

COMMONWEALTH OF KENTUCKY
KENTUCKY DEPARTMENT OF EDUCATION
DIVISION OF EXCEPTIONAL CHILDRENS SERVICES
AGENCY CASE NO. 1617-02



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PETITIONER

VS.

HENRY COUNTY SCHOOLS

RESPONDENTS

DECISION AND ORDER

Introduction

This Due Process Hearing was requested by letter filed with the Kentucky Department of Education (KDE) by Counsel for the Petitioner on July 19, 2016 pursuant to the Individuals with Disabilities Act (IDEA), (*20 U.S.C. § 1400, et. Seq.*)

This matter was scheduled for a Hearing beginning on September 19-20, 2016 but was postponed.

Hearing in this matter was held on November 28, 29, December 1, 2016. Hearing was not held in January as Counsel for the Respondent was out of state. The Hearing was concluded on February 9 and 10, 2017.

Following the Hearing Counsel for Petitioner filed a Motion for the deposition of a rebuttal witness on February 24, 2017. Counsel for Respondent responded to the Motion on February 27, 2017. This Hearing Officer, allowed the deposition.

Due to scheduling issues, the deposition did not take place until May 24, 2017.

An Order establishing a schedule mutually convenient briefing schedule was Ordered on July 17, 2017.

At the request of the Parties, an extension of time for serving memorandum was extended to Monday, August 28, 2017 for the first memorandum and Monday September 11, 2017 for the second memorandum.

Petitioner's Counsel made a motion to strike Respondent's Reply Brief and Respondent's Counsel made a motion to strike the deposition testimony. This Hearing Officer denied these motions.

Within Petitioner's Due Process request, Petitioner alleges that the Respondent School District has not provided a "Free and Appropriate Public Education" (FAPE) for the Student. As a result, the Parents of the Student have removed her from the Respondent School District and placed her at the [REDACTED] Kentucky.

The Parties submitted simultaneous briefs and reply briefs after the conclusion of the Hearing and after a deposition of Petitioner's Witness.

Abbreviations

To protect the identity of the Student, throughout this opinion the Petitioner [REDACTED] [REDACTED] will be referred to as "the Student" or "Student/Petitioner. Some documents will reference her as "[REDACTED]" The Henry County Schools will be referred to as "the Respondent", the "Respondent School District" and "the School District". T.T. is the Hearing Transcript. "P.E". is the Petitioner's Exhibit. "R.E". Is Respondent's Exhibit. "KAR" is Kentucky Administrative Regulation. "K.R.S" is Kentucky Revised Statutes. "IEP" is Individual Education Plan. C.F. R. is "Code of Federal Regulations". "LRE" is Least Restrictive Environment".

STANDARD OF REVIEW

Burden of Proof

The burden of proof under **KRS 13B.090 (7)** is as follows. *“The party proposing that 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, unless otherwise provided by statute or federal law”*. In this instance, the Student is proposing that the agency take action and that he is entitled to a benefit sought. Therefore, the Student/Petitioner has the burden of proof to show by the preponderance of the evidence that the IEP and the services provided were not adequate or otherwise deficient to satisfy the requirement of FAPE (Free Appropriate Education).

It is the position of the Petitioner-Student that the Respondent failed to provide the Student FAPE. It is alleged that the FAPE was denied because the Student’s IEP was not properly implemented in part due to the failure of the School District’s employees to be properly monitor Student’s progress under her IEP(s). Under IDEA, the burden of showing whether or not a school district provided FAPE rests with the Petitioner; who is usually the parents on behalf of the student who is challenging or otherwise disputing the effectiveness of the student’s proposed independent education program or IEP. ***Board of Education of Avon Lake City School District v. Patrick M., 9 F.Supp. 2d 811, 820*** (N.D. Ohio) (citing ***Doe v. Board of Education of Tullahoma City Schools***, 9 F.3d 455, 458 (6th Cir. 1993)). See ***Alson Schaeffer v. Weast***, 546 U.S. 40 (2005) in an administrative hearing, party seeking relief has the burden of proof.

Relief Requested

PETITIONER'S ARGUMENTS

1. The Petitioner alleges that the School failed to provide the Student a Free and Appropriate Education for the three years immediately filing this Due Process Hearing Request.
2. The Student Was Not Making Progress
3. In Order To Achieve the FAPE the Student must have supports and related services to achieve educational services
 - a. Development of a BIP
 - b. The Development of Unrealistic IEP Goals and Failure to Monitor
 - c. Occupational Therapy
 - d. Denial of an ARC Meeting before February 29th
 - e. Placement of the Student
 - f. Restraint of the Student
4. The Parents Are Entitled To Reimbursement For Summit and Related Costs

RESPONDENT'S ARGUMENTS

1. The Petitioner Did Not Meet the Burden of Proof On Any Issue
2. The Petitioner Is Not Entitled To Any Relief
3. Dr. [REDACTED]'s Testimony Should Be Stricken From The Record

