

KENTUCKY DEPARTMENT OF EDUCATION  
DIVISION OF LEARNING SERVICES  
AGENCY CASE NO. 1718-34

[REDACTED]

PETITIONER

V

ORDER

JEFFERSON COUNTY SCHOOLS

RESPONDENT

\*\*\*\*\*

PROCEDURAL HISTORY

A Due Process Hearing request was filed on May 11, 2018 on behalf of the Petitioner who was a 10<sup>th</sup> grade student identified as eligible under IDEA in the category of Emotional Behavioral Disability(EBD). The request alleged that the student had poor attendance throughout the school year 17-18, having only attended 85 days. The student had a diagnosis of ADHD, Post-Traumatic Stress Disorder (PTSD), Oppositional Defiant Disorder (ODD), Anxiety and Reactive Attachment Disorder.

Petitioner alleged that placement was not made by her ARC in violation of 707 KAR 1:350 Section 1(5). Specifically, the Petitioner argued that placement at Breck Metro (BM) was “district enrollment” and that the Student Intervention and Support Handbook constituted a predetermination of placement. She also alleged that the student handbook required that before a child could exit from an alternative school program for behavior, they must complete certain requirements in accordance with the student handbook and that same was a violation of IDEA. The request for proposed resolution was that the student be allowed to enroll in Minor Daniels Academy (MDA) under stay put; that the school be compelled to take the student’s placement decision out of the Student Relations Section and into her ARC; that placement decisions be based upon the student’s needs; that training be provided to all staff involved in placement decisions for all ECE students to be sure decisions were made in conformity with the law; that the student be

provided summer school instruction so that she could earn enough credits to be a senior the next year which would have put her on her normal graduation course; and attorney's fees.

A telephonic prehearing conference was held on May 17, 2018 wherein Petitioner stated that stay-put was not needed at that time due to the fact that the student was pregnant and was on home/hospital instruction at the time. Further, the parties waived the deadlines for filing a Response to the Due Process hearing and for the hearing to be conducted.

The school filed a Response to the Due Process request on or about June 15, 2018 alleging the student did not attend JCPS during the 17-18 year as she had been enrolled in the Louisville Metro Youth Center, Peace Academy (hospital), Louisville Day Treatment and the Brook (hospital). The school alleged that when she returned to JCPS she was a new enrollment which required her to go through enrollment process as set forth in the student handbook, but also alleged that said process did not violate IDEA as a predetermination and that policy made specific provisions for the children covered under IDEA to go through an ARC process for an actual determination of the placement that would be required. Further, the school alleged that the student was not arguing placement, but instead location of the placement and that same is within the discretion of the school district.

The school filed a Motion to Dismiss the Due Process request on July 16, 2018 on the issue of the student requesting a location change versus a change of placement and that location changes are totally within the discretion of a school district so long as they comply with the placement decision made by the ARC. The student filed a Response to the Motion to Dismiss on August 6, 2018.

A telephonic prehearing conference was held on August 17, 2018 where the parties were permitted to argue their positions on the Motion to Dismiss. The undersigned overruled the Motion

to Dismiss as relates to the issues of predetermination and the validity of the IEP in terms of the least restrictive environment. Petitioner was granted time in which to file an amended Due Process complaint to clarify her exact position on those issues. Same was filed on August 21, 2018 wherein the allegation of a least restrictive violation under 707 KAR 1:350 Section 1 (5)(6) was raised. Petitioner pointed out that the IEP only offered fifty minutes of special education services in a co-teaching environment, which resulted in a placement that should have been much less restrictive than in an alternative behavior school such as BM. She alleged that the only service that was placed in the IEP was “a highly structured environment” and that this service was inconsistent with the belief that the student only needed fifty minutes of special education services a day. She further alleged that the ARC did not have any data to support the student’s need for such a restrictive environment. The requested relief was essentially the same, other than compensatory education was also requested. The school filed a Response to the amended Due Process Complaint and renewed its Motion to Dismiss on September 4, 2018. The student replied to the Motion to Dismiss on September 10, 2018.

After the exchange of Witness and Exhibit Lists, the school filed a Motion to exclude the Petitioner’s Exhibits 14 and 15, which were KDE findings concerning other children, one a couple of years ago and the other over ten years ago. This matter was addressed at the hearing and ultimately the undersigned ruled that both exhibits would be introduced into evidence, noting that she might or might not find them relevant once she had the opportunity to fully review them. The Hearing Officer notes that she is not making any of her findings based upon these exhibits. Exhibit 15 related to a case that occurred over ten years prior to the date of hearing, making it irrelevant to current policy within the school district. It is not necessary for the Hearing Officer to place any

weight on Exhibit 14 and she has not done so as there is sufficient other evidence in this case on which to base her decision.

#### EVIDENTIARY HEARING

At the time of the hearing the student was 17 years old and was a junior in the JCPS system. She was found to be eligible for services under Emotional Behavioral Disability. The student had received special education services for years and her IEPs from the years 2016-17, 2017-18 and the current 2018-19 were introduced into evidence as Petitioner's Exhibits 5, 4 and (3 and 2) respectively. The student had been placed in an alternative school, MDA, in the seventh grade due to behavioral issues. All of the IEPs had placed the student in part-time general education and part-time special education services. Details of these IEPS are set forth in the text under ruling II below.

At the time the May 9, 2018 ARC met the student had not been in a traditional JCPS school setting for nearly a year. The district referred to student's returning under these circumstances as a "district enrollment". (T2, p 421-422) The student's last attendance in a traditional JCPS school had been at the MDA. Her enrollment history since of the beginning the 2014-2015 school year was as follows: Valley Prep Middle School, 8/13/14-8/14/14; Peace Academy (hospital) 8/20/14-9/10/14; Kennedy Metro Middle School (which later became MDA) 9/16-12/19/14; Olmstead Academy South 1/6/15-4/17/15; Kennedy Metro Middle School 4/20/15-6-5/15; MDA 8/12/15-9/26/15; Ackerly (hospital) 9/28/15; MDA 9/29/15-5/26/16; Louisville Metro Youth Detention Center 5/3/17; MDA 5/4/17-5/24/17; Louisville Metro Youth Detention Center 8/16/17-8/25/17; Louisville Day Treatment 8/28/17-12/6/17; The Brook (hospital) 12/14/17; Louisville Day Treatment 12/19/17-2/8/18; Louisville Metro Youth Detention Center 3/9/18; Peace Academy (hospital) 3/12/18-3/15/18; Louisville Metro Youth Detention Center 3/16/18-3/19/18; Peace

Academy (hospital) 3/20/18-4/12/18; and Louisville Metro Youth Detention Center 4/23/18.

