

**KENTUCKY DEPARTMENT OF EDUCATION
DIVISION OF LEARNING SERVICES
AGENCY CASE NO. 1718-16**

█

PETITIONER

v.

█

COUNTY SCHOOLS

RESPONDENT

FINAL DECISION AND ORDER

This appeal comes before the Exceptional Children Appeals Board (hereinafter “ECAB”) following a hearing conducted by Hearing Officer Paul L. Whalen. The ECAB panel, consisting of Kim Hunt Price, Mike Wilson and Susan Gormley Tipton, Chair, was appointed to consider the appeals of the Petitioner and Respondent, both of which were timely filed. The parties submitted written briefs. These documents have been reviewed and carefully considered by the ECAB.

Having reviewed the administrative hearing record in its entirety, together with the briefs of the parties, this ECAB issues its Final Decision and Order.

I. FACTUAL SUMMARY

Petitioner is a 10 year old male who, at the time of the filing of the due process request, resided in Respondent’s school district. As the result of an initial pre-school screening and subsequent Admissions and Release Committee (ARC) meeting conducted in 2012, an Individualized Education Program (IEP) was established for Petitioner so that he could receive speech and language therapy services. In February of 2016, Petitioner was identified as a student with developmental delay in the social-emotional area, as well as speech-language impairment.

Petitioner attended [REDACTED] Elementary School during his pre-school, kindergarten and first grade years. During his second grade year, Petitioner switched to [REDACTED] Elementary. He was home schooled for his third (2017-2018) and fourth (2018-2019) grade years.

At issue in this proceeding are IEPs that are dated February 24, 2016 and February 22, 2017. These IEPs were placed into effect during Petitioner's first and second grade school years. Reading and math were areas of concern on Petitioner's report card during his kindergarten, first and second grades. Accordingly, he received "response to intervention" (RTI) services during this time in reading. RTI is a program consisting of three intervention tiers to assist students in various areas and identify their progress.

Petitioner filed this due process action on December 22, 2017. At a resolution session conducted on March 22, 2018, the District agreed to conduct its own reevaluation of Petitioner and to provide an independent evaluation. After reviewing the results of the reevaluation conducted by Respondent, the school district determined that Petitioner was eligible under the Specific Learning Disability (SLD) categories in math reasoning and Other Health Impairments (OHI) in addition to his prior speech-language impairment determination. At a June 15, 2018 ARC meeting, Petitioner's parents refused to provide consent for Petitioner to receive services for SLD in math reasoning and OHI.

The independent evaluation was conducted by Dr. Teresa Izquierdo. The ARC reconvened on September 10, 2018 to consider that evaluation and concluded that Petitioner was eligible for services under the category of SLD in math calculation in addition to the previously identified eligibility categories. An ARC was conducted on November 29, 2018 to develop a new IEP for Petitioner, but his parents ultimately rejected the IEP as it did not address to their satisfaction his processing delays, reading struggles or written expression.

II. PRELIMINARY ISSUES

Jurisdiction for the Appeal. Appeals of a due process hearing decision are permitted by 707 KAR 1:340, Section 12(a), which states:

a party to a due process hearing that is aggrieved by the hearing decision may appeal the decision to the members of the Exceptional Children's Appeal 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 appeal of this matter was timely filed.

The Student Bears the Burden of Proof. The party seeking relief bears the burden of proving, by a preponderance of the evidence, its entitlement to relief. In this case, the Student requested the due process hearing and therefore bears the burden of persuasion on each element of the Student's claims. *See Schaffer v. Weast*, 546 U.S. 49, 57-58 (2005) and KRS 13B.090(7). Legal Standard for Provision of FAPE. *Board of Education of Fayette County v. L.M.*, 478 F.3rd 307, 314 (6th Cir. 2007) describes the obligations of a school district in providing FAPE to a student determined eligible for services under the IDEA, as follows:

Under the IDEA, the School is required to provide a basic floor of educational opportunity consisting "of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Rowley*, 458 U.S. at 201 102 S.Ct. 3034. There is no additional requirement, however, "that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children." *Id.* At 198, 102 S.Ct. 3034.

Emphasis in L.M.

The U.S. Supreme Court recently revisited the *Rowley* decision in *Endrew F. v. Douglas City School District*, 137 S.Ct. 988 (2017). In *Endrew*, the Court considered a disagreement between the parents of a child with autism and the school district regarding development of an

appropriate IEP and the provision of FAPE to a student with autism, whose behaviors impeded his ability to progress academically. In discussing the differences between *Rowley*, where a deaf student easily advanced from grade to grade despite missing information due to her deafness, and *Endrew*, where the parents alleged inadequate IEPs were a denial of FAPE, the Court expanded our understanding of *Rowley*, without increasing or decreasing the obligations of a school district.