FINDINGS OF FACT

1. The Student became eligible for an IEP because of categorical disability in “emotional behavior disability” in September 2014. (R.E. # 14)
2. The Student started exhibiting “acting out” behaviors in school during third grade. (T.T. Vol. I, p. 13)
3. The Student began to receive services under an IEP on or about September 11, 2014, when she was in the 4th grade. (R.E. # 14)
4. Prior to becoming eligible for an IEP under IDEA, the Petitioner received services under Section 504. (R. E. #11; T.T. Vol. I p. 32-35)
5. On the first page of the School/District’s Section 504 Notice of Conference at point “D” at the bottom of the page it says: “You may bring additional persons to the 504 team Meeting. (R.E. #11, 12 and 13)
6. At the Section 504 Conference of 5-21-14, convened to discuss behaviors and possible IDEA referral. (R.E. #13)
7. It was during a meeting dated 5/30/2014, that it was agreed to pursue evaluation of the Student for potential IDEA eligibility. (R.E. # 14)
8. There was an ARC Meeting on 05/30/2014. Under “II. Document Parent Concerns and Input”; it stated “Parents attended. They are concerned with the escalation in “the Student’s” behaviors at home and school. They are in agreement to pursue evaluation for potential IDEA eligibility”. (R.E. #14, p. 1)
9. On or about 05/30/2014, the Student’s Parents consented to a “Referral for Multi-Disciplinary Evaluation. (R.E.# 15)

10. Sean Reeder is the School District's Psychologist. He first met the Student when she was referred for the Multi-Disciplinary Evaluation. (R.E. #16; Vol. III, p. 605)
11. The Student's Parents came away from the September 11, 2014 ARC Meeting with the understanding that the Student met the categorical definition or guidelines for EBD. (T.T.Vol. II, p. 213)
12. The Student's first IEP has the date of 09/11/2014 to 12/18/2014. (R.E. #17)
13. The Student was hospitalized at [REDACTED] in late September 2014 due to her behaviors. (T.T. Vol I p. 227)
14. The Student's Parents and employees from the District attended a meeting with [REDACTED] administration to assist with the Student's transition back to [REDACTED]. (T.T. Vol. V, p. 913)
15. An ARC convened on November 10, 2014. During that meeting, screening of the Student for occupational therapy was discussed. (R.E. #19) The Student was still at [REDACTED] and being educated by the educational component of [REDACTED] called [REDACTED]. (T.T. Vol. V, p. 911-912)
16. An ARC meeting was held on December 10, 2014. At that meeting a daily schedule was developed. The Student would have math in the afternoon. (R.E. # 20)
17. From the month of January 2016 through the end of the 2015-2016 school year, there were no ARC meetings for the Student. (T.T. Vol. IV, p. 664-665)
18. According to [REDACTED], the Student ended her fourth grade year "on a very high note" (T.T. Vol. IV, p. 664)
19. The Respondent/District's "Notice of Admissions and Release Committee Meeting contains the following two sentence under the checklist of persons who may be invited to attend an ARC Meeting: "You are welcome to bring any information,

including form or informal test results, work samples, etc. to the meeting. You may bring someone who has knowledge or special expertise regarding the student or someone to assist you at the meeting if you like". (P.E. # 31; R.E.#14, last page under the tab)

20. During the ARC of 08/24/2015, it was reported that the Student was making 88% and 88% (percent) of her goals in behaviors. At the same meeting-- at p. 13 : "ARC determined permission for OT school based services will be obtained". (R.E. # 24; T.T. Vol. III, p. 433-434)
21. On or about 09/23/2015, the Functional Behavior Assessment was released. It had been developed by [REDACTED]. (R.E. # 30)
22. Petitioner had [REDACTED] testify on her behalf. [REDACTED] is a therapist with the [REDACTED] Psychiatric Group. She is a licensed clinical social worker who started seeing the Petitioner on or about December 30, 2014 as a private client. (T.T. Vol. I, p. 100-102)
23. During the ARC Meeting of 09/03/2015, the Student's IEP for the period 09/03/2015 through 09/02/2015 was developed. On the first page of the IEP, it was noted that the Student had a "Primary Disability of "Emotional-Behavioral Disability". Under "Social and Emotional Status", within the second sentence it states: "Behavior data collected by classroom teachers indicates that "the Student" has mastered her goals of making good choices (88%) and managing her feelings (89%). (R.E. #28)
24. The 09/03/2015 IEP had as the Student's #1 Annual goal, 'increase her ability to self-regulate (permission to dismiss, decrease excuse making, use of voice and words that fit the context of situation and setting) in a daily basis with 80% accuracy as measured by tracking data. (p. 3 of R.E. #28)

25. On page 3 of the Summary Notes form the ARC Date 10/29/2015, it stated: "FBA was reviewed. This was not met on in the last ARC per parent request. They requested input from outside agency/physician be included but had not returned the Release of Information allowing the district to obtain it. Parents shared that there was a Dr. apt. scheduled for Oct. 12. Prior to the meeting today, parent returned the Release of Information form but did not provide information regarding who to contact. [REDACTED] returned the forms so this could be completed. Parent did not send them back and therefore further information could not be obtained. (R.E.# 31)
26. At the ARC Meeting of 10/29/2015, the ARC discussed the email brought to the meeting by Dr. [REDACTED], the Student's Psychiatrist. He suggested a self-contained classroom that could be monitored throughout the school day for anxiety and increasing impulsive behaviors. (R.E. #31, p. 5)
27. The Student was restrained while at school on April 19, 2016 after she became upset while attending an assembly. The Student was forcefully moved to the ICE room. Thereafter, the Student was placed on homebound instruction for the remainder of the 2015-2016 school year. (R.E. # 39)
28. On Monday, April 25, 2016, the Student's Parents provided to the School District an application for Home/Hospital Instruction. (R.E. #39)
27. While on Homebound Instruction, the IEP stipulated "home instruction teacher will consult with Occupational Therapist approximately 15 minutes per week for sensory integration strategies in this setting." (R.E. # 38, p. 11)
28. The Petitioner did not receive occupational therapy while on Homebound Instruction, although it was required as a related service in her IEP (T.T. Vol IV, p. 843)