When students reenter the school system, JCPS requires them to meet with the Student Relations Department in order to ensure they do not just show up at school after extended absences unexpectedly and without preparation. (T2, p 486) The school alleged that Student Relations assigns regular education student's to the schools at the time they reenter and an ARC meeting is held for Special Education students after they meet with Student Relations (T 2, p 416)

MDA is a restorative school, meaning they use restorative techniques to resolve conflicts. It is an alternative behavioral school. Michelle Icing, a counselor at MDA, stated that as part of the ongoing curriculum students gather in circles to discuss topics and staff members teach them how to better communicate. (T 1, p 294) All students participate in these restorative circles two to three times per week. (T 2, p 350) MDA has a mental health counselor, social worker and three counselors on staff. Outside agencies are also allowed to come into the school to work with students. (T 1, p 294; T 2, p 339) Both regular and special education students attend MDA. (T 2, p 341-342) All students at MDA have point sheets where they can earn points during each class period and the points are totaled at the end of each week. Students can earn rewards for the points. (T 2, p 351-357) Special education students at MDA can be in regular education classes, resource classrooms or have co-teaching. (T 1, p 321-324) All students at MDA receive social skills instruction. (T 2, p 337) The students are supervised at all times, during class changes and to and from lunch. (T 2, p 345) The school also contains locations where students can deescalate. (T 1, p 322) There are approximately 115 students at the MDA high school portion with a small teacher/student ratio of no more than ten students per class. (T 2, p 345-346)

While Petitioner was at MDA, staff allowed her to leave the classroom and go to the office when she got upset in order to cool down. (T 1, p 317) She was also allowed to go see staff

members that she felt comfortable with to deescalate and she was allowed to eat with one of the staff members. (T 1, p 322, 204) Petitioner also talked to MDA counselors. (T 1, p 323) Rebecca Ivy, the ECE consulting teacher, testified that she provided the Petitioner with a lot of support while she was at MDA working with her in the classroom, giving her cool off breaks and walking and talking with her. (T 2, p 335-343) If the student began to escalate, teachers would allow her to move to a separate area either in the classroom or outside of it, or they would call Ms. Ivy. (T 2, p 338) Ms. Ivy discussed Petitioner's attendance problems with her many times. (T 2, p 342) She stated that Petitioner's teachers used the point system with Petitioner and provided daily visual schedules and a place in the classroom where she could work alone. (T 2, p 337) The student's grandmother verified that staff at MDA regularly called her to report on her problems and successes. (T 1, p 109-110) Staff at MDA had behavior training. (T 2, p 338) Ivy testified that the extra behavioral support and social skills at MDA were beneficial to Petitioner. (T 2, p 339, 346) No data was presented in support of her conclusion.

At the August 2, 2016 ARC due to progress the student had made at MDA, the ARC offered to place her in a comprehensive/regular education school. (RX 5, T 2, p 344) The student and her grandmother strongly objected to this offer and wanted her to remain at MDA. The student stated that she believed her behavior was better at a small school and she felt more comfortable at MDA. (T 1, p 305, RX 5; T 1, p 302; T 2, p 436) The ARC conceded and the student remained at MDA earning all of her credits that year as she had the previous year. (T 1, p 179- 207) Ms. Ivy testified that the student made progress at MDA. (T 2, p 340) Again, no data was introduced to substantiate that conclusion.

Ivy also testified that all students at MDA are asked to meet an 80/80/80% criteria for attendance, behavior, and passing courses in order to exit from the program. She stated that Special

Education students can be placed elsewhere even if they have not met this criteria. (T 2, p 340) Heather Lubey, the JCPS ARC chair, testified that the same exceptions were made at BM and that whether a Special Education student exited from the behavioral school was an ARC decision. (T 2, p 384)

At the end of the school year, Petitioner committed crimes in the community which led to her being placed on supervised commitment probation to the Department of Juvenile Justice in May 2017. (T 1, p 288) She remained on this commitment for about a year, during which time she attended school at several Juvenile Justice and treatment facilities as outlined above. (RX 32, p 194; T 1, p 88) At the end of the 2017-18 school year, the school was notified that Petitioner was being released from Louisville Day Treatment and was ready to return to traditional JCPS schools. (T 2, p 423) Because she was exiting the Juvenile Justice program and returning to traditional JCPS schools, she was required to make an appointment with Student Relations as a district enrollment. This was done and discussions held with Ben White. (T 1, p 75) Mr. White told the grandmother and student that since she was an ECE student he could not make recommendations for her and they would have to attend an ARC meeting. (T 1, p 475) Carrie Willis, a JCPS placement specialist, explained “If the student needs consideration of an alternative placement, it has to be done through the ARC process. That has to be an ARC decision. Our regular education students go to the office of Student Relations, decisions are made there. Our ECE students do not go through that office because a decision cannot be made outside of the ARC.” (T 2, p 488) Nonetheless, under JCPS protocol and policy she was initially sent to Student Relations.

