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KENTUCKY DEPARTMENT OF EDUCATION
DIVISION OF EXCEPTIONAL CHILDREN SERVICES
EXCEPTIONAL CHILDREN APPEALS BOARD
AGENCY CASE NO. 1516-17

E.G. APPELLANT

V. **FINAL DECISION AND ORDER**

[redacted] SCHOOLS APPELLEE

This appeal comes before the Exceptional Children Appeals Board panel (hereinafter "ECAB") following a hearing conducted by Hearing Officer Paul Whalen. The panel, consisting of Kim Price, Jenny Jones, and Mike Wilson, Chair, was appointed on to consider the appeal of the student. Having reviewed the record in its entirety, including the briefs of the parties, ECAB issues this final decision and order, remanding the matter as explained elsewhere hereinbelow.

I. PRELIMINARY ISSUES

A. JURISDICTION

This is an appeal of a decision of a due process decision issued by a Hearing Officer as permitted under 707 KAR 1:340; Section 12, which provides that

> [a] party to a due process hearing that is aggrieved by the hearing decision may appeal the decision to the members of the Exceptional Children's Appeals Board as assigned by the Kentucky Department of Education. The appeal shall be perfected by sending by certified mail to the Kentucky Department of Education a request for appeal within thirty (30) days of the date of the Hearing Officers decision.

This appeal was requested timely.

B. THE STUDENT BEARS THE BURDEN OF PROOF

The party seeking relief bears the burden of proving their entitlement to relief by a preponderance of the evidence. In this case, the student bears the ultimate burden of persuasion on the elements of student's claims. *Schaffer v Weast*, 546 U.S. 49, 57-58 (2005); KRS 13B.090 (7).

C. ECAB IMPARTIALLY REVIEWS THE RECORD DE NOVO AND MAKES A DECISION INDEPENDENTLY

Appellant's first argument (pp. 14-17 Appellant's brief) is that the hearing officer made mistakes regarding certain fact-findings. ECAB reviews de novo and can make fact-findings it deems necessary to address legal issues raised on appeal.

Where a State has established a two-tier administrative process, the appellate review is to be conducted pursuant to 20 U.S.C. § 1415(g). Kentucky has adopted such a two-tier system. See 707 KAR 1:340, Section 12. ECAB is required to "conduct an impartial review" of a hearing decision and to "make an independent decision upon completion of such review." 20 U.S.C. § 1415(g). Elaborating on the statutory language, 34 CFR §300.514(b)(2) provides that the appellate panel is to examine the entire hearing record before making its independent decision.

The only limitation on the de novo review is that ECAB must give deference to hearing officer fact findings based on credibility judgments unless nontestimonial, extrinsic evidence in the record would justify contrary conclusion or unless the record read in its entirety would compel a contrary conclusion. *Carlisle Area School v. Scott P. By and Through Bess P.*, 62 F.3d 520, (C.A.3 (Pa.) 1995). Such deference applies only "to those situations involving record-supported credibility determinations." *Id.*, p. 529. This panel is free to make fact findings contrary to the hearing officer's findings so long as they are supported by substantial evidence and are based not upon different views about credibility of witness testimony. *Id.*, p. 529. The existence of conflicting testimony does not, by itself, warrant concluding that a related fact-

finding was implicitly a credibility determination of evidentiary facts by the hearing officer rather than "differences in overall judgment as to proper inferences." *Id.* P. 529.

II. [redacted] HAS NO DUTY TO CONSIDER A PRIVATE PLACEMENT UNLESS IT IS UNABLE TO PROVIDE FAPE THROUGH CONTRACT WITH A PUBLIC SCHOOL

Appellant's reply brief points out a key peculiarity of this case not present in most IDEAA disputes:

> [redacted] ...did not have a high school....This somewhat unique dynamic is at least partially to blame for a fundamental disagreement between [redacted] and [the student's parents] about what role [redacted] was to play securing an appropriate education for [the student].

