

**KENTUCKY DEPARTMENT OF EDUCATION  
DIVISION OF EXCEPTIONAL CHILDREN SERVICES  
EXCEPTIONAL CHILDREN APPEALS BOARD  
AGENCY CASE NO. 1819-16**

■

**APPELLANT**

**V.**

**FINAL DECISION AND ORDER**

■■■■■■■■■■

**SCHOOLS**

**APPELLEE**

**PROCEDURAL HISTORY**

A due process hearing was held in May and June of 2017 in a different case involving the same parties. The Hearing Officer issued a decision in that case on November 1, 2017. That decision was appealed to the Exceptional Children Appeals Board (“ECAB”) which issued its decision in May 2018. Both parties appealed the ECAB decision to the United States District Court and ultimately entered into a settlement agreement resolving all issues in that case.

On February 15, 2019, the Appellant filed a Request for Due Process Hearing initiating the current case. A hearing was held on February 26 and 27, 2020. On July 31, 2020, the Hearing Officer issued a final order holding the Appellant’s Due Process Complaint was denied in all regards. On September 8, 2020, the Appellant filed a Notice of Appeal. In the Appellant’s Brief dated October 19, 2020, he alleges:

1. The Hearing Officer erred when she found that the Appellee school district appropriately developed and implemented Appellant’s IEP so as to offer FAPE.
2. The Hearing Officer erred when she found that the Appellee school district offered an appropriate Least Restrictive Environment under the Appellant’s IEPs.

3. The Hearing Officer erred when she found that the removal of transportation services was not a stay-put violation.
4. The Hearing Officer erred when she found that the Appellant was provided FAPE all of 2018-2019 and 2019-2020 school years.
5. The Hearing Officer erred when she determined that the Appellant was not entitled to any form of relief.
6. The Hearing Officer erred when she determined that she did not have jurisdiction to require the Appellee school district to adopt specific policies or programs prospectively.

This case is now before the Exceptional Children Appeals Board.

### **FINDINGS OF FACT**

1. ■■■ was a 17-year-old senior at ■■■ High School at the time of the hearing. (JE 190) He graduated with his peers in May 2020 earning a high school diploma.
2. ■■■ was identified as a student with attention deficit hyperactivity disorder; anxiety; dysgraphia with a learning disability in written expression; learning disability in math; non-verbal learning disorder; sensory integration disorder with motor planning deficit; static encephalopathy; executive functioning disorder; and depression. He also suffered concussions during the 2016-2017 academic year. (TT Volume 2, pgs. 304-311; JX 43-51; Petitioner's Exhibit 23-24)
3. ■■■ was identified as a student with a disability under the primary eligibility category of other health impairment and has had an IEP at all times relevant to this litigation. (JE 1-5)

4. While very intelligent, ■■■ struggles academically in math and writing. He also struggles socially with transitions, following directions, following a schedule, and responding appropriately to people whom he is not comfortable with or whom he does not have a good relationship. He struggles to communicate and express his feelings, and instead uses inappropriate language, raises his voice, cusses, and punches inanimate objects. (TT Volume 1, pgs. 79, 88 and 100; Petitioner's Exhibit 23-24)

5. ■■■ has an extensive history of behavioral related issues. (TT Volume 1, pg. 139) His disabilities manifest in such ways as being on edge, talking out, cussing, having difficulty forgiving, perceiving situations and people's feelings toward him inaccurately. He has executive functioning deficits that make it difficult for him to plan, organize and see the consequences of his action in the moment. When confronted with difficult situations, ■■■. often has a fight or flight response and may become verbally or physically aggressive toward inanimate objects; or he may completely shut down. (TT Volume 1, pgs. 32, 33, 101-103, 141-142, 144-145, 147; Petitioner's Exhibit 23, 24).

6. One of ■■■'s coping strategies is to walk around in the school building, and he sometimes goes to areas where he is not allowed. (TT Volume 1, pg. 99). Techniques that are successful in de-escalating ■■■. include giving him time to cool down and process his feelings, speaking to him calmly, and approaching him from a caring perspective. (TT Volume 1, pgs. 101, 140-141)

7. During the 2018-19 academic year, ■■■. began taking dual enrollment courses at ■■■ Community and Technical College (“■■■”) from Monday through Thursday for half a day. (TT Volume 1, pgs. 39-40, 76) ■■■ is a post-secondary educational institution and part of the Kentucky Community and Technical College System. It is one of multiple local

colleges at which [REDACTED] High School students may apply to take dual enrollment courses which are then integrated into their high school class schedule. There is a time period in which the students can enroll in this program and the enrollment is done through the high school. (PE 2; TT Volume 2, pg. 520)

8. [REDACTED] High School students may enroll in dual credit courses through [REDACTED] with the courses being cataloged and approved through the college's regular course approval process and are taught by [REDACTED] faculty on its campus. Other dual enrollment courses are offered exclusively to high school students and taught by [REDACTED] faculty at the high school campuses. (PE 2, pg. 10)

9. [REDACTED] also provides opportunities for prospective students to enroll in courses taught at one of the [REDACTED] campuses where high school students receive instruction along with college students. These courses are not administered through the school district. (PE 2)

10. [REDACTED]. traveled to [REDACTED] to attend class as [REDACTED] does not have a location on the [REDACTED] High School campus. (TT Volume 1, pg. 130) During the 2018-19 academic year, the school district provided transportation for [REDACTED]. to travel between [REDACTED] High School and [REDACTED] s campus as part of the automotive repair cohort. (TT Volume 2, pg. 513)

11. During the 2018-19 academic year, after [REDACTED]. returned from [REDACTED], he ate lunch in Ms. [REDACTED] s (a [REDACTED] High School teacher) room and participated in social school skills activities there. (TT Volume 1, pgs. 39-40) During the 2018-19 academic year, [REDACTED]'s IEP provided for 10 minutes per day Monday through Thursday of social skills instruction and 50 minutes per day on Friday which was given by Ms. [REDACTED]. (TT Volume 1, pgs. 40, 49) [REDACTED]. came to Ms. [REDACTED]'s room about once a week when frustrated to calm down. He had

unlimited access to her classroom at any time for de-escalation and behavior supports. (TT Volume 1, pg. 41)

12. During the 2018-19 academic year, [REDACTED]. attended regular classes for math and writing. Ms. [REDACTED] attended those classes with him to facilitate collaborative support in a regular classroom. (TT Volume 1, pgs. 76-77)

13. During the 2018-19 academic year, [REDACTED]. was very successful in classes he took at both [REDACTED] High School and [REDACTED], and he made good progress toward accomplishing his goals. [REDACTED].’s behavior significantly improved during the fall of 2018. (JE 13, pg. 130)

14. Collaborative support services are administered when a certified general education teacher and a special education teacher work together in a single classroom composed of students in special education and students who are not in special education. (TT Volume 1, pg. 157)

15. Resource model services require special education students to be removed from the general education classroom to a room with a small group of special education students and a special education teacher. (TT Volume 1, pg. 75)

16. In December 2018, [REDACTED]’s parents noticed an increase in his negative behaviors after a reduction of special education services minutes. In January and February 2019, school personnel also expressed concerns about his behaviors. Thereafter, there were two significant behavioral incidents in which [REDACTED] was criminally charged. (TT Volume 2, pgs. 339-345, 441-442) [REDACTED] has never been charged with a criminal offense occurring outside of school. (TT Volume 2, pgs. 345)

17. Beginning with the IEP dated December 18, 2018, [REDACTED]’s post-secondary goals were to complete an automotive technician program at a local community college and obtain employment as an automotive technician at a local automotive repair shop. (JE pg. 46) His

transitional services were listed as a multi-year course of study, an individual learning plan (“ILP”), and a referral to the office of vocational rehabilitation (“OVR”). (JE pg. 46) The IEP stated teachers will be provided with information about ■■■■■'s diagnosis. (JE pg. 50)

18. The IEP defined the least restrictive environment as collaborative math and writing support in the general education classroom with behavioral support throughout the school day as needed and access to a separate location for de-escalation and self-regulation as needed. (JE pg. 50)

19. Following a string of behavioral incidents, the ARC met on March 22, 2019, and revised ■■■■■'s Behavioral Intervention Plan (“BIP”). (JE pg. 149) ■■■■■. experienced external stressors before this time including the birth of his child. (TT Volume 2, pg. 381) The ARC decided to provide extra support and amended the BIP to include more time with preferred staff members. Although there was an increase in behavioral issues in early 2019, the 2018-19 academic schedule of dual enrollment and collaborative classes at Scott High School worked well for J.H. (TT Volume 2, pg. 423)

20. ■■■■■ scored 32 on the ACT in English and thus was eligible for a dual enrollment English class at ■■■■■. (TT volume 1, pgs. 83-84; JE pg. 132)

21. During the spring 2019 semester, ■■■■■ enrolled himself in classes at ■■■■■ for the Fall 2019 semester. He missed the deadline to register for the automotive cohort program through ■■■■■ High School. (TT Volume 2, pgs. 274, 511-512) The ■■■■■ schedule was made without input from the school district's personnel and did not provide for class time at ■■■■■ High School. (PE 3, pgs. 16-17) The schedule required ■■■■■. to travel to three ■■■■■ campuses located in three different cities to attend classes. Prior to the beginning of the 2019-20

academic year, the school district became aware of ■■■'s enrollment in solely ■■■■ courses. (TT Volume 1, pg. 158-159)

22. On August 6, 2019, school personnel attempted to contact ■■■'s mother to begin preparing the 2019-20 IEP. During the ARC meeting on September 5, 2019, it was determined that ■■■'s minutes under the current IEP were not compatible with the ■■■■ class schedule ■■■. (JE 15, 157; PE 13, pg. 145) The school district was still willing and able to provide special education services under the IEP, but ■■■. would have to come to ■■■ High School's campus because ■■■■ did not permit school employees to provide these services during dual enrollment courses. (JE 157)