Carrie Willis, who was the chair of the May 9, 2018 ARC meeting, testified that after being informed by the Office of Student Relations that the student was interested in returning to JCPS

traditional schools, she took several steps of preparation. First, she mentioned a program for pregnant teens entitled Teenage Assistance Parenting Program (TAPP), but the grandmother was not interested in that program. (T 2, p 424) At that time, Petitioner's attorney stated the student was interested in Phoenix, but regular and special education students must apply there and be accepted. (T 2, p 424-425)

Ms. Willis also reviewed a Notice of Charge against the Petitioner in preparation for the ARC meeting. She had been charged with Robbery, 2<sup>nd</sup> degree, Assault, 3<sup>rd</sup> degree and Carrying and Concealed Weapon by a Prior Felony Offender. (RX 32, p 206) She testified that information about a student's criminal charges can be used in providing additional support on the student's IEP and is helpful in creating a safe learning environment for the student and other students. (T 2, p 426) Willis stated that student's charged with crimes are not always placed in alternative behavioral schools, such as BM. (T 2, p 426)

Willis also reviewed the student's enrollment history in order to look for previous enrollments and patterns of placement. (T 2, p 427) She cross-referenced the student's conference summaries and special education documents to try to better understand her. She reviewed a report by an Assistant Principal at the Louisville Day Treatment, which noted that the student was being discharged from that program largely due to lack of attendance. The principal's report noted that the student had gone back and forth between staying where she was and wanting to attend BM. He noted the student's behavior was not aggressive, but had been disruptive. Specifically, it stated "On bad days she becomes very emotional and needs lots of attention. Her emotional state is inconsistent and hard to predict. She spent a fair amount of time in the PAC room. This was not disciplinary, but simply a place for her to calm down and process her thoughts." (RX 32, p 197)

In preparing for the ARC meeting, Willis learned that the student had been in and out of the detention center due to non-compliance with the terms of her probation. (T 2, p 469) The Peace Academy also told her the Petitioner had been non-compliant with her treatment. (T 2, p 470)

The May 9, 2018 ARC meeting was held at BM, an alternative behavior school. Present were Carrie Willis, JCPS Placement Specialist; Heather Lubey, JCPS ARC Chair; Kelly Jones, Probation Officer; Susanne Poteet, JCPS regular education teacher; Kanisha Fields, Youth Advocate Program worker; Petitioner; her grandmother; and her attorney. At that time, counsel for Petitioner stated that the student had taken the test and applied to Jefferson County High School, and asked if the student could attend there. During the ARC, Ms. Willis called the office of Student Relations to determine the status of Petitioner's application. She reported to the ARC that the student would need to make an appointment with Student Relations to receive her results and further her application. (T 2, p 440) Given this response it appear that ARCs are not permitted to consider placement in all district schools in relation to an ECE child's needs. The student voiced that she did not believe her IEP was followed at Louisville Day Treatment because she was not given her journal at the end of the day. The ARC added the use of her journal to the IEP. (RX 19, p 117, 118; RX 21, p 130)

Counsel objected to the special education and regular education teachers who were present at the ARC because they had not worked with Petitioner. Willis stated that the student was not enrolled in JCPS, and therefore, did not have a teacher of record. (RX 19, p 117)

At this ARC the grandmother gave consent for a re-evaluation. (RX 20) No evidence was ever introduced during the hearing as to whether this re-evaluation took place. The ARC reviewed the student's existing Behavior Intervention Plan (BIP) and Functional Behavioral Assessment. (FBA) (RX 19) The group noted that these were no longer appropriate and a new FBA would be

conducted and data collected to update the BIP. Nothing was introduced into the record to indicate that this had been done at the time of hearing. The ARC summary notes reflect the student was due for her three (3) year redetermination of eligibility on or before May 21, 2018. No evidence of same was introduced at the hearing.

During the ARC meeting, a full continuum of placement options was discussed from full-time general education to part-time general education and part-time special education to full-time special education. Part-time general education and part-time special education were selected as the placement. It was at this juncture that the point sheets, highly structured environment, small school/small class setting, monitored/limited transitions, and low student/adult ratio was added for the first time to the student's Supplementary Aids and Services. (RX 19, p 114) The student stated that she did not want to attend a comprehensive or regular high school. (RX 19, p 118) She stated that she no longer wanted to be placed in special classes, but preferred to have a teacher check in with her. (RX 19, p 118)

The student disagreed that she needed a highly structured environment with monitored transitions. The ARC school members took the position that all previous placements were considered to be highly structured. (PE 3, p 6 of Conference Summary) The conference summary notes further state that the ARC agrees that the student continues to require a highly structured environment, small school/small class setting, monitored/limited transitions, and low student/adult ratio that is provided at a behavioral support school. The Hearing Officer finds it significant that despite the fact that the student had been in a behavioral program school previously, none of these needs had ever been reflected on her IEP until this meeting, which leads the Hearing Officer to believe that they were added strictly in order to continue her in a behavioral alternative school.

Further, the conference summary specifically notes

“The District Representative explained the District’s position regarding placement based upon off campus behavior (felony offenses) and/or enrollments from juvenile justice facilities referencing page 35 of the Student Support and Behavior Intervention Handbook. It was also mentioned again that a behavior support school was student’s JCPS placement. Due to attendance issues (present 69 days, absent 100 days), and [student] had not successfully met the requirements to return to a comprehensive school setting for the start of the 2017-18 school year. An appeal would be made to the Office of Student Relations if disagreeing with the location of the placement”.

The Hearing Officer cannot ignore that this language in the conference summary indicates the school placed precedence of the behavior policy over the student’s individual needs.

At the time of the ARC, MDA was at full capacity and BM was the available alternative behavior school. Ms. Willis testified she was told this prior to the ARC and that if the ARC agreed to an alternate school for Petitioner, BM was the site to which she would be assigned. (T 2, p 457) Again, the school was looking at alternative school as a placement before the ARC.

BM is a alternative behavior support school with a highly structured environment and low staff/student ratio with built in supports for behavioral needs. (T 2, p 379) Students are sent there because of behavior issues, rather than keeping them in comprehensive regular schools. There are security guards at the school. There are approximately 140 students, a full-time mental health counselor, and a therapist from an outside agency that comes to the school once or twice per week. (T 2, p 379) BM encourages the students to identify a staff member that they can go to for a cool down or break. (T 2, p 380) Approximately half of the students at BM receive special education services. (T 2, p 380) Staff there attend professional development training to learn how to teach students to self-monitor behaviors. (T 2, p 381) Life skills and social skills are taught each day during the beginning class of Pathways to Careers. Heather Lubey testified that BM is able to offer supports that comprehensive regular education schools cannot due to its size and the number of students and staff in the building. (T 2, p 393) Students are supervised at all times at the school. (T 2, p 393) All students at BM have point sheets and can earn rewards as a result of good behavior.

