

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



PETITIONER/APPELLANT

V. EXCEPTIONAL CHILDRENS APPEALS BOARD DECISION

HENRY COUNTY SCHOOLS

RESPONDENT/APPELLEE

The parents filed for Due Process on or about July 14, 2016. The Due Process request requested a review of three issues:

1. The failure of Henry County Schools to provide the child a Free and Appropriate Education for the past three school years [2013-14, 2014-15 and 2015-16] in violation of 707 KAR 1:290.
2. The failure of Henry County Schools to develop appropriate behavioral interventions to assist the child in achieving an education for the past three academic years in violation of 707 KAR 1:320.
3. The failure of Henry County Schools to place the child in the least restrictive environment for the past three academic years in violation of 707 KAR 1:350.

As a remedy the parents requested that Student's tuition at  be paid and the associated costs to transport Student to and from the Louisville school.

A Hearing was held on November 28, 29, December 1, 2016 and February 9 and 10, 2017. The Hearing Officer entered a Decision and Order on November 13, 2017. Petitioner timely appealed said decision.

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 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 Student that the school 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 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 *AlsonSchaejfer v. Weast*, 546 U.S. 40 (2005) in an administrative hearing, party seeking relief has the burden of proof.

FACTS

The Student at all times relevant resided with her family in Henry County, Kentucky. Student enrolled in Henry County Schools for Kindergarten in 2010. Student's pediatrician, [REDACTED], referred her to [REDACTED], at [REDACTED] [REDACTED] (Pet. Exh. p. 136). Dr. [REDACTED] performed a battery of tests with Student. The test results found a child with High Average Range of cognitive ability (Pet. Exh. p. 138). However,

Dr. [REDACTED] also found Student experiencing significant mood-related symptoms, cyclothmic disorder, anxiety and oppositionally defiant with adults. (Pet. Exh. p. 152). Dr. [REDACTED] recommended attending social skills group and therapy session to assist Student in learning coping skills. (Pet. Exh. p. 153)

Dr. [REDACTED] of [REDACTED] diagnosed the Student with ADHD, Generalized Anxiety Disorder and Dysthymic Disorder (Pet. Exh. p 131-135 and T.T.Vol. I p. 18)

Dr. [REDACTED] referred student to [REDACTED]. Student was seen by [REDACTED] [REDACTED] in October 2013 at age of eight (8). (Pet. Exh. p. 131) Student was referred to [REDACTED] due to defiant behavior, sensory issues, and difficulty in completing homework. At the time of the evaluation, Student was in 3rd grade. As a part of the evaluation procedure a Conners-3 survey was sent to Student's third grade teacher, Ms. Knust who reported "Elevations were found in hyperactivity/impulsivity, defiant behavior, and peer relations." (Pet. Exh. p. 133)

The [REDACTED] report Summary and Recommendation found the Student had "Low frustration tolerance, reactivity, and limited coping skills [Student] is a very unhappy young [person] who very much wants external approval but has difficulty reaching it." (Pet. Exh. p. 134) The report also concluded that Student "will benefit from continuing occupational therapy.

Both the [REDACTED] and [REDACTED] reports were shared by the Student's parents with the School and were considered by the 504 committee in developing the §504 plan. (Resp. Exh. #11)

Student first began to receive services through the school by the way of a 504 plan dated January 30, 2013. The 504 referral "Student Referral Form" was completed by January 17, 2013. (Resp. Exh. #11) The purpose of the Referral was that Student "complains of a headache and stomach aches several times throughout the day. Spends a great amount of time in the restroom.

Asks to see Ms. Duvall once or twice each day." (Resp. Exh. #9). Ms. Duvall was the school counselor. Student was determined to be eligible for a 504 plan.

The 504 plan established accommodations in the area of anxiety, attendance, and compliance. The accommodations included counseling with Ms. Duvall once a week, journal writing, extended time and making good choices on given tasks. There was no mention of the initial problem of Student leaving class or spending time in the bathroom. As of January 30, 2013 Student's I.Q. was reported to be 108. (Resp. Exh. #11)

According to the Student's Mother, the Student was diagnosed with cyclothymic disorder a form of bipolar in children at around age 8. (Trans. p. 17) Lori Ann Duvall, a guidance counselor and teacher of the hearing impaired, testified. She Duvall began working with the Student during the second half of 2012-2013 school year when the Student had a 504 Plan. (Trans. p. 543 and 540 and Resp. Exh. #9)

The 504 plan was reviewed on or about October 18, 2013. The purpose of the meeting was to "discuss OT evaluation, behavior, medication, etc." This meeting occurred at the beginning of Student's third grade year. At this point, Student's teacher found her to be manipulative and showing more questionable behaviors at school. The 2013 Section 504 summary stated that Student did not like assemblies and that they triggered negative behaviors. The Committee amended the §504 plan. However, the record does not reflect specifically how it was amended.

