

**COMMONWEALTH OF KENTUCKY
KENTUCKY DEPARTMENT OF EDUCATION
DIVISION OF EXCEPTIONAL CHILDREN SERVICES
AGENCY CASE NO. 1718-04**

■

PETITIONER/APPELLANT

V. EXCEPTIONAL CHILDRENS APPEALS BOARD DECISION

KENTON COUNTY SCHOOLS

RESPONDENT/APPELLEE

STATEMENT OF FACTS

At the time of hearing, X.S. was a fourth grade student attending school in Kenton County. ■'s educational history began when he started attending Ohio Valley Voices, a program for deaf children for half days. TT 11/30/17, p 35. OVV would not allow ■ to continue attending after the 2011-12 school year because he was not progressing at the same rate as typical deaf children his age. He attended school in Kenton County that year. TT 3/8/18, p 77,83. The family began to notice regression with ■ as soon as he stopped attending OVV. TT 3/8/18, p 78. He then attended a private school, Redwood School, for the school year 2012-2013. TT 3/7/18, p 42-43. He returned to Kenton County School a few weeks before the end of the 2013 school year and attended extended year services that year. Thereafter, he attended Kenton County for the 2013-2014 school year for half days beginning in 2014-2015, 2015-2016, and 2016-2017 he attended full days in Kenton County. T 11/30/17, p 67, J 407.

■ has multiple disabilities including deafness, cortical visual impairment, an anomaly of chromosomes 17 and 22, developmental delays, and sensory processing disorders. J 145-146. Due to these disabilities, ■ has had an IEP for the entire time that he attended Kenton County Schools. ■ has had two (2) cochlear implants. Over time he has had ear infections and does not regularly wear the cochlear devices in any setting. TT 11/30/17, p 48-49, TT 3/8/18, p 67, 74-75

and TT 3/9/18, p 15-16. His IEP's are of record at Joint Exhibits 1, 12, 23, 37, 55, 70, 80, 96, 128, 144, and 159.

Ultimately, the mother of █████ requested the ARC on August 17, 2017 place █████ at a private program in Cincinnati, Applied Behavioral Services (ABS). The ARC declined to do so, and by letter dated October 21, 2017, █████'s mother gave notice of her intent to unilaterally place █████ at the ABS facility. The child began attending ABS on September 18, 2017 for three (3) hours each day. ABS is a yearround private school that provides educational services, outreach services and other therapies to children with disabilities in Ohio and Kentucky. It has been in operation for 19 years. TT 11/29/17, p 157-162, 166-167, and 280. It provides services based upon principles of applied behavior analysis, which is a science based and data driven model of the use of reinforcements and consequences to teach. Each skill a student needs to master is broken down into very small steps and each small step is taught until mastery is achieved before beginning the next step. TT 11/29/17, p 164-167, 226-229. Staff at ABS have a minimum of a Bachelor's Degree and most have advanced certifications as board certified behavior analyst, special education teachers and speech pathologist. TT 11/29/17, p 173-178. The representative of ABS testified that it can implement IEP's when students are placed there by an ARC. In addition, they can offer occupational therapy, speech therapy, music therapy and physical therapy. TT 11/29/17, p 196-197. ABS did not view █████'s IEP. TT 11/29/17, p 166. According to ABS's representative, at the time █████ started ABS's program he had very limited skills, academically or otherwise. J 462-464, TT 11/29/17, p 201-224, 229-230, 233, 235-255. His treatment plan at ABS is very detailed with anticipation of mastering eleven very specific goals and benchmarks. J 465-470. He receives a minimum of 120 minutes monthly of speech services at ABS. J 471. He has not slept

during his time at ABS or had behavioral problems of biting, scratching or pulling hair. TT 11/29/17, p 255.

Upon his enrollment at Kenton County, the child had made good progress at OVV and could utilize a few words and expressions. TT 11/30/17, p 36-39. At this time he was communicating via sign language with sign approximations. TT 3/9/18, p 22-23, 33. During his first year at Kenton County, [REDACTED] began to have some regression of skills he had developed at OVV. TT 11/20/17, p 42-43, 53-55.

[REDACTED] has had frequent health issues which have required him to attend many doctor and therapy appointments during the school day, creating many absences.

During the time [REDACTED] was enrolled at Kenton County, the school district offered extended school year services every summer, except the summer of 2012. During the summer of 2013, [REDACTED] attended 24 hours of ESY. During the summer of 2014, he attended 36 hours of ESY and during the summers of 2015 and 2016, he attended 60 hours of ESY. Despite this fact, he continued to show some regression. The school offered ESY during the summer of 2017, but [REDACTED]'s mother did not send him. J 95, 143, 210, 239, 242 and 327.

REVIEW OF IEPS

The IEP dated October 4, 2013 notes concerns with regression and no progress on current IEP goals. This IEP called for 560 minutes per week of special education with a DHH teacher and 100 minutes per week of special education with a special education teacher, 80 minutes per month of speech services, and 120 minutes per month of occupational and physical therapy in a half day program. J 45, 219.

The March 31, 2014 IEP called for a 100 minutes per week of special education with a DHH teacher (a 460 minute per week decrease), 600 minutes per week of special education with

a special education teacher (an increase of 500 minutes per week), 320 minutes per month of speech services (an increase of 240 minutes per month), 80 minutes each per month of physical therapy and occupational therapy (a decrease of 40 minutes per month in each area). This IEP was scheduled to begin when the child started full day programs on July 1, 2014. J 63. As discussed herein, the Statute of Limitations bars any claims the Petitioner may have that occurred prior to August 28, 2014.

The January 23, 2015 IEP included 660 minutes per week of special education with the DHH teacher (a 560 minute per week increase), 700 minutes per week of special education with the special education teacher (an increase of 200 minutes per week), and continued with 320 minutes per month speech services, and 80 minutes each per month for physical therapy and occupational therapy. J 78, TT 3/9/18, p 88.

The IEP was changed in less than two months on March 19, 2015 providing for 160 minutes per week of special education with the DHH teacher (a 500 minute per week decrease), 1200 minutes per week of special education with a special education teacher (an increase of 500 minutes per week), 240 minutes per month speech services (a decrease of 80 minutes per month), 120 minutes per month of physical therapy (an increase of 40 minutes per month) and continued with 80 minutes per month of occupational therapy in a full time program. J 87-88.

The February 19, 2016 IEP called for 150 minutes per week of special education with the DHH teacher (10 minutes per week decrease), continued with 1200 minutes per week of special education with a special education teacher, 240 minutes per month with speech services and 120 minutes per month physical therapy and 80 minutes per month of occupational therapy in a full time program. The conference report for the February 19, 2016 IEP shows regression, in speech, yet the services of the DHH teacher slightly decreased and speech therapy services remained the

same. J 87-88, 110, 268. The DHH teacher stated that during ■■■'s time with her he was positively impacted in his learning. She could not give any reason why her services were decreased by 510 minutes per week with the February 19, 2016 IEP. TT 3/9/18, p 89-90.