23. All students with disabilities who participate in dual enrollment classes at ■■■■ are required to return to a school campus to receive their special education services. (JE 158) The school offered ■■■ several options to remedy the incapability of his IEP minutes and his desired dual enrollment schedule exclusively at ■■■■. (TT Volume 2, pg. 418) One option was for ■■■ to return to ■■■ High School for resource minutes. (TT Volume 1, pg. 158-159, Volume 2, pg. 395)

24. ■■■'s parents wanted ■■■ to remain fulltime at ■■■■ and receive special education services at ■■■■. (TT Volume 2, pg. 418)

25. ■■■ did not attend class at ■■■ High School or receive any services from the school during the 2019-20 academic year. (TT Volume 1, pgs. 158-159) ■■■. received dual enrollment credit for his ■■■■ classes which allowed him to graduate from ■■■ High School and obtain college credits simultaneously.

26. ■■■ did not have an IEP that provided for dual enrollment or transportation services as a special education related service or accommodation. (Entire record.)

27. ■■■'s IEP provided for indirect occupational therapy services to be furnished by the school for 20 minutes per month. (JE 50-51) No occupational therapist ever consulted with Ms. ■■■ about providing ■■■ with sensory input strategies or a sensory diet. (TT Volume 1, pgs. 51-52)

28. Generalized special education training was provided to all personnel at the high school each year. (TT Volume 2, pg. 502) Assistant Principal ■■■ conducted special education training to all of ■■■'s teachers during each academic year regarding ■■■ IEP. (TT Volume 2, pgs. 502, 504-505) She also conducted training specifically related to ■■■ and his IEP to other school personnel who interacted with ■■■ including a school nurse, a librarian and bus monitors. (TT Volume 2, pgs. 502-503, 506-507) Ms. ■■■ and Ms. ■■■, teachers at ■■■ High School, did not receive training concerning ■■■'s diagnosis. Both of these teachers had supervisory roles at the school. (TT Volume 1, pgs. 32, 50-51, 175, 207-208; TT Volume 2, pgs. 504-506)

29. Ms. ■■■ attended court proceedings regarding the criminal charge against ■■■ without using leave while being paid by the school. Principal ■■■, Assistant ■■■ and ■■■, the ■■■ County School Board Attorney, attended the court hearing regarding charges filed by Ms. ■■■ against ■■■. (TT volume 1, pg. 188, volume 2, pgs. 532-533) ■■■'s special education file was not given to the juvenile court when charges were filed against ■■■. (TT volume 1, pg. 206)

30. ■■■ High School has an agreement with the City of ■■■ Police Department to provide a school resource officer ("SRO") at the school. The SRO is employed by the City of ■■■ and is not a school employee. (TT Volume 2, pgs. 467, 468) SRO's do not partake

in the discipline of students or the implementation of BIPs. They are assigned primarily to maintain the safety and protection of students and staff. (TT Volume 2, pgs. 457-459)

31. SRO ██████ filed criminal charges against ██████ at the request of teachers ██████ and ██████ due to incidents occurring in 2017. (TT Volume 2, pg. 461; JE 22 and 23) SRO ██████ never received training regarding ██████'s disabilities, ██████'s manifestations or ██████'s BIP. (TT volume 2, pgs. 483, 503, 507)

32. ██████ is a male English teacher at ██████ High School who openly identifies as non-binary, wears women's clothing and keeps long painted fingernails. ██████ felt uncomfortable around Ms. ██████. On January 18, 2019, Ms. ██████ encountered ██████ and other students in the men's restroom. While exiting the restroom, ██████ yelled "faggot" back toward the restroom which was presumably directed toward Ms. ██████. (TT Volume 1, pgs. 105-106, 121) Ms. ██████ requested SRO ██████ file a juvenile criminal complaint against ██████ alleging "hate speech" and SRO ██████ complied. (JE 23; TT Volume 2, pgs. 462-463) ██████ did not receive counseling, debriefing or social skills instruction regarding this incident. (TT Volume 1, pgs. 35-36, 118-119)

33. On February 11, 2019, SRO ██████ responded to a request for assistance on a bus after school was dismissed to address unruly behavior by a group of students. (JE 205) ██████ was present on the bus with his girlfriend, although it was not his assigned bus and he did not have permission to be on it. (TT Volume 2, pgs. 470-472) ██████ yelled profanities and violently punched the roof of the bus when he was asked to leave. (TT Volume 2, pgs. 470-472; JE 205) SRO ██████ entered the bus where Assistant Principal ██████, a preferred person on ██████'s intervention plan, was intervening with ██████. SRO ██████ did not interact with ██████ or file criminal charges against him regarding this incident. (Body camera video; TT Volume 2, pgs.