(Appellant reply brief, p. 7). However, there is a statute that defines [redacted]'s duty to all students, both disabled and not disabled. KRS 158.100 provides that

> [a]n approved high school service for all children of high school grade under twenty-one (21) years of age residing in the district shall be provided either by maintaining the schools within the district **or by contract with another district**.

(Emphasis added). By statute, [redacted] necessarily must seek to provide services through contract with another district.

Pursuant to KRS 158.100, [redacted] cannot contract with a private school, such as Bluegrass Center for Autism, to provide high school services unless it is unable to provide high school services, including FAPE, through contract with a public school.

III. THE ARC MEETINGS AT ISSUE WERE PROPERLY CONSTITUTED

It appears that the parties agree that for purposes of the events being appealed, [redacted] was the student's LEA. The student complains that [redacted] "abdicated its responsibility" because (1) it did not chair certain ARC meetings attended by both [redacted]

personnel and [redacted] County personnel and (2) that [redacted] personnel appeared inclined to defer to the judgment of [redacted] regarding details of the IEP being fashioned by the ARC.

There are no regulations regarding who should "chair" an ARC meeting. There are regulations governing who must be on an ARC. 707 KAR 1:320, Section 3 states as follows:

> (1) An LEA shall ensure that the ARC for each child with a disability includes:
> (a) The parents of the child;
> (b) Not less than one (1) regular education teacher of the child (if the child is or may be participating in the regular education environment) to provide information about the general curriculum for same aged peers;
> (c) Not less than one (1) special education teacher of the child or a special education teacher who is knowledgeable about the child's suspected disability or, if appropriate, at least one (1) special education provider of the child;
> (d) A representative of the LEA who is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, is knowledgeable about the general curriculum and the availability of the resources of the LEA;
> (e) An individual who can interpret the instructional implications of evaluation results who may be a member of the team described in paragraphs (b) through (d) of this subsection;
> (f) An individual who has knowledge or special expertise regarding the child at the discretion of the parent or the LEA;
> (g) Related services personnel, as appropriate; and
> (h) The child, if appropriate.

In addition to the parents, it appears that there were other individuals present at the ARC meetings at issue, whether from [redacted], [redacted] or both, sufficient to satisfy the requirements of this regulation.

A distinction must be drawn between legal responsibility for providing FAPE, which [redacted] does not contest, and deferring to opinions of members of the ARC meeting. Whether [redacted] personnel erred by agreeing with or deferring to opinions or recommendations of [redacted] personnel is better characterized as a substantive argument about whether the IEP is designed to provide a meaningful educational benefit.

IV. THE SCHOOL DID NOT HAVE A PROCEDURAL DUTY TO GIVE WRITTEN NOTICE REGARDING PLACEMENT OR REFUSAL TO CHANGE PLACEMENT WHEN IT CONTRACTED WITH [redacted] COUNTY TO PROVIDE HIGH SCHOOL SERVICES.

[redacted] has contracted with [redacted] County to provide high school services for the student. Concurrent with the decision to contract with [redacted], the parents were asking [redacted] to consider contracting with Bluegrass Center for Autism instead of [redacted] County. Per the findings above, the LEA had a statutory duty to contract with a public school to provide high school services and no duty to consider a private school unless it determined that it could not provide FAPE through the contract with a public school.

The decision to contract with [redacted] did not trigger a duty to give written change of placement notice to the parents. 707 KAR 1:340, Section 3, provides that

> an LEA shall provide written notice to the parents of a child with a disability at least seven (7) days before a meeting in which the LEA:
> (a) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or
> (b) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

In the present case, the student quotes *Eley v. D.C.*, 47 F. Supp. 3d 1, 16 (D.D.C. 2014) that "[t]he location where educational services are to be implemented is a vital portion of a student's educational placement" but omits the next sentence, which states **"[y]et the rigid view, put forward by the plaintiff, that a change in physical location is always a necessary and sufficient condition to trigger the stay-put provision is also incomplete."** (emphasis added). Similarly, *R.L. v. Miami-Dade County School Board,* 2008 WL 3833414, at 29 (S.D. Fla. Aug 12, 2008), quoted by the student at length, states that the school site "**can** be a critical element for the IEP to address." (emphasis added).