A third §504 meeting was held on March 19, 2014 to discuss outside evaluations. The result of the testing placed Student at an IQ composite of 86 (*22 points lower than the previous year*). By this time Student had been diagnosed with ADHD and generalized anxiety disorder. The Committee found that OT had been good for Student. The OT at the time was being provided outside of school by a private OT at the parents' expense. It was also determined that her teacher,

Ms. Knust would find a "special job" for Student. The special job was taking the building recycling out to the garbage. (Trans. p. 70).

On May 21, 2014 another 504 meeting was convened to discuss behaviors and possible IDEA referral. (Resp. Exh. #13). During third grade, Student's behaviors at school had been escalating. Although the parents had been seeing concerning behaviors at home since Student began school it was not until third grade the School felt the behaviors became a concern at school. The Committee determined that "[B]ehaviors is the area of concern. Academics could also be addressed."

A referral was made by the Committee for testing to determine if Student would be eligible under IDEA. The ARC convened on May 30, 2014 to discuss the referral (Resp. Exh. #14). The Parents consented to the referral and the process began (Resp. Exh. 15.) Eric Davis, the Student's Principal, testified. (Trans. p. 499-539). He served as Chairman of the ARC that met on May 30, 2014 (Trans. p. 502) Mr. Davis was aware of the Student's being at [REDACTED]. He went to [REDACTED] and met with the staff of [REDACTED], along with Ms. Hosey and Mr. Reeder. (Trans. p. 509). As [REDACTED] is located in Jefferson County, it was Davis's belief that the Student might have been provided services through the Jefferson County Schools. (Trans. p. 509).

Student was determined eligible by the ARC under the category of Emotional Behavior Disability. An IEP was developed and the child began to receive services under the IDEAA and state regulations on or about September 11, 2014, when she was in the 4th grade. (Resp. Exh. #14). Said IEP ran through December 18, 2014. (Resp. Exh. # 17).

The IEP that was developed for Student addressed the problem behavior that Student had been experiencing at school. One goal was that Student would identify and manage her feelings at 80% as measured by tracking sheets. Another goal was that Student would learn to make good

choices 3 out of 6 opportunities as measured through "direct measures". However, the IEP does not define or explain what is meant by direct measures. A full discussion of data measurement is set forth later in this Order.

Kimberly Mooney, Special Education Teacher, testified that Student did pass her OT screening, "but we knew that she needed sensory breaks. We knew she was receiving outside occupational therapy as well. And so that's why we added the frequent sensory breaks and so forth." (Trans. p. 664) She also stated that Student benefitted from more direct instruction. (Trans. p. 702).

Approximately two (2) weeks after the September 11, 2014 ARC, Student was hospitalized at [REDACTED]. (Trans. p. 213). While Student was at [REDACTED], the Director of Special Education, the child's teachers, principal, and parents attended a meeting to discuss Student. The purpose of the meeting was to develop a plan for Student to return to school. (Trans. p. 913)

On November, 11, 2014, an ARC was convened to discuss Student's return to school. Screening of Student for Occupational Therapy was discussed (Resp. Exh. #1). At that time, Student was still at [REDACTED] and being educated by [REDACTED]'s educational component called CrossRoads. (Trans. p. 911-912).

On December 19, 2014, an ARC was convened to discuss Student's transition back and a change in her daily schedule. The changes placed Student in resource math in the afternoon. (Resp. Exh. # 20) The record has numerous references to Student having trouble in the afternoon at school, as well as ongoing struggles in math. Within the Conference Summary Report with the ARC Date of December 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 Student's sensory schedule." "IEP will be amended to reflect her new schedule and OT consult." (Resp. Exh. #20, p. 6) Ms. Mooney stated that it was never explored that the child could have math in the mornings. (Trans. P. 705).

Tiffany Chamberlain, the School Occupational Therapist, testified that she was in charge of the October 25, 2015 Occupational Evaluation for Student, and that services did not begin until a couple of months into the Student's fifth grade year (Trans. p. 823). She wasn't asked to continue OT while Student was on homebound, but could have done so in the home setting (Trans. p. 826). She further acknowledged that the consult OT was a bandaid on a big wound and that while she was doing the consult more direct supports in OT were needed. (Trans. P 835-837).

On August 7, 2015, the ARC was convened to discuss Student's placement. The child's measurable annual goals and objectives remained the same as previous years. (Resp. Exh. #23). The meeting also discussed conducting a Functional Behavior Assessment (FBA) for Student. The parents consented to the FBA. (Resp. Exh. #25). It was reported at this ARC that student was achieving 88% of Student's behavior goals.

The ARC was again convened on September 3, 2015 for annual review. The idea of a "lunch bunch" was discussed due to Student's problems with sensory overload during the lunch period. (Resp. Exh. #26). This was where Student and a selected group of Student's friends could have lunch together in a separate setting to avoid some of the Student's problems from being in the lunchroom, which was noisy. There was no data shared as to how often or how successful the lunch bunch was for Student. School personnel could not testify as to whether it occurred on more than a couple of occasions.

At the September 3, 2015 ARC, an IEP for the period September 3, 2015 to September 2, 2016 was developed. The ARC Summary reported that behavior data collected by classroom teachers shows Student had mastered Student's goal of making good choices at 88% and of managing feelings at 89%. The IEP had set 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 Resp. Exh. #28)

On or about September 23, 2015, the Functional Behavior Assessment was released. It had been developed by Ms. Pohlman, Bruther and Moody. (Resp. Exh. #30)

On October 29, 2015 the ARC convened at the parent's request. Parents presented a letter from the child's treating psychiatrist, Dr. [REDACTED], which stated that the ARC should consider a more restrictive setting for Student, namely a self-contained classroom, where Student could be monitored throughout the day for anxiety and increasing impulsive behaviors. The ARC declined to accept the more restrictive placement. (Resp. Exh. #30) On page 3 of the Summary Notes form the ARC, 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. Ms. Hosey returned the forms so this could be completed. Parent did not send them back and therefore further information could not be obtained." (Resp. Exh. #31).

However, the ARC did adopt a Behavior Management Plan (BMP) for Student. The BMP was a result of an observation by John Winslow, with the local educational cooperative, and the

completion of a state generated form titled "Functional Behavior Assessment" completed by three of Student's teachers. (Resp. Exh. 30).

An ARC was convened on February 29, 2016. The parents requested the meeting to discuss Student's escalating behaviors at school and to receive clarification on the IEP. (Resp. Exh. #33)

On April 19, 2016, the Student was restrained. According to the write up in Petitioner's Exh. p. 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 Student 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. According to Shawna Pohlman, the Student's 5th grade homeroom teacher, there were only four members of the faculty certified to restrain. They were Ms. McMahan, Loren Jeffries, Ms. Bruther, Ms. Knust and Ms. Miller. (Trans. p. 450). The Student's Parents were notified by Principal McMahan by e-mail at approximately 9:33 pm. (Pet. Exh. p. 183).

On April 21, 2016 the ARC was convened to address Student's transition to Middle School. The ARC summary does not mention that Student's restraint two days earlier was discussed. (Resp. Exh. #36). 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. (Resp. Exh. #36)

On Monday, April 25, 2016, the Student's Parents provided to the School District an application for Home/Hospital Instruction. (Resp. Exh. #39) The Student'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. (Resp. Exh.

#39) She testified that she was part of the decision to put the Student on Homebound Instruction. (Trans. p. 111-112) Ms. [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 in school". (Trans. p. 111)

At the ARC meeting of May 2, 2016, the primary purpose was to review the physician's recommendation for home instruction for the balance of the school year. (Resp. Exh. # 40, p. 6). 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 minutes for sensory integration strategies on this setting and 3. Per ARC, Student 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". (Resp. Exh. #40, p. 6) (Resp. Exh. # 38, p. 11). Student did not receive occupational therapy while on Homebound Instruction, although it was required as a related service in her IEP (Trans. p. 843)

The parents advised the District of their intent to remove the child from Public Schools on or about July 14, 2016. (Resp. Exh. #2). Student was removed to [REDACTED] Academy, a private school for students with various "learning differences". She began attendance there in August 2016.

The School requested that an ARC be convened to offer the parents another IEP. The ARC met on August 17, 2016. While the new IEP offered more time for Occupational Therapy and a modified Behavior Intervention Plan, the parents were not convinced after years of failure that Henry County schools could provide an appropriate education for their child. (Resp. Exh.

#7) According to page 3 of the Conference Summary Report of August 17, 2016, "ARC met to present an IEP to [the parents] to respond to their notification of enrolling the Student in a private school placement". (Resp. Exh. # 6)

The Student's Father testified that the Student was placed at the ██████ Academy-based upon the recommendation of the Student's psychiatrist, Dr. ██████. The idea had been originally raised to the Parents after the Student had been at ██████ in the fall of 2014. (Trans. p. 380-381).

During the ARC Meeting of August 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". (Resp. Exh. #6)

John Benjamin Roberts, the School District's behavior specialist testified. (Trans. p. 855). He met twice with the Student. It concerned preparation for the Student's transition from elementary to middle school. He attended the ARC Meeting of August 19, 2016 (marked incorrectly as August 17, 2006 per Trans. p. 862). He was going to be one of the Student's teachers for the 2016-2017 school year had student returned to Henry County. (Trans. p. 859; Resp. Exh. #6). Roberts 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 (Trans. p. 856-857).

Susan Hill, the lead teacher for the sixth grade at ██████ Academy testified. (Trans. p. 299-340). She testified that she does not have a special education background, except for her professional development while working at ██████. (Trans. p. 301-302). She is the Student's homeroom and literacy teacher at the ██████ Academy. (Trans. p. 303). The Student has math

beginning at 8:15 a.m. at ██████ Academy. (Trans. p. 303). ██████ Academy's students do not have an IEP. (Trans. p. 302). Student does not receive related services at ██████ Academy, such as Occupational Therapy (OT). (Trans. p. 302-305; 324-325). ██████ Academy does not enroll students who do not have disabilities. (Trans. p. 322).

Ms. Hill 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. Hill) 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 at ██████ are

different than their behaviors at the other school because of the learning

environment. (Trans. p. 321-322).

Shawna Pohlman had the Student in her 5th grade regular classroom for homeroom, reading and social studies. (Trans. p. 426) She observed the Student's behavior escalate in the afternoon and that the child struggled in math. (Trans. p. 428-429) She stated that small classroom size was beneficial for student (Trans p. 430). She felt Student's behaviors adversely affected her ability to be educated at the school district at times. (Trans. P. 430). Ms. Pohlman testified that the Student

was reaching 88 % and 80% (percent) of her goals in behaviors in her classes, but could not say how these percentages were calculated. (Trans. p. 433-434, 471 and Resp. Exh. #24)

Ms. Pohlman verified that Student went to ICE quite a bit. ICE was a program designed for all students who had a problem as a place they could go to reflect and modify their behaviors. It was a disciplinary component. Pohlman would first send Student to the Special Education teacher, Ms. Moody, if there was a problem so that the Student could get one on one help. Moody might send her to ICE. Other students knew this was a disciplinary measure and how other students viewed Student was important to Student. (Trans. p. 438-441). Polhman also voiced that the Student's behavior worsened in fifth grade, that the BIP offered Student did not benefit her, that she did not understand the data for the measurable goals, and that the goals on the IEP were too high. (Trans. p. 445-453) She voiced her concerns to the principal that what the Student's point sheet had on it did not reflect some of the behaviors she saw, especially with peer interaction. The principal said what they had was "good enough and I was to keep my mouth shut." (Trans p. 475-476). She was told what they had in place is what they were going with for student. She did not feel comfortable bringing up other concerns about Student after that. (Trans. p. 479).

Sean Reeder is the school psychologist for the School District. In his position he assists with special education placement (Trans. p. 599-602). He performed a Multi-Disciplinary Evaluation on the Student. (Trans. p. 602 Resp. Exh. #15) The Student's Mother did not have any concerns about Sean Reeder's evaluation of the Student. (Trans. p. 214-215).

James "Jamey" Elliott testified. He is the Head of the School at [REDACTED] Academy. (Trans. p. 480). [REDACTED] is a small private school established in 1992 specifically for students with "learning differences". Approximately 130 students attend [REDACTED]. (Trans. p. 480). He 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. (Trans. p. 487-489).

At the conclusion of the Hearing, Petitioner was allowed, over the objection of the Respondent, to take the deposition of Dr. Tammy Hammond Natof, Ph.D. a licensed Psychologist and Behavior Analyst as a rebuttal witness. The purpose of Petitioner's deposition of Dr. Natof was to explain the problems with the Schools Behavior Intervention Plans or BIPs, to discuss the proposed FBA and how an FBA should be conducted. Dr. Natof reviewed the Petitioner's "BIP" for February 29, 2016. (Resp. Exh. #7, 22, 26, 30 (Trans. p. 11-27) In forming her opinion(s), Dr. Natof did not review any of the Petitioner's IEPs. (Trans. p. 27). She was not asked to testify to the adequacy of the IEPs. Her purpose was to address the various behavior management plans and the FBA.

A review of the record in this matter, finds Petitioner did not introduce any records regarding services or academic progress from [REDACTED] the private school that Student/Petitioner is currently attending. After the closing of Appeal Briefs, Student sought to introduce a document as proof of progress at [REDACTED]. School opposed said request and the ECAB is not allowing same as discussed below.

I. THE APPLICATION OF RESTRAINT WAS NOT A FAPE VIOLATION

The use of restraint in schools is regulated by laws that apply to all students and that are independent of and separate from the laws requiring provision of FAPE. If there is a violation of restraint laws, 704 KAR 7:160, Section 2, (1) (f) provides that schools have a complaint process by which parents may submit a complaint regarding the physical restraint or seclusion of their child, which shall require the district and school to investigate the circumstances surrounding the physical restraint or seclusion, make written findings, and if appropriate, take corrective action.

Restraint violations are irrelevant to the issue of whether FAPE was provided unless they are specifically related to implementation of the IEP or BIP or otherwise concern provision of FAPE. The restraint event occurred on April 19, 2016, when, according to the summary 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. Burther put [the student] in a standing cradle to move her to IXCE so that she could calm down without other students around. When exiting [the student] twisted, her body causing Mrs. Bruther's left forearm to be smashed into the pencil sharpener.

Both teachers involved were faculty who had been certified to restrain. (TE 450). That evening, the parents were contacted concerning the use of restraint (PE 183), sufficiently complying with the notice requirements of 704 KAR 7:160, Section 5 (2) that parents be notified "as soon as possible within 24 hours of the incident." The regulation gives the right for a parent to request a debriefing on the incident under 704 KAR 7:160, Section 5 (2) and there is nothing in the record showing that one was requested and not provided. Contrary to Appellant's argument, the regulation does not require giving notice of a right to a debriefing. The notice requirements to parents under these regulations only require notice that the incident occurred.

There appears to be no procedural violations of the restraint regulation. But even if there had been, or even if the restraints used were found to have been unjustified under the circumstances and a substantive violation of restraint laws, the incident was not shown to have impacted implementation of the IEP or to have resulted in denial of FAPE. If there is a substantive or procedural violation of restraint regulations, the parent may have remedies under 704 KAR 7:160, Section 2, (1) (f), but use of restraint did not constitute failure to provide FAPE.

II. THE SCHOOL FAILED TO DEVELOP AND IMPLEMENT A PROPER IEP

The school district did collect data related to the benchmarks of the Student's IEPs. During the 2014-2015 school year, for example, a progress tally chart for the Student's benchmark goal of "making good choices" kept track of points earned each day, possible points and the weekly benchmark percentage of points earned toward the benchmark. This tally sheet seems to have been used primarily from December through the end of the year. An accompanying graph provides a pictorial representation of the percentages calculated on the tally sheet.

For the 2015-2016 school year, Ms. Moody developed a tracking data sheet, which broke each school day into small chunks of time (varying between 15 minutes and an hour). Teachers were asked to respond "yes" or "no" for each of three benchmarks: "stays in designated area," "takes responsibility," and "appropriate voice/words." The tracking data sheet had a total of ten possible yes/no responses for each of the three targeted behaviors. It is not at all clear, when looking at the progress tally sheets for each benchmark, how these sheets were actually used. The number of possible points varies from day to day, often exceeding the number of times (10) that responses were to be given on the tracking data sheet.

To add to the difficulty in assessing what the data means, three pages of graphs, labeled as "[the Student's] chart, only full days, no ER or checkouts" graphs a total of 30 possible points per day, which appears to be the combined possible points each day for all three of the benchmarks targeted. A handwritten page, with three columns corresponding to the dates identified on the graphs, clearly combines the points for all three benchmarks and calculates an average of 90% on progress toward the combined behavior benchmarks. Graphs comparing behavior in general education and special education were also similarly prepared.

Two behavioral observations were performed by Mr. Winslow on August 26, 2015 from 12:45 pm until 3:00 pm, and September 3, 2015 from 10:55 am until an unspecified time in the

afternoon after 2:00 pm. On the first observation, the Student uses fidget tools after the teacher whispers something to the Student. Later, the Student leaves the class, following something else whispered. Mr. Winslow waited about 5 minutes before following the Student, who was then arguing with Ms. Moody. Winslow has no way of knowing what preceded the argument, because he wasn't there. Ms. Moody blocked the door, preventing the Student from returning to the previous class. The Student was uncooperative, arguing and tearing things off the wall. The Instructional Assistant successfully distracted and redirect the Student, who then began her work with some redirection from the teacher. The hearing record contains no data recorded to describe what happened before the argument began (the antecedent). The consequences appeared to be attention (Moody barring the door, IA distracting her, redirection to work, etc.).

The day before the second observation, the Student had grabbed a girl during lunch, kneed two boys, and pulled down the tank top of another girl. Again there is no data about the antecedents to these behaviors. The consequence was being sent to ICE. On the morning of the second observation, but prior to the observation the Student had already made fun of another girl. There again is no data re the observation of the antecedents of this behavior, although the Student reported that the other student had "said mean things."

Later that morning, the class is divided into groups but the Student did not participate, complaining that another student was loud. At the end of that class, the Student put hands on another student and was reminded to get in the back of the line. There is no description of what happened immediately before this incident. The consequence was the reminder. In the next classroom, the Student is reminded several times about what needed to be done, but the Student roamed about the room, uncapped a marker, pouring the contents onto construction paper and blowing on it to form patterns. When the teacher instructed the Student to work on the assigned

project and provided another sheet of construction paper, the Student became verbally upset because the Student couldn't find an item necessary for the completion of the project. The teacher provided another copy and the Student finished the project. It is not clear from the narrative whether this incident relates to any of the three benchmarks, and it cannot be determined what happened immediately before the wandering around the room, etc., but the apparent consequence was repeated reminders from the teacher and being provided with another copy of a needed item. At the end of lunch, the Student, while lining up to go back to class, began arguing with another student and apparently became angry. It is unknown what precipitated this behavior. No consequence is described or mentioned in the narrative of the observation. Back in class the Student remained angry and not focused on the teacher's instructions. Again, no antecedents known and no consequences described. A student assembly occurred without incident. On the way back to class the Student did go to the bathroom without permission. Later, in Social Studies, the Student kicked another student while verbally complaining about having to do an assigned project for that class. The Teacher kept trying to work with the Student, who continued to complain and began throwing pens, etc. The teacher then whispered to the Student who then went to Ms. Moody's room ten minutes early. Here, one antecedent appears to have been the instruction to complete the project. There may or may not have been others. The consequence of the behavior appears to have been the change of classrooms, where the Student actually worked on the assignment without further reported incidents.