479-481) Criminal charges were later filed by the [REDACTED] Police Chief after [REDACTED]'s parents brought the chief's attention to this incident. (TT Volume 2, pgs. 472-473; JE 25) [REDACTED] did not receive counseling, debriefing or social skills instruction regarding this incident. (TT Volume 1, pg. 36, 118-199)

34. [REDACTED], previously [REDACTED] was [REDACTED]'s case manager in 2018-19 and 2019-20. She gave [REDACTED] specially designed instruction in both regular and resource classrooms to help him stay organized and focused, to teach him de-escalating and calming strategies, and to provide behavioral support. (TT Volume 1, pgs. 69, 72, 76)

35. The school district and [REDACTED] signed a Memorandum of Agreement whereby [REDACTED] would provide dual credit classes to students. The Memorandum of Agreement does not address how students with disabilities will be served. (JE 9-15) The Director of Special Education, [REDACTED], relied upon this agreement when she testified that teachers from [REDACTED] County cannot provide collaborative special education services to students while the students are attending dual classes at [REDACTED]. (TT volume 2, pgs. 9-15, 251-252) Ms. [REDACTED] did not contact [REDACTED] personnel to determine if special education services could be provided at [REDACTED]. (TT volume 2, pgs. 250-251)

36. The school provided transportation services to [REDACTED] to and from [REDACTED] for the dual enrollment classes during the 2018-19 academic year. The transportation services were not part of [REDACTED]'s IEP. The transportation services were withdrawn on September 5, 2019. (TT volume 1, pg. 117)

37. Ms. [REDACTED] offered [REDACTED] the opportunity to ride a cohort school buses from [REDACTED] back to the school building during the 2019-20 academic year. The bus left [REDACTED] at 10:30

am, but ■■■ did not get out of class until 11:45 a.m. during the 2019-20 academic year. (TT volume 2, pgs. 240-247, 328-329, 332)

38. ■■■'s parents paid the costs, including transportation, for his attendance at ■■■ for the 2019-20 year. (TT volume 2, pgs. 357, 360, Petitioner's Exhibit pgs. 291-295)

Additional issue-specific fact-findings appear elsewhere hereinbelow.

**I. THE SCHOOL APPROPRIATELY DEVELOPED THE IEP AND IMPLEMENTED IT IN 2018-2019**

**A. THE IEP AND BIP WERE APPROPRIATE**

■■■ High School has a cohort program in which a group of ■■■ students are permitted to attend auto mechanics classes at ■■■ in the morning. This student was interested in that program but missed the deadline for signing up. (TT Vol. 2, p. 274, 511-512). However, because of his academic success, he was eligible to sign up for a dual-credit program at ■■■ which also has auto mechanics classes. Because ■■■'s dual-credit auto mechanics classes started at the same time as the cohort auto mechanics classes, the student was permitted to ride on the ■■■ cohort bus to ■■■ even though he was not part of the cohort. Though not required to do so, the school also transported him back to ■■■ in the afternoon for classes there. (TT Vol. 2, p. 511-513).

However, because ■■■ is a special needs student, this schedule required adjustments in his special education services. Prior to 2018-2019, the student received special education minutes in the resource room. During the 2018-2019 year, because of the auto mechanics classes at ■■■, he was at ■■■ only for the 4<sup>th</sup> and 5<sup>th</sup> periods. Rather than pull him out of classes, to minimize transition issues that cause problems for the student, the ARC decided to provide

special ed minutes collaboratively in the general education classroom in the English and math classes (TE Vol. 1, p. 87-88). This arrangement worked. The hearing officer, on page 18 of her ruling, found that

[the student] has not argued that anything in the 2018-2019 school year was inappropriate under the IEP. It provided for [the student's] needs, and he progressed great with it.

ECAB agrees. The record reflects that he was very successful in his classes taught in █████ High and █████ and progressed well on his goals (JE 13, p. 130). In addition, while there were some incidents in early 2019, there was some improvement in behavior as well (TT Vol. 2, p. 375, 378).

On appeal to ECAB, student argues that the entire IEP and BIP of the student should have been revisited when parents became concerned about behaviors of the student in December of 2018 and January 2019. No rationale is given to justify reviewing the IEP. With regard to behavior, the school also noticed behavior issues in January and February of 2019. The student experienced external stressors during this time including the upcoming birth of his child (TT Vol 1, p. 33; Vol. 2, p. 381) and difficulties interacting with adult students at █████ (TT Vol. 2, p. 340-341). There were two significant behavior incidents, “the bathroom incident” in late January of 2019 and the “school bus incident” in February of 2019 that resulted in criminal charges. (TT Volume 2, p. 339-345, 441-442). Consequently, the ARC met in March and revised the student’s BIP (JE p. 149), providing more time with preferred staff members. Although the student argues the BIP should have been revised more quickly, ECAB does not believe there is evidence that the changes made in the BIP would have prevented either the “bathroom incident” or the “school bus incident.” Although there had been some behavior spike in early 2019, by all accounts the

2018-2019 school schedule of dual enrollment and collaborative classes at [REDACTED] worked well for the student (TT Vol. 2, p. 423).

