

**KENTUCKY DEPARTMENT OF EDUCATION
AGENCY CASE NO 1819-18**

█

PETITIONER

V

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND FINAL ORDER**

█

COUNTY SCHOOLS

RESPONDENT

The student in this case qualifies for special education services under autism. The student moved from █, where he qualified for special education and had an IEP, to Kentucky a few weeks into his fifth grade year and enrolled in █ County (“the school”), where the student attended for roughly five months before filing for a due process hearing, contending that he was denied a free and appropriate public education (“FAPE”). A few days later, the student applied for home hospital and thereafter continued and continues to be educated by the school in the student’s home.

FAPE requires that a student’s IEP “set out an educational program that is ‘reasonably calculated to enable the child to receive educational benefits.’” *Endrew F. v. Douglas County Sch. Dist.*, RE-1, 137 S.Ct. 988 (2017), quoting *Bd. Of Educ. V. Rowley*, 458 U.S. 176 (1982). The student must be educated in the “least restrictive environment” (707 KAR 1:250), balancing the goal of mainstreaming with “the equally important objective of providing an education appropriately tailored to each student’s particular needs.” *P. v. Newington Board of Education*, 543 F.3d 111,122 (2nd Cir. 2008). Implementation of the IEP requires that the school “make a good faith effort to assist the child in achieving the goals, objectives, or benchmarks listed in the

IEP.” 707 KAR 1:320, Section 9(1). The school must provide related services if they are necessary to enable the child to benefit from special education.

The student contends that the school failed to provide FAPE in the following ways:

1. By allowing law enforcement to intervene in incidents where the student lost control of his behavior and assaulted school personnel, which intervention the student contends constituted a unilateral change in the student’s IEP.
2. By effectively changing his placement through suspensions and removals from class that constituted a pattern, thereby triggering the need for a manifestation determination that student alleges did not take place.
3. By failing to create an appropriate IEP.
4. By failing to implement the IEP and behavior plan.
5. By making inappropriate placement decisions.
6. By committing other procedural violations

A hearing was held over three days on June 5-6 and on July 19, 2019. Much of the student’s proof focused on two subjects: (1) comparing the Kentucky IEPs with the IEP the student had in [REDACTED] prior to moving to Kentucky; (2) two incidents in February of 2019. It also became clear during the hearing that the school’s decision to charge the student with crimes in relation to the second incident had made a major negative impact on the relationship between the student’s mom and the school.

The parties were given an opportunity to file post-hearing briefs and have done so. The student, as the party seeking relief, bears the burden of proof *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). After reviewing the briefs and the record, the hearing officer makes findings of fact, conclusions of law, and a final decision as set forth below.

FINDINGS OF FACT

1. The student is qualified for special education under the category of autism.

This is not disputed. There was evidence that autism was suspected in [REDACTED] but not diagnosed by a doctor until February of 2019 and that PTSD due to past physical abuse was suspected and at some point diagnosed, but regardless of when either was medically diagnosed, the student was qualified under autism and the school was aware of the background surrounding the possible PTSD early in the student's matriculation in Kentucky.

2. Prior to coming to Kentucky, the student attended a series of schools, private and public, and most recently [REDACTED] in [REDACTED].

This is undisputed.

3. Prior to coming to Kentucky, the student had a long history of behavior problems and had been suspended multiple times from the [REDACTED] County Schools.

See TE Vol III, p. 33, 179; P0375. There is no question that the student has a history of behavioral problems, especially in public schools.

4. [REDACTED] evaluated the student in January and February of 2018.

This is undisputed. See Petitioner Exhibit 26.

5. [REDACTED] prepared a new IEP for the student dated May 28, 2018, right before the close of the 2017-2018 school year. (hereinafter "the [REDACTED] IEP")

See Petitioner Exhibit 37, p. 310.

6. The student's mom informed [REDACTED] County of her intent to move to Kentucky during the summer of 2018.

TE Vol. I, p. 8. Even before the [REDACTED] had attempted to implement the student's IEP at the beginning of the 2018-2019 school year, the mom had plans to move to Kentucky.

7. Related services on the [REDACTED] IEP initially consisted of 60 minutes per month of OT direct service; weekly OT consultation with teacher; and 30 minutes per week of “Individual Counseling (Family counselor)”

P0330. There was not clear evidence regarding what “Individual Counseling (Family counselor)” would have looