KENTUCKY DEPARTMENT OF EDUCATION
DIVISION OF EXCEPTIONAL CHILDREN SERVICES
EXCEPTIONAL CHILDREN APPEALS BOARD
AGENCY CASE NUMBER 1718-09

APPELLANT

V. **FINAL DECISION AND ORDER**

HARDIN COUNTY SCHOOLS APPELLEE

This appeal comes before the Exceptional Children Appeals Board (hereinafter "ECAB") following a hearing conducted by Hearing Officer Mike Wilson. The ECAB panel, consisting of Paul L. Whalen,Kim Hunt Price and Karen L. Perch, Chair, was appointed to consider the appeal of the Student, which was timely filed. The Appellant, represented by his parent, *pro se*, submitted a written statement detailing the Student's concerns for this appeal and the Appellee also submitted a written brief. These documents have been reviewed and carefully considered by the ECAB.

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

I. 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.

<u>The Student Bears the Burden of Proof</u>. 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).

<u>Legal Standard for Provision of FAPE</u>. *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 caases.

<u>The ECAB reviews the Record de Novo</u>. The Student on appeal takes issue with Hearing Officer decisions related to Student placement, the manifestation determination, functional behavioral analysis ("FBA") and behavior intervention plans ("BIP"). 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 the 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.

<u>Issues for hearing raised by the Parent</u>. The Hearing Officer was asked to decide

1) whether the school district denied the Student FAPE by refusing to permit the parent to bring a therapist to school to provide services to the Student,

2) whether the school district denied the Student FAPE by refusing to permit the Student to remove himself from the PASS classroom and

3) whether the school district denied the Student FAPE by changing the Student's placement from [redacted] Middle School to [redacted], which the Student alleges is not the least restrictive environment.

Additional issues considered by the Hearing Officer. The hearing officer also considered several additional issues:

4) whether the school district denied the Student FAPE by failing to conduct evaluations, hold ARC meetings, modify BIPs, etc. after the Student returned to Hardin County in the Spring of 2016,

5) whether the school district denied the Student FAPE by failing to implement appropriate social skills services at [redacted] Middle School,

6) whether the school district denied the Student FAPE by making changes in a BIP before completing another FBA,

7) whether the school district denied the Student FAPE by proposing a change of placement prior to completing a previously authorized FBA, and

8) whether the school district denied the Student FAPE by failing to give proper notice of the November 15, 2017 ARC meeting and by failing to provide the parent with a copy of the notes from that meeting.

The parent also invoked stay put for the pendency of these proceedings, so that the Student would not be transferred to [redacted] prior to a final decision in this matter.

II. EDUCATIONAL HISTORY

<u>Student enrollment in Hardin County Schools</u>. It is undisputed that the Student has been entitled to special education services from pre-school to the present time. TE 15-16. Initially, the classification for such services was Developmental Delay. D1. At a later re-evaluation this was changed to Emotional - Behavioral Disorder. At all times relevant to this Final Decision and Order during the Student's educational career, the category of eligibility was Emotional - Behavioral Disorder. It is also undisputed that between the Student's third and fourth grade school years, the family moved to [redacted], but then returned to Hardin County in the Spring of the Student's fourth grade year. Since the return from [redacted], the Student has remained enrolled in Hardin County Schools.

<u>The</u> <u>ARC</u> **<u>met numerous times to assess Student needs and progress and to revise his IEPs and BIPS</u>.** The record shows that the Student has had no fewer than four BIPs throughout his educational career. TE 112, 126. The first FBA was conducted in 2012 and BIP data was reviewed by the ARC in September of that year. D 2, TE 64. As part of this process and subsequent discussions, it was decided that the Student would receive social emotional services twice per day, and would use the school's PASS program as needed in the elementary school setting. TE 66-67, 69, D 3.

The Student was first identified as having an Emotional-Behavioral Disorder as a result of an evaluation conducted in the Spring of 2014. TE 70, D. 4. The ARC continued Student participation in the PASS program at that time. TE 78.

Following the Student's return to Hardin County from [redacted], the ARC met to review the [redacted] IEP and BIP. D8, TE 88-89. It appeared that the [redacted] school had seen the

same types of behavioral issues that had been seen previously in the Hardin County schools. TE 90. On April 15, 2016, the ARC also did a new eligibility determination. Initial school disclosure at 222-265.