The February 14, 2017 IEP called for 450 minutes per week special education with a DHH teacher (an increase of 300 minutes per week), 600 minutes per week of special education with a special education teacher (a 600 minute per week decrease), 105 minutes per month speech therapy (a decrease of 135 minutes per month), 80 minutes per month of physical therapy (a decrease of 40 minutes per month) and continued 80 minutes per month of occupational therapy with a full day program. This IEP added a sign language interpreter for collaboration with the DHH teacher and special education teacher. J 155.

The April 18, 2017 IEP offered by the district included continuing 450 minutes per week of special education with the DHH teacher, 600 minutes per week special education with a special education teacher, 105 minutes per month of speech therapy, 80 minutes per month of physical therapy and 80 minutes per month occupational therapy. It added 90 minutes per month of special education with a teacher for the visually impaired. J 171. This IEP included a visually impaired teacher, but no services were provided and a teacher of visual impairment was not contacted to work with ■■■ until August 2017 when she was asked to attend ARC meetings. TT 3/8/18, p 251-252, 140, 146; P 390-403.

■■■ was placed in a DHH classroom during both 2011-12 and 2013-14 school years. The teacher in that classroom was fluent in sign language and used it consistently throughout the day to communicate with him. TT 3/9/18, p 10, 14, 19, 21, 33. It was known that use of a sign language interpreter was beneficial in helping ■■■ participate in his education, but the sign

interpreter was not added to his IEP until the 2016-17 school year and only in a collaboration method. TT 3/9/18, p 29-31, J 155.

At the ARC at the end of the 2013-14 school year, the school professionals had determined that [REDACTED] should be in a MSD classroom rather than the DHH classroom of previous years. This was conveyed to the mother during the ARC meeting. TT 3/9/18, p 25-27. Coincidentally at the same time the DHH teacher who was fluent in sign language was leaving her position and no longer available to be the child's teacher. The determination made by the district to recommend that [REDACTED] be in a functional mental disability class (FMD) was based upon his cognitive level of functioning. However, no professional has ever been able to ascertain a reliable standardized cognitive score for the child. J 438, 503, 515, 743, TT 3/9/18, p 58-70.

[REDACTED] was pulled entirely from the district when he was four years old an age that is critical to intensive support for speech acquisition and may have contributed to his slow progress. TT 1/9/18, p 214-215.

Preschool attendance was only taken at the time when students entered the room for the day not when they left early and is not mandatory. TT 3/8/18, p 7-8, 23-25.

It sometimes takes a child with cognitive impairment double the time or more to recoup from speech language regression after instruction breaks than it takes higher functioning children. When a student regresses, educators must adjust their present levels, rebuild basic skills, and begin to scaffold on more difficult skills. TT 1/9/18, p 5-25.

PROGRESS DATA

No data was kept on [REDACTED]'s progress on goals 1, 2 and 7 of his October 4, 2013 IEP goals. The benchmarks on the progress reporting data that were reported for goal 6 are different from

those for the goal on the IEP. Progress monitoring data for goals 3, 4, 5, 6, and 8 show that ■■■ did not master any goals. J 40-43, 792, 798, 801, 512, 823, 828, 832, 834.

On the March 31, 2014 IEP there was no progress data for goals 5 or 6. The monitoring data for goals 1, 2, 3 and 4 indicate that ■■■ did not master any of the goals. Those benchmarks for jumping and descending stairs were removed from the next IEP on March 19, 2015. J 58-61, 83-67, 795, 847, 853, 856.

There was no progress data for goal 5 of the March 19, 2015 IEP. The data for goals 1, 2, 3, 6 and 7 show that ■■■ did not master any of his goals on that IEP. J 839, 840, 844, 845, 849-852, 859, 863, 865, 869.

Progress data for the February 19, 2016 IEP shows that ■■■ did not master any of his goals J 870, 871, 873, 876-887, 889. There is no progress data in any IEP area, other than Readiness for the year 2016-17. The counting goal on J 841 was not monitored after February 22, 2014. Monitoring on the counting goal on J 843 stops on February 25, 2015.

The progress data for the 2014-15 school year consistently states that the student is on target to meet his goals. However, the goal concerning counting required 80% accuracy and he was only receiving 40% accuracy on average. J 839. Again, on J 840 the goals of choosing two numbers, the numbers 0-5 and 6-10, he was noted as being on target to meet the goal which was 60% and none of the reported data showed progress above 20%. On J 841 his math goal required 60% performance and he was noted to be on target to meet the goal, but only went above 20% on one occasion. On the math goal reflected on J 842, all data stopped on December 15, 2014. On February 24, 2015, even the collection of the math data on J 843 stopped. J 848 reflects that the teacher unilaterally determined not to take data on benchmark II on the reading goal until benchmark I had been met. In readiness skills on the goal concerning descending stairs while

switching lead legs, the goal was 80% but, the progress data reported that the student was on target to meet the goal when he was only at 20% on the goal, and had performed vary inconsistently. J 855 with regard to the readiness skill on play activity, the performance monitoring was all over the place with 0%, 25% and 50%. The requirement for mastery was 75% and he never reached higher than 50% except once which indicates lack of ability to meet the goal.

Further, J 863 reflects that the teacher again unilaterally stopped taking data on benchmark III and focused on using two pictures rather than three without the consultation of the ARC. Data regarding benchmark II of the reading goal for 2014 reflects that data was never taken on benchmark II at the teacher's sole discretion. J 848.

Further, none of the raw data behind the data sheets was ever produced. In 2012, the child was administered an IQ test through Cincinnati Children's Hospital and scored 50 which would be more than three standard deviations below the mean of 100. J 52 at J 0650. The school was unable to administer standardized cognitive testing due to the child's inability to respond, but did several tests for general intelligence and cognitive functioning through parent and teachers completing developmental profiles. The mother and teachers scored the child at the same cognitive level in the 2017 evaluations. J 20, p 515. It is standard practice to use this form of alternative testing to assess students' functioning level. TT 3/9/18, p 43-46. Through general intelligence and cognitive functioning testing by the psychologist in 2011 and during the 2014 reevaluation, the school psychologist determined that [REDACTED] was extremely low in overall intelligence and cognitive range. J 11, p 434-435 and J 19, p 503-504. The mother repeatedly asked that the school focus on the child's life skills rather than academics. J 1, p 328, 331.

The district provided the child with an iPad for communication purposes. It contained icons, rather than real pictures and required moving through multiple folders to find the category

and icon that [REDACTED] would need to express himself. He had difficulty using it and refused to use it at home. TT 11/30/17, p 42-43, 57; TT 3/8/18, p 49, 53-54, 158, 232-234; J 454, 551-552, 582, 584; TT 3/9/18 p 97 (Petitioner's Exhibit 14(JPEG 274-280)). The child's pediatrician, Dr. Susan Wiley, suggested that the icons were too abstract to build meaningful strategies, but the district made no changes to the iPad. JE 551, TT 3818, p 235.