The Court opined that in order to “meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.” 137 S.Ct. 999. The IEP must *aim* to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and *functional advancement*. *Id.*, Emphasis added. The Court further stated:

[E]ducational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.

137 S.Ct. 1000.

The Court reiterated its long-standing position that an IEP must have as its target substantial academic and functional progress for the student, and that the specially designed instruction and related services must be determined by what is appropriate for the student in the student’s unique circumstances. The Court further refused to “attempt to elaborate on what ‘appropriate’ progress will look like from case to case.” 137 S.Ct. 1001.

It seems clear that if an IEP has been developed and implemented taking into account the unique circumstances and needs of a student, it is not necessarily a denial of FAPE simply because a student does not achieve the goals of the IEP. Although little attention was paid to this distinction, *Endrew* does seem to acknowledge that education includes both academic and functional

advancement. In evaluating allegations of denial of FAPE herein below, the ECAB considers such allegations in light of these cases.

The ECAB Reviews the Record de Novo. Kentucky has a two-tier administrative process, which requires the appellate review to be conducted in accordance with 20 U.S.C. § 1415(g). *See also* 707 KAR 1:340, Section 12.

The ECAB is required to conduct an impartial review of a hearing decision and to make its own, independent decision upon completion of such review. 20 U.S.C. § 1415(g). The ECAB must also review the entire hearing record before making its decision. 34 CFR § 300.514(b)(2). The only limitation to this required de novo review pertains to Hearing Officer findings based upon credibility determinations. Even credibility judgments may be overturned, but only if non-testimonial extrinsic evidence in the hearing record would justify a contrary conclusion or if the hearing record, read in its entirety would compel a contrary conclusion. *Carlisle Area School v. Scott P. By and Through Bess P.* 62 F.3rd 520, (C.A. Pa.) (1995). In other words, credibility determinations supported by the record require deference to the Hearing Officer's determinations. The ECAB may make fact findings contrary to those of the Hearing Officer as long as the ECAB's fact findings are supported by substantial evidence in the record and not based upon different views about credibility of witness testimony. *Id.*, p. 529. The existence of conflicting testimony does not necessarily mean that any particular finding of fact was implicitly a credibility determination by the hearing officer. *Id.*, p. 529.

Decision by the Hearing Officer and Issues before the ECAB. The Hearing Officer found that Respondent successfully fulfilled the "Child Find" obligations set forth in 707 KAR 1:300, that the Respondent had no obligation to pay the independent evaluator to be present at the ARC after

she conducted her evaluation of Petitioner, and that the 2014 and 2015 IEPs were appropriate. These findings were not appealed.

The Hearing Officer made three additional findings which have been appealed to the ECAB and are thus the subject of this decision. First, the Hearing Officer found that the 2016 and 2017 IEPs were inappropriate as they did not address the February, 2016 evaluation which indicated Petitioner was having issues with hyperactivity and mathematics. Second, he found that the IEP proffered in 2018 was inappropriate as it did not adequately address the recommendations of the independent evaluator. Third, the HO found that Petitioner did not meet its burden of proof regarding an award of compensatory education, noting that in the event Petitioner re-enrolls in the Respondent's district, the matter should be remanded to the ARC for a determination.

III. THE STUDENT DID NOT PROVE THAT FAPE WAS DENIED IN 2015-2016 OR 2016-2017

The student was found to have learning disabilities in 2018 by evaluations conducted both by the school and the student's independent evaluator. The hearing officer found, among other things, that FAPE was denied due to inappropriate IEPs adopted in February of 2016 and in February of 2017. The chronological summary and analysis below will address whether the student should have been re-evaluated for learning disabilities sooner than 2018 and whether the 2016 and 2017 IEPs fashioned by the school were appropriate.

KINDERGARTEN

The student initially qualified in pre-school as a student with speech language disability in 2012 and at all relevant times has received speech services for that disability. During 2014-2015, the student attended kindergarten half days. According to [REDACTED], his teacher, the student struggled with letter and number identification and pre-reading skills (Transcript of Evidence, hereinafter "TE" p. 13). He received RTI in reading in addition to his speech services. (RE 107-

108).¹ He also received special assistance in math as needed. (TE p. 33). In December of 2014, the ARC reviewed his progress on speech goals and agreed it needed to re-evaluate the student's articulation skills. (PE 108-110). The ARC reconvened March 16, 2015, to review the evaluation and determined the student eligible in Speech Language Impairment (SLI) and approved an IEP increasing speech and language therapy to thirty minutes, six times per month. (PE 117-120; 229).