**B. ANY ERRORS IN IMPLEMENTATION IN 2018-2019 WERE *DE MINIMUS* AND NOT A DENIAL OF FAPE**

There were potentially three *de minimus* failures to implement that are discussed in the hearing officer's opinion – failure to provide specific counseling after the “bathroom incident” and the “school bus incident,” both of which resulted in criminal charges, and failure to provide training to the SRO regarding the student's specific disability. Regarding the lack of counseling after the two incidents, the counseling approach generally used with this student immediately after an incident is to assist the student in de-escalation rather than reflecting upon an incident that had just occurred (TT Vol. 1 p. 42-43). The BIP provides for “social skills instruction utilizing reflection, modeling, scripts, and/or role playing on how to better respond to authority figures and how to disagree respectfully.” (Pet. Ex. 4). However, it does not specifically require this instruction after each event. The record is clear that the student received resource support for behavior throughout the year wherein he was instructed in social skills and de-escalation skills. Additionally, it appears that, in fact, after both “the bathroom incident” and “the school bus incident” the student actually did go through debriefing and reflection on the incidents (TT Vol. 1, p. 104, 119, 122, 138, 144).

A previous ECAB order required that the SRO receive training. The hearing officer gave greater credibility to the SRO's testimony that he was not trained than an administrator's testimony that he was. However, ECAB agrees with the hearing officer that failure to train the SRO had no actual impact on the student. The only contact the SRO had with the student during the period relevant to this case was when he came onto a bus where the student was being

disorderly as a potential backup. At that time a preferred staff member, Assistant Principal Rogers, was already on the bus intervening. The SRO had no interaction with the student on that occasion. Thus, although failing to train the SRO violated a previous ECAB order, the violation was of no substantive consequence to the student and does not amount to a denial of FAPE.

**II. THE SCHOOL OFFERED FAPE IN 2020 BUT THE STUDENT REJECTED THE OFFER**

**A. THE STUDENT UNILATERALLY ENROLLED FULL-TIME AT ██████████**

The student chose not to continue in 2019-2020 the successful arrangement he had in 2018-2019 under which the student took auto mechanics classes at ██████████ and received the rest of his classes and special education services at Scott under a collaborative model delivered jointly by a special education teacher and general education teacher. Nor did he sign up for the cohort program that allows ██████████ students to take auto mechanics classes at ██████████ in the morning. Instead, the student and his parent, with the assistance of a ██████████ representative, unilaterally enrolled ██████████ full-time for classes at various ██████████ campuses in 2019-2020 (TT Vol. 2, p. 426, 428). The classes at ██████████ in 2019-2020 included math and English classes, the only two classes he needed to qualify for graduation and classes in which, in the previous year, he had received collaborative special education services at ██████████. The student's enrollment full-time at ██████████ was without any input from the school and did not provide for any class time at Scott. (PE 3, p. 16-17).

**B. IT IS NOT POSSIBLE FOR THE SCHOOL TO PROVIDE SPECIAL EDUCATION SERVICES AT ██████████**

The student had been receiving special education at ██████████ delivered collaboratively by a

special education teacher and a general education teacher working cooperatively. Some of the support is provided in the classroom and some in a resource room. (TT Vol. I, p. 75). Ms.

██████████ described the way such collaboration works. (TT Vol. 1, p. 76, 150, 157). During the resource module the student is pulled out of his classroom for instruction in a special education class. In and of its nature, collaborative model requires cooperation between regular and special education teachers to administer instruction. It incorporates all students in the classroom into the special education experience.

However, ██████████ does not permit a high school to provide special education services on the ██████████ campus during their dual enrollment college classes.(TT Vol. 1, p. 131; Vol 2, p. 252, 255, 257). The school can require its own general education teachers at ██████████ to assist in a collaborative model of special education but does not have authority to make professors at a college do the same (TT Vol. 2, p. 280). The parents were advised that the only services available on the ██████████ campuses would be whatever accommodations might be available through the ██████████ Disability Services Department. (TT Vol. 1, p. 131; Vol. 2, p. 414-415)

### **C. THE SCHOOL OFFERED FAPE FOR 2019-2020**

Prior to the beginning of the 2019-2020 school year the school became aware of the student's enrollment solely in ██████████ courses (TT Vol. 1, p. 158-159). Discussions began for forming the 2019-2020 IEP with attempts to contact the mother on August 6, 2019. An ARC meeting occurred on September 5, 2019 (JE 15; PE 13, p. 145), during which it was determined that the students current minutes were not compatible with the ██████████ schedule the student had created. (JE 157). Principal ██████████ explained that the school was willing and able to provide special education services under his IEP but the student would have to come to Scott's campus to receive those services because ██████████ would not permit District employees to provide services

during dual enrollment courses at ██████ (JE 157). The District offered several options to remedy incompatibility of his IEP minutes with his desired dual enrollment schedule exclusively at ██████ (TT Vol. 2, p. 148), one of which was to return to ██████ or any school in ██████ County for resource minutes (TT Vol. 1, p. 158-159; Vol 2 p. 395, 436). Resource minutes have been effective for the student in the past. (TT Vol. 2, p. 290). The parents declined, even though they knew that ██████ would provide no specially-designed instruction, only accommodations. (TT Vol. 2, p. 436). They insisted that ██████ remain full-time at ██████ and that the school deliver the same special education services at the ██████ campus that he had been receiving at the ██████ campus (TT Vol 2, p. 418).

