, that the stated goals are not measurable, and that the IEPs were not kept current. The 2018 IEP identifies issues with Student having bouts of anxiety, inappropriately calling out in the classroom, and at times exhibiting explosive verbal behaviors. The goals set forth in the IEP are geared towards addressing these and other issues and improving Student's success in the classroom, thus helping him academically. They are measurable as set forth in the IEP. There is no indication the ARC was presented with or considered specific academic problems to target with additional goals.

7. The 2019 IEP is problematic as it is almost identical to the 2018 IEP, in spite of Student's behavioral problems, the use of PASS and additional disciplinary actions. The IEP was required to address Student's "present" levels of academic achievement and functional performances; it did not. "An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth."

*Andrew F. v. Douglas Cnty. Sch. Dist.*, 137 S.Ct. 988 (2017), citing 20 USC §§

1414(d)(1)(A)(i)(I)-(IV) and(d)(3)(A)(i)-(iv). Student’s 2019 IEP is largely a cut and paste from the 2018 IEP. It is clear that the ARC did not recognize a need to provide any meaningful evaluation of Student’s current needs and whether the newly-adopted PASS program was serving those needs and enabling Student to make appropriate progress. While the district can argue that Student’s behaviors improved because official disciplinary actions against him decreased, the evidence is that that reduction only took place because the PASS program was being used as a disciplinary measure. The 2019 IEP was not developed appropriately and was not “appropriately ambitious” as required by *Andrew*.

8. Petitioner next argues that Respondent failed to appropriately implement the IEPs in violation of 707 KAR 1:320. School districts are responsible for providing specially designed instruction and related services to each child with a disability in accordance with his IEP. They are charged with making a good faith effort to assist the child in achieving the goals, objectives, or benchmarks listed in the IEP. 907 KAR 1:320, Section 9(1).

9. The IDEA requires that when a child’s behavior impedes his learning or that of others, the ARC must consider the use of positive behavioral interventions and supports and other strategies to address that behavior. 34 CFR 300.324(a)(2)(i). It is undisputed that Student’s behaviors impeded his learning and that of others; in fact, it is acknowledged on the IEPs, along with a reference to the intended use of a BIP. Thus, it is clear that a meaningful BIP should have been in place. However, a separate BIP was never developed for Student. Although Respondent witnesses testified that the it utilized various strategies in the IEP, namely the SAS interventions made available, as a BIP, that approach is insufficient.

10. SAS are required to be listed in an IEP and are defined to mean aids, services, and other supports that are provided to enable children with disabilities to be educated with

nondisabled children to the maximum extent appropriate. 34 CFR 300.320(a)(4), 34 CFR 300.42. BIPs, on the other hand, though not specifically defined in the IDEA, require more than just the requisite listing of aids. While it is true that the IDEA does not specifically require a BIP to be in writing (*see Sch. Bd. Of Indep. Sch. Dist. No. 11 v. Renollett*, 440 F.3d 1007, 2006 (8<sup>th</sup> Cir. 2008)), it should, at a minimum, match a student's specific behaviors with specific strategies to address them. *C.F. v. New York City Dep't of Educ.*, 62 IDELR 281 (2d Cir. 2014) (holding that a district failed to adequately create and implement behavior strategies in a BIP because it lacked specificity.) *See also*, the Kentucky Department of Education approved BIP form, which includes, among other things, proposed analysis of the targeted behavior, function of behavior, replacement behavior and instructional strategies: <https://education.ky.gov/specialed/excep/forms/Pages/Special-Education-Forms---Due-Process.aspx>. Respondent district clearly recognized the need for a substantive BIP, but it never constructed one. For these reasons, Student's 2018 and 2019 IEPs were not appropriately implemented.<sup>4</sup>