During the 2014-2015 kindergarten school year, the student had 13 ½ absences and 15 tardies which could have impacted his progress (TE p. 36). However, the student showed a steady increase in skills (TE p. 32). He received mostly “progressing with help” marks on his report card. (PE 001). ██████ saw nothing alarming for a kindergarten student at that time (TE p. 26) and thought the student was progressing normally for a kindergarten student. (TE p. 42).

FIRST GRADE

During the 2015-2016 first grade year, the student continued to receive RTI in reading and speech interventions (PE 122-123) as well as one-on-one attention in math (TE p. 23). However, ██████, his first-grade teacher, testified that he stood out as struggling and was moved to TIER 3 RTI in November of 2015 (TE p. 62), prompting a referral for special education evaluation in November (TE p. 63) by the teacher with which the parents concurred (TE p. 58). ██████ suspected the disability of developmental delay. (TE p. 59). The ARC convened on November 23, 2015 to discuss the referral and agreed to evaluate for eligibility under developmental delay (PE 122-129) in addition to his existing eligibility under SLI.

The ARC met to discuss the results of the evaluation on February 24, 2016, found the student eligible under both SLI and social-emotional developmental delay (PE 122-141; TE p. 76),

¹ Both party's exhibits were marked by tab numbers as well as Bates stamped numbers. For simplicity, this decision will reference the Bates stamped page numbers. Petitioner's exhibits are referred to as PE; Respondent's exhibits are referred to as RE.

and revised the IEP to provide 10 minutes of collaborative special education services, two times per day, 15 minutes of resource room special education services, two times per week, and 50 minutes of speech language therapy, three times per month. (PE 243; TE p. 76). [REDACTED], the student's teacher, testified that developmental delay was the appropriate disability category based upon her own observations and the data on the Conners form. (TE p. 100). Regarding the student's argument that testing for SLD should have occurred as well, [REDACTED] testified that it is the norm to treat difficulties in kindergarten and first grade as developmental delay because they often grow out of the problem (TE p. 71-72) and students don't qualify for cognitive testing at that age (TE p. 102). [REDACTED], the school psychologist, testified that it is not appropriate to evaluate in first grade for SLD because usually students are suffering developmental delay and will grow out of it. (TE p. 235) It's the accepted practice to address attention issues instead. (TE p. 235). When pressed, [REDACTED] explained as follows:

Q. Okay. So if we got a Tier 3 student, the ARC decides there's concerns in all core content areas, including math and reading, does it not make sense to evaluate that student in those areas as well as looking at the focus and the inattention?

A. If you're talking about a six-year-old student versus a 10-year-old student, generally a six year old you would not look at that. It's very difficult to identify a learning disability in a student of that age because of the breadth and scope of the content at that point. They've been provided instruction in letter names, in letter sounds, the beginnings of decoding, so it's really difficult to show that there's a significant disparity between them and their peers at that point.

(TE pp. 237-238).

It was thought that addressing the hyperactivity, or inability to focus, was the key to addressing academic issues. While the IEP had no academic goals of its own, the student continued to receive RTI (except math RTI, which was not provided to students that young at that time) and special attention from teachers. (TE p. 85). Special education teacher [REDACTED] would come to

the room and help the student focus, and also pull him out for allocated minutes. (TE p. 88). In addition to his inability to focus, another reason for the student's academic difficulties, not addressable with academic goals, are the student's absences and tardies. The student had 12 tardies and 25 absences for 2015-2016. (TE p. 93). A struggling student who misses instruction is likely to fall further behind. It is not surprising that the student was still reading at beginning first grade level as the end of first grade approached. (TE p. 63). ██████████, the school psychologist, testified that such frequent absences can impact performance because lack of instruction creates problems with the ability to attain specific skills. (TE p. 229). The tardies also affected the student's special education hours because the time missed due to arriving late was the same time scheduled for his special education services. (TE p. 93).