As a result of her mental health diagnosis of PTSD, ADHD, Anxiety, Depression, Bipolar, Reactive Attachment Disorder, and ODD, when Petitioner gets upset her anxiety level gets very high and she becomes overwhelmed at which time she blocks herself from everyone else, cries, tenses up, curses and wants to be left alone. She does not like to be touched and if people put their hands on her she can react aggressively, have flash backs and blackout. (T 1, p 136-138) Petitioner was first identified for services as an EBD student after a six month residential placement at Uspiritus in the 2013-14 school year. (T 1, p 94; PX 1)

#### 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".

#### DECISION

- I. THE PLACEMENT OF STUDENT IN A PART TIME SPECIAL EDUCATION PART TIME REGULAR EDUCATION CLASS ROOM AT THE SITE OF AN ALTERNATIVE PLACEMENT SCHOOL WAS PREDETERMINED IN VIOLATION OF IDEA'S MANDATE THAT PLACEMENT DECISIONS BE MADE BY AN ARC.

707 KAR 1:002 Section 1(1) defines the ARC as

“a group of individuals described in 707 KAR 1:320, Section 3, that is responsible for developing, reviewing, or revising an individual education program (IEP) for a child with a disability.”

707 KAR 1:320 Section 2(1) states

“An LEA shall ensure that each child has an ARC which includes the membership in Section 3 of this administrative regulation and is initiated and conducted for the purpose of developing, reviewing, and revising the IEP.”

707 KAR 1:320 Section 5(2) states an ARC shall

“In the case of a child whose behavior impedes his or her learning or that of others, consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior;”

A. THE INGRAINED METHOD BY WHICH THE SCHOOL’S ALTERNATE PLACEMENT POLICY WAS IMPLEMENTATED CAUSED PREDETERMINATION.

Petitioner argues in this case that the policy of the school set forth in Respondent’s Exhibit 36, page 35 mandates placement in an alternative school thus taking the matter out of the ARC’s decision making requirement. Said policy specifically states:

“Alternate Placement: Alternative Placements helps students improve academic skills, become more self-sufficient, and develop self-control. Students who fail to control their behavior after receiving repeated disciplinary measures from the school or students who commit serious offenses will be suspended to student relations so that their cases may be expedited for alternative placement. If a student is charged with or convicted of a felony offense (or an offense that would be considered a felony if the student were an adult) committed off the school campus and while not engaged in a school sponsored activity, student relations may assign the student to an alternative school. The decision to assign a student to an alternative placement for off campus behavior shall include a review and consideration of the exceptional status of the student and any appropriate federal and state laws. Students who enter JCPS from out of the district, from private or parochial schools, or from juvenile justice facilities may be referred to student relations to determine appropriate placement.

A student who has been assigned to an alternative placement must complete the requirements of that program before he or she can return to another Jefferson County Public School, unless his or her return is approved by the Assistant Superintendent from Climate and Culture...IDEA regulations will be implemented for ECE students.”

The policy and procedure provides a written exception to the fact that Student Relations will be in control of these placement decisions in the event that children (such as the Petitioner), are Special Education students and states that those appropriate federal and state laws under IDEA

and Kentucky statutes will be followed. However, this Hearing officer cannot ignore what the facts say about implementation of the policy.

█████████ grandmother testified that she received a phone call between the time that she and the student met with Student Relations and before the ARC telling her the child's placement would be at BM. Specifically, Student Relations called her after ██████████ completed testing at Jefferson County High and said "we've talked about [student]. We've made a decision. [student] will be going to Breck Metro. (T 1, p 73) The student testified that she had a conversation with Josh Greer, ECE Behavioral Consultant at Student Relations, about attending BM prior to the ARC being held. (T 1, p 184)

Heather Lubey, the head of Special Education at BM, who was a member of the ARC in question, testified "Because we don't make the placement decisions, I mean, our----what we understood is that she needed to be in a structured environment, you know, because we don't deal with that, that end of things... And I don't know if, you know, at that time Minor Daniels was at its capacity and that was how the site was decided. But when we come into the meeting we know Breckinridge has been the recommended placement for the student because of the structured environment." (T 2, p 396-397)

In discussing the issue of placement, Ms. Carrie Willis, the Placement Specialist with Student Relations, who chaired the ARC on May 9, 2018, testified that placement was due to the needs of the IEP and that her criminal history did play a part because of her different enrollments. (T 2, p 455) Ms. Willis further opined that due to her attendance issues, the student had not met the requirements to return to the comprehensive school. She had not been released from MDA, the alternative school which she previously attended. When asked directly by the Hearing Officer if the student would have to go to an alternative school because her prior enrollment was an

alternative school and she hadn't worked her way out of it, Ms. Willis responded "yes". (T 2, p 457)

The testimony of several of the school's witnesses specifically acknowledge that because this child had not worked her way out of an alternative behavior school that had to be considered in determining where her site of placement would be. Further, the fact that disciplinary issues are placed in Student Relations where the person is not trained in Special Education matters and where there is no supervisor who is trained in Special Education matters to address the issues shows a pattern of predetermination.

Although not particular to this case, the Hearing Officer cannot ignore the findings of the Department of Education that show a pervasive culture in this school system, at the time that this IEP was being implemented, of staff believing Student Relations rules had preference over IDEA requirements and that a policy of using Student Relations for behavioral purposes was used in this case to decide this child's placement contrary to her interest and needs as expressed in her IEP.

**B. THE INGRAINED METHOD BY WHICH THE SCHOOL'S DISTRICT ENROLLMENT POLICY WAS IMPLEMENTED FOR STUDENTS WITH BEHAVIOR ISSUES CAUSED PREDETERMINATION.**

Petitioner also makes issue of the fact the student would not have been subject of the alternative placement of the provisions in the policy and handbook if she had not be considered a district enrollment when she returned to a classroom setting. The Hearing Officer holds she did continue to be a student of the Jefferson County School system as all services provided to her in the settings through DJJ and the detention center, as well as hospitalizations were provided by JCPS personnel.