29. On or about July 14, 2016, Petitioner's Parents notified the Respondent School District the Student would be enrolling in the [REDACTED] Kentucky for the 20016-2017 school year. (R.E. #2, 37)
30. Petitioner's first witness was her Mother. (T.T. Vol. I, p. 5-195)
31. The Student [REDACTED] at the time of the hearing was 11 years old. [REDACTED] [REDACTED] (T.T. Vol. I p. 6)
32. The Student attended Kindergarten and Elementary School through grade 5 at the Respondent School District. She began attending [REDACTED] in August 2016. (T.T.Vol. I, p. 6-7)
33. John Benjamin Roberts, the School District's behavior specialist testified. (T.T. Vol. V, p. 855) Mr. Roberts met twice with the Student. It concerned preparation for the Student's transition from elementary to middle school. He attended the ARC Meeting of 08/19/2016 (marked incorrectly as 08/17/2006 per T.T. Vol. V. 862. He was going to be one of the Student's teachers for the 2016-2017 school year had she returned to Henry County. (T.T. Vol. V, p. 859; R.E. #6)
34. Mr. Roberts was the Respondent's Middle School Behavior Specialist. He has a degree in special education learning behavior disorders. He holds certificates issued by the Kentucky Professional Standards Board in K through 5 and a certificate in special ed learning disorders K through (T.T. Vol. V p. 856-857)
35. Trica Lynn Hosey the School District's Director of Special education testified. (T.T. Vol V, p. 882-1065) that the Student became eligible and started to receive services under Section 504 in the second grade. (T.T. Vol. V, p. 889-891) By the time the Student was in third grade, more supports were needed and the referral process for an IEP was initiated. (T.T. Vol. V, p. 891; R.E. #11)

36. R.E. # 17 is the Petitioner's first IEP from 09/11/2014.
37. According to the Student's Mother, the Student was diagnosed with cyclothymic disorder a form of bipolar in children at around age 8. (T.T. Vol. I, p. 17)
38. Lori Ann Duvall testified. Ms. Duvall is a guidance counselor and teacher of the hearing impaired. Ms. Duvall began working with the Student during the second half of 2012-2013 school year when the Student had a 504 Plan. (T.T. Vol. III, 543 & R.E. #9; T.T. Vol. III, p. 540)
39. Eric Davis who was the Student's Principal testified. (T.T. Vol. III, 499-539) Mr. Davis served as Chairman of the ARC that met on 5/30/2014 (T.T. Vol. III, p. 502)
40. Mr. Davis was aware of the Student's being at [REDACTED] He went to [REDACTED] and had meeting with the staff of [REDACTED] along with Ms. Hosey and Mr. Reeder. (T.T. p. 509)
41. As [REDACTED] is located in Jefferson County, it was Mr. Davis's belief that the Student might have been provided services through the Jefferson County Schools. (T.T. Vol. III, p. 509)
42. Within the Conference Summary Report with the ARC Date of 12/19/2014, on page 5, it notes that the Student did pass her OT Screen, but it was noted by Mrs. Moody "that she is given frequent sensory breaks which helps her adjust to transitions and frustrating situations". "it was suggested that Mrs. Moody work with the OT on a consult basis of 15 minutes per month to make any adjustments/improvements to [REDACTED] sensor schedule." "IEP will be amended to reflect her new schedule and OT consult." (R.E. #20, p. 6)
43. Dr. [REDACTED] Ph.D. of [REDACTED] diagnosed the Student with ADHD, Generalized Anxiety Disorder and Dysthymic Disorder (P.E.#—Bates Stamped 131-135 and T.T.Vol. I p. 18)

44. On April 19, 2016, the Student was restrained. According to the write up in P.E. #183, "Mr. Jeffries asked "the Student" three times to walk to Mrs. Moody's room. "The Student" refused to leave. Mr. Jeffries and Mrs. Bruther put [REDACTED] in a standing cradle to move her to ICE so that she could calm down without other student around. When exiting "the Student" twisted, her body causing Mrs. Bruther's left forearm to be smashed into the pencil sharpener.
45. According to Shawna Pohlman the Student's 5th grade homeroom teacher, only there were four members of the faculty certified to restrain. They were Ms. McMahan, Loren Jeffries, Ms. Bruther, Ms. Knust and Ms. Miller. (T.T. Vol. III, p. 450)
46. The Student's Parents were contacted in the evening of the same day at about 8:45 p.m. concerning the use of restraint. (P.E. # 183)
47. There was an ARC on 04/21/2016. On the Conference Summary Report on page 1 under "II. Document Parent Concerns and Input", there is the statement: "Parents are concerned with anytime the Student is not being supervised by an adult". A further review of that document including the "Summary Notes" indicates no discussion about adult supervision. (R.E. #36)
48. On or about 4/25/16, the Student Petitioner's Mother completed the Application for Home/Hospital Instruction. Dr. [REDACTED], M.D., the Petitioner's Psychiatrist, signed it. [REDACTED] was listed as the Student's therapist. (R.E. #39)
49. [REDACTED] testified that she was part of the decision to put the Student/Petitioner on Homebound Instruction. (T.T. Vol. I, p. 111-112)
50. [REDACTED] testified that the decision to request homebound was reached after " a long period of trying to get "the Student's" medication right, doing weekly therapy

for a long time, working with the IEPs and trying multiple avenues to try to make “the Student” feel” successful n school”. (Vol. I, p. 111)