Enrolling full-time at ██████ made it impossible for the school to provide collaborative education in the classroom and the parents refused to allow the student to come back to ██████ for resource service minutes. (TT Vol. 2, p. 293-297). The school also made offers to allow the student, as he had in 2018-2019, to come to the district for his collaborative models requiring joint effort by a special education teacher and a general education teacher, either at ██████ or any other high school in ██████ County (TT Vol. 1, p. 132), but the student declined and did not attend ██████ or any ██████ County school at all during 2019-2020. To the extent he did not receive services, it was because he declined the FAPE offered and unilaterally changed his placement.

#### **D. THE SCHOOL SATISFIED ITS FAPE OBLIGATION BY OFFERING FAPE**

The school had an obligation to offer an IEP that was appropriate. The school's obligation is fulfilled when FAPE is offered. *N.W. v. Boone County Board of Education*, 763 F.3d 611, 615-616 (6<sup>th</sup> Cir. 2014). In this case, the school offered the student an IEP where he would receive special education services per his prior IEP which had allowed him to progress

academically and behaviorally at the September 5, 2019 ARC, if he would simply come to [REDACTED] or another school in [REDACTED] County to receive those services. They also offered to provide resource setting services outside the regular schedule. Either of these offers met the school's burden to offer an appropriate IEP which could be implemented to provide FAPE. These options would have still allowed the student to have his dual enrollment and meet the transition goal of working toward a certification in automotive mechanics.

#### **E. DUAL ENROLLMENT WAS NOT NECESSARY TO PROVIDE FAPE**

Dual enrollment was the student's choice, not a requirement of FAPE. The student failed to provide evidence showing it was necessary for him to have dual enrollment classes to have an opportunity to progress. His IEP never required that he receive all of his classes in a dual enrollment setting. (TT Vol. 2, p. 275). It was not even necessary to take dual-credit automotive classes to achieve the student's transition goal of preparing for auto mechanics. As previously mentioned, there is a cohort of [REDACTED] students who take auto mechanics courses at [REDACTED] in the morning that is not part of the dual-credit program and the student could have attended classes with them. (TT Vol. 2, p. 509-510).

[REDACTED] is a community college. (TT Vol. 1, p. 77). A school district is not required to provide special education services to a high school student enrolled in a community college, according to *Colorado Dept. of Educ. in Mountain Board of Cooperative Educational Services*, 54 IDELR 334 (SEA Co. 2010) because FAPE is "an appropriate preschool, elementary school or secondary school education provided in conformity with the student IEP." Accordingly, districts are not required to provide special education services to students attending college courses on college campuses. AGO 17-9121, cited by student, does not apply because unlike [REDACTED] and [REDACTED] Academy, [REDACTED] does not educate high school students exclusively. *USDOE*

*Guidance September 17, 2019 USDE* recognizes that students with disabilities are not precluded from participating in dual enrollment programs but if doing so is not necessary to provide FAPE, the district could not be required, and was prohibited from, spending PART B funds to pay for same. While the student's transition goal is he hopes to obtain a certification in auto mechanics after graduation, and school facilitated his participation in the auto mechanics program during 2018-2019 before graduation at [REDACTED], as he desired, his IEP did not require that he complete college courses in auto mechanics during high school.

Additionally, because he did not require these courses in order to receive FAPE, the school had no obligation to provide transportation to [REDACTED]. See *Letter to Luger and Weinburg*, 58 IDELR 199 (OSEP 2011); *Baltimore County Publ. Schs*, 61 IDELR 210 (SEA MD 2012). As described elsewhere hereinbelow, transportation services are not part of the student's IEP. (TT Vol. 2, p. 244-246). The fact that he was permitted to ride with the [REDACTED] cohort students to [REDACTED] in the mornings in 2018-2019 (TT Vol. 2, p. 513) and was gratuitously transported back in the afternoon did not require that any transportation be offered in 2019-2020. The school's course guide states clearly that tuition and transportation for students participating in dual-credit classes is the responsibility of the student, not the school. (TT Vol. 2, p. 514-515). The school offered transportation to Scott for OT and other services (TT Vol. 2, p. 242), but the parents refused to allow the student to return to Scott for any services or instruction, rendering the issue of transportation irrelevant. (TT Vol. 2, p. 267).