The school can hardly deny the information it received concerning the student's progress and activities within all of the hospital placements, DJJ placements and detention center

placements could not have been shared, because it is confidential information under FERPA, unless JCPS was the entity providing the services. It appears the DJJ sites were just that, sites where IEP placement occurred. LEAs are responsible for the implementation of IEPs for students who are found within the district. All facilities Petitioner was in are in Jefferson County. JCPS's policy on district enrollments may make administrative sense when students are truant or in private schools. However, they cannot use their policy for "district enrollments" to change where the student attends just because they have been receiving educational services in a location other than a traditional school. Therefore, despite what its policy says on how a student should be treated upon an absence from a classroom, it continued to be the provider of these services. The school's argument is somewhat similar to that taken by the school district in *M.S. v Los Angeles Unified Schools* (below) in that just because the child was in a juvenile facility it lost all control or was required to do certain things.

Effectively, the prevalence of the policies within the school district to not allow students out of behavioral placements unless they earn points required, even as recognized by witnesses for the school district, shows that the school may have had language in their policies that said consideration would be given to Special Education students under IDEA, but in fact that was not happening.

The most recent case the Hearing Officer could find addressing this issue is *M.S. v Los Angeles Unified School District*, 913 F.3<sup>rd</sup> 19 (9<sup>th</sup> Circuit, 2019) wherein the 9<sup>th</sup> Circuit held that a school district had engaged in predetermination. Said case involved a child who had been placed in a residential treatment facility as a ward of the state. The school district there took the position that the child had to be placed in this residential placement for educational purposes due to the fact that she had been placed in a residential placement pursuant to a juvenile court Order for emotional

needs. Although the district in this case is not out and out arguing that it should be able to follow its disciplinary procedures and its district enrollment policies and procedures (they argue the policies are in compliance with IDEA), its actions effectively tell the story that is exactly what the district was doing. The district is essentially saying because this child was in DJJ placements, she was unenrolled and had to go back through Student Relations as a “district enrollment”. This ignores the fact that JCPS had provided all educational services to student while she was in DJJ facilities. Had she been able to return to her original school, MDA, when she returned from placements to regular school system, we would not be deciding this matter.

Although the Hearing Officer has given some weight to the findings of the audit because it discusses some of the very same issues, the most prevalent reason the undersigned believes predetermination took place in this case is that the child’s IEPs which had been in existence at least two years prior to the IEP in question, had never contained references to her requiring a “highly structured environment, small school/small class setting, monitored/limited transitions and low student/adult ratio”. It appears that the school was concerned about this child’s behavior due to her placement in various juvenile facilities and hospitals and penalized her on a behavioral basis for those past incidents, rather than where she stood at the time of the 2018 ARC.

These matters are more fully discussed in Decision Section II.

#### C. THE ARC WAS PROPERLY COMPOSED.

In their briefing, the Petitioner argues, for the first time, that the ARC was not composed of the proper people. This matter cannot be considered as it was not raised in the original petition. As an aside this Hearing Officer does believe the ARC was appropriately composed in that it had a Special Education teacher who was knowledgeable about the student’s suspected disability.

Heather Lubey and Susan Poteet, who were members of the ARC were certified in Special Education. The language in 707 KAR 1:320 Section 3 (c) states that

“Not less than one (1) special education teacher of the child or a special education teacher who is knowledgeable about the child’s suspected disability or, if appropriate, at least one (1) special education provider of the child”.

The fact that someone is not currently teaching does not mean that they are not a teacher so long as they have their certification, which is the case of both of the witnesses. Ms. Lubey had taught in self-contained resource classrooms, worked as a coordinator for highly emotional students and headed the ECE Department at BM.

**D. THE SCHOOL NEVER CONDUCTED RE-EVALUATIONS AND FUNCTIONAL BEHAVIORAL ANALYSIS THAT WERE CONSIDERED WHEN FORMULATING THIS IEP SHOWING PREDETERMINATION IN THE IEP.**

All parties agree that this child was due for a re-evaluation for IDEA purposes in May 2018 when this IEP was written. The conference summary notes that and the grandmother signed appropriate releases allowing that to take place. In addition, it is noted that a functional behavior analysis needed to be completed in order to update her BIP. Yet no evidence was introduced at the hearing that even at the time of hearing any of these evaluations or analysis had taken place. With a child who had not been in a traditional classroom setting for nearly a year, and otherwise due her evaluations, the ARC could not have reasonably been considering her current needs, but instead was relying upon ingrained policies.

**II. PETITIONER’S PLACEMENT IN AN ALTERNATIVE SCHOOL SETTING IS NOT THE LEAST RESTRICTIVE ENVIRONMENT FOR IMPLEMENTATION OF HER IEP.**

707 KAR 1:350 Section 1 (5)(6) states that

“(5) In determining the educational placement of a child with a disability, the LEA shall ensure that the placement decision is made by the ARC in conformity with the least

restrictive environment provisions. (6) A child's placement shall be: (a) Determined at least annually; (b) Based on the child's IEP; and (c) As close as possible to the child's home."

707 KAR 1:350 Section 1(5) states

"In determining the educational placement of a child with a disability, the LEA shall ensure that the placement decision is made by the ARC in conformity with the least restrictive environment provisions."

Subsection 8 states

"In selecting the least restrictive environment, consideration shall be given to any potential harmful effects on the child or on the quality of services that he needs."

Petitioner was originally placed in an alternative school setting for disciplinary infractions that took place in 7<sup>th</sup> grade and was not able to work her way out under the point system of those programs.

*Roncker v Walter et al, 700 F 2<sup>nd</sup> 1058, 1063 (6<sup>th</sup> Cir. 1983)* states that

"in a case where the segregated facility is considered superior, the Court should determine whether the services that make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in segregated school would be inappropriate under the act."