## **DISCIPLINARY CHANGE IN PLACEMENT**

11. Petitioner argues that the district imposed a disciplinary change in placement during Student's 9<sup>th</sup> grade year. The IDEA requires that a district make a manifestation determination within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct. 34 CFR 300.530(e). For purposes of removals of a child with a disability from the child's current educational placement, a "change of placement"

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<sup>4</sup> Petitioner argues that Respondent was obligated to perform an FBA prior to adopting a BIP. That argument is rejected, at least as concerning the IEP in effect at the outset of Student's 9<sup>th</sup> grade year. The IDEA only requires an FBA to be conducted in the situation addressed *infra*, so there was no mandate that it be conducted prior to Student's change of placement. It is noted, however, that even though the PASS program places great emphasis on an FBA, one was not conducted.

occurs when a child is removed for more than 10 consecutive school days or the child has been subjected to a series of removals that “constitute a pattern.” 34 CFR 300.536. Petitioner argues that Student’s ISS and alternative school suspensions amounted to a series of removals that constituted a pattern.

12. A “change of placement because of disciplinary removals” is defined in 707 KAR 1:002, Section 1(8). Under that regulation, a change of placement occurs if:

- (a) The removal is for more than ten (10) consecutive school days; or
- (b) The child has been subjected to a series of removals that constitute a pattern (which is determined on a case-by-case basis) because:
  - 1. The series of removals totals more than ten (10) school days in a school year;
  - 2. The child’s behavior is substantially similar to the child’s behavior in previous incidents that resulted in the series of removals; and
  - 3. Of additional factors, including the length of each removal, the total amount of time the child has been removed, and the proximity of the removal to one (1) another.

13. During his 9<sup>th</sup> grade year, Student spend 19 days in ISS and several more days in the alternative school setting. He was repeatedly disciplined for causing disruptions and inappropriate interactions with others. The disciplinary measures were taken on almost a monthly basis during the school year. Certainly, a pattern meeting the above requirements emerged.

14. Respondent argues that the ISS days do not constitute “removals” as that term is used in the regulation if “the child is afforded the opportunity to continue to continue to appropriately participate in the general curriculum, continue to receive the services specified on the child’s IEP, and continue to participate with nondisabled children to the extent they would have in their current placement.” 71 Fed. Reg. 46,715 (2006). Although ██████ testified that Student received special education services while he was in ISS, much of his IEP was focused on social interaction and spending time in the general education classroom, things he did not have access to in ISS.

15. Had the district recognized a disciplinary change in placement, the ARC would have convened to conduct a manifestation determination to determine whether Student's conduct was caused by, or had a direct and substantial relationship to, his disability. A determination that the conduct was a manifestation of Student's disability would have led to the conduct of a functional behavioral assessment or a review of Student's BIP as it existed. 34 CFR 300.530. (*See also* 707 KAR 1:340, Section 13 and 14).

16. Petitioner has met its burden of proving that Student's procedural safeguards were violated with respect to his change of placement in violation of 707 KAR 1:340.

#### **PLACEMENT IN PASS PROGRAM**

17. Petitioner concedes that the PASS program, as designed, could possibly have been an appropriate placement for Student. However, Petitioner argues that, as a practical matter, the PASS program was not implemented as designed and simply became a replacement for other disciplinary placements. As such, the PASS program was not an appropriate placement pursuant to 707 KAR 1:350. Maciel, the GRECC special education consultant who testified about the PASS program, explained that it incorporates explicit instruction, behavior interventions and very consistent corrective feedback and coaching with the student. She also stressed the importance of a functional behavioral analysis and daily data collection. There is evidence that [REDACTED] at times provided behavior interventions to address Student's behaviors, but there is no indication that Student received explicit instruction, consistent corrective feedback and coaching through the PASS program. An FBA was never done and there is no evidence of daily data collection.

18. It is easy to see that the PASS program, designed to be a positive behavior support, can certainly be a useful tool for children with disabilities. However, in Student's case, the

evidence is that it was used for disciplinary reasons and to give teachers a break from Student. The placement was not appropriate for Student's needs and thus was violative of 707 KAR 1:350.