██████████, the student's special ed teacher, testified that her job was to help student meet goals 1,2,3 on February 14, 2016 IEP regarding focusing, using appropriate language and attending to task (TE p. 436). She collaborated with the teacher and sometimes pulled the student out of the classroom so he could complete work without distraction (TE pp. 431-432). She testified that "he completed his work very quickly once we came out of a less [sic] distractive environment." (TE p. 432). ██████ kept data on how many prompts he needed to be redirected (TE pp. 433; 439-440). Regarding the absence of academic goals, ██████ testified that the goals in the IEP were appropriate because the main concern was inability to focus rather than academics per se and that the academic difficulties were a result of the underlying attention issue (TE pp. 452-453). She said the student's progress was difficult to monitor because he was absent so much (TE pp. 456-457). She testified that such an unusual number of absences made it hard for the student to learn. (TE pp. 456-457; 465).

SECOND GRADE

In second grade, 2016-2017, the student struggled with math and reading but his teacher, [REDACTED], saw progress in both areas. (TE pp. 114-115). The student received RTI in reading and math both and the special education teacher worked with attention and focus goals through intervention in classroom and as well as working with the student outside of classroom (TE p. 154). [REDACTED] also did redirection in the classroom and helped support the focus goals in the classroom. (TE p. 169).

The student showed consistent progress in reading and math during the first half of the year. (RE 065-68). The student's reading score on Benchmark reading test was 39 percent but it increased to 71 percent by midyear and his scaled score in reading was 395 in December, rose to 423, and then declined after that. (TE p. 150). Another problem affecting his performance, as in first grade, were absences. [REDACTED] testified that the student's absences during first part of 2017 caused him to miss a lot instruction and fall further behind (TE p. 158).

The student left [REDACTED] classroom May 3, 2017 (TE p. 176) transferring to [REDACTED], and at that time he was trending toward his goal in reading (TE p. 123) but hadn't reached it. (TE p. 126). For math he trended toward his goal until December, then flat-lined after that. (TE p. 132). The flatlining in math coincided chronologically with the manifestation of a new problem.

In late November of 2016, [REDACTED] began to notice and reported to the parents her concern that the student was coming to school sleepy, and "not in a normal way." (TE p. 162). The teacher doing RTI noticed it too and called it to the attention of the parents. (TE pp. 143-144). In December, [REDACTED] began tracking how the student came to school sleepy and the problems it caused with his focus (TE pp. 143-144, 162). The ARC met December 15, 2016 to address these

concerns and the mom reported that the parents were working to obtain an EEG and a sleep study (PE 144).

It appears that these sleep studies were still ongoing contemporaneous with the student's annual review by the ARC on February 22, 2017. (See TE pp. 372-373). At that ARC meeting, the ARC found some growth on interventions but the primary concern remained the student's inability to stay on task. (PE 149-150). The ARC revised the IEP to increase collaborative special education from 10 to 20 minutes per day, two times per week. And to increase minutes in the resource room from 15 to 20 minutes per day, four times per week.

The student left ██████ in March of 2017, finishing up the second grade at ██████, another school in the ██████ County system. The student has not attended school in ██████ County since second grade and has been home-schooled for third and fourth grades.

REFERRALS WERE NOT INAPPROPRIATELY DENIED

██████ County uses the RTI model. Under this model, to qualify for special education the student must not have responded to RTI, the lack of response must not be due to certain specified factors, such as lack of instruction due to absences, and the disability must have an adverse on effect to education. (TE pp. 227-228).

As set forth in the chronology appearing hereinabove, the school acted promptly on referral request made in November of 2015. Notwithstanding the parent's testimony that requests for "academic evaluation" were made subsequently, it is not clear from the record that any referral was made by the parent for evaluation for SLD prior leaving the ██████ County system at the end of second grade. Regardless, testimony cited above, unrefuted, indicates that evaluation for SLD at such an early age is inappropriate and not effective. Therefore, failure to conduct one would not be failure to make a timely evaluation, even if there had been reason to suspect SLD.

In addition, progress in RTI is relevant to the timeliness of an evaluation. The hearing officer cited OSEP 11-07, memorandum to State Directors of Special Education, January 21, 2011, 50 IDELR 50, to the effect that RTI may not be used to delay or deny a **timely** initial evaluation of a student suspected of having a disability. This does not mean that RTI is irrelevant when deciding when evaluation is merited. On the contrary, 34 CFR 300.307(2) requires, regarding SLD, that “the use of a process based upon the child’s response to scientific, research-based intervention.” By regulation, the response to RTI is a required factor.