In the narrative of his observations, Winslow made no attempt to analyze what led to the Student's behaviors, what purpose(s) the Student's behaviors served, or the effects of the consequences of the behaviors on the Student. He did note that there was no point sheet visible and available at one point and that there needs to be consistency in its usage and a shorter time

frame for recording data. He also suggested such things as frequent recognition for appropriate behaviors. It seems that these observations were intended to be used as part of a FBA and subsequent development and refinement of a behavior intervention plan. Unfortunately, however, neither the daily tracking sheets nor the narrative of the observations provides sufficient information to identify a pattern or patterns of incidents immediately preceding the undesired behaviors. Despite having much data collected, the school district does not truly know what causes or leads to the problem behaviors and it does not know what the Student gets out of the behaviors. Attention? Avoidance? Both? Something else?

Although at one point in her testimony, Ms. Pohlman testified that she thought the Student was performing on targeted behaviors at about 80 or 85 percent (TR at 434), she also testified that, with respect to the benchmark, “staying in designated area,” she did not know what the 88 percent calculated really meant. See TR at 447. Ms. Pohlman also participated in completion of the September 23, 2015 Functional Behavior Assessment (FBA) form, together with Ms. Bruther and Ms. Moody.

As described by Dr. Natoff, in performing a FBA, the first step is to define the problem behavior very specifically. Depo. at 9. After defining the behaviors, data is collected to determine the reason or function of the behavior for the individual. After the data is collected that data is used to develop the behavior plan. Teachers would record daily information, which if properly collected, includes information about what happened immediately before the problem behavior (antecedents) and what happened after the problem behavior (consequence). See Depo at 10.

Section A of the FBA form contains information about the strengths and preferences of the Student. Section B.1. is where the target behaviors are described. The three target behaviors identified on the form are: 1) leaving the classroom without permission, 2) not taking responsibility

for her actions and 3) not having appropriate voice/tone. Like Dr. Natoff, this appeals panel finds that the first of the three target behaviors, leaving the classroom without permission is both observable and measurable. It is very specific. Behavior 2, however, “not taking responsibility for [the Student’s] actions,” appears to be divisible to several possible more specific and measurable target behaviors, such as hitting or kicking others, throwing objects, taking things that don’t belong to her without permission, etc. Target behavior 3, “not having appropriate voice/tone” may be observable and measurable, but as described also includes things that are not related to voice and should not be counted for this particular target, such as “refusal to work.”

Section C of the FBA form is for describing the antecedent condition or setting for the problem behavior. In this document, the School focused on the least measurable target behavior, “taking responsibility and reasoning through her actions,” and described. In this section, the duration, average time between request for appropriate behavior and the Student’s appropriate response, and the intensity of the behavior. Finally, consequences are described. No attention whatsoever is given in Section C of the FBA form to target behaviors 1 and 3. Despite this, the school used the information of Section C to complete the Results section for all 3 target behaviors. As a result of the analysis, it was decided that the existing plan would be revised.

The Student’s ARC did, in fact, revise behavior management plans for the Student several times. One of the Student’s fifth grade teachers testified, however, that there were ebbs and flows in the Student’s behavior, but that as that year went on it got worse. The FBA document was completed early in the fifth grade year. The behavior plan was revised but, because there wasn’t truly an analysis of the function of the Student’s behaviors, the attempted interventions might as well have been darts thrown at a dart board. The consequences provided in the various versions

of the behavior plans, as Dr. Natof testified, could have been helpful or could have backfired, inadvertently reinforcing the function of the Student's behavior. Depo. at 14.

707 KAR 1:320, Section 5(2)(a) requires that and ARC, in developing an IEP shall, in the case of a child whose behavior impedes his or her learning or that of others, consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior. The ARC acknowledged that the Student's behaviors impeded the learning of the Student. It attempted to correct the behaviors but did not follow proper procedures in data collection and did not develop and implement an appropriate IEP, with respect to the Student's behavior goals. The Student was denied FAPE at all times after being determined eligible for services under the IDEA in the category of EBD.

III. APPELLANT IS NOT ENTITLED TO REIMBURSEMENT OF PRIVATE TUITION OR TRAVEL EXPENSES

707 KAR 1:370, Section 1, (2) creates two requirements that must be met before reimbursement of private tuition can be considered:

If a parent of a child with a disability, who previously received special education and related services under the authority of the LEA, enrolls the child in a private school without the consent of or referral by the LEA, a hearing officer or a court may award financial reimbursement to the parent if it is determined that the LEA did not offer FAPE to the child in a timely manner and the private placement is appropriate. This may be awarded even if the parents did not receive consent from the LEA for the private placement and the LEA did not make a referral to the private school. A hearing officer or a court may determine a private school placement to be appropriate even though it does not meet state standards that apply to an LEA.

(emphasis added).

Even though the school did not offer FAPE, reimbursement is not appropriate because Appellant failed to prove that the placement at [REDACTED] is appropriate either academically or for the special needs that makes this student entitled to FAPE.