In the Fall of 2016, the parent requested an ARC meeting, which was initially scheduled for September 28, 2016 and rescheduled for October 17, 2016, due to parent scheduling conflicts. The latter date was also cancelled at parent request. Special Education contact log at 1034. Contrary to parent testimony regarding failure of ARC to address Student needs (TE 17-18, 23), the ARC met again on December 8, 2016, at parent's request. TE 195. It also met on April 14, 2017, in part to update information about the Students social emotional status, academic performance, behavioral instruction and in part to adjust social skills instruction for transition to middle school. TE 153-155, 156-157.

In the Fall of 2017, the Student was suspended for disciplinary reasons. As the suspension period approached 10 days, the ARC met to conduct a manifestation determination and found that the behavior leading to the suspension was indeed a manifestation of the Student's disability. Then, relying upon a FBA and BIP previously developed, the school district proposed a change of placement (considered herein to mean both a change of location of services and a change of the manner in which services are delivered to the Student). The parent objected to the proposed change and suggested that the Student be allowed to remove himself from the classroom to a private location in the hall until he could regain control of his behavior. The parent also requested an outside therapist to be provided to the Student at school, rather than sending the Student to [redacted]. The parent believed that the proposed change would deny the Student FAPE and that the school district was not providing appropriate psychological and

social skills services. This disagreement led to the due process hearing conducted on March 9, 2018.

FINDINGS OF THE ECAB

1. The school district did not deny the Student FAPE by refusing to permit the parent to bring a therapist to school to provide services to the Student.

The parent testified that she believes that the Student needs therapy from the outside. TE 27. The parent also believes that the school should either provide or permit her to hire a therapist to deliver services to the Student at [redacted] Middle School, rather than changing placement to an alternative school setting. The Student's IEP does not require provision of a private therapist to serve the Student at school. The proposed placement at [redacted], however, would include pairing the Student with an on-site therapist who would assist in the Student's behavioral skills instruction. The school district has offered an approach that is very similar to what the parent requested , although the physical location will be different from that preferred by the parent. Refusal to hire or permit the parent to hire a private therapist for the Student does not constitute a denial of FAPE in the circumstances before this ECAB.

2. The school district did not deny the Student FAPE by refusing to permit the Student to remove himself from the PASS classroom.

The Student's behaviors continued to escalate in 2017, to the point that the Student was at times physically and/or verbally aggressive, threatening to others, disrespectful to others, especially women, and disruptive of his own learning and that of other students. Because of the frequency and severity of the problem behaviors, especially during transition times, the Student was actually given an escort to assist him in getting from place to place. TE 180. In the circumstances as they existed at the time of the hearing, this ECAB cannot help but agree that the

School's decision was appropriate, both for welfare of the Student and also for that of other students and staff. This does not amount to a denial of FAPE.

3. The school district did not deny the Student FAPE by changing the placement from [redacted] Middle School to [redacted], which the Student alleges is not the least restrictive environment.

As stated herein above, the Student has a long history of behavioral issues at school. Although the school record of the Student's behavioral issues is extensive, not all incidents of inappropriate Student behavior are even recorded in the behavioral database, because some are successfully handled in the classroom or with special support services and don't warrant removal from the school setting. TE 78. From first grade through third grade the Student had 33 behavioral incidents serious enough for entry into the behavioral database. D 6, also TE 78.

Upon the Student's return to Hardin County from [redacted], and despite the school's efforts to attempt various strategies to teach the Student and help the Student to modify his behavior, the Student's behaviors have substantially worsened. By sixth grade, not only had the Student's behaviors escalated significantly, but he was also considerably larger than a typical sixth grader, which may have the effect of making physical aggression more difficult to manage. TE 296-320. *See also* D 22 for a detailed accounting of Student behavior.

The PASS classroom system had marginal success in the Student's early educational history, because at that point he was at least able to receive some benefit from the academics. The Student did struggle with math and missed a lot of content either because he was not in the classroom or because his behavior prevented him from participating in the classroom. TE 82-83. At this point, the PASS program is not working for the Student at all, even with a modified BIP. Alternatives other than [redacted] have been considered by the ARC, but all

were rejected for various reasons. *See* TE 150-151.