The student did not prove that progress in RTI was so poor that additional evaluations in SLD or something other than developmental delay should have occurred for the purpose of creating the 2016 or 2017 IEPs. This is even more true in light of the student’s extensive absences. As described elsewhere hereinabove, when evaluating the effectiveness of RTI as a factor dictating referral for evaluation, the lack of response to RTI must not be due to certain specified factors, such as lack of instruction due to absences.

**THE FEBRUARY 24, 2016 AND FEBRUARY 22, 2017 IEPs WERE APPROPRIATE
WITHOUT ACADEMIC GOALS**

When developing an IEP, an ARC must consider, among other things, the results of the evaluation and the academic needs of the student. 707 KAR 1:320. However, the regulation does not require that all IEPs have academic goals. In the present case, the absence of academic goals in the IEP is not evidence of a defect in the IEP. The ARC believed that the student’s inability to focus was the reason for academic difficulties. The disabilities for which the student qualified were speech and developmental disability. The goals in the IEPs addressed correction or mitigation of the negative impact those disabilities had on the student’s ability to learn. There was no evidence that additional goals in academic areas were needed on the IEP in order to measure progress in

addressing ability to focus. The goals in the IEPs were appropriate for the disabilities under which the student qualified for special education at that time.

IV. THE IEP OFFERED BY RESPONDENT ON NOVEMBER 29, 2018 VIOLATED NUMEROUS REGULATORY REQUIREMENTS AND THUS COULD NOT ENSURE FAPE

Testimony was taken at the hearing concerning the IEP that was proposed by the school district on November 29, 2018 as part of an ongoing alleged violation. Therefore, this issue was heard by the Hearing Officer and will be reviewed by the ECAB. In November 2015 the school district conducted an occupational/vision therapy screening which noted vision issues and recommended a repeat screening. (PE 259-260). The recommendation from 2015 was:

Vision screen should be repeated near the end of first grade or beginning of second grade to see if eyes have matured.

(TE 320). The parents made specific requests for follow-up on same at ARC meetings on March 28, 2018 and June 15, 2018. (PE 153-161, 165, 180) (TE pp. 212). The OT, in her evaluation in 2018, observed the student to see if the concerns noted in 2015 were still there:

I didn't see any signs of vision concerns. Typically, there's soft signs. The child can't pay attention, they're leaning in, they're wiggling, their handwriting is smooshed in. Like, there are soft signs you see as a therapist that would kind of clue you in on, hey, I probably need to look at that. I didn't see any of those

(TE 327). An OT is qualified to screen for visual problems and then refer for diagnosis. (TE 330-331). She didn't refer because she didn't see problems. The student's eyes had matured.

Q. When you reported that you did not see any signs of visual issues, you're reporting that you had observed [REDACTED] conduct a variety of assessments and tasks and noted no problems with vision when you saw that, correct?

A. Correct.

Q. So the thing that the 2015 evaluation reported, that [REDACTED] reported in her evaluation --

A. Okay.

Q. -- in her evaluation in 2015, in terms of observing saccadic eye movements or jumping back and forth, overshooting, undershooting; did you observe any of that?

A. I did not see any of that.

Q. And are you trained to note that if you observe eye movements that are problematic while you're conducting OT assessments?

A. Yes. I mean if -- I will watch for those things.

Q. And is that what you always do when you do your assessments?

A. Yes.

(TE 340-341) However, the OT did administer the WRAVMA test, which measured visual motor skills:

The test that was administered [by the OT in 2018] was the WRAVMA, which looks at visual motor skills, visual spatial ability and fine motor ability.

(TE 222). ECAB finds that the visual screening was appropriate.

The first evaluation of [REDACTED] in reading and math took place on May 31, 2018 after the Due Process action had been commenced. (PE 273-287) An ARC meeting was held on June 15, 2018 to review the district's evaluation of [REDACTED] (PE 162-169) The evaluation revealed below average scores in every reading area, except letter and word recognition and reading comprehension and vocabulary. There were also low and below average scores in math and below average scores in written expression. (PE 282) The evaluation also revealed delayed processing speed and struggles with visual tracking. (PE 162-177) It was determined that [REDACTED] was disabled in the categories of speech and math reasoning only. The integrated psychological report dated May 31, 2018 is of record at RE 12-27. A new IEP was not offered at the June 15, 2018 ARC meeting. It was discovered during this meeting that the district forgot to conduct an occupational therapy evaluation (PE 165).