19. Petitioner raised a number of other issues at the administrative hearing and in his briefs. Any claims that are not specifically addressed by this decision and order are denied and dismissed.

20. Petitioner has requested compensatory education for any time for which Student was denied FAPE. However, Petitioner has presented no specific claim as to the compensatory education sought. *S.C. by and through N.C. v. Chariho Regional School District*, 298 F.Supp.3d 370, 384 (D.R.I. 2018) states:

“Compensatory education is a surrogate for the warranted education that a disabled child may have missed during periods when his IEP was so inappropriate that he was effectively denied a FAPE.” *C.G. ex rel. A.S. v. Five Town Cmty. Sch. Dist.*, 513 F.3d 279, 290 (1st Cir. 2008) (citing *Me. Sch. Admin. Dist. No. 35 v. Mr. & Mrs. R.*, 321 F.3d 9, 18 (1st Cir. 2003) ). “However, compensatory education is not an automatic entitlement but, rather, a discretionary remedy for nonfeasance or misfeasance in connection with a school system's obligations under the IDEA.” Id.

The burden of proof on this issue is on the Petitioner. KRS 13B.090(7). In this case, the Petitioner has failed to meet its burden of proving that Student suffered any educational harm and that compensatory education services are warranted. (*See also, Gregory-Rivas v. District of Columbia*, 577 F. Supp. 2d 4 (D.D.C. 2008)). The request is therefore denied.

21. Petitioner has requested that attorney fees be awarded to it. This Hearing Officer is without the authority to award attorney fees in this matter. Under IDEA, 20 U.S.C. § 1415 the award of attorney fees is under the jurisdiction of the district courts of the United States. Specifically, 20 U.S.C. § (i)(3)(A) and (B) is set forth below:

- (3) Jurisdiction of district courts; attorneys' fees
- (A) In general, the district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.
- (B) Award of attorneys' fees;

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

As this Hearing Officer is not with the district courts of the United States, she is without the jurisdiction or the ability to award attorney fees to a prevailing party in a Due Process Hearing

22. Nothing in this order shall preclude the parties from reaching an agreement to alter the terms of this order.

### **FINAL ORDER**

The undersigned concludes that Petitioner proved by a preponderance of evidence that Student was denied FAPE. Specifically, Petitioner proved that Respondent failed to create an appropriate IEP for Student in 2019 and that it failed to properly implement the IEP in 2018 and 2019. Likewise, Petitioner proved by a preponderance of evidence that Student was denied due process because of a disciplinary change in placement and that he was the subject of an inappropriate placement.

Based on the foregoing, this matter is remanded back to Student's ARC to:

1. Arrange for an independent behavioral professional who is certified in Applied Behavior Analysis to conduct a functional behavior assessment;
2. Develop a written behavior intervention plan based on the results of the functional behavior assessment;
3. Update Student's IEP to include the behavior intervention plan;
4. Allow Student to have a reduced or modified schedule that will allow him social opportunities at school while also having partial home instruction;





CERTIFICATION

I hereby certify that a true copy of the foregoing Order has been served by mailing same to the following, via **e-mail**, on this the 6th day of March, 2020:

Hon. Marianne Chevalier  
[mchevalier@lawcg.com](mailto:mchevalier@lawcg.com)

Hon. Claire E. Parsons  
[cparsons@aswdlaw.com](mailto:cparsons@aswdlaw.com)

Todd Allen  
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Jennifer Payne  
[jennifer.payne@education.ky.gov](mailto:jennifer.payne@education.ky.gov)

And by **U.S. mail** on this same date to:

Todd Allen  
Kentucky Department of Education  
Office of Legal Services  
300 Sower Blvd; 5<sup>th</sup> Floor  
Frankfort, KY 40601

\_\_\_\_\_/s/ Susan Gormley Tipton  
Susan Gormley Tipton  
Hearing Officer