The final progress report for the school year 2016-17 showed that [REDACTED] had made significant progress on his IEP goals from February to March 2017. However, there is no data in the record after February 7, 2017 with which to support this conclusory statement. TT 3/8/18, p 253-257, JE 397, 879-881. The child's mother asked the ARC for raw data to support the progress reported in May 2017 at the ARC meeting on August 14, 2017. The ARC agreed to provide the data, but it was never provided. Data collection was sporadic during the 2015-16 and 2016-17 school years. There are discrepancies between the raw data that was produced at the hearing and the indications of progress on the monitoring graphs produced at hearing. Further there are issues with monitoring data matching the IEPs goals. J 100-102, 144, 159, 327, 331, 870, 871, 873, 876-889; P 680-699; TT 12/1/17, p 31-88.

CHILD'S PROGRESS/REGRESSION

In May 2012 [REDACTED] could verbalize syllable shapes if segmented. He could also say some words. He was making progress on his speech goals and was using some sign language. By April 2017 he was no longer using words and no longer able to use any syllable shapes that he could in 2012. He was making no progress on his communication goals, had no reliable method of communication and no longer used signs to communicate. J 12-13, 159-163.

In May 2013 he was able to complete an arrival routine and count from 1-10. By April 2017, he was only able to follow his arrival routine 25% of the time. In March 2014 he could

answer questions given a choice of two pictures. By April 2017 he could only pick the correct answer out of choice of two 50% of the time. J 23-24, 159-163. In May 2012 he could use both hands cooperatively and could ascend stairs using alternating feet. By April 2017 he had difficulty moving his hands, fingers, legs and feet and had to have extra time for walking and extra space going up and down stairs. J 12-13, 159-163. In May 2012 he was able to play alone with a toy, watch other people, play simple games, smile at others, laugh, lift his arms to be picked up, and acted happy when his parent returned. By April 2017 he was unresponsive to other people, became frustrated and emotional more easily, stomped his feet, smacked his hands or face, yelled and became visibly upset. He has hit and scratched a teacher and his parent. J 12-13, 159-163.

In October 2013 he could play with a single toy for at least a minute. By April 2017 he was only able to hold a toy for 5 seconds. J 37-38, 159-163.

During 2014-15, ■■■ made some progress on his goals. Namely he made progress in imitating syllables, vowels and some word approximations. J 80. He was progressing with choosing an object from three, answering yes or no questions, using a few signs to communicate and had been observed using his communication device independently to communicate. J 238. He learned to hold a writing utensil and throw a ball to a partner. He was progressing on recognizing family members and his first and last name. J 258-259, J 71-72. The mother was happy with his progress that year according to the ARC Summary Report. J 258-259. At March 19, 2015 ARC meeting, ■■■ was between 40%-60% for most goals. He had regressed on his motor goals to only 20% success. After dropping his communication goal back to articulating vowels and syllables rather than whole words, he had begun to progress on that goal. J 258.

■■■ made some progress during the 2015-16 school year learning to climb stairs with no assistance while alternating feet, learning to go down stairs and learning to flip the pages of a book,

to bend his knees and jump with assistance. J 129-130. However, in February 2016 the articulation goals were reduced again from articulating words to articulating word approximations. J 100. The vocabulary goal was changed to engaging effectively in conversation with sign language for vocabulary support. J 116-118. Gross motor skills goal stayed the same with different benchmarks. J 101.

In the winter of 2017, the child was reevaluated, and the teachers and parent reported some areas of progress. He was making progress on communicating wants and needs, putting on a coat, identifying main ideas in a story although he did not articulate at all during the speech evaluation. J 506. He chose a toy and played with it for ten minutes, correctly identified three pictures, could perform scheduling task, correctly used a picture exchange to identify an apple, follow directions to put the apple picture in a box, and used an iPad device to correctly choose a friend's picture. J 507-509. Speech pathology notes reflect recent progress in picture exchange communication, but there was regression in producing sounds. The evaluation showed that the student was able to walk around the room, throw and catch a ball and step over a 10" balance beam without support. Occupational therapy reports showed that he could complete tasks and use his hands to remove items from his backpack. Adaptive behavior showed that he had learned to look at books, watch movies, have good relationships, take off his shirt, undo Velcro and zippers, use a fork for solid food, drink from a cup, take off his shoes, follow a classroom schedule and perform classroom chores. J 513-514. Reports were made at the February 2017 ARC meeting that [REDACTED] had progress on comprehending signs and an interpreter was added to his IEPs with new goals under that area. J 149-152, 155.

Behavior due to stimming was first marked as a concern at the February 2017 ARC meeting and positive behavior sensory supports were put into place at that meeting. But no monitoring was

set up and no actual IEP goal was changed. J 148. At the next meeting, Ms. Armbruster thought the behavior sensory strategies were working. J 330. Further modifications were made to the February 2017 IEP for the DHH to collaborate with the interpreter and special education teacher for sign language consistency throughout the day. J 155.

At the end of the 2016-17 school year, [REDACTED] could no longer count to 10, was unable to write his name or even draw a line on a piece of paper and had “lost many skills overall”. He had shown regression in every area. He was unable to read or do any type of math calculations. TT 11/29/17, p 255; TT 3/8/18, p 134, 175-176; J 301-304. Ironically, at this same time [REDACTED] scored proficient on his KPrep alternate assessment in the areas of reading and math with a score of an average of 9 points higher than the state mean. J 548.

[REDACTED]’s DHH teacher was with him longer than any other teacher in the district and stated that his cognitive ability was just below average. TT 3/9/18, p 58, 70.

The school district does not have any special education students placed in programs outside of the school district. TT 3/9/18, p 187-188.

OTHER INFORMATION

As early as June 3, 2011 the school was on notice that [REDACTED] had myopia and astigmatism. Further, in October 2016 after a Lyons Foundation vision screening, the school was on notice that [REDACTED] could have a visual impairment. In April 2017, the school identified [REDACTED] as a student with a visual impairment determining that he was legally blind with a vision of 20-260 in both eyes. J 318-319, 549, 624. The functional vision assessment conducted by the district on April 3, 2017 found that children with visual impairment, such as blindness, are often delayed in other developmental milestones. The school at that time declared the child qualified for special

education services under the additional category of visual impairment. However, it did not look at whether its FMD determination would be impacted by ██████'s blindness. J 319, 545.

The child engaged in stimming behaviors and beginning in November 2016 his physician began recommending that he have an occupational therapy evaluation to rule out sensory issues. School personnel were also aware of his sensory differences. However, the district never evaluated ██████ in this area. J 301, 580, 513-514; TT 3/8/18, p 240-241, 263. ██████ later developed behavior problems such as hitting, biting, screaming, and throwing himself on the ground when the school bus arrived. There were consistent problems with ██████ sleeping during the school day. The school district never conducted a functional behavioral assessment to determine the functions of these behaviors. TT 3/8/18, p 36, 247-248.