Not every change in site location is an event requiring written notice of change of educational placement. Transition from elementary to middle or middle to high school usually involves a change in buildings and campuses. Even changes from grade to grade involve changes in classrooms where services are provided. Such changes in the physical location where services are delivered are not, per se and by themselves, changes in "educational placement." Only changes in "educational placement" trigger notice provisions. In addition, the change in educational placement must "substantive" to trigger notice provisions.

The parents are not aggrieved by the change in site location per se. The parents are aggrieved because they believe that the ARC was in the process of modifying the IEP to make implementation more convenient for [redacted] rather than to help the student achieve appropriate goals. The issue is not procedural, it's substantive – is the IEP reasonably designed to provide a meaningful educational benefit? In this case, as described below, the student appealed before the process of developing the IEP had been completed.

V. THE PROCESS OF DEVELOPING THE IEP HAS NOT BEEN COMPLETED; THE CASE MUST BE REMANDED TO THE LEA TO CONVENE AN ARC MEETING.

The IDEA and corresponding Kentucky regulations entitle disabled students to a free and appropriate education (FAPE). *Fayette County Bd. Of Educ. v. M.R.D. ex rel. K.D.*, 158 S.W.3d 195, 201-202 (Ky. 2005). The primary vehicle for delivery of a FAPE is the development and implementation of an IEP. *Id.* at 199. The U.S. Supreme Court has explained that a FAPE "consists of education instruction specially designed to meet the unique needs of the disabled child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." *Id., citing Bd. Of Ed. Hendrick Hudson Dist. v. Rowley*, 458 U.S. 176, 188-89, 102 S.Ct. 3034, 3042 (1982). The IDEA requires only that the school district provide a "basic

floor of opportunity," "sufficient to confer some educational benefit upon the handicapped child." *Id.*, *citing Rowley* 458 U.S. at 200, 102 S.Ct. at 3048. The IDEA's "basic floor of opportunity" is achieved, in part, through the establishment of an IEP. *Id.* The IEP must be reasonably calculated to provide some educational benefit to the disabled child. Id. More specifically, the IDEA requires an IEP to confer a "meaningful educational benefit" gauged in relation to the potential of the child at issue. *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 862 (6th Cir. 2004).

"Individual education program" or "IEP" means a written statement for a child with a disability that is developed, reviewed, and revised in accordance with 707 KAR 1:320. 707 KAR 1:002, Section 1(34). An LEA shall ensure an IEP is developed and implemented for each child with a disability served by that LEA, and for each child with a disability placed in or referred to a private school or facility by the LEA. 707 KAR 1:320, Section 1(1). An LEA shall ensure that the specific accommodations, modifications, and supports are provided for the child in accordance with the IEP. 707 KAR 1:320, Section 1(6)(c). An LEA shall ensure that the ARC 1) reviews each child's IEP periodically, but no less than annually, to determine whether the annual goals for the child are being achieved and 2) revises the IEP in accordance with 34 C.F.R. 300.324(b)(1)(ii). 707 KAR 1:320, Section 2 (6)(a) and (b). IEP revisions may address, in part, results of any reevaluation conducted; information about the child provided to or by the parents; the child's anticipated needs; or other matters. 34 C.F.R. 300.324(b)(1)(ii)(B)-(E).

An ARC shall consider, in the development of an IEP, the strengths of the child and the concerns of the parents for enhancing the education of their child; the results of the initial and most recent evaluation of the child; as appropriate, the results of the child's performance of any general state or districtwide assessment programs; and the academic, developmental, and

functional needs of the child. 707 KAR 1:320, Section 5(1)(a)-(d). An IEP shall include a statement of the specially designed instruction and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable to be provided to the child, or on behalf of the child. 707 KAR 1:320, Section 5(8). An LEA shall provide specially designed instruction and related services to each child with a disability in accordance with his IEP and shall make a good faith effort to assist the child in achieving the goals, objectives, or benchmarks listed in the IEP. 707 KAR 1:320, Section 9(1).