51. At the ARC meeting of 05/02/2016, the primary purpose was to review the physician’s recommendation for home instruction for the balance of the school year. (R.E. # 40, p. 6)
52. There were three supports for the Student’s Home Instruction for the balance of the 2015-2016 school year. “1. Home instruction teacher will consult with classroom teachers for academic task needs, 2. Home instruction teacher will consult with OT approximately 15 mpw for sensory integration strategies on this setting and 3. Per ARC [REDACTED] will be provided home instruction services at a rate of 4 hours per week by special education teacher who has been informed/trained regarding her needs”. (R.E. #40, p. 6)
53. An ARC convened on August 17, 2016 to discuss an IEP for the Student at the Middle School. (R.E. #6)
54. According to page 3 of the Conference Summary Report of 08/17/2016, “ARC met to present an IEP to Mr. and Mrs. _____ to respond to their notification of enrolling the Student in a private school placement”. (R.E. # 6)
55. The Student’s Father testified that the Student was placed at the [REDACTED] based upon the recommendation of the Student’s physician or psychiatrist Dr. [REDACTED]. The idea had been originally raised to the Parents after the Student had been at [REDACTED] in the fall of 2014. (T.T. Vol. II, p. 380-381)
56. During the ARC Meeting of 08/17/2016, the Conference Summary Report indicates that the Student’s Parents attended with their attorney. On the first page under “II. Document Parent Concerns And Input” it stated: “They expressed that sensory

processing disorder be added to present levels. Parents engaged in discussion regarding behavior intervention and co-teaching”. (R.E. # 6)

57. The proposed IEP for the 2016-2017 school year for the Student contained an updated Behavior Management Plan and increased time for Occupational Therapy.

58. A Behavior Intervention Plan (BIP) was presented for the ARC of 8/19/2016. (R.E. #8)

59. [REDACTED] the lead teacher for the sixth grade at [REDACTED] testified. (T.T. Vol. II, p. 299–340)

60. Ms. [REDACTED] testified that she does not have a special education background except for her professional development while working at [REDACTED]. (T.T. Vol. II, p. 301-302)

61. Mrs. [REDACTED] is the Student/Petitioner’s homeroom and literacy teacher at the [REDACTED] [REDACTED] (T.T. Vol. II, p. 303)

62. The Student/Petitioner has math beginning at 8:15 in the morning at [REDACTED] [REDACTED] (T.T. Vol. II, p. 303)

63. The [REDACTED]’s students do not have an IEP. (T.T. Vol II, p. 302)

64. The Student does not receive related services at [REDACTED] such as Occupational Therapy (OT). (T.T. p. 302-305; 324-325)

65. [REDACTED] does not enroll students who do not have disabilities. (T.T. p. 322)

66. Ms. [REDACTED] the lead teacher for the sixth grade in answer to the following line of questioning ----

Q. (from Respondent’s Counsel: An I correct that be it the curriculum coordinator or someone determined that (the student) has a disability? would that be fair to say?

A. (Ms. [REDACTED] Uh-huh.

Q. Because if I'm understanding you your testimony, all the children that the curriculum coordinator says yes, we'll take you child to the parents, guardians—

A. Right.

Q. —is because the child does have some disability?

A. Right.

Q. The nature of that disability apparently is not a factor?

A. Well, it's usually a learning disability and, like I said Before, or if there's a behavior issue, if they think the behavior Was related to frustration or struggle academically, a lot of the Kids that are at the school now would act out at their other Schools. But because of the educational program and the way We modify and do things there, that kind of ---their behaviors Have subsided.

So a lot of times when I go back and I do, you know, have to fill out forms or look at things from other schools, schools that kids had come from, sometimes I can't believe it's the same child because their behavior s at [REDACTED] are different than their behaviors at the other school because of the learning environment. (T.T. Vol. II, p. 321-322)

67. Shawna Pohlman was called by the Student's Counsel to testify. Ms. Pohlman had the Student in her 5th grade regular classroom for homeroom, reading and social studies. (T.T. Vol. III p. 426)

68. Ms. Pohlman testified that she observed the Student's behavior escalate in the afternoon. (TT Vol. III p. 428)

69. Ms. Pohlman testified that the Student was reaching 88 % and 80% (percent) of her goals in behaviors in her classes. (T.T. Vol. III, p. 433-434 and R.E. # 24))

70. Ms. Moody was the Student's caseload special education teacher at [REDACTED] [REDACTED]. (T.T.Vol. III p. 431) She had the resource room (T.T. Vol. III, p. 433)
71. Angela Knust testified. She was a third grade teacher at [REDACTED] during the 2013-2014 school year. She had the Student in her third grade class in 2013-2014 and in her third-fourth grade class the following year. (T.T. Vol. III, p. 569-572)
72. Sean Reeder is the school psychologist for the School District. In his position he assists with special education placement (T.T Vol. III p. 599-602)
73. Sean Reeder conducted an evaluation on the Student. He performed a Multi-Disciplinary Evaluation on the Student. (T.T. Vol. III, p. 602 RE# 15)
74. The Student's Mother did not have any concerns about Sean Reeder's evaluation of the Student. (T.T. Vol. II, p. 214-215)
75. [REDACTED] testified. He is the Head of the School at [REDACTED] (T.T. Vol. III, p. 480)
76. Mr. [REDACTED] testified that [REDACTED] is a small private school established in 1992 specifically for students with "learning differences". Approximately 130 students attend [REDACTED] (T.T. Vol. III, p. 480)
77. Mr. [REDACTED] the head of the [REDACTED] does not have a degree in education or any certificates issued by the Kentucky Professional Standards Board. He has not been involved with eligibility determinations as to whether a child has a categorical disability under IDEA and would be eligible for an IEP. (T.T. Vol. III, p. 487-489)
78. The Student does not receive occupational therapy at [REDACTED] (T.T. Vol. III p. 491)