707 KAR 1:350 Section 1 (3) defines as follows

"The continuum shall include the alternative placements of: (a) Instruction in regular classes; (b) Special classes; (c) Special schools; (d) Home instruction; and (e) Instruction in hospitals and institutions."

A. STUDENTS PRIOR IEPs NEVER CALLED FOR SUPPLEMENTAL SERVICES THAT WOULD REQUIRE THE RESTRICTIVE PLACEMENT IN A BEHAVIOR SCHOOL.

An alternative behavior school is a more restrictive placement than a regular school by its very nature in that only students with behavioral issues are there. The most telling evidence in this matter is the student's prior IEPs. The earliest IEP introduced into evidence was dated May 16, 2016 (Petitioner's Exhibit 5). It specifically placed the student in part-time general education and part-time special education and stated with the reason being

“Due to [student’s] need for specially designed instruction to address her emotional behavior disability, placement in a part-time special education environment will allow her access to the general education curriculum.”

There were three goals concerning the student’s behavior on that IEP. The Supplementary Aids and Services on Page 5 of the May 16, 2016 IEP specified “Prompts/Cues: Extended time (time and half); Reinforcement in Behavior Modifications Strategies; and Preferred Seating.” For that school year the student had twenty minutes of special education in a co-teaching situation with a regular education teacher in math class and twenty minutes in language arts class. At that time the student was participating in a regular education setting in all of her core content classes (Page 2 of said IEP).

The next IEP introduced was from the ARC on May 10, 2017 (Petitioner’s Exhibit 4). Again in that IEP the least restrictive placement was found to be part-time general education and part-time special education with the reason being stated (child) will be part-time regular education and part-time special education. She requires the support of an ECE classroom for specially designed instruction in the area of completing assignments and demonstrating appropriate behaviors in complying with teacher/staff directives. She also goes to a regular education class where she utilizes supplementary aids and services including; prompts and cues; extended time (time and a half); reinforcement in behavior modification strategies; and preferential treatment.

The IEP currently at issue dated May 9, 2018 again found placement in a part-time special education and part-time general education class to be appropriate with reason being

“(student) requires direct specially designed instruction in: on task behaviors, use of point sheets to self-monitor, replacement behaviors, social skills, use of modeling, and use of cool off. The committee rejects a full-time educational environment and accepts a part-time general and part-time special education environment in a behavior support school where (student) can receive services in a highly structured environment/small class setting with monitored/limited transitions, and low student to adult ratio.”

This is the first time this language is included in the IEP and there are no valid reason given in any of the summary discussion as to why this change is required. It appears this language simply meets the definition of the alternative school setting. Granted the student did state during the meetings that she felt that a small setting was good for her. However, a small setting should be able to be provided within a regular school setting as part of the part-time special education program as a least restrictive setting.

Further, the summary notes included on Page 6 of such ARC in Petitioner's Exhibit 3 specifically states "(student) had not successfully met the requirements to return to a comprehensive school setting for the start of the 2017/18 school year." By making this consideration during the ARC, the school district is paying attention to its policy of the points necessary for a student to earn their way out of an alternative school setting versus the student's individual needs under IDEA. It is particularly enlightening to the Hearing Officer that the student's placement during the day includes only ten minutes of special education each day in a regular classroom with co-teaching in the classes of English, Math, Science, Social Studies, and Reading, making a total of fifty minutes of special education services throughout the day. This limited amount of time needed to provide special education services on behavior indicates that a highly structured environment, small school or small setting with monitored or limited transitions, and low student to adult ratio are not in fact needed for that student. If these intensive services were required, much more time would be needed with special education instruction. Further, the supplementary aids and services for the first time adds the point sheet journal opportunity for cool-offs, preferred activity time, highly structured environment, small school/small class setting, monitored/limited transitions and low student to adult ratio.

B. THE KENTUCKY DEPARTMENT OF EDUCATION AUDIT FURTHER ILLUSTRATES A PATTERN OF LEAST RESTRICTIVE ENVIRONMENT VIOLATIONS, WHICH FURTHER SUPPORTS THE FINDINGS IN MATTER.

Petitioner's Exhibit 12 contained the Report of Findings Related to Exceptional Children's Services by the Kentucky Department Division of Learning Services Management Audit Summary. This document was produced in April 2017 after a management review that was conducted in the fall of 2016. The school then implemented a CAP (Correction Action Plan) on October 17, 2017, just a few months before the ARC meeting in this matter. The Division of Learning Services held on site meetings on October 9, October 23, December 19 and February 16 as of the time of Petitioner's Exhibit 12 was created to review JCPS' compliance.

Greta Hylton, Director of the Division of Learning Services at the Kentucky Department of Education (T2, p 492) testified concerning this audit summary. The staff who conducted the audit conducted on-site visits to Central Office and nineteen schools through the district including alternative behavior schools. Interviews were conducted with JCPS staff of 316 school employees and 47 Central Office staff, as well as informal discussions with school staff and students. The individual records of 119 Special Education students were reviewed, including the Due Process files and behavioral records. The audit found that

“the JCPS organizational structure impedes the district's ability to model and deliver an appropriate, district wide approach to its most significant need-that of behavior supports and student discipline... it is important to note that while many of the deficiencies included in this report are specific to the IDEA, the JCPS Exceptional Child Education (ECE) branch has no leverage to remedy iDEA violations. The governance and organizational structure of JCPS impedes ECE's ability to provide the required oversight of the district's special education program. Without the ability of ECE to require Central Office and school administrators to follow the law, JCPS will likely continue to violate IDEA and ECE does not have the power to ensure compliance...the ECEA office will not be able to remedy these deficits without a change to the organizational structure of the district, including changes to the culture of the district.”

Id at Page 2, Exhibit 12.