All occupational and physical therapy services were provided to the child by assistants, rather than actual therapist. The therapists' roles were limited to assessing the child. The mother was unaware of this until the hearing in this matter. Speech therapy services were often provided in a group setting, rather than an individual setting as set forth in the ARC. Again, the mother was not aware of this. TT 11/30/17, p 54-57, 110-113, R 62-166, 117-207; TT 3718, p 165-166. Notations in the Medicaid services logs for speech and occupational therapy show that ██████ did not receive services because he was absent. These attendance reports did not always match that ██████ was absent on the occasions in the service logs. Likewise, there were notations where services were logged in the Medicaid log, but according to attendance reports ██████ was absent on that date. There were also days the child missed services due to the absence of service providers. R 67-68, 71-72, 76-78, 80, 82, 84, 88-90, 100, 102, 105, 107-109, 112, 115-116, 118, 121-122, 124-125, 128, 136 147, 152, 175, 178, 186, 188, 208, 210, 211, 214, 215-216, 218, 219, 223, 224, 228-231,

235, 240, 243-245, 247-248, 250, 253, 254, 255, 257-263, 265, 270, 272-274, 277-281; J 410, 413, 414, 416 and 418.

Valerie Armbruster was [REDACTED]'s special education teacher in the MSD setting for the years 2015-16 and 2016-17. She was not certified as a special education teacher in the area of moderate to severe disabilities and had no work experience with such disabilities. She was not fluent in sign language and had only a short training on picture exchange communication system (PECS) that was used by [REDACTED]. That training was delivered by Danielle Rice of the school district who is not a certified PECS instructor. TT 11/30/17, p 169-171, 173-174; TT 12/1/17, p 235.

I. PRELIMINARY ISSUES

A. JURISDICTION BEFORE THE EXCEPTIONAL CHILDREN APPEALS BOARD IS ESTABLISHED

This is an appeal of a hearing officer's decision as permitted by 707 KAR 1:340 Section 12 which provides:

- (1) A party to a due process hearing that is aggrieved by the hearing decision may appeal the decision to members of the Exceptional Children Appeals Board 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 officer's decision.

The Student's appeal was timely requested.

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 the student's claims. *Schaffer v. Weast*, 546 U.S. 49, 57-58 (2005); KRS 13B.090. *See also, City of Louisville, Div. of Fire v. Fire Serv. Managers Ass'n by and Through Kaelin*, 212 S.W.3d 89, 95 (Ky. 2006; providing, "the party proposing the agency take action or grant a benefit has the burden to show the propriety of the agency action or entitlement to the benefit sought".

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

ECAB reviews the record 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 make an independent decision upon completion of such review. 20 U.S.C. § 1415(g).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 a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion." *Carlisle Area School District v. Scott P.*, 62 F.3d 520, (3d Cir. 1995). Such deference applies only to those situations involving record-supported credibility determinations. *Id.* at 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 not based upon different views about credibility of witness testimony. *Id.* at 529. The existence of conflicting testimony does not, by itself, warrant concluding 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.* at 529.

D. MOTION TO STRIKE

The Petitioner filed a Motion to Strike the portion of the Appellee's Reply Brief at page 19 that referred to happenings after the Hearing Officer's Decision and Order, and to strike Exhibit A attached to said brief. The ECAB sustains this motion on the grounds this information and document occurred after the Hearing Officer's Decision and Order and were not part of the record.

In opposition to this motion, counsel for the Petitioner writes, "The federal regulation

providing for the establishment of state-level appellate boards, such as the ECAB, states that state-level appellate boards should, "[s]eek additional evidence if necessary." 34 CFR § 303.446(b)(2)(iii)." However, it is not necessary for the ECAB to consider this information or document to decide the issues in this case. Counsel for the Petitioner also cites 20 U.S.C. §1415(i)(2)(C)(ii) to oppose the Motion to Strike; but, this statute refers to federal courts and does not apply to the ECAB. Further, the Respondent has not had an opportunity to offer testimony regarding this information or cross-examine the source of it. Finally, as the facts alleged in the Reply Brief and the attached exhibit occurred after the hearing in this case, they are not relevant to the issues herein.

Consequently, it is hereby ordered that the portion of the Appellee's Reply Brief at page 19 that refers to happenings after the Hearing Officer's Decision and Order, and Exhibit A attached to said brief are stricken from the record.

II. THE HEARING OFFICER CORRECTLY FOUND THE STATUTE OF LIMITATIONS ONLY ALLOWED RELIEF FROM AUGUST 28, 2014 FORWARD

The Petitioner argued that the Hearing Officer could rule that there were continuing violations from May 2013 when the child returned to the school district until the end of 2016-17 school year.

KRS 157.224(6) provides that claims must be brought within three years of the date the parent or eligible student "knew about the alleged action that forms the basis for the complaint unless a longer period is reasonable because the violation is continuing." There is no case law interpreting this provision of the statute. There is, however, case law on the continuing violation doctrine, an equitable doctrine sometimes applied in other types of cases to "bootstrap" claims outside an applicable limitation period. *Waltman v. International Paper Co.*, 875 F.2d 468, 475(5th

Cir.1989), applying the doctrine in an employment case, identifies as factors the identical nature of the acts, the frequency with which they are repeated, and, most importantly, whether the acts

should trigger an employee's awareness and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected....

If a parent knew of circumstances that allegedly constitute denial of FAPE and knew or should have known these circumstances would continue to exist. It was incumbent upon the parent to assert the student's rights.

Regardless, it is not reasonable to interpret a failure to find a child in need of special education or failure to provide FAPE as *per se* a "continuing" violation simply because it continues to exist. Such an interpretation would render time limitations meaningless in almost all cases. There is nothing unique in the circumstances of this case that makes it reasonable to extend the period limitations. Nor are there alleged or present circumstances of fraud or procedural irregularities that could make the three-year period inapplicable under other provisions of the statute.

III. THERE WAS NO DENIAL OF FAPE REGARDING VISUAL EVALUATION

At the trial level the Petitioner alleged that the school failed to properly determine the student's eligibility for special education under 707 KAR 1:310 by not performing visual screenings on the student prior to 2017.

This matter was not appealed by either party, but the ECAB agrees that the Hearing Officer correctly determined that there was no failure by the school district in this regard.

The school relied upon the parent's input that there was not presently a visual issue based upon previous reports from Children's Hospital. (H.O. F.F. #9). In the fall of 2016, the parent reported that a doctor had diagnosed cortical visual impairment. Prior to that diagnosis, the family

had been unaware of any visual problems. (TT 11-29-17 p. 101-105). At that point, consistent with state procedures and protocols, the school properly waited until receipt of the doctor's report to formally identify and set in process an evaluation to qualify the student for visual impairment. (12-1-17 p. 126-127, 134). The ARC was in the process of changing the IEP to add services to address CVI in 2017-2018 IEP (TT 11-29-17 p. 101) when the parent removed the student from KCS.