The school district exclusively uses the Response to Intervention Model to identify and support students with learning needs. (TE pp. 227, 244) However, the school district did not offer RTI in writing for any student in the [REDACTED] Elementary School (TE 115, 195). Mrs. [REDACTED] the school psychologist, testified that in order to follow this model the district must first indicate

whether the student has been provided with appropriate instructional experiences and then determine the method of instruction. The district would then assess whether the student is responding to intervention and progressing at a rate where he is capable of meeting age level standards. Lastly, the district evaluates whether exclusionary criteria apply for a specific learning disability consideration, such as lack of instruction or other alternatives which can contribute to poor performance. (TE pp. 227-228)

An independent educational evaluation was conducted by Teresa Izquerido, PhD on August 16, 2018 (PE 289-301). This was more than a year after [REDACTED] had been removed from the district and homeschooled. (RE 36-48) Dr. Izquerido's evaluation revealed that [REDACTED] had disabilities of a specific learning disability in written expression and math, attention deficit hyperactivity disorder, and adjustment disorder with anxiety and depressed mood, along with below grade level reading scores (PE 178-185, 289-301). Another ARC meeting was held on September 10, 2018 to review the independent evaluator's report. The independent evaluator was not in attendance and any issue concerning that was not appealed. There were noted disparities between the scores on the district's evaluation and the independent evaluation. The ARC noted in the summary report "it is hard to determine where the errors were in the testing in order to pinpoint a reason for the discrepancy between the two evaluations". Dr. Izquerido performed the TOVA, which is not a test routinely used by school districts (TE pp. 754-755). Dr. Izquerido used an older WISC-IV in order to avoid duplication of the more recent WISC-V which had been done by the school. (TE pp. 790-792). The scores were still relatively consistent.

Dr. Izquerido testified that if she had been at the ARC meeting, she would have recommended eligibility in written expression and support services of processing speed, organizational skills, study skills and other accommodations, extended time, copies of notes and

other accommodations that were ultimately not offered in the 2018 IEP (TE pp. 755-758). The district failed to determine ■ was eligible for services in a specific learning disability area of written expression, partially because he had never received intervention in the area of writing (PE 178-185).

The ARC developed a revised IEP on September 10, 2018 which provided for 20 minutes of collaborative special education services two times per day; 20 minutes of resource special education services four times per week; and 50 minutes of speech language therapy 3 times per month. (PE 249) No IEP was offered at the September 10, 2018 ARC meeting, but the parents were offered an opportunity to attend another ARC meeting after they and their counsel conferred. At the November 29, 2018 ARC another revised IEP was offered which provided 30 minutes of collaborative special education services one time per day (resulting in a decrease in services); 45 minutes of resource special education services one time per day (resulting in a decrease in services); and 30 minutes of speech language therapy four times per month (a decrease of 30 minutes from the September 2018 IEP). (PE 255) An ARC meeting was held on November 29, 2018 at which an IEP was offered that did not find a specific learning disability in written expression and did not address processing delays or reading struggles. The parents refused to consent for special education services because they did not agree with the ARC's finding (PE 250-255, 197-203).

- A. The IEP offered on November 29, 2018 and the process leading to same violated numerous provisions of 707 KAR 1:300.

707 KAR 1:300 states in relevant part as follows

"Section 3. (3) The LEA shall ensure that: (a) Prior to, or as a part of the referral process, the child is provided appropriate, relevant research-based instruction and intervention services in regular education settings, with the instruction provided by qualified personnel; and (b) Data-based documentation of repeated assessments of achievement or measures of behavior is collected and evaluated at reasonable intervals, reflecting

systematic assessment of student progress during instruction, the results of which were provided to the child's parents. (4) If the child has not made adequate progress after an appropriate period of time during which the conditions in subsection (3) of this section have been implemented, a referral for an evaluation to determine if the child needs special education and related services shall be considered.