Typical Student behaviors during the Student's fifth grade year included such things as being disruptive in class, talking out, singing, getting out of his seat, running across the classroom, verbal aggression, speaking disrespectfully to others, calling names, cursing, threatening, defiance, refusal to complete assignments, tearing papers , throwing items, arguing with adults and peers, making fun of other students and calling them names, laughing, being disrespectful to females, and intimidation. TE 151-152, 155. School initial disclosure at p. 146. The PASS program was ineffective in de-escalating Student disruptiveness and defiance, even when a PASS coach attempted to utilize positive behavior strategies with the Student. TE 107-108.

In an effort to further assist the Student, the ARC again revised the IEP in September, 2017 to have more class time in the resource room for language arts, which had a smaller class size, and more social skills training. The ARC also proposed doing another formal FBA, which would require parental consent. Exhibit D 17 also shows another adjustment to the BIP, which would include Student participation in the bullying prevention program. When these efforts did not go well, the ARC proposed a change of placement at a November 2, 2017 meeting.

The proposed placement was for all support class work, language arts, math science and social studies to be provided in the resource room at [REDACTED], with general education for lunch and other classes. TE 109, 172. Social skills instruction would be for 50 minutes per day. TE 171. By that time, it was clear that the efforts of [REDACTED] Middle School were not working and that the needs of the Student could not be met at [REDACTED]. Shortly thereafter, the

parent filed this due process hearing request and the Student has remained at [redacted] under stay-put. TE 175.

The Hearing Officer is correct in his finding that the proposed placement at [redacted] is a more restrictive environment than is the current placement at [redacted]. The Hearing Officer is also correct that the proposed placement can provide more intense, immediate and one-on-one services to the Student. [redacted] has a smaller class size and more individual supports and students are automatically paired with a therapist. Therapy is woven into the curriculum and group counseling is also provided for middle school students. TE 116-117, 259-260.

The ECAB is not unmindful of the parent's objections to certain aspects of the program at [redacted]. The parent objects, for example, to the system of levels used in that program, in which students work their way through levels of behavior under a point system. In order to be able to transition back to their home school, they must be successful at level 4.
TE 266, 267. The parent believes that the proposed change of placement is for punishment, but the hearing record does not support that belief. As the principal of [redacted] testified,

> [t]his is a young man that has a wonderful heart and that by not giving him the tools that I think [redacted] could give him we're just doing him a disservice, because he's a good young man, he just needs some extra tools for really a short amount of time.

TE 325.

In making this statement, the principal was giving due consideration to the potential harmful effects on the child or on the quality of services that he needs, by *not* providing to the Student the additional supports and services of [redacted], as required by 707 KAR 1:350,

Section 1(8) . ARC conference summary notes also support the ECAB's conclusion that the ARC has taken various potential effects on the Student into account in making its recommendation for placement at [redacted].

707 KAR 1:350, Section 1(1) states:

> An LEA shall ensure that **to the maximum extent appropriate**, children with disabilities... are educated with children who are nondisabled. The LEA shall ensure that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if education in the regular education environment with the use of supplementary aids and services cannot be satisfactorily achieved due to the nature or severity of the disability.

Emphasis added.

This ECAB finds that the Student, at the present time, cannot benefit from his education in the regular education environment and that the proposed placement is currently the least restrictive environment appropriate for the Student. It is not correct to say that the [redacted] program denies FAPE to the Student simply because it is a more restrictive program than what can be provided at the Student's home school. Such would be the case only if the program is not the least restrictive placement appropriate for the Student. Although this ECAB finds that the proposed [redacted] placement is the least restrictive placement for the Student at this time, the ARC must continue to satisfy the requirements of 707 KAR 1:350, Section 1(6), determining the student's placement at least annually, based upon the IEP and as close as possible to the Student's home.

4. The school district did not deny the Student FAPE by failing to conduct evaluations, hold ARC meetings, modify BIPs, etc. after the Student returned to Hardin County in the Spring of 2016 and

5. The school district did not deny the Student FAPE by failing to implement appropriate social skills services at [redacted] Middle School.

As indicated herein above, the ARC did conduct evaluations after the Student returned to Hardin County. The school district also scheduled ARC meetings, some at the request of the parent and some at the request of school district personnel. Some ARC meetings were rescheduled and/or cancelled at the request of the parent. Numerous others were held, during which the IEPs and BIPs were reviewed, tweaked and modified in an attempt to better serve the Student. The school district was also in regular communication with the parent.