IV. LACK OF PROGRESS WAS NOT CAUSED BY AN INADEQUATE IEP OR FAILURE TO IMPLEMENT IN GOOD FAITH

The hearing officer gave weight to the student's lack of progress in meeting his goals in finding, implicitly if not expressly, that FAPE was not provided.

The school years in question were not without some bright spots. Although there may be discrepancies between data from different teachers on this point (12-1-17 p. 202), the school believed it was seeing real progress in iPad goals and matching goals. (12-1-17 p. 168). By the date of the 4/18/17 IEP, the student

has achieved 100% with making a preferred real choice from a choice of two pictures or objects, one desired....one undesired, by grabbing the preferred picture or object and handing it to his communication partner.

(12-1-17 p. 169-170). The student was able to match pictures of other students in the class with the iPad, but sometimes needed prompting. (11-30-17 p. 208-209). Prompting does not involve doing the task for the student or suggesting an answer, but doing something to draw his attention to the task at hand, such as touching his elbow or pointing at the paper (12-1-17 p. 138). He was able to match pictures of objects and vocabulary in a field of four on the iPad. (11-30-17. p. 210-211). Regarding benchmarks on the student's IEP goals, the due process coordinator testified that the student was matching picture-to-picture vocabulary on his iPad, following routines in the bathroom, and checking his schedule regularly. He sometimes needed prompting to go to specific

spots where his schedule was pointing. (11-30-17, 227). By the end of 2016-2017, the student was making progress with picture exchange (12-1-17 p. 136)

However, there also was proof of lack of progress and regression as well. Without parsing in this opinion the extensive proof presented by both parties over many days regarding progress and regression, the record shows that progress was modest at best and punctuated with regressions. However, ECAB believes that lack of progress and regressions were caused by factors other than a faulty IEP or faulty implementation.

One contributing factor was absences from school. The student missed frequently for appointments and frequent illnesses and was withdrawn temporarily for a hospitalization and surgery, resulting in regression, so when he returned the school had to start over. The regression was exacerbated by the nature of the student's disabilities. The student depends heavily on habits, and if he falls out of routine he will be unsuccessful until the habits are trained back again. (12-1-17 p. 133-134). As set forth in the hearing officer's decision, the student missed a lot of school in 2015-2016 and 2016-2017. When he returned to school, the teaching assistant and teachers tried to catch him up on what he'd missed. (TT 11-29-2017 p. 151). However, progress was continually erased by the regression caused by absences and breaks between school semesters.

In the unique circumstances of this case, the most important factor in assessing the significance of the student's progress and regression is the severity of the disabilities of the student and how they manifested over time. The student has a severe hearing impairment. During 2011-2012, at age 3, the student attended River Ridge (a Kenton County School) half-days and Ohio ValleyVoices for half-days. The grandmother's testimony reflects that when the student was age 3 and attending Ohio Valley Voices and River Ridge he could count, speak, and understood words.

(TT 11-29-17 p. 41). Similarly, the mother described in a memorandum given school personnel in 2014-2015, that before Redwood

he was saying a few words like, “Hi, bye, All Done, More,” and counting 1-10 with help. He would actually say this! It was adorable the way he helped me sing Old McDonald had a farm and would say “do,” or “duck” and I would do the motions. (P0353).

Then, at age 4, he spent 2012-2013 at a private school, Redwood, chosen by the mother. By the time the student returned to Kenton County Schools, a year later, there had been a dramatic change. The grandmother observed a regression during the year at Redwood, age 4, so by the time he returned to Kenton County in 2013-2014 “he wasn’t verbalizing like he had before.” (TT 11-29-17 p. 41). By the time he returned to Kenton County in 2013-2014, the student had lost most of the vocalizations he acquired in previous years at OVV and KCS (TT 2-2-17 at 168:6-16), something the ARC immediately recognized. The grandmother testified that by 2014-2015 he was no longer able to count. (TT 11-29-17 p. 54).

No one could figure out what had happened. The mother described asking Genetics at Children’s Hospital if they could provide a clue by comparing the student’s genetic makeup to other children with diagnosed conditions in their database, but there were none genetically like this student. (PO352). She described asking a developmental specialist if the student had autism and was told he didn’t, but might have some autistic qualities. (PO352). She described seeing multiple specialists and no one could figure out what the student had. The mother herself through her own research, came to believe that the student has rare condition called Childhood Disintegrative Disorder (CDD) or Heller’s Syndrome. (PO354). The mother is not a doctor, but the specifics of this disorder uncannily match the experience of this student:

CDD occurs in children who have had previously normal development who then appear to regress, sometimes rapidly, the condition can develop over time, but most commonly begins in the FOURTH YEAR OF LIFE. This to me is shocking. [The student] left OVV

at three, where he was speaking not great but speaking, and then left River Ridge for Redwood where he just stopped talking and progressing....[A] typical presentation would be of a child who is able to communicate in two or three word phrases losing this ability. They would eventually stop talking altogether or retain only fragments of their former speech.

(P0354, emphasis in the original). There was no evidence in the record that the CDD theory has been confirmed or ruled out by a medical professional.

As time passed, the student's conditions have worsened. His grandmother testified that the student's ability to sit and play has continued to decline over the past few years. (TT 11-29-17 p. 100). The student continued to manifest a succession of new, additional, physical problems involving heart surgeries, a cranial issue, tubes in his ears, and infections. Sometimes he would fall asleep in class (TT 11-29-17 p. 152), in part because of illnesses and medical conditions he was dealing with. (12-1-17 p. 148). There was a diagnosis of cortical visual impairment (CVI) in 2016-17, though the family had been unaware of any visual problems (TT 11-29-17 p. 101-105) and the ARC was in the process of changing the IEP to add services to address CVI in 2017-2018 IEP. (TT 11-29-17 p. 101).

V. THERE WAS NOT EVIDENCE SUFFICIENT TO FIND THAT THE STUDENT HAD POTENTIAL TO PROGRESS BETTER THAN HE DID

The evidentiary significance of progress, or the lack thereof, should be weighed in light of the student's potential for progress. "Where good-faith efforts have been made, the child's failure to achieve his goals does not equate to a failure by the LEA to implement the IEP." *J.K. v. Fayette Cty. Bd. of Educ.*, at p. 6, 2006 WL 224053 (E.D. Ky 2006). It is clear that more is going on with this student than deafness and a recently-diagnosed vision issue, but the lack of more specific diagnoses precludes generalizing that more progress can reasonably occur based upon the nature

of the diagnoses. The evidence at the hearing did not warrant concluding that the student had potential to progress more than he did during the years at KCS.