██████ is a private school for “students with learning differences” (TE 480) that charges \$15,000 a year tuition for students like the one in this case (TE 482). Class sizes average 7 to 10 students. (TE 484). Jamey Elliott, the “head of school,” (TE 480), testified that as a private school it is not required to mirror the state’s core curriculum but “I wouldn’t say [our curriculum] would be vastly different.” (TE 483), but there was no proof that Elliot is qualified to have an opinion on that subject. He has no degrees in education at any level (TE 487). Elliot testified that a team of teachers and administrators develop “priority goals” for each student that are individualized. (TE 483). Elliot testified that he had never heard of the Kentucky Educational Professional Standards Board (TE 487). Elliot did not know whether or not there were students at ██████ who were not disabled (TE 491).

Susan Hill is the student’s sixth grade teacher at ██████. She has a master’s degree in teaching pre-k through 8th grade. (TE 299). She does not have a degree in special education (TE 302). She had experience teaching in public schools before teaching at ██████. (TE 311). Hill testified that ██████ does standardized testing in the spring but “not like other schools.” (TE 332). The standardized tests are GMADE for math and GRADE for reading, which are not the same testing used in public schools (TE 332-333). Academic achievement is measured at ██████ using something called “Brook” which Hill testified is “like a public system scale” (TE 331).

While academic instruction in a private placement could, theoretically, be appropriate without duplicating the curriculum of a public school system, the burden was on Appellant to demonstrate that was appropriate. There was not sufficient proof to draw meaningful conclusions regarding how the student was being educated at the ██████ and what “success” there meant in terms of educational advancement.

The student at issue was under an IEP and had a BIP while in public school and received OT and specially-designed instruction. At [REDACTED], there is no IEP or BIP. There was no proof that she receives specially-designed instruction at [REDACTED]. Elliot testified that the student does not receive OT at [REDACTED] (TE 491) and Hill testified that she receives no other related services, either (TE 325).

Generally, placement at and reimbursement of tuition for private schools that do not or cannot provide special education services is not permitted under IDEA. *Berger v. Medina City Sch. Dist.*, 348 F.3d 513 (6th Cir. 2003); *Rome Sch. Comm. V. Mrs. B.*, 247 F.3d 29,33 (1st Cir. 2001); *Florence County Sch. Dist. Four v. Carter by & Through Carter*, 510 US 7, 12-13 (1993); *J.G. Kiryas Joel Union Free Sch. Dist.*, 777 F.Supp 2d 606 (S.D. N.Y. 2011); *Covington v. Yuba City Unified School District*, 780 F. Supp. 2d 1014 (E.D. Cal. 2011). *Burger*, at 523, holds that private placement cannot be appropriate “when it does not, at a minimum, provide some element of special education services in which the public school placement was deficient.”

Appellant argues that small class size and individualized instruction is causing the student to make progress at [REDACTED]. A letter from Dr. [REDACTED], the student’s psychiatrist, dated October 15, 2015, states “[REDACTED] struggles to function academically in educational settings. It is my recommendation that [REDACTED] be placed in a self-contained classroom, and be monitored throughout the school day for anxiety and increasing impulsive behaviors.” There was no explanation of the basis for Dr. [REDACTED]’s opinion regarding the student’s academic performance or his recommendation for a self-contained classroom. Dr. [REDACTED] was not called as a witness at the hearing.

There is some precedent for treating small class size as an element of special education. *M.G. v. District of Columbia*, 246 F.Supp.3d 1, 9-10 (2017) held that failure of a private placement

to provide all the special education services previously provided in the public school was not fatal, and that small class size in the private school, if unavailable in the public school, could be considered a kind of special education service. But in *M.G.*, some other supports also were provided by the private school, and the overall plan at the private school, the court held, was “reasonably calculated to enable the child to receive educational benefits.”

The proof offered suggests that the student does not have a meaningful plan at [REDACTED] to address her special needs as they impact learning. Hill testified that “all of the kids [at [REDACTED]] have either some sort of educational issue or behavior issue or most of them” (TE 299). However, there does not appear to be a conscious and systematic method used to address the special needs of students with disabilities, much less any method to gather data and measure progress. Elliot testified as follows:

Q. Are you familiar with developmental goals and objectives on an IEP for an identified disabled child under IDEA?

A. Since I have not been involved in the development of a public school IEP as governed or dictated by IDEA, I guess I would have to say no to that.

Q. You testified that there – you used the phrase “priority goals.” Give an example, and specifically as to [REDACTED] if you know, what priority goals look like.

A. Sure. They typically are a combination of academic and in some cases social/behavioral goals. So I think in [REDACTED]’s case I think, you know, one of her goals would be improvement in spelling, for instance, that can be measure through the year with academic measures.

Q. What about the rubric that would be used for peer interaction, for example, if that is a priority goal and is it a priority goal for [REDACTED]?”

A. Whether it appears on a black-and-white piece of paper as a priority goal, I can’t say. But I think it’s fair to say that [REDACTED]’s peer interaction is something that we place a priority on, sure.