Section 4. Evaluation and Reevaluation Procedures. (1) An LEA shall ensure that a full and individual evaluation is conducted for each child considered for specially designed instruction and related services prior to the provision of the services. The results of the evaluation shall be used by the ARC in meeting the requirements on developing an IEP as provided in 707 KAR 1:320... (5) A variety of assessment tools and strategies shall be used to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum described in the Kentucky Program of Studies, 704 KAR 3:303. (6) A standardized test given to a child shall: (a) Have been validated for the specific purpose for which it is used; (b) Be administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the tests; and (c) Be conducted under standard conditions unless a description of the extent to which it varied from standard conditions is documented in the evaluation report. (7) Tests and other evaluation materials shall include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient... (9) A single procedure shall not be used as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child. (10) The child shall be assessed in all areas related to the suspected disability, including, if Legislative Research Commission PDF Version Page: 11 appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. (11) The evaluation shall be sufficiently comprehensive to identify all the child's special education and related services needs, whether commonly linked to the disability category in which the child has been classified. (12) Assessment tools used shall be technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors... (14) Assessment tools and strategies shall be used that provide relevant information that directly assists and is used in the determination of the educational needs of the child. As part of an initial evaluation, if appropriate, or as part of any reevaluation, the ARC and other qualified professionals, if necessary, shall review existing evaluation data on the child including: (a) Evaluations and information provided by the parents; (b) Current classroom-based, local, or state assessments and classroom-based observations; and (c) Observations by teachers and related services providers. (15) On the basis of the review, and input from the parents, the ARC shall identify what additional data, if any, are needed to determine: (a) Whether the child has a particular category of disability and the educational needs of the child, or in the case of a reevaluation of the child, whether the child continues to have a disability, and the educational needs; (b) The present levels of academic achievement and related developmental needs of the child; (c) Whether the child needs special education and related services, or in the case of a reevaluation, whether the child continues to need specially-designed instruction and related services; and (d) Whether any additions or modification to the special education and related services are needed to enable the child

to meet the measurable goals set out in the IEP and to participate, as appropriate, in the general curriculum..." (emphasis added)

First, Section 3 (3-4) requires that schools provide intervention services delivered by qualified personnel. Further, the ARC did not appropriately consider Dr. Izquerido's evaluation. Admittedly she used TOVA, a test not used by schools, and an older version of the WISC than the school used. However, Section 4(5-14) allows said testing to be considered. Section 4(5) calls for a variety of assessment tools. Section 9 provides no single procedure shall be solely relied on thus making it appropriate to rely on Dr. Izquerido's testing, the child's poor performance in writing areas, and the school's testing to find qualification in written expression. Dr. Izquerido explained a logical reason for using the older WISC-IV to prevent better performance since [REDACTED] had just taken the WISC-V. Nothing in the regulation dictates that the latest version of a test be the only one used.

B. The ARC failed to follow mandates of 707 KAR1:310 in the IEP offered on November 29, 2018.

707 KAR 1:310 in pertinent part states

"(1) Upon analysis of intervention and assessment data, the ARC shall determine whether the child is a child with a disability as defined in Section 1(9) of 707 KAR 1:002 to the extent that specially designed instruction is required in order for the child to benefit from education...(3) In making eligibility determinations, an LEA shall draw upon information from a variety of sources, which may include: (a) Response to scientific, research-based interventions; (b) Vision, hearing, and communication screenings; (c) Parental input; (d) Aptitude and achievement tests; (e) Teacher recommendations; (f) Physical condition; (g) Social or cultural background; (h) Adaptive behavior; or (i) Behavioral observations." (emphasis added)

Similar to the analysis in the section above, the lack of intervention services in writing violates 707 KAR1:310(1). Further, the discounting of Dr. Izquerido's evaluation and recommendations due to using different tests than the school violates(3)(d) above, which requires looking at all testing.

C. The ARC failed to follow the mandates of 707 KAR 1:320 in the IEP offered on November 29, 2018.

707 KAR 1:320 states as follows

"Section 1. Individual Education Programs. ... (3) An LEA shall ensure that within sixty (60) school days following the receipt of the parental consent for an initial evaluation of a child: (a) The child is evaluated; and (b) If the child is eligible, specially designed instruction and related services will be provided in accordance with the IEP. (4) Within this sixty (60) school-day period, an LEA shall ensure that the ARC meeting to develop an IEP for the child is conducted within thirty (30) days of the determination that the child is eligible... Section 5. Contents of IEP. (1) An ARC shall consider in the development of an IEP: (a) The strengths of the child and the concerns of the parents for enhancing the education of their child; (b) The results of the initial or most recent evaluation of the child; (c) As appropriate, the results of the child's performance on any general state or districtwide assessment programs; and (d) the academic, developmental, and functional needs of the child. ... (3) All the factors listed in this section shall be considered, as appropriate, in the review, and if necessary, revision of a child's IEP. " (emphasis added)

In this case, the determination of eligibility in the area of math was made on June 15, 2018, an IEP was developed in September 2018, but not finalized until November 29, 2018, to take into account the findings of the Independent Evaluation. However, the ARC did not afford appropriate deference to the Independent Education Evaluation's recommendation. Contrary to the findings in the IEE, the final version did not offer a disability in written expression or services to address that along with reading and processing weaknesses. The November 2018 IEP did not contain any goals concerning writing or math. If the ARC did not believe those recommendations were necessary, it should have specifically addressed in the summary minutes why they were not. Otherwise, they had a report in front of them making such recommendations and nothing which controverted it.