Even the mother seems to believe that the student's ability to meaningfully participate in an educational curriculum is *de minimus* or null. While the student's hearing impairment obviously is serious (if he is not using his cochlear device, he is completely deaf), when it comes to making educational decisions, the school believes the deafness is secondary in importance to his severe cognitive disability. (12-1-17 p. 161). The mother disagrees, but the school and the mother have different goals. The mom, since reenrolling the student at KCS in 2013-2014, repeatedly told the ARC that she wishes for her son to be taught only life skills, not academics. (J1 at J0328; J0331). The mother wants the student to have skills to make him more functional at home. Quoting the mother's correspondence with school personnel:

[T]hank you so much for being involved in [the student's] life. I cannot possibly thank you enough for all of the support and care you... have given [the student]. ...[W]e all just need to live in his fantasy world so we can live by his standards and keep him happy. That's my goal. **I could care less if he doesn't know colors, numbers, writing, reading, math, etc. I just want him to be able to communicate with me.** If we can get him to understand a few words ... I use on a daily basis, I will be happy. I don't want all those phrases on the iPad. If could just have a morning routine (drink, cereal, brush teeth), evening routine (dinner, drink, bath, teeth) then I think [the student] and I could survive without getting frustrated and irritated.

(PO354-355, emphasis added). While the mother's goal for the student is understandable and relevant to the happiness of them both, the school's legal obligation is to make appropriate *education* available, utilizing special education techniques and providing related services to the extent needed to advance that purpose.

If the student's experience at ABS is offered as proof of the potential of progress, it fails to win the point. When the student arrived at ABS for the initial assessment, he had been out of school for 4 months and the Executive Director of ABS testified that students who miss a summer

of instruction regress. (*Id.* p. 257). Progress during the student’s time at ABS appears, upon close examination, is progress from the student’s regressed condition when initially assessed, rather than progress beyond what had been attained at KCS prior to breaking for summer vacation.

In the present case, there is not evidence to conclude that the student had potential to do better than he did, but there is much evidence of a continuing decline medically and cognitively that appears unrelated to the goals or implementation of IEPs.

VI. THE IEPS SATISFIED FAPE

A. THE IEPS HAD APPROPRIATE GOALS

IEPs must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F. ex rel Joseph F. v. Douglas Cty. Sch. Dist, RE-1*, 137 S.Ct. 988,999, 197 L.Ed. 2d 335 (2017). In the present case, the goals in the IEPs were appropriate to this child’s circumstances. Many of the goals were not significantly dissimilar from goals at ABS, the treatment facility that Petitioner advocates as a placement for the student. The director of ABS testified that she is not aware of anything offered at ABS that is not offered at KCS. (*Id.* p. 283). Petitioner offered a great deal of proof at the hearing that FAPE was denied because there was not enough signing and not enough teachers who could sign fluently, but none of the individuals who work with the student at ABS sign because it’s not on the treatment plan (*Id.* p. 267).

Additionally, aspects of the non-IEP plan at the ABS treatment facility are concerning from an educational point of view. ABS is a certified “provider” under Ohio’s voucher program for parents who prefer private placement over public school programming and they have on staff licensed social workers, certified special education teachers, and occupational therapists. (TT 11-29-17 p. 160-161). However, ABS is not certified as a “school” under Ohio law. Instead, it is

certified as a “treatment facility.” (TT Id. p. 287). The grandmother testified that the student is “happier” since enrolling in ABS, but there are no educational goals for the student at ABS.- it’s purely therapy.(11-29-17 at 265:5-10).

The student’s treatment plan at ABS is not based upon his IEP, but is based upon his ABS assessment. (*Id.* p. 288) and his service plan is a function of what the assessment suggests limited by what the customer can pay for. (*Id.* p. 291). Ninety-percent of the students at ABS are autistic. (*Id.* 281). While this student may have autistic qualities, a development specialist consulted by the mom said the student is not autistic. (PO352).

The student has severe cognitive impairments that affect the student educationally. His low-functioning cognitive abilities manifest in an inability to follow directions, apparent inability to understand, and other low-functioning behaviors typical of low cognitive students. (12-1-17 p. 142). The school stated in correspondence to the mom on 10/7/16 (11-30-17. p. 224) that

The most important thing we discussed was that ■’s hearing impairment is really second to his cognitive delay disability. So in making educational decisions, we certainly need to be aware of his cognitive needs.

The student’s primary classroom teacher, testified that

[w]e were seeing issues with the cognitive and the ability to attend and things like that more so than we were having issues with the hearing...[That] was the first priority for us ... So we made sure that when ... we were working on activities with him, that we were keeping that in mind before the deaf and hard of hearing.

(11-30-17. p. 226-227). But notwithstanding the important role cognitive impairment plays, ABS has not looked at the student’s IQ scores and has no data regarding his very low cognitive functioning. (11-30-17. p. 273), but acknowledged that low cognitive functioning could affect the ability to understand information receptively and auditorily. (11-30-17. p. 274).

The student has a cochlear implant to aid his hearing problem, which consists of an internal component surgically implanted and an external component that picks up sound and transmits it.

There was testimony that therapists say, and the family understands, he should wear it as much as possible. (11-29-2017 p. 96). His teacher over the last two years required the student to wear his cochlear transmitter, but the same requirements were not being enforced at home. (12-1-17 p. 131). Without the cochlear transmitter he is 100% deaf. (12-1-17 p. 133). The teachers frequently checked the settings on his device to make sure he was hearing as much as he could. (12-1-17 p. 139). He was inconsistent in responding to someone calling his name, but did so more frequently when he was wearing his transmitter. (12-1-17 p. 140-141). The school was not always successful in getting him to wear the device, but the efforts they made were consistent with providing FAPE. Yet ABS, conducted its assessment testing without the student wearing his cochlear hearing transmitter, which meant assessments concerning receptive understanding were under the condition of visual input only. (11-29-17. p. 276-277). There was testimony about KCS's efforts, sometimes successful, sometimes not, to have the student wear the transmitter, but at ABS, the student is *never* required to wear his cochlear device (Id. p. 293) because it causes him discomfort. (Id. p. 298).

From a FAPE point of view, the school's IEPs also are superior to the non-IEP plan at the ABS treatment facility because they also include educational goals and provide some contact with non-disabled peers. The student's teaching assistant at KCS testified that the student spent time with the regular education population for special classes, such as music, and that he participated and enjoyed the regular ed. (TT 11-29-17 at p. 143).

B. SPECIAL ED RELATED SERVICES WERE APPROPRIATE

Related services that were provided by the school were appropriate and reasonable. Petitioner presented proof to the effect that reduction of overall minutes of related services in the face of no significant progress was denial of FAPE, but there was no proof that *more* of anything

would necessarily result in an educational benefit. Changes the ARC made in minutes of related services had a rational basis. For example, minutes in special education were decreased, but at the same time minutes with DHH teacher were increased. (12-1-17 p 102-103)

Regarding reductions or increases in minutes of particular types of services, the OT testified (11-30-17 p. 105) that

[t]he ARC decides on and prioritizes... what goals are most important. The services and the minutes vary according to the need for the expertise of the therapist, because sometimes... it might be a goal we can support, the teacher can carry that out without...our expertise, especially if we've laid the groundwork for it.