79. Eric Davis who was principal at the Student's elementary school for two years, He was the chair of the ARC that met on 5/30/2014. It was at that meeting it was determined that the Student would receive services for EBD. (T.T. Vol. III p.501; 502-503)
80. At the conclusion of the Hearing, Counsel for the Petitioner was allowed to take the deposition of Dr. [REDACTED] Ph.D. a licensed Psychologist and Behavior Analyst as a rebuttal witness. (See
81. Dr. [REDACTED] deposition was taken on May 24, 2017. (See [REDACTED] deposition)
82. The purpose of Petitioner's deposition of Dr. [REDACTED] was to take issue with the Respondent School District's Behavior Intervention Plan or BIP.
83. Dr. [REDACTED] reviewed the Petitioner's "BIP" for 2/29/16, (R.E. #7, 22, 26, 30 (T.T. N p. 11-27)
84. In forming her opinion(s) Dr. [REDACTED] did not review any of the Petitioner's IEPs. (T.T. N. p. 27)
85. A review of the record in this matter, finds Petitioner did not introduce any records regarding services or academic progress from Summit the private school that Student/Petitioner is currently attending. (T.T. Vols. I-V)

ANALYSIS AND DECISION

I.

The Petitioner alleges that the School failed to provide the Student a Free and Appropriate Education for the three years immediately filing this Due Process Hearing Request.

This matter was filed with the KDE on July 9, 2016. Doing the math, Petitioner is claiming that the Respondent School District failed to provide a "Free and Appropriate

Education or FAPE from July 10, 2013 through July 9, 2016. It should be noted that the Student was not considered eligible for an IEP until May 2014. (F.F. 3 & 4)

As grounds for the Student/Petitioner's allegation to provide her a "Free and Appropriate Education" she cites the following criticism.

- a. Lack of follow-up at the mention of screening for occupational therapy (OT) (R.E. #19 –ARC 11/10/2014)
- b. The Student's daily schedule developed by the ARC after her return from [REDACTED] which scheduled her for math in the afternoon when it was determined that math was a stressor and the afternoons were times when her behaviors were worse. (R.E. # 20)
- c. The August 24, 2015 ARC meeting for getting parental consent for a Functional Behavior Analysis (FBA). It was during this meeting the Student's Parents wanted the Student's outside therapists to be included with the development of the FBA. (According to the notes, the FBA was going to be delayed until an October 12, 2015 appointment with the outside therapist –p. 13. (R.E.#24)
- d. The Student/Petitioner was not making educational progress under an appropriate IEP.
- e. The Respondent was late in suggesting that the Student/Petitioner OT when the ARC convened on October 29, 2015. (R.E. # 31 and 28 p. 3)
- f. The rejection by the ARC on October 29, 2015 to take up the suggestion of the child's physician Dr. [REDACTED] that the Student be place in a self-contained classroom. (R.E. # 31)

- g. The denial of the Parents' request of an ARC Meeting prior to February 29, 2016 in violation of **34 CFR 300.322**.
- h. The Student being restrained on April 19, 2016.
- i. The ARC developed unrealistic IEP Goals and the failure to monitor those goals

This Hearing Officer will now review those allegations as set forth below.

a. Lack of follow-up at the mention of screening for occupational therapy (OT) (R.E. #19 –ARC 11/10/2014)

At the time of the ARC on 11/10/2014, the Summary notes say: "We discussed having "the Student" screened for Occupational Therapy. Consent will be sent home with the "Student" upon her return". In the Summary Notes for the ARC of 12/19/2014, it states: "The Student" did pass her O.T. screener, but it was noted by Mrs. Moody that she is given frequent breaks which helps her adjust to transitions and frustrating situations. Therefore, it is suggested that Mrs. Moody work with the OT on a consult basis of 15 minutes a month to make any adjustments/improvements to "the Student's" sensory schedule". (F.F 42)

At the ARC Date of 08/24/2015, at p. 13 : "ARC determined permission for OT school based services will be obtained". (F.F. 20)

Based upon the findings set forth above, there was no lack of follow-up for OT screening.

b. The Student's daily schedule developed by the ARC after her return from [REDACTED] which scheduled her for math in the afternoon when it was determined that math was a stressor and the afternoons were times when her behaviors were worse. (R.E. # 20)

There is significant evidence that math was a stressor for the Student and that her behaviors were worse in the afternoon. (F.F. 20 68) However, the evidence shows that the Student had an uneventful balance of her 2014-2015 school year. ARC Meeting were not

needed after January 2015. The Student did well the second half of her fourth grade school year. (F.F. 17 and 18)

- c. The August 24, 2015 ARC meeting for getting parental consent for a Functional Behavior Analysis (FBA). It was during this meeting the Student's Parents wanted the Student's outside therapists to be included with the development of the FBA. (According to the notes, the FBA was going to be delayed until an October 12, 2015 appointment with the outside therapist –p. 13. (R.E.#24)**

The IDEA requires IEP meeting notices to include a statement informing parents of their right to invite individuals who have knowledge or special expertise regarding the child, **including related services** personnel, as appropriate (F.F. 19). **34 CFR 300.322 (b)(1).**

The ARC, IEP and even the Section 504 (F.F. 5) meetings indicate that the Respondent School District included notice of the parents' right to invited individuals with knowledge of or special expertise concerning the child. (F.F.19) In this instance, the Parents did not send back the forms after several months.