Further, the testing performed by the school and Dr. Izquerido showed deficits in writing sufficient to allow identification in that area and accommodations that would be appropriate both in that area and for the child's other noted disabilities. Although schools can use the RTI method of determination, it cannot be used to delay services for a special education child under IDEA. OSEP 11-07 Memorandum to State Directors of Special Education (January 21, 2011) 50 IDEALR

50 states specifically “districts must not deny referrals or delay initial evaluations suspected of having a disability and needing education related services based upon utilization of RTI.” The school admittedly did not have a Response to Intervention Program for writing due to a time constraint. Therefore, it cannot appropriately rely solely on the RTI method to assess specific learning disabilities in this area. Further, the regulation relies upon a variety of factors even when the Response to Intervention method is being used which includes consideration of independent educational evaluations. Those were present in this case and dictated services were needed to address writing, as well as processing and other delays.

V. **DESPITE THE FACT THAT THE NOVEMBER 2018 IEP WAS NOT REASONABLY CALCULATED TO PROVIDE FAPE, PETITIONER IS NOT ENTITLED TO COMPENSATORY EDUCATION**

S.C. by and through N.C. v Chariho Regional School District, 298 F.Supp 3rd 370, 389

(DRI 2018) states:

“compensatory education is a surrogate for the warranted education that a disabled child may have missed during periods when his IEP was so inappropriate that he was effectively denied a FAPE. [citations omitted] However, compensatory education is not an automatic entitlement, but, rather, a discretionary remedy for nonfeasance or misfeasance in connection with a school system’s obligations under the IDEA.” *Id.*

Glenda E v Bristol Warren Regional School District, 758 F.Supp 2nd 75, 92 (DRI 2010)

notes that in determining how much compensatory education a student is entitled to, the right to compensatory education “accrues from the point the school district knows or should know of the IEP’s failure.” *Reid v District of Columbia, 401 F3rd 516, 524 (DC Cir 2005)* acknowledges that the purpose of compensatory education is to undo the harm caused by the school’s nonfeasance or misfeasance. “The ultimate award must be reasonably calculated to provide the educational

benefits that likely would have accrued from special education services the school district should have applied in the first place.”

In the case at hand, the child had been homeschooled for over a year before the testing had taken place. Further, the child has not been enrolled in the school district since the 2018 IEP was offered. The child’s testing scores and resulting eligibility in the area of written expression and math cannot be proved to have entirely been the responsibility of the school during the period of time the child was not enrolled. Further, the child is still not enrolled as of the briefing in this matter, and thus there would be no compensatory education required during that period of time. However, the ECAB would note that if the child returns to the district, services in these areas should be offered consistent with the recommendations in the IEE in order to have an IEP reasonably calculated to provide FAPE.

ORDER

The ECAB finds that Petitioner was not denied FAPE in the 2015-2016 and 2016-2017 school years as referrals were not inappropriately denied and the IEPs were appropriate. The ECAB further finds that the IEP offered on November, 29, 2018 was not reasonably calculated to provide FAPE. As there is no causal connection between the 2018 IEP and Petitioner’s claim for compensatory education, that claim is denied.

NOTICE OF APPEAL RIGHTS

This decision 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 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 12th day of March, 2020, by the Exceptional Children's Appeals Board, the panel consisting of Kim Hunt Price, Mike Wilson and Susan Gormley Tipton, Chair.

EXCEPTIONAL CHILDREN APPEALS BOARD

BY: /s/ Susan Gormley Tipton
Susan Gormley Tipton, Chair

CERTIFICATION:

The original of the foregoing was mailed this 12th day of March, 2020 to:

Todd Allen
Division of Exceptional Children Services
Kentucky Department of Education
300 Sower Blvd.
Frankfort, KY 40601
Todd.allen@education.ky.gov

With copies to:

Jennifer Payne
Jennifer.payne@education.ky.gov

Marianne Chevalier
mchevalier@lawcg.com

Claire Parsons
cparsons@aswdlaw.com

Kim Hunt Price
khplaw@windstream.net

Mike Wilson
mikewilsonattorney@earthlink.net