At all times relevant to the Hearing Decision, school personnel were teaching social skills. Some of the techniques used to teach social skills and behavior replacement included role playing, modeling appropriate behaviors, check lists and reminders, written down to serve as a reference for students, verbal and non-verbal cues, visual cues, and use of research based social skills lesson materials. TE 113. All of these were used with the Student in the PASS classroom and at various other times. Social skills strategies were included in the Student's IEP. The parent offered conflicting testimony on this point, on the one hand indicating that she believes the Student receives social skills instruction, but doesn't know how it's being done and on the other hand, that the social skills training is not written down, but that school personnel told her verbally that the social skills training is being done. TE 40, 38. The parent has acknowledged receiving the results of the school's behavior data collection and the results. TE 49.

FAPE has not been denied by either failing to hold ARC meetings, etc. following the Student's return to Hardin County, or by failing to implement social skills instruction.

6. The school district did not deny the Student FAPE by making changes in a BIP before completing another FBA and

7. The school district did not deny the Student FAPE by proposing a change of placement

prior to completing a previously authorized FBA.

It is true and undisputed that the ARC had decided to do another formal FBA and that the ARC made changes to the Student's BIP before any such FBA could be completed. The parent's argument that the BIP changes should not have occurred prior to completion of the FBA has some merit. The purpose of the FBA is to attempt to determine what function various behaviors serve for a particular person. What benefit does the person derive from a behavior that keeps even an inappropriate behavior going? Creating a BIP without this information can result in making the undesirable behavior worse, by accidentally giving the person what he wants - attention, escape, avoidance, power and control, etc., or some combination of these. The possibility of accidentally rewarding bad behaviors exists when the behavior plan is developed in the absence of good data collection techniques.

Examined in the context of this case, however, two FBAs had already been performed, one in Hardin County and one in ████. The ARC did not have the benefit of the underlying data from the ████ FBA, but did have the BIP that resulted from it. The ARC also had collected substantial data itself about the Student in this case and had developed and revised BIPs based on the data collected.

Although the parent speculated that deficiencies in the BIP may have led to the Student's behaviors, the Hearing record contains no evidence that this is true. Given the escalation of Student behaviors, both in frequency and intensity, in the Fall of 2017, the ARC reasonably would have used the data it had already gathered to further modify the Student's BIP - and may have been remiss in not doing so had it waited for the results of the new FBA.

8. The school district did not deny the Student FAPE by failing to give proper notice of the November 15, 2017 ARC meeting and by failing to provide the parent with a copy of

the notes from that meeting.

The Hearing Officer correctly found that the school did not give the required seven days advance notice to the parent of an ARC meeting scheduled for November 15, 2017, when it called her on November 10, 2017 - just five days before the scheduled meeting. In her testimony at Hearing, the parent acknowledged that she agreed to the ARC meeting because the Student was not going to be allowed back to school after a suspension, until an ARC meeting was held. TE 31. Although the parent did not intend to waive proper notice of the meeting, her agreement to the meeting, regardless of the reason, constituted a waiver of the required seven day notice for that meeting. It did not constitute a waiver with respect to any other past or future meeting and no allegation of such waiver or of violation of the notice rule has been made.

Although the parent signed the conference summary minutes, which clearly states that the parent had been given all documents pertaining to that meeting, the parent alleged that she did not receive those minutes. The Hearing record supports the position that the parent did in fact receive those notes. School initial disclosure, p 100-102. The parent presented no evidence or explanation for how it could have happened that she could have signed the document, having been in attendance at the meeting at which the ARC changed the Student's placement to ████ ███. Furthermore, the parent acknowledges having received the signature page from the ARC meeting, but offered no explanation for why she would not have objected at the time it occurred. A full copy of the notes was also mailed to the parent on November 29, 2017. School initial disclosure, p. 1040.

ORDER

The school district is the prevailing party on all issues.

NOTICE OF APPEAL RIGHTS

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

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

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

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

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

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

(1) All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit

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

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

SO ORDERED this 27th day of June, 2018, by the Exceptional Children's Appeals Board, the panel consisting ofKim Hunt Price, Paul L. Whalen and Karen L. Perch, Chair.

EXCEPTIONAL CHILDREN APPEALS BOARD

BY: /s/ Karen L. Perch

KAREN L. PERCH, CHAIR

CERTIFICATION:

The original of the foregoing was mailed this 27th day of June, 2018 to:

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