As set forth in F.F. 25, "This was not met on in the last ARC per parent request. They requested input from outside agency/physician be included but had not returned the Release of Information allowing the district to obtain it. Parents shared that there was a Dr. apt. scheduled for Oct. 12. Prior to the meeting today, parent returned the Release of Information form but did not provide information regarding who to contact. Ms. Hosey returned the forms so this could be completed. Parent did not send them back and therefore further information could not be obtained in time for completion of the FBA".

- d. The Student was not making educational progress under an appropriate IEP**

There are several instances where the Student is making progress. This is particularly true at the end of the 2014-2015 school year. F.F. 69, Petitioner is critical of Respondent's Transition Plan (last page under R.E. # 36) to Middle School. Petitioner's argument seems to be that she needs more one on one as she did with Ms. Moody. (Vol. Petitioner has not presented evidence which would indicate. (T.T. Vol. IV, p. 749)

However, this is critical of a plan for the next school year and not of the present or past school years.

- e. The rejection by the ARC on October 29, 2015 to take up the suggestion of the child's physician Dr. [REDACTED] that the Student be placed in a self-contained classroom. (R.E. # 31)**

During the ARC Meeting of 10/29/2015, the Student's Parents shared Dr. [REDACTED]'s recommendation that the Student be placed in a "self-contained classroom".

707 KAR 1:350. Placement decisions.

Section 1. Placement Decisions. *(1) An LEA shall ensure that to the maximum extent appropriate, children with disabilities, including children placed by the LEA in public or private institutions or other care facilities, are educated with children who are nondisabled. The LEA shall ensure that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if education in the regular education environment with the use of supplementary aids and services cannot be satisfactorily achieved due to the nature or severity of the disability.*

According to the maximum extent possible, the Student should be placed in the Least Restrictive Environment per **707 KAR 1:350 at Section 1.**

On pages 5 and 6 of the Summary Notes, there is a record of the ARC discussion concerning Dr. [REDACTED]'s suggestion of a "self-contained classroom" for the Student. Ms. Moody, the Student's teacher indicated that the Student is making progress in her current

setting. Ms. Bruther said that the Student is becoming better organized in her present classroom setting. (F.F.)

Based upon the preponderance of the evidence there was not a violation of FAPE when the ARC did not follow Dr. [REDACTED] recommendation.

f. The denial of the Parents' request of an ARC Meeting prior to February 29, 2016

The Student/Petitioner alleges that there was a violation of the parental safeguards when an ARC was not held at the request of the Student's Parents prior to February 29, 2016. A review of the Summary Notes does not indicate the Parents had problems with the urgency of the ARC at that time. (R.E. #33)

A review of **34 CFR 300.322** regarding Parent Participation indicates there was no violation under the evidence presented.

g. The Student was restrained on April 19, 2016

On April 19, 2016, the Student was restrained. According to the write up in P.E. #183, "Mr. Jeffries asked "the Student" three times to walk to Mrs. Moody's room. "The Student" refused to leave. Mr. Jeffries and Mrs. Bruther put Lindsay in a standing cradle to move her to ICE so that she could calm down without other student around. When exiting "the Student" twisted, her body causing Mrs. Bruther's left forearm to be smashed into the pencil sharpener. (F.F. 44)

There are four members of the faculty certified to restrain. They were Ms. McMahan, Loren Jeffries, Ms. Bruther, Ms. Knust and Ms. Miller. (F.F. 45) Mr. Jeffries and

Mrs. Bruther who put the Student in a restraint position. Both are certified to place a student in a "restraint" position.

In Kentucky, the applicable section of **704 KAR 7:160. Use of physical restraint and seclusion in public schools, is at Section 5.**

Section 5. (1) All physical restraints and seclusions shall be documented by a written record of each use of seclusion or physical restraint and be maintained in the student's education record. Each record of a use of physical restraint or seclusion shall be informed by an interview with the student and shall include:

- (a) The student's name;*
 - (b) A description of the use of physical restraint or seclusion and the student behavior that resulted in the physical restraint or seclusion;*
 - (c) The date of the physical restraint or seclusion and school personnel involved;*
 - (d) The beginning and ending times of the physical restraint or seclusion;*
 - (e) A description of any events leading up to the use of physical restraint or seclusion including possible factors contributing to the dangerous behavior;*
 - (f) A description of the student's behavior during physical restraint or seclusion;*
 - (g) A description of techniques used in physically restraining or secluding the student and any other interactions between the student and school personnel during the use of physical restraint or seclusion;*
 - (h) A description of any behavioral interventions used immediately prior to the implementation of physical restraint or seclusion;*
 - (i) A description of any injuries to students, school personnel, or others;*
 - (j) A description as to how the student's behavior posed an imminent danger of physical harm to self or others;*
 - (k) The date the parent was notified;*
 - (l) A description of the effectiveness of physical restraint or seclusion in de-escalating the situation;*
 - (m) A description of the school personnel response to the dangerous behavior;*
 - (n) A description of the planned positive behavioral interventions which shall be used to reduce the future need for physical restraint or seclusion of the student; and*
 - (o) For any student not identified as eligible for services under either Section 504 of the Rehabilitation Act or the Individuals with Disabilities Education Act, documentation of a referral under either law or documentation of the basis for declining to refer the student.*
- (2) If the student is not an emancipated youth, the parent of the student shall be notified of the physical restraint and seclusion verbally or through electronic communication, if available to the parent, as soon as possible within twenty-four (24) hours of the incident. If the parent cannot be reached within twenty-four (24) hours, a written communication shall be mailed to the parent via U.S. mail.*
- (3) The principal of the school shall be notified of the seclusion or physical restraint as soon as possible, but no later than the end of the school day on which it occurred.*