Greta Hylton found the organizational structure of JCPS concerning. She testified as to the findings on continuum of educational settings, lack of alternative settings in elementary students, and EBD classes within the district being over legal size capacity and no student ever being placed in residential settings. She summarized by saying “so basically that’s saying that there was a lack of educational settings for students with serious emotional and behavioral disabilities. So not having the continuum of educational replacements (sic) removed the decision making from the ARC.”(T 2, p 502) She felt placement decisions were taken out of the hands of the ARC in situations where students were being referred to alternative schools. (T 2, p 503)

She further stated “...if there was a referral for a student to attend an alternative school, then it was reviewed within the schools due process staff to determine which alternative school is most appropriate. They were referred to the appropriate school. And there was no distinction made between the process used for students with IEPs and students who were general education students.” (T 2, p 583)

“The continuum wasn’t available and so the decision making was taken out of the hands of the ARC.” (T 2, p 503-504) When asked if she was aware of Students Due Process and ECE collaborated on EBD students being placed in alternative schools she answered “I can’t say that they did or did not because I would not have been there behind closed doors to say for certainty that yes, they did, or no, they didn’t. However, if you look in the report and read the report as a whole, the organization structure of JCPS was definitely a huge concern.” (T 2, p 507) “ Area 5 Superintendent is not a Special Education expert, yet a decision-making power remained in that office for students with disabilities, and so DLS continues to be in conversation with the district about the restructure. More information is needed and a clear plan for involving the ARC must be developed, shared with DLS, and evidence of implementation must be provided regularly.” (T 2,

p 507-508) In commenting on the implementation of the CAP, Hylton pointed out that DLS was still meeting with JCPS and that the data on implementing the CAP was self-reported by JCPS and DLS did not necessarily agree all statutes JCPS had checked as completed had taken place. Some requirements continued with the Settlement Agreement which had not yet been completed. (T 2, p 515-516) When discussing the adequacy of the number of self-contained EBD classrooms, Hylton stated “I am not saying that the district has remedied that issue of non-compliance. “ (T 2, p 518)

Dr. Scott Hooper, current Director of Special Education testified concerning the audit and the structure of the school district. He said JCPS was made aware of areas of concern from the audit in October 2017 and JCPS developed the CAP in November and December 2017. When Dr. Hooper began as Special Education Director in January 2018 he had to begin training schools on the CAP and monitoring it. He acknowledged Department of Education was not satisfied and JCPS got a letter in April 2018 that state was going to take over. An appeal was filed by the district on June 1, 2018. (T2, p 531-535) A new CAP was then developed which he is responsible for implementing in the Special Education area. (T 2, p 538) He testified to the new ARC meeting protocol that has been established for current use to insure ARCs consider the continuum of services and that additional classrooms for EBD elementary students are developed. Those meeting and protocols are being monitored with the new CAP. This new CAP also has a process to project the number of seats for alternative schools and therapeutic settings. (T 2, p 539-541) All of these are protocols put into effect after the ARC in question was created. Dr. Hooper also testified to the training that ARC chairpersons now receive. A new ARC chairperson receives three full days of training when they first become eligible to chair ARCs. An experienced ARC chair gets two days of training every year. One full day of each of those trainings is devoted solely

to behavior to provide training strictly on making sure that the behavioral needs of students with disabilities are being met. (T 2, p 551-552)

Dr. Hooper stated “the things that were reported to schools from KDE staff were an ARC would have a meeting, for example, to determine placement of a student in a special school, a self-contained classroom for EBD, or an alternative school. And the perception amongst the schools was that the school district would go and look at that situation and then override and say, no, that student needs to go back to their least restrictive environment.... Now, we, you know, as a department, are clearly communicating to everyone that it is an ARC decision when it comes to the placement and it is always going to be an ARC decision. However, you always want to consult and make sure that the decisions that the ARC makes is based on multiple pieces of analyzed data that you have to a good basis by which you are making that ARC decision, and we are available as a district for consultation.” (T 2, p 544,545)

After the audit completion, but before the results were published in July 2017 the structure of the Central Office staff was changed. The structure of the Exceptional Child Educational Division, the Special Education Department at JCPS, was introduced as Petitioner’s Exhibit 11. JPS has divided the Special Education Department into two parts, taking the behavior component out of ECE and placing it with Student Relations. Dr. Hooper testified that this was done so that all disciplinary matters could be handled in the same department. (TR 2, p 549) He acknowledged that he does not supervise the ECEA behavior section of Student Relations. If a child is to be placed in an alternative school, placement specialist from Student Relations chairs the ARC, researches the students’ history, and sets up the ARC meeting. (T 2, p 423, 443) If placement will not be in an alternative school setting, the student relations is not involved in the ARC meeting.

Placement specialist from Student Relations only chair meetings where placement in alternative school is discussed. (T 2, p 311, 375)

There has been yet another change in organization wherein the department that was previously known as Student Relations at the time of hearing, is now called Culture and Climate Department. A coordinator of ECE behavior had been added to that department with the task of overseeing the behavior aspects of the ECE group of students. That person is also in charge of monitoring and collaborating with schools to insure they are meeting IDEA with regard to behavioral expectations. A specialist who had previously been involved in ECE solely has the purpose of focusing on ECE programming and how to enhance programming needs for behavior within the district. (T 2, p 549, 550) District placement specialists who were previously placement specialists within the Special Education Department were then placed under the new ECE Behavior Department. Two placement specialist work under the specialist who work on students with emotional behavioral disabilities. (T 2, p 551)

The audit specifically noted that the alternative school only provided the seventy-three seats for a district with 13,000 students with IEPs. (PE 12, p 13) The audit on issue four noted that class size/case load waivers were requested for students in self-contained EBD classrooms to allow a larger number of students than the limit of eight students, rather than the school increasing the number of self-contained classrooms. It also noted that placements in middle and high school students were sent to EBD classes that were already at capacity. It noted one school, Waller Environmental, for grades K-8 with students with severe behavioral and emotional disabilities had an enrollment of 92 and that there was a second setting known as Riverview, a school within a school that served students with emotional and behavioral issues. There were four classrooms in Riverview that could only serve eight students at time serving less than 40 students. Therefore,

JCPS had a combined total of 132 students with behavioral based IEPs in two separate schools or classrooms. (PE 12, p 12)

The audit also found

“Central Office staff indicated some schools inappropriately refer students to alternative schools, such as Minor Daniels Academy, before exhausting all less restrictive options, stating “if we build it [more alternative schools], they will come. During interviews with Central Office staff it was revealed that staff believes JCPS has a full continuum of placements for EBD students; however, none were aware of any student ever being placed in a residential setting by a student’s ARC.”