**III. THE DISTRICT OFFERED [REDACTED] AN APPROPRIATE LEAST RESTRICTIVE ENVIRONMENT IN ACCORD WITH HIS IEPS**

The IDEA requires that, “to the maximum extent appropriate,” children with disabilities be educated with children who are nondisabled and that children be removed from the regular educational environment only if the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR 300.114(a)(2). The pertinent Kentucky regulation, 707 KAR 1:350, essentially mirrors the federal regulation. This least restrictive environment (LRE) mandate balances the goal of mainstreaming with nondisabled peers with the equally important objective of providing an education appropriately tailored to each student’s particular needs. *P. v. Newington Board of Education*, 546 F.3d 111 (2d Cir. 2008).

Appellant argues that the District did not offer ■■■ an appropriate LRE. Specifically, Appellant argues that ■■■’s IEPs called for participation in dual credit coursework and that he was entitled to dual credit coursework with specially designed instruction and related services in order to progress in the dual credit environment.

Appellant is correct that ■■■’s IEP referenced his classes at ■■■■■. However, the dual enrollment was never addressed as a special education related service or accommodation and was never deemed something ■■■ was entitled to in order to obtain FAPE. As the Hearing Officer noted, a student’s IEP team can designate post-secondary programs as transition services payable through IDEA funding streams **if** the IEP team determines they are necessary to assist the child in receiving FAPE. *Letter to Dude*, 62 IDELR 91 (OSEP 2013). That determination of necessity was not made in this case and the IEP team did not determine that an IDEA funding stream would be utilized for ■■■’s dual enrollment.

■■■’s 2018-2019 IEP called for collaborative support services and resource time for ■■■ and those were provided at ■■■. The District was prepared to continue to offer those support

services for the 2019-2020 school year, but, in light of [REDACTED]'s unilateral all-[REDACTED] enrollment and the family's refusal to have [REDACTED] physically attend [REDACTED] in any capacity, it was simply impossible for the District to provide the support services.

As the Hearing Officer noted, it is understandable that a family would want their child to participate in dual credit programs, but such programs are not always going to be required for an IEP to be deemed sufficient. There is insufficient evidence that the District failed to educate J.H. in the LRE.

#### **IV. THE REMOVAL OF J.H.'S TRANSPORTATION SERVICES FOR THE 2019-2020 SCHOOL YEAR WAS NOT A "STAY PUT" VIOLATION**

The stay put provision set forth in 20 U.S.C. 1415(j) allows for a student with a disability to remain in his current educational placement during the pendency of an administrative or judicial proceeding involving a due process complaint. *See also* 34 CFR 300.518 and 707 KAR 1:340, Section 12(3), which contain similar language.

It is undisputed that [REDACTED] received bus transportation from [REDACTED] to [REDACTED] during the 2018-2019 school year via the automotive repair cohort bus, even though [REDACTED] was not part of the cohort; the timing simply worked out and the district was able to accommodate [REDACTED]. At or before the outset of the 2019-2020 school year, the District became aware of [REDACTED]'s new and solely-[REDACTED] schedule, which included the need for [REDACTED] to attend three different [REDACTED] campuses in three different cities and did not include physical attendance at [REDACTED]. The District notified [REDACTED]'s parents that he would no longer be receiving transportation services. It is important to note that neither dual enrollment nor transportation services were ever provided for as a special education or related service in [REDACTED]'s IEP.

Appellant argues that the removal of the transportation services for the 2019-2020 school year violated the stay put provisions. He acknowledges that ■■■■■'s IEP is silent as to transportation services, but argues that it was an oversight on the part of the District and that the transportation should have continued as it was "actually occurring." Appellant further argues that the District's removal of transportation services denied ■■■■■ access to the monthly 20-minute occupational therapy services that were included in his IEP.

The stay put provision of 20 U.S.C. 1415(j) states, with an exception not applicable here, that "during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child." According to 34 CFR 300.518, the child must remain in his or her current educational placement "during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing..." Finally, according to 707 KAR 1:340, Section 12(3), the child must remain in her current educational placement "during the pendency of any administrative or judicial proceeding, including the dispute resolution meeting..." The statutory scheme calls for the child to stay put in their "then current educational placement," but that term is not defined in the IDEA. As the Hearing Officer noted and as Appellant and Appellee agree, the term can be interpreted as meaning the type of program the student is receiving, as opposed to a specific school or classroom. *N.D. v. State of Hawaii, Department of Education*, 54 IDELR 111 (9<sup>th</sup> Cir. 2010).

However, the stay put provision applies only to services included in the student's IEP. *Cordrey v. Eukert*, 917 F.2d 1460 (6<sup>th</sup> Cir. 1990), citing *Gregory K. v. Longview School Dist*, 811 F.2d 1307 (9<sup>th</sup> Cir. 1987). The court in *Cordrey*, determined that even if a district has provided a

particular service in the past, it does not have to provide the service in a stay put situation if the services were not required in the governing IEP.

Appellant cites *Thomas v. Cincinnati Bd. of Educ.*, 918 F2d 618 (6<sup>th</sup> Cir. 1990) in arguing that ■■■ should have continued to receive bus service as he was actually receiving bus services at the time this dispute arose. However, the Sixth Circuit in that case ruled that if an IEP has been implemented, that program's placement will be the one subject to the stay put provision. As ■■■ had an IEP in place and that governing IEP did not include any reference to transportation services, the District has not violated stay put provisions by ceasing the use of transportation services in September of 2019. Appellant's argument that the denial of transportation services back to ■■■ for occupational therapy is unconvincing as Appellant and his family unilaterally chose to have ■■■ solely attend ■■■■ campuses and not set foot on ■■■■ campus.

#### **V. FAPE WAS PROVIDED AND NO RELIEF IS DUE**

*Andrew F. v. Douglas County School District RE-1*, 137 S.Ct. 988, 996 (2017) holds that a district's FAPE obligation is satisfied if the child's IEP sets out an educational program reasonably calculated to enable the child to receive educational benefits. As stated in *Bd. of Educ. v. Rowley*, 458 U.S. 176, 199 (1982) districts do not have an obligation to maximize a child's potential. The school met those standards. The student progressed under the 2018-2019 IEP and was offered an IEP for 2019-2020 consistent with the previous IEP, but the student's parents refused the offer of FAPE.

**VI. THE HEARING OFFICER DID NOT HAVE JURISDICTION TO REQUIRE THE APPELLANT SCHOOL DISTRICT TO ADOPT SPECIFIC POLICIES OR PROGRAMS PROSPECTIVELY**

The Hearing Officer correctly found she did not have jurisdiction to require the school district to adopt the specific policies or programs prospectively as requested by the student. The student requested the Hearing Officer develop site based policies regarding FAPE to students with disabilities who are enrolled in dual credit courses, and to create memoranda of agreement regarding special education and related services for students with disabilities with all post-secondary institutions who provide dual credit courses to ██████ County Schools. The student did not identify the details of the requested policies or terms of the agreements.

The undersigned considered the statutes, regulations and case law cited by the student but they do not give the Hearing Officer the jurisdiction to order the relief requested by the student. The student stated in his brief that the purpose of the IDEA is (a) “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living” and (b) “to ensure the rights of children with disabilities and parents of such children are protected.” 20 USC § 1400(d)(1)(a) and (b). But, the school district has a contract with ██████, a postsecondary school, to provide high school students with dual enrollment opportunities and the Hearing Officer does not have the power to change the terms of their contract. The school district cannot require ██████’s faculty to participate in a collaborative format.

Assuming the Hearing Officer possessed the authority to order the school district to adopt the policies or programs the student requests, such an order would not be appropriate in this case.

Students do not have an automatic right to participate in dual enrollment. They have to apply and qualify for it.

As explained herein, the adoption of the requested policies or programs were not necessary to provide FAPE to J.H. The school district offered ■■■ an IEP which was reasonably calculated to enable him to receive appropriate educational benefits. The school district met its obligations to provide FAPE by offering resource room special education minutes at any school district facility.

Therefore, the Hearing Officer correctly found she did not have jurisdiction to require the school district to adopt the specific policies or programs prospectively as requested by the student.

#### **FINAL DECISION AND ORDER**

The Exceptional Children Appeals Board affirms the decision of the hearing officer and finds no relief is due Appellant.

#### **NOTICE OF APPEAL RIGHTS**

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

(a) General. Any party aggrieved by the findings and decision made under Sec. 300.507 through 300.513 or Sec. 300.530 through 300.534 who does not have the right to appeal under Sec 300.514(b), and any party aggrieved by the findings and decision under Sec. 300.514(b), has the right to bring a civil action with respect to the due process complaint notice requesting a due

process hearing under Sec. 300.507 or Sec. 300.530 through 300.532. The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

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

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

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

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

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

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

SO ORDERED this 23<sup>rd</sup> day of December, 2020, by the Exceptional Children's Appeals Board, the panel consisting of Susan Gormley Tipton, Lyndell Pickett and Mike Wilson, Chair.

EXCEPTIONAL CHILDREN APPEALS BOARD

BY: /s/ Mike Wilson  
Mike Wilson, Chair

CERTIFICATION:

The original of the foregoing was mailed this 23<sup>rd</sup> day of December, 2020 to:

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

With copies emailed to:

Marianne Chevalier  
mchevalier@lawcvg.com

Mary Ann Stewart  
MStewart@aswdlaw.com

Lyndell Pickett  
dlpickett2001@yahoo.com

Susan Tipton  
susantipton@roadrunner.com

KDE Legal Services  
[kdelegal@education.ky.gov](mailto:kdelegal@education.ky.gov)

\_\_\_\_\_/s/ Mike Wilson\_\_\_\_\_  
MIKE WILSON, CHAIR  
EXCEPTIONAL CHILDREN APPEALS BOARD