Q. Is there a rubric of some sort as to how she is progressing on that priority goal as sued at [REDACTED]?”

A. I don’t know what you mean by rubric for how she’s progressing.

(TE 493-495). Further testimony by Elliot made clear that there is no measure other than unspecified “feedback” because “I think by its nature, social progress is harder to quantify than academic, at least from my prospective.” (TE 495).

Susan Hill, the student's sixth grade teacher testified that she had experience implementing IEPs in public school (TE 319). However, there does not appear to be anything scientific or methodical about addressing this student's special needs. Hill testified that

[t]here's just, like, a priority goal sheet that we fill out and then it's just, like, in February we say progressing or goal met or come up with another goal and just kind of keep pushing forward. But that's the only document that I keep as a teacher.

(TE 324). When asked what markers she used to determine whether the student was making progress in behaviors, she testified that

I guess, just when I say that I just mean I have less situations with her recently than behavior issues. I don't keep, like, tallies or, you know, record – I don't have any record like that, anything concrete.

(TE 340). Hill keeps no data at all on the student's sensory issues (TE 326).

Courtney Rodewig, who has a Masters in social work and is a therapist with [REDACTED] group, testified that the student, to whom she provides therapy, has become happier since she began attending the [REDACTED]. When asked why, Rodewig testified as follows:

[O]ne, I think it's the environment that she's in. But I think most of all she is around people where she sees that they are giving her the ability to succeed....[S]he sees that she's given chances, that people are seeing her talents and that she's given a floor to just kind of run with and be successful in a way that [the student] knows how to be successful and that her talents and her intelligence is...appreciated.

(TE 116). However, Rodewig's opinion was not based on personal knowledge. She believed, incorrectly that there were nondisabled children at [REDACTED] (TE 124). She's never observed the student at [REDACTED] (TE 125). She's never spoken with any of the student's teachers (TE 126). She's seen no educational documentation from [REDACTED] concerning this student. (TE 126). Her knowledge and opinion about [REDACTED] are based solely on what the student and her mother have told her. (TE 126).

The shortcomings of [REDACTED] in addressing special needs impacting education are far greater than the public school's shortcomings that ECAB finds, elsewhere herein, constituted

failure to provide FAPE. [REDACTED] is not an appropriate placement and tuition reimbursement is not merited.

IV. APPELLANT’S MOTION TO SUPPLEMENT THE RECORD IS DENIED

34 CFR 300.514(b)(2)(iii) authorizes ECAB to “seek additional evidence if necessary.” Appellant’s request to supplement the record in effect asks ECAB to find that additional evidence is necessary. ECAB does not so find. The hearing concluded before the end of the 2016-2017 school year and the proffered evidence concerns a subsequent year and is evidence created after the hearing. ECAB does not believe the additional evidence is necessary or would change ECAB’s opinion regarding the unsuitability of the Summit as a private placement or any other issue in the case.

V. ATTORNEY FEES

20 USC 1415 (i) (3) grants the District Court jurisdiction over the issue of attorney fees. Neither the hearing officer nor ECAB can award attorney fees.

ORDER

1. ECAB finds that the school failed to properly develop and implement an IEP.
2. In light of these failures the school is ordered as follows:
 - a. To Conduct a new FBA. (The ECAB recognizes it is the province of the ARC to determine that a FBA is necessary, which they did in this case. Once such determination is made the FBA must be properly conducted, which did not occur.) The school shall employ a private Behavioral Consultant agreed to by the parties to assist with the FBA.
 - b. Once the FBA is completed the ARC shall develop a new BIP and IEP with goals and measurements as indicated by the FBA.
 - c. The child is granted compensatory education as follows:

i. For direct Occupational Therapy as set forth in the IEP at Respondent's Exhibit 36 of 30 minutes one time per week from the date the child went on homebound to the date the ARC develops a new IEP after the new FBA. The missed time from the last service of OT prior to homebound until implementation begins again shall be made up by adding an additional time each week as deemed appropriate by the ARC, but being no less than an additional 30 minutes a week. This reflects the fact that the OT was not provided while the child was on homebound, nor during the time at [REDACTED]. The ECAB believes the school is responsible for this time at [REDACTED] due to the fact the school failed in developing and implementing an appropriate IEP for a long period of time, leaving the parents with no choice but to try something else to educate Student.

ii. The ECAB has found that the behavioral component of the IEP was not properly addressed. Therefore, the ECAB finds the Student entitled to compensatory time by services being provided in the resource setting. The Student will need additional behavior supports as she transitions back into public school. Thus the child shall receive resource compensatory time directly one on one for her behavior issues for a period of time of at least 300 minutes per week from the time she transitions back until the ARC develops a new IEP and BIP after the new FBA occurs. Should the ARC feel additional time is necessary during this period, they are encouraged to add same.

3. The student's request for reimbursement of tuition and travel expenses is denied, except for the travel expenses to and from CrossRoads from the time she was released from inpatient care at [REDACTED] until she stopped attending classes at CrossRoads.
4. Future progress data should be compile in a manner such that resource and regular classroom settings are maintained separately and each IEP goal is monitored separately.

NOTICE OF APPEAL RIGHTS

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

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

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