In this matter, it is undisputed that the student's most recent IEP, prepared on March 30, 2015, following evaluations (JEX 9), was not utilized at the July 28, 2015 ARC meeting when discussing his transition from [redacted] to high school and developing an IEP for the same. Instead, the IEP from January 16, 2015 (JEX 8) was utilized at the ARC meeting. It is argued by the Appellee the differences between the January 16, 2015 and March 30, 2015 IEPs were minimal and the July 28, 2015 IEP would have provided the student a meaningful educational benefit, while the Appellant argues the opposite. There are several notable differences between the IEPs.

The first difference is related to the delivery of speech therapy services. The March 30, 2015 IEP contains all the language related to Communication Status listed in the January 16, 2015; however, the ARC also found that the student needed one-on-one delivery of speech services:

> [Student] needs speech services in a one-on-one setting because [student] does not model from his peers. A group setting has been tried in the past, but has not been successful.

(JEX 9, EG-198). The necessity for one-on-one speech services also was memorialized in the Summary Notes from the March 30, 2015 ARC meeting. (JEX 5, R-128). At the hearing, [redacted] speech therapist who had worked with the student for six (6) years at

[redacted], explained that the sentence was added to the March 30, 2015 IEP to help ensure his one-on-one speech therapy remained in place when he started at [redacted]. (TT 438).

The IEP developed during the July 28, 2015 ARC meeting omits the sentence regarding provision of speech therapy services in a one-on-one setting that the ARC deliberately added to the March 30, 2015 IEP. (JEX 10, EG-225). The ARC Summary Notes from the July 28, 2015 meeting read, "Speech/Language Specialist described service delivery including small group and classroom experiences." (JEX 10, EG-238). There is no mention of the services being provided in a one-on-one setting in either the July 28, 2015 IEP or related ARC Summary Notes, nor is there any finding that the student's capabilities and needs changed between March 30 and July 28.

Second, in the Health, Vision, Hearing, Motor Abilities section of the March 30, 2015, IEP, the ARC determined that the

> [student] has significant sensory processing and motor coordination issues which impact his attention, emotion regulation and performance of functional motor tasks such as handwriting, cutting, drawing, coloring, folding, manipulation of objects and participation in gross motor activities for play and fitness. He has shown great improvement in all areas but still has significant issues with imitation of movement which impacts his ability to engage in complex, novel motor tasks.

(JEX 9, EG-200). This finding was added to the March IEP following the student's 2015 evaluations, but is omitted from the July 28, 2015 IEP. (JEX 10, EG-226).

Third, the General Intelligence section of the March 30, 2015 IEP, records that

> [a]ccording to [student's] recent evaluation given in March 2015, [student's] cognitive scores are in the Very Delayed range of the Universal Nonverbal Intelligence Test. No relative strengths of weaknesses were noted. [Student's] adaptive behavior scores were extremely low, commensurate with cognitive functioning. He scored in the significantly delayed range for academic testing. His relative strengths were expressive vocabulary and word identification.

(JEX 9, EG-200). Once again, information gained from the most recent evaluation was

omitted from the July 28, 2015 IEP. (JEX 10, EG-227). In fact, the language of the July 28, 2015 IEP is verbatim of that included in the January 16, 2015 IEP. (JEX 8, EG-192).

Fourth, in the Supplementary Aids and Services section of the March 30, 2015 IEP, the ARC found that the "[student] needs movement breaks in the gym (to run, spin, use scooters) throughout the day to help regulate his body." (JEX 9, EG-204). This sentence was added to the IEP following the 2015 evaluations, but was omitted from the July 28, 2015 IEP (JEX 10, EG-232), again without any finding that the student's abilities and needs had changed between March and July. Although the ARC Summary Notes from the July 28, 2015 meeting reflect that the occupational therapist from [redacted] said that the student needed "intense forms of input which does not have to be a swing" and she felt "the extra gym break would be good" for the student (JEX 10, EG-238), the movement breaks in the gym, which the ARC in March had found necessary, were not included in the July IEP.