Similarly, the third-grade teacher testified that special ed minutes in the MSD classroom were reduced to increase special ed minutes with the deaf and hard-of-hearing teacher based upon data KCS had collected. (11-30-17 p. 190)

C. KCS PERSONNEL WERE QUALIFIED

The personnel implementing the IEPs at KCS were qualified. Petitioner presented evidence that they could have been *more* qualified, but “any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.” *Andrew F.* p. 999. Similarly, the practice at ABS of conditioning behaviors by breaking them down into smaller parts for purposes of monitoring their progress (See 11-29-17 p. 229-230) seems logical, but does not make the manner in which KCS pursued similar goals unreasonable.

VII. THE SCHOOL MADE GOOD-FAITH EFFORTS TO IMPLEMENT THE IEPs

Changes were made in the IEPs and related services to adjust to the ever-changing situation of the student. For example, some goals in his 2014 IEP that were not in his 2015 IEP reappear in his 2016 IEP (12-1-17. p. 25) because of regressions. As described hereinabove, rationally-based adjustments were made in special education and other services based upon what was happening

with the student and the student's changing needs. His teachers observed that the student benefited from small group work because he mimicked the behaviors of successful students. (12-1-17 p. 138-139) and adjusted accordingly.

The school also tried to adjust to the requests of the mother. The student engaged in "stemming behaviors" such as eye closing, hand-clapping, and lying on the floor, but the mother told the school not to stop them because they made the student feel better (12-1-17 p. 149), even though the behaviors interfered with his learning (12-1-17 p. 150). When the mother requested an interpreter in October of 2016, the school responded that they "would give it a shot" adding 60 minutes of interpreter time (11-30-17., p. 223-224). In addition to having the student wear the cochlear device, the teacher communicated with basic school functional signing. When he was with Ms. Osborne and Ms. Wolfzorn, both fluent signers, they signed with him. (12-1-17 p. 136).

The school also attempted to coordinate its work with outside therapists hired by the mom. A speech pathologist at Children's Hospital, hired by the mother to provide services privately, met with the student's teacher and recommended continuing to work on the picture exchanges. (12-1-17 p. 147). That speech pathologist was doing picture exchanges with the student very similar to what the school was doing and the school, as a result of the meeting, adjusted some of the details of their picture exchanges to correspond to what the speech pathologist was doing. (12-1-17 p. 185-186).

The student received one-on-one attention from the special education teacher, the speech therapist, the PT, the OT, and the interpreter. (11-29-17 at p. 144-145). There was some proof that some scheduled services were missed due to absences or meetings of therapists, and it was unclear whether all of those were made up, but services were provided substantially as required under the IEPs. Adjustments in the amounts of minutes were rationally-based, as described elsewhere herein.

VIII. KCS FAILED TO ADEQUATELY KEEP RECORDS DURING 2015-2016 AND 2016-2017, WHICH CONSTITUTED FAILURE TO PROVIDE FAPE

Because of the severity of the student's impairments and inability to communicate, it is difficult to know whether he truly understands when he makes a choice between objects and pictures. (12-1-17 p. 94 – 95). His teacher testified that there was no way to determine whether the student was guessing answers or making them with understanding (11-30-17 p. 236-237). Because the student's ability to communicate is so limited, there's no way to double-check the results to try to determine whether he is simply guessing (12-1-17 p. 20, 22). This is *not* the fault of the school, but simply part of the student's unique circumstances stemming from his disabilities.

Nonetheless, ECAB found the school's data-keeping troubling. For example, Ms. Armbruster did not keep data on two of the student's IEP goals in fall of 2015 prior to October 13 due to "development of routines." It is unclear from the record why she did not keep data on these two goals, but the witness testified that she collected data on the other goals and that data on the student's IEP goals were collected and kept in a separate data set by Ms. Wolfzorn, his hearing-impaired teacher, and that both data sets were presented to the ARC (11-30-17 p. 230-231). Regarding Benchmark number 1, given two pictures the student will answer verbal yes/no questions about the text with 80% accuracy, Ms. Armbruster kept the raw data and presented it to the ARC. (11-30-17 p. 232-234). However, regarding Benchmark number 2, given picture choices, the student will answer questions about key details in the story, in an ARC meeting in August of 2017, notes state under behavior observations that, while [REDACTED] makes choices when prompted to do so, "data does not support verification that he is making a certain preferred choice or simply quick choice in order to move on." (11-30-17 p. 235).

Wolfzorn's monitoring data goes from 3/26/15 to 2/18/16 (Id. p. 10) for the IEP ending in February 2016, but the school did not provide data sheets for Armbruster on the student's goals

after 11-17-15. (12-1-17 p. 9) for the IEP that ended in February of 2016. Armbruster testified that she believes she continued to collect data after 11-17-15 but could not account for why the data had not been provided (12-1-17 p. 14, 16). On the goal of counting the number of objects in a set of one to five, Armbruster testified that she kept data on the goal of counting from one to five, but not on counting from six to ten, because until the student had made progress on one to five it would not be attempted (12-1-17. p. 12), though elsewhere it appeared that Wolfzorn had kept data on the six-to-ten goal.

The 2016 IEP began 2/19/16. There were only five data points entered by Armbruster from 9/8/16 to 2/13/17 for goal #1 (12-1-17. p. 32) although Armbruster testified that the speech teacher was collecting this data as well. Data on 2016 IEP shows student was able to independently remove his communication device out of his backpack and carry it. (Id. p. 33). For the 2016 2nd goal, fourth benchmark, regarding sequencing two buttons on his device to create unique phrases, Armbruster collected only 7 data points, all of which were zero, but said part of it had to do with access to the student since he missed so much school. (Id. 36-37). Regarding the third 2016 goal, reporting to a given destination, Armbruster collected 4 data points, all yeses, and then switched to documenting a different way involving how many out of five attempts were successful. (Id. p. 37-38). There were three data points collected by Armbruster in the 2016 IEP regarding ability of the student to put his arms in the sleeves of his coat. (Id. p. 39). Armbruster collected 4 data points in 2016 IEP on alternating feet going up and down stairs. (Id. p. 40). Armbruster was monitoring jumping up and down goal with yes and no, but Wolfzorn was monitoring as a percentage. (Id. p. 41). Regarding selecting correct answer from four choices concerning main idea of text, there are two places in the record in Armbruster's enters data dated 3/31/16, one of which is a zero and the other is a 20%. (Id. p. 42-43). Multiple raw data entries collected by Armbruster for one of the goals on

the 2016 IEP are not reflected on a graph of the progress on that goal (Id. p. 48-50) although it was pointed out that the graph is not dated and might be from the 2015 year IEP. Armbruster could not tell whether a document reflecting data she collected concerning the speech goal was for the 2015 IEP or the 2016 IEP (Id. p. 52). In several instances, this witness could not tell whether data collected, presented to the school as part of the due process folder disclosure, was for 2015 or 2016 or was data she collected for the IEP or was classroom monitoring she did for herself. (Id. p. 60-66). Some of the raw data upon which graphs were based was not available. (12-1-17 p. 68, 75). In some instances, school personnel were unable to interpret the meaning of the notations on the data collected. (12-1-17 p. 72).