(4) The physical restraint or seclusion record as outlined in subsection (1) of this section shall be completed by the end of the next school day following the use of seclusion or physical restraint.

(5) If the parent or emancipated youth requests a debriefing session under Section 2(1)(d) of this administrative regulation, a debriefing session shall be held after the imposition of physical restraint or seclusion upon a student.

In this case, the Student was restrained by two of Respondent's personnel who were certified to do so. The Parents were notified within 24 hours. They were not notified by the end of the school day and were not told that they were entitled to a briefing in accordance with **704 KAR 7:160**.

Regarding the use of restraints, a recent case **116 LRP 45760 SAUGUS UNION SCHOOL DISTRICT California** State Educational Agency 2016060676 October 20, 2016 opined that the use of restraint in itself is not necessarily a denial of FAPE. There is no denial of FAPE particularly when there is evidence the IEP and the BIP are being implemented. A one-time use of restraint is not a denial of FAPE where the paperwork regarding the restraint was not properly completed by the Respondent School District.

g. The ARC developed unrealistic IEP Goals and the failure to monitor those goals

This Hearing Officer has reviewed the Student's IEPs since 2014 and the notes from the ARC Meetings. Most of the goals involved behaviors. Within this review, there is no evidence that the Student's Parents objected to the goals within the individual IEPs. In fact the Parents sensory processing disorder be added to present levels". (F.F. 56) Moreover, there is no evidence within the Hearing record which challenges the IEP goals and the way they were monitored. For example within the proposed IEP for the 2016-2017 school year, there were no objections to the updated Behavior Management Plan and increased time for OT. (F.F. 57) There was also not objection to the BIP. (F.F. 58)

Based upon the preponderance of the evidence presented, there is no evidence that the goals were unrealistic.

II.

***Whether the [REDACTED] Has Provided and Continues To Provide
Petitioner
With An Appropriate Education***

The Petitioner contends that the [REDACTED] of Louisville (hereinafter [REDACTED]) is the appropriate educational placement for the Student and the education provided by [REDACTED] is appropriate for reimbursement for tuition and associated costs.

Courts and hearing officers will order tuition reimbursement as a remedy when a district has failed to make FAPE available to the student and the private placement is appropriate. ***Florence County Sch. Dist. 4 v. Carter, 20 IDELR 532 (U.S. 1993).***

The U.S. Supreme Court first recognized and laid the groundwork for the parent's right to private school tuition reimbursement in ***Burlington School Committee v. Massachusetts Department of Education, 556 IDELR 389 (1985).*** The IDEA later adopted the tuition reimbursement remedy expressed in ***Burlington***. The IDEA provides that "If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a

hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs." **34 CFR 300.148 (c)**.

In **Sch. Comm. Of Burlington v. Dep't of Educ., 471 U.S. 359, 105 S.Ct. 1996 (1985)** which held that a school district would have to reimburse costs of unilateral private placement for a disabled child if the following findings were made: (1) The school's IEP was inappropriate or not reasonably calculated to confer a meaningful benefit, and (2) The private placement id sound to be appropriate under IDEAA. In other words, the Petitioner must prove the following two elements are present in order to find the Student's Parents eligible for reimbursement for tuition and associated expenses.

1. The School District' placement was inappropriate; and
2. The private school placement was appropriate.

In the case before us, the Petitioner has to show the Hearing Officer that the Respondent School District's placement of the Petitioner Student was less than a preponderance of the evidence. With the exception of the having the Student take a math class in the afternoon, there has been nothing specific about the Petitioner's criticism.

Additionally, Petitioner has rejected the proposed IEP of August 2016. (F.F. 53, 54, 55, 56, 57 and 58) This rejection is based upon speculation. Speculation that a proposed public school placement won't be able to implement the student's IEP generally isn't an adequate basis for a tuition reimbursement award. *See, e.g. B.P. and S.H. v. New York City Dep't of Educ., 66 IDELR 272 (2d Cir. 2015, unpublished)* There has been no evidence presented showing that the IEP of August 2017 would not be able to provide FAPE for the Student. Furthermore, the Student's Parents had input into the IEP of August 2016. **J.S. and R.S. v. New York City Dep't of Educ., 69 IDELR 153 (S.D.N.Y. 2017)**

(Evidence that the final IEP reflected the parents' concerns and considered alternative placements helped the district avoid having to reimburse the parents for their son's unilateral private placement). The IEP presented for the 2016-2017 school year had input from the Student's Parents.

At this point, the Petitioner/Student has not provided a preponderance of the evidence supporting tuition reimbursement. The United States Supreme Court has held that tuition reimbursement is an appropriate as a remedy when a district has failed to make FAPE available to the student and the private placement is appropriate. ***Florence County Sch. Dist. 4 v. Carter, 510 U.S. 7, 114 S.Ct. 361 (1993)***. IDEA was subsequently amended to reflect this principle and provides that "If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs". Cited in ***116 LRP 50566 Avon Local School District Board of Education 10/28/16***.