Fifth, in the Least Restrictive Environment (LRE) and General Education section of the March 30, 2015 IEP, the ARC found that the student needed to "receive individual speech/language therapy in the resource room for 30 minutes 14 times per month (scheduled 4x/week). [Student] will also participate in 3/30 minute session of OT per week in the resource setting." (JEX 9, EG-205). These provisions are omitted from the July 28, 2015 IEP (JEX 10, EG-231), again without any finding that the student's needs and abilities had changed between March and July.

Lastly, in the Related Services section of the March 30, 2015 IEP, occupational therapy services were to be provided in the resource room. (JEX 9, EG-206). In the July 28, 2015 IEP, occupational therapy services were to be provided school-wide. (JEX 10, EG-233). There was

no finding that the student's needs and abilities had changed between March and July to account for the change in location of delivery of OT.

To develop an IEP reasonably calculated to provide a meaningful educational benefit to a student, the ARC should consider the student's current IEP and the most recent evaluations upon which it was based. In this instance, that did not occur. The ARC Summary Notes from said meeting states that "[the student's]'s current IEP is dated 1/16/15. . ." (JEX 10, EG-237).

After the July 28, 2015 ARC meeting, the parents complained to [redacted], [redacted] Special Education Director, that the current IEP had not been used at the July 28 ARC meeting. Ms. [redacted] responded via email on August 18, 2015, that [redacted] had agreed to hold an ARC to correct the error, but that based on a voicemail, the parents indicated they were not interested in pursuing services at [redacted] High School or holding an additional ARC to correct the error. (JEX 47). At the hearing, each parent of the student acknowledged they had declined the offer by [redacted] to have another ARC meeting to correct the IEP. (TT 145-146 & 232).

ECAB finds that the July 28 IEP cannot be reasonably *calculated* to provide a meaningful educational benefit without utilizing the current IEP, developed only a few months earlier, and the evaluations upon which it was based. The ARC's calculations must consider the current IEP and the findings and evaluations therein. There must be an additional ARC meeting wherein this occurs.

This matter is remanded back to the LEA to convene an ARC meeting that will utilize the March 30, 2015 IEP, and the evaluations upon which it is based, in developing an appropriate IEP for the student.

VI. IF [redacted] CANNOT IMPLEMENT THE IEP, THE BLUEGRASS CENTER FOR AUTISM WOULD BE AN APPROPRIATE PLACEMENT FOR THE STUDENT

ECAB is remanding to the ARC to complete the IEP development process, and consideration of private placement is premature until there is a properly developed IEP and a finding that it cannot be implemented by the LEA's contractor. However, the parties litigated and the hearing officer addressed whether BAC could be a proper placement for the student. Because there is a fully developed record on this point, in the interests of judicial efficiency ECAB will address the issue for guidance to the parties. To do so, ECAB discuss the student's needs and BAC's capabilities.

The IEP created in March 2015 (Joint Exhibit 9) required that the student would receive speech services in a one on one setting because the student did not model from his peers. The ARC found, in that March IEP, that a group setting had been tried in the past but had not been successful. It further noted that the student's deficits in a group setting would affect how the student communicated his wants, needs and knowledge to teachers and peers in classroom and special education setting. (EG 00198) The ARC further noted that the student's inability to complete tasks independently, complete self-care tasks, ask for assistance when needed, and interact with peers has a negative impact on his ability to access the general curriculum without assistance. (EG 00200)

In regard to general intelligence, the March IEP noted the student's "deficits in learning and generalizing information negatively affects his ability to access grade level curriculum without extensive modifications and specially designed instruction." (EG 00200) The Supplementary Aides and Services portion of said IEP provided the student would receive "…sensory support, frequent breaks … discreet trial teaching." It further noted the student

needed movement breaks in the gym throughout the day to help regulate his body." (EG 00204) The March IEP specifically provided that the student receive all of his academic instruction and vocational instruction in the special education classroom. It also provided for thirty minutes of speech therapy fourteen times per month, and thirty minutes of occupational therapy three times per week.