No school interviewed knew that residential placement at the expense of the district was an option for seriously disabled EBD students, and there had no students of the due process folders reviewed that were placed in a residential placement. (PE 12, p 13)

The Hearing Officer recognizes that a residential setting is not at issue here and that some findings related to elementary schools, but believes that these findings are relevant to the school’s overall mindset with regard to behavioral placements and special education students. The conclusions of the audit under this issue stated that

“the district’s failure to have a continuum of EBD placements manifest itself in a lack of alternative schools, lack of therapeutic classrooms, too few self-contained EBD classrooms... The number of alternative school placements for students with IEPs is inadequate, based on the student population size and range of serious behaviors exhibited in the district such as JCPS... having too few structured settings for students with significant emotional behavioral needs leads to students remaining in inappropriate educational placements at their home schools. This practice violates the IDEA as administrative barriers and cannot be used to deny a student the right to special education services based on the students’ individual needs... ARCs have the legal responsibility to determine appropriate settings for students. Due to the scarcity of EBD resources, ARCs are unable to place EBD students in restrictive settings when appropriate. Instead, placements of EBD students needing restrictive settings are improperly taken out of the hands of ARCs and made by Central Office staff, or are not made at all, due to the lack of educational settings for students with serious or emotional and behavioral disabilities. (Conclusions B-J, pgs 13, 14, PE 12) ...having too few structured settings for students with significant emotional/behavioral needs leads to student’s remaining in inappropriate educational placements at their home schools.”

The Findings noted that this practice violates IDEA as administrative barriers cannot be used to deny a student special education services based on their individual needs. In the case at hand, this same lack of resources can include having self-contained units within regularly functioning schools to prevent a child with minimal needs being placed in an alternative school or having additional aids and supports in the regular education classroom at a regular school.

The Hearing Officer recognizes that this decision may not create the result that either party wishes as it appears the student wishes to go to certain other alternative schools or choice schools and the district wants her to go to BM, an alternate school. This finding could mean that the least restrictive environment for her is with a specially designed instruction in a special and regular education setting in a regular comprehensive school in her home district.

### III. PETITIONER IS NOT ENTITLED TO ADD FINDINGS FROM THE STATE AUDIT AS EVIDENCE AFTER THE HEARING

Subsection (4) of Section 11 of 707 KAR 1:340 provides that the procedures that apply to due process hearings are those included in KRS Chapter 13B and IDEA Subpart E. According to Chapter 13B, findings of fact in administrative hearings "shall be based exclusively on the evidence in the record." KRS 13B.090 (1). Each party has the right to inspect, at least five (5) days prior to the hearing, a list of all witnesses every other party expects to call at the hearing and the available documentary or tangible evidence relating to an administrative hearing either in person or by counsel. KRS 19B.090 (3). IDEA Subpart E furnishes similar rights, providing that any party to a hearing has the right to do the following:

- (2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;
  - (3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing,
- 34 C.F.R. §300.512.

JCPS had the right to inspection of all evidence five days prior to the hearing. The document that Petitioner now wishes to introduce into evidence and include in the record was never produced prior to the hearing. It did not even exist at the time of the hearing or the ARC meeting at issue. To allow this document to be submitted at this stage would rob JCPS of its right to confront and cross-examine the evidence being presented against it.

Petitioner admits that the monitoring report she now seeks to introduce into the record was produced after the October 24-25, 2018 hearing. This document does not have conclusive and determinative weight in deciding the issues in this case. This document was not introduced as evidence or otherwise considered by the parties or the Hearing Officer at the due process hearing. It was not even drafted until almost a year after the ARC meeting at issue in this case. As such, it was not subject to the examination and scrutiny that the evidentiary process requires. To allow this document to now be considered as evidence without JCPS being afforded the opportunity to contest or explain its merit or admissibility before this body would be unduly prejudicial. Moreover, Chapter 13B is clear that the findings in this case must be exclusively based on evidence in the record. Petitioner has already exercised her right to be heard and to present her evidence and to confront, cross-examine and compel the attendance of witnesses in this case. The document she now seeks to introduce is not in the record, and therefore the Hearing Officer cannot base her findings on same.

#### ORDERS

Based upon the foregoing it is hereby ordered as follows:

1. That the ARC reconvene and a determination be made of the full continuum of placement given the student's needs as reflected in current evaluations and to consider that she be in a regular and comprehensive school with similarly situated peers to the greatest degree possible under least restrictive environment requirements. It is hoped that by the time the ARC reconvenes

that the school district has implemented more programs within their mainstream schools as required in the Kentucky Department of Education Audit Findings and set forth in their Corrective Action Plan which would give the ARC more options to consider.

2. Compensatory education for the student is ordered for summer school to allow the child to graduate as soon as possible by recovering credits during the summer.

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

#### APPEAL RIGHTS

Pursuant to 707 KAR 1:340 Section 12. Appeal of Decision. (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 (ECAB) assigned by the Kentucky Department of Education. The appeal shall be perfected by sending it, by certified mail to the Kentucky Department of Education, a request for appeal, within thirty (30) calendar days of the date of the Hearing Officer's decision.

The address: Kentucky Department of Education  
Office of Legal Services  
300 Sower Blvd. 5<sup>th</sup> Floor  
Frankfort, Kentucky 40601

Dated this 18<sup>th</sup> day of March, 2019.

/s/ Kim Hunt Price

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KIM HUNT PRICE  
HEARING OFFICER

CERTIFICATE OF SERVICE

The foregoing Order was served by electronic mail to Hon. Rita J. Ward at [REDACTED]  
[REDACTED]; Hon. Dana Collins at [REDACTED] with the original being mailed to Hon.  
Todd G. Allen, KDE, 300 Sower Blvd., 5<sup>th</sup> Floor, Frankfort, Kentucky 40601, this 18th day of  
March, 2019.

/s/ Kim Hunt Price

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KIM HUNT PRICE  
HEARING OFFICER