The enrollment of the [REDACTED] is limited to disabled students. (F.F.66, 65 & 76) For the Respondent/School District to reimburse the Students for tuition and associated costs would be to violate the LRE requirement of FAPE as set forth in ***707 KAR 1:350 at Section 1***.

The Petitioner complains in this Due Process Hearing that the OT services were inadequate and now attends a private school where OT is not offered. (F.F. 78) Additionally, Plaintiff complains that the Respondent's BIP and Behavior Plan are defective. (F.F. 80, 81, 82, & 83)

The burden of proof is on the Petitioner to show by the preponderance of the evidence that the services provided by the Respondent School District were not adequate or otherwise inappropriate to satisfy the requirement of FAPE and the services provided by Summit were and are appropriate. *Forest Grove School District v. T.A., 557 U.S. 230 (2009)*.

It should be noted in cases where the private school has a teaching method parents deem superior to that in the public school, such a claim was insufficient to support a reimbursement claim in *D.G. v. Cooperstown, Cent. Sch. Dist., 55 IDELR 155 (N.D.N.Y. 2010)* The court found that the public school offered a multisensory reading program, just no one preferred by the parent. It did not matter that the parent believed the private school's program superior and would promote maximum progress, as long as the public school offers a program reasonably calculated to confer educational benefit.

At the [REDACTED] testimony was that the Petitioner was not receiving occupational therapy during the school day and did not have an IEP. (F.F. 78-305; 324-325) Furthermore, the private school program must deliver the services that the parent demands of the public school. *Lauren P. v. Wissahickon Sch. Dist., 51 IDELR 206* (3d Cir. 2009, unpublished)

Within the Petitioner's presentation, references were not made to the appropriateness of the services provided by [REDACTED] other than small classes. Records of the Student's progress at [REDACTED] were not introduced into evidence. (F.F.85) *John M. v.*

Brentwood Union Free Sch. Dist., 66 IDELR 129 (E.D.N.Y. 2015) (upholding an SRO's denial of tuition reimbursement where the parents failed to explain "in any detail" how the private parochial school offered the teen the services needed to address his disabilities).

A further review of the record in this matter, finds a lack of proof that the Student/Petitioner was receiving an appropriate services or education at [REDACTED]. Therefore, Student/Petitioner's request for tuition reimbursement and associated reimbursement is denied.

ATTORNEY FEES

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 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;

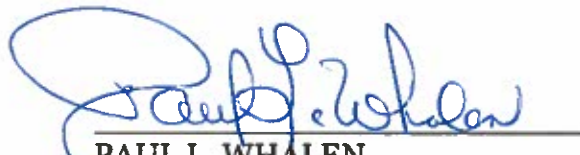
As this Hearing Officer is not with the district courts of the United States, he without the jurisdiction or the ability to award attorney fees to a prevailing party in a Due Process Hearing.

ORDER

1. Were there procedural violations and if so, did they equate to a denial of FAPE?
 - a. There was no lack of follow-up for screening for occupational therapy; and
 - b. The Student's daily schedule developed by the ARC after her return from [REDACTED] which scheduled her for math in the afternoon was a stressor; and
 - c. There was no denial of FAPE, when the outside therapists were not included in the development of the FBA as set forth above; and
 - d. The Student was making educational progress under the IEPs from September 2014 to the present; and
 - e. There was little or no evidence presented regarding lack educational progress from July 2013 through September 2014; and
 - f. There was no denial of FAPE for the alleged denial of the Parents' request for an ARC Meeting prior to February 29, 2016; and
 - g. There was no denial of FAPE for the Student's restraint on April 2016; and
 - h. The Petitioner did not prove by a preponderance of the evidence that the ARC developed unrealistic IEP goals and failed to monitor those goals.
2. There was no evidence that the [REDACTED] was an appropriate private placement as set forth above. Therefore, the Petitioner is not entitled to tuition and other associated costs.
3. The Respondent School District did not deny the Petitioner FAPE from July 2013 through July 2016.

4. This Hearing Officer is without the authority to award attorney fees in this matter.
5. In respect to the use of restraint, Parents were entitled to a debriefing. Should the Parents desire a debriefing, it is Ordered that the Petitioner request one within ten days of this Order and that the Respondent make arrangements for such a debriefing within 20 days of that request.

This Order and Decision is entered ^{9th}~~2nd~~ day of November 2017.


PAUL L. WHALEN
Due Process Hearing Officer

(Signed version will be sent via US Mail)

APPEAL RIGHTS

Pursuant to **707 KAR 1:340 Section 12. Appeal of Decision.** (1) A party to a due process hearing aggrieved by the hearing decision may appeal the decision to members of the Exceptional Children Appeals Board (ECAB) assigned by the Kentucky Department of Education. The appeal shall be perfected by sending, by certified mail to the Kentucky

Department of Education, a request for appeal, within thirty (30) calendar days of the date of the Hearing Officer's decision.

The address is: Kentucky Department of Education
Office of Legal Services
300 Sower Blvd.; 5th Floor
Frankfort, Kentucky 40601

CC: Via Email and Postage Pre-Paid to:

Ed Dove, Esq. Counsel for the Petitioner

Bob Chenoweth, Esq. Counsel for the Respondent

Tina Drury, KY Department of Education