[redacted], the Program Director at The Bluegrass Center for Autism (BCA), testified. She is a board certified behavioral analyst and is also licensed as a behavioral analyst for the Commonwealth of Kentucky. The BCA campus that the student attends is located in a mall and has 15 students. There is a one-to-one student-to-adult ratio.

[redacted] explained applied behavioral analysis (ABA) as a scientific methodology that studies observable and measurable events. (T 299) It uses assessment processes to determine the function of behavior and then applies principles of reinforcement to either increase or decrease the targeted behavior. (T 299) The function of behavior is the purpose the behavior serves to reach certain desired outcomes. (T 300) ABA is the only empirically-proven treatment for autism. It has been recommended by the US Surgeon General and the American Medical Association as the preferred treatment for autism, based upon a vast amount of research (TE 301).

The BCA program allows opportunities for the students to interact with the community, including trips to the grocery store where they are taught functional money skills, allowed to purchase groceries from a list and then prepare their own meals. (TE 305) Several business within the mall partner with the school to have vocational placements for the students. There is a job coach and some students are placed in jobs outside the mall. (TE 306) The school also has a

vocational room that works on various tasks such as sorting, packaging and assembling. (T 307) Each student goes to the vocational room once per day.

There is a licensed speech pathologist at the school full-time and all students receive a minimum of three thirty-minute speech sessions per week, one-on-one. (T 308)

The school has a fitness room with adaptive fitness equipment designed for people who need modifications. There are six pieces of fitness equipment including standard gym equipment and other pieces that provides specific assistance including a trampoline and vestibular swing. (T 309)

[redacted]verified that the student began attending BCA in August 2015. At the initial meeting, they went through the IEP to make sure that they could provide it. She personally reviewed all of the goals listed and summaries. No changes were made to the IEP. (T 311) She believed and provided to the parents a letter guaranteeing that BCA could implement the IEP. When the student first arrived, Elliott performed an initial functional behavioral assessment on him. This included directly observing him while others worked with him, working directly with him herself, and taking anecdotal data on the antecedents of and consequences to his behaviors. She also interviewed staff and parents. As a result of these assessments, [redacted] came up with a behavior plan for the student to reduce his physical stereotypy, vocal stereotypy, and aggression. (T 311-312) [redacted] explained in detail the methods BCA uses to modify the student's behavior. She also explained the charting done to monitor several behaviors. When the student began, the student could only go four minutes without engaging in physical stereotypy. The rate of those undesired behaviors decreased significantly and continue to stay low. (T 316-317) As of February 29th, when the graph ended, the student was engaging in physical stereotypy behavior

only every twenty-six minutes. This is important because not being distracted by engaging in that behavior enables the student to focus on skill acquisitions and education. (T 318).

[redacted] also explained the program BCA uses to work on vocal stereotypy and aggression. When the student engages in such behaviors, the student is also distracted from learning. (T 318). She showed the data where the student's vocal stereotypy had been monitored. At the time the student began with BCA, the student was making twenty-seven to twenty-eight vocal stereotypys per day. (T 320). By the end of February, it had decreased to well under ten times per day. (T 321). She explained the work BCA had been doing with the student regarding aggression. Aggression had lowered to the point that on many days there were no occurrences, but on days it occurred there were multiple aggressions during the day. (T 323)

[redacted] further explained the Assessment of Basic Language and Learning Skills (ABLLS) Curriculum that is used at BCA. This assessment allows BCA to determine where there are deficits and that information is used as a guide to pick out which skills to teach and in what progression. Under this system, the majority of the student's day consists of one-on-one discrete trial work wherein the student is presented skill acquisition programming. Twice a day the student receives small group instructions. The school also works on weaning off support in a systematic way. The student has one-on-one thirty-minute speech sessions three times per week with the therapist and once per week with a practicum student under the supervision of the therapist. Additionally, the student goes to the vocational room once per day for thirty minutes and to the fitness room once per day for thirty minutes. There are six adults working with six students in the student's class. The students are alternated between instructors to help them better generalize their skills. (T 324-326)

[redacted] testified that typically-developing peers observe other children's behavior and emulate that behavior, but this student does not. Therefore, [redacted] was not concerned that the student's learning environment at BCA was too restrictive because this student would not benefit in the way a typically-developing peer would from interacting with non-disabled peers. In addition to the vocational program in the mall, described above, BCA has high school volunteers who come in every Wednesday for a buddy program to provide some typical peer involvement for the students. (T 326-327)

Data is collected on all skill acquisition program and on each presentation of a skill. Data is also taken on the prompt that is needed to elicit a correct response. This data is compiled daily. Behavior data is also collected daily. (T 327).

Occupational therapy is available to the student at BCA. However, the student is not currently receiving it because there is additional cost involved that the family could not afford or did not choose to incur. Occupational therapy is supplemented by having students go to the fitness room. (T 336).

One reason [redacted] contends that BCA is not appropriate is that none of the instructors are certified teachers, something BCA acknowledges. Some of the staff are certified behavior technicians. Additionally, the school is not accredited. (T 336-337). The ABLLS program used by BCA is for typically-developing students up to six years of age. The student in the present case functions at the level of a four-year-old. BAC does not take data on each IEP goal, but work is done on each goal at different times. (T 338). However, other public schools have utilized BCA. BCA has contracts with [redacted] County Public Schools to educate their students. (T 345).

[redacted] who has been the student's board-certified behavioral analyst since 2007, testified that he consults by performing direct assessments and observations and had worked with staff at the school to develop a behavior plan for the student and continues to work with the staff at BCA. He has had direct face-to-face contact with the student for over 200 hours. (T 355) He had participated in the ARC meetings and development of IEPs and felt that the student had a fairly standard IEP. (T 359) He had observed the student at BCA. During that time there was a small group activity where the student had a one-on-one worker with him to keep the student on task. [redacted] believed this to be appropriate for the student's education. He also felt the one-on-one instruction at BCA was appropriate for the student as well as the speech therapy four times per week for thirty minutes. (T 361) [redacted] pointed out that there is ten years' worth of data that shows that this student works best in a one-on-one setting and learns best with intensively high-structured teaching formats and, based upon the data, there was no reason to change from such formats. (T 362)

J.K. v Fayette County Board of Education, 2006 WL224053 (E.D. Ky. January 2006) held that "if FAPE is not being provided by an LEA, a Plaintiff is entitled to reimbursement for unilateral private placement as long as the private placement is proper under IDEA."

The school argues that BCA does not provide an appropriate education for several reasons:

1) BCA is not implementing IEP goals.
2) Occupational therapy services required by the IEP are not being conducted.
3) BCA staff is not certified and BCA is not an accredited school.
4) The use of the assessment of basic language and learning schools (ABLLS) curriculum is inappropriate.

5) Use of discrete trial training is not consistent with the techniques mandated by the IEP and does not provide appropriate focus for generalizing of skills.

6) BCA is not the least restrictive placement.

None of these arguments hold weight with the ECAB. It is clear that this student has severe cognitive deficits with an IQ of 42 and functioning at the level of a four-year-old. Further, he has extreme communication deficits and behavioral issues that must be addressed in order for the student to effectively access any portion of academics. The bottom line is that this student will not function academically at the level of other students no matter what special education and related services are provided. As a practical matter, the most effective education for this student is one designed to prepare the student to function daily with minimal aggression episodes, communicate his basic needs, and possibly hold a structured job.

Frank G. v Board of Education at Hyde Park, 459 F 3rd 356, 364 (2nd Cir. 2006) held that private placement is not required to have an IEP for a child and that an education can be appropriate even if there is no IEP in place. In the present case, the IEP was being followed and monitored although not all facets were monitored at one time. As a practical matter, that often happens in the public school setting. The goals were being adequately addressed at BCA. Further, *J.K.* held that "the private placement need not meet the definition of a FAPE under IDEA." *Id.* at 4. Therefore, it is not necessary that the private school implement the IEP.

Further, *Frank G.* held at page 364 that certified teachers and accredited schools are not required in order for a private facility to be an appropriate placement, stating that

> an appropriate private placement need not meet state education standards or requirements. (citation omitted) For example, a private placement need not provide a certified special education teachers or an IEP for the disabled students. (citation omitted) In addition, parents "may not be subject to the same mainstreaming requirements as a school board" (citation omitted). The test for the parents' private placement is that it is appropriate, and not that it is perfect.

BCA has OT available. The student is not placed there currently by the LEA so the LEA is not mandated to provide same. If it were the placement, same could be provided. *Frank G.* recognizes that, although there are many state mandates, such Core Curriculum, applicable to private institutions, some students simply cannot attain those goals and must be educated in a way that will be most functional for their own lives. That is exactly the situation for this student. ABLLS is appropriate for this student, as it is for students to age six and this child functions at the four-year-old level. Discrete trial training has always been part of the student's IEP. (It can hardly be argued that using discrete trial is inappropriate.) BCA makes provision for the student to adequately generalize the student's skills.

As far as the least restrictive placement, the evidence is clear that this student does not model peers, which is the primary reason for IDEA mandating the least restrictive environment for placement. Thus, there would be little to no benefit for this student being in general education classrooms in a public school. However, this student does have contact with non-disabled peers at BCA because it is located in the mall and has regular outings into the community in a practical setting that may benefit the student in the future. In addition, under the buddy program and community activities, other non-disabled peers come in at least once per week to work with this students and others. Therefore, it appears this student has as much interaction at BCA with non-disabled peers as he would at [redacted] since the student would only have been in general education classes for his elective course and not during lunch or any other times.

ECAB finds that the provisions of the student's March IEP discussed in this decision are necessary to provide FAPE and that if [redacted] were unable to implement an IEP with such provisions that BCA would be an appropriate placement capable of implementing such an IEP.

This matter is remanded back to the ARC for action consistent with this decision and the findings herein.

NOTICE OF APPEAL RIGHTS

This decision and order is a final, appealable decision. Appeal rights of the parties under 34 CFR 300.516 state:

(a) General. Any party aggrieved by the findings and decision made under Sec. 300.507 through 300.513 or Sec. 300.530 through 300.534 who does not have the right to appeal under Sec 300.514(b), and any party aggrieved by the *findings* and decision under Sec. 300.514(b), has the right to bring a civil action with respect to the due process complaint notice requesting a due process hearing under Sec. 300.507 or Sec. 300.530 through 300.532. The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(b) Time limitation: The party bringing the action shall have 90 days from the date of the decision of the hearing officer or, if applicable, the decision of the State review official, to file a civil action, or, if the State has an explicit lime limitation for bringing civil actions under Part B of the Act, in the time allowed by that State law. (Emphasis added).

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

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

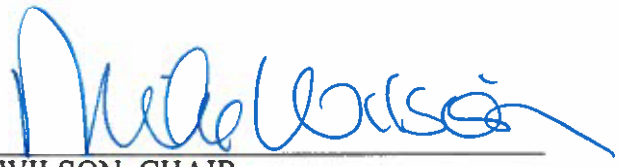
KRS 13B. 140, which pertains to appeals to administrative hearings in general, in Kentucky, and not to civil actions under Part B of the Act (the IDEIA), provides:

(1) All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not in the enabling statutes, a party may appeal to Franklin Circuit Court of the Circuit Court of the county in which the appealing patty resides or operates a place of business. Copies of the petition shall be served by the student upon the agency and all parties of the record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

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

SO ORDERED this 14th day of November, by the Exceptional Children's Appeals Board, the panel consisting of Mike Wilson, Kim Price, and Jenny Jones.

EXCEPTIONAL CHILDREN APPEALS BOARD

BY: 
MIKE WILSON, CHAIR
EXCEPTIONAL CHILDREN APPEALS BOARD

CERTIFICATION:

The original of the foregoing was mailed to Todd Allen. KDE, 300 Sower Blvd, 5th Floor, Frankfort KY 40601, and copies to [redacted]

[redacted] on November 14, 2016.

MIKE WILSON, CHAIR
EXCEPTIONAL CHILDREN APPEALS BOARD