The foregoing are examples of errors, inconsistencies and omissions in record-keeping. While ECAB does not, in this opinion, intend to establish a standard of what is required or appropriate record-keeping in all cases, we find that enough evidence in this case to conclude that record-keeping during 2015-2016 and 2016-2017 was not sufficient to meet the requirements of FAPE. There is no evidence that harm resulted that can be remedied by compensatory education or additional services, but ECAB will order a protocol for future record-keeping corresponding to the period we find that records were not adequately kept that is designed to fit the unique facts of this case.

IX. THE STUDENT IS NOT ENTITLED TO REIMBURSEMENT OF EXPENSES FOR PRIVATE PLACEMENT

The Petitioner is not entitled to compensatory education. Pursuant to 707 KAR 1:370:

- (1) An LEA shall make FAPE available to each child with a disability. If a parent decides to place his child with a disability in a private school after the offer of FAPE, the LEA shall not be required to pay for the cost of the private education.
- (2) 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.

To obtain financial reimbursement, the parent must show: (1) the LEA did not offer FAPE in a timely manner, and (2) the private placement is appropriate.

(1) Here, the Respondent offered FAPE for the 2017 – 2018 year to the Petitioner in a timely manner.

The parent placed the Petitioner in a private school after the offer of FAPE. Consequently, the LEA is not required to pay for the cost of the private education. The IEP goals established for the 2017 – 2018 year were appropriate and implemented in good faith. They were continually reviewed and refined by the ARC based on the teachers' and therapists' notes of progress. The proposed 2017 – 2018 IEP included the support of an American Sign Language interpreter. (J#1). In the 2017 – 2018 year, the Respondent did not have the same issues monitoring data as it did in the 2015 – 2016 and the 2016 – 2017 years. At the ARC held August 14, 2017, the Respondent offered to reevaluate the Petitioner, but the parent did not make him available. (J2 at J031).

(2) Further, if the Respondent had failed to offer FAPE in the 2016 – 2017 year, the Petitioner's parent would still not be entitled to reimbursement for educational expenses because the private placement to ABS was not appropriate.

To receive reimbursement for unilateral placement in a private school, a parent must also show the private school in question is "appropriate." A parent is not entitled to reimbursement for a private school placement unless it offers their disabled child an education otherwise proper under IDEA. *Berger v. Medina City School District*, 348 F.3d 513, 523 (6th Cir. 2003). Similarly, the Sixth Circuit held that a private school is appropriate if it is "proper under the [IDEA]." *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 770 (6th Cir. 2001). The Supreme Court held

that the education offered by a school is "proper" under the IDEA if it is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

Here, ABS provided no curriculum services during the 2017-2018 school year. Instead, ABS provided the Petitioner with "treatments" under a "treatment plan." There was no academic instruction. There was no evidence that anyone at ABS reviewed [REDACTED]'s IEP. During the 2017-2018 school year, a behavior analyst, a behavior technician, a speech and language pathologist, and an intervention specialist worked with [REDACTED] (T.T. 11- 29-17 at 173:1-13.) However, he was not taught academics.

The Petitioner had "transition goals" while at ABS which included "walking nicely, walking with a peer, hanging up a book bag, and following a morning routine. (T.T. 11-29-17 at 187-189.) ABS also taught the Petitioner toilet training, feeding skills, independent development, and peer social engagement. (T.T. 11-29-17 at 187-189.) But as the record indicates, ABS provided therapy, not a general education curriculum as required by the IDEA and Kentucky regulations. 707 KAR 1:320 Section 5(7)(b)(1).

Further, 707 KAR 1:350 Section 1 provides, "An LEA shall ensure that to the maximum extent appropriate, children with disabilities, including children placed by the LEA in public or private institutions or other care facilities, are educated with children who are nondisabled." At ABS, [REDACTED] did not have contact with children who were not disabled.

In the instant case, the Petitioner has not shown that the Respondent failed to offer FAPE for the 2017 – 2018 year. Further, the Petitioner has not established that ABS is an appropriate placement for [REDACTED]. Consequently, the Petitioner's mother is not entitled to reimbursement of expenses for the year the Petitioner spent at ABS.

X. ATTORNEY'S FEES

Pursuant to 20 USC 1415(I)(3) only a district court has jurisdiction to award attorney's fees. Therefore, the ECAB does not make a ruling on this matter.

ORDER

Based upon the foregoing it is the Order of the Exceptional Children Appeals Board as follows:

1. The proper statute of limitations in this matter began August 28, 2014.
2. The evidence submitted by school district as part of Appellee's Reply Brief on page 19 shall be stricken from the record.
3. The school district did not commit any violation of IDEA in identifying and testing the child for visual impairments.
4. The IEPs were sufficiently developed.
5. The school district's failure to keep appropriate data created a violation the school district for school years 2016-17 and 2015-16.
6. The school district is not required to reimburse the mother for private placement of the child.
7. For a period of two school years, the school shall collect and provide to the parent at the end of each month a copy of all of the raw data collected by the school in implementing the student's IEP and the identity of the school personnel who collected the data.
8. No award of attorney's fees can be made by this panel.

NOTICE OF APPEAL RIGHTS

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

CFR 300.516 state:

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.

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 party 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 6th day of February, 2019, by the Exceptional Children's Appeals Board, the panel consisting of Mike Wilson, Kim Hunt Price, and Dennis Lyndell Pickett.

EXCEPTIONAL CHILDREN APPEALS BOARD

BY: /s/ *Kim Hunt Price*

CERTIFICATION:

The original of the foregoing was mailed to Hon. Todd Allen, KDE, 300 Sower Blvd., 5th floor, Frankfort KY 40601, with copies to Hon. Marianne S. Chevalier, Attorney for Petitioner, Chevalier & Kruer, P.S.C., P.O. Box 66, Walton, Kentucky 41094; Hon. Teresa T. Combs, Mazanec, Raskin & Ryder Co, L.P.A, 230 Lexington Green Circle, Suite 605, Lexington, KY 40503; Hon. Paul Whalen, Hearing Officer, [REDACTED] [REDACTED] [REDACTED] [REDACTED], this 6th day of February, 2019.

/s/ *Kim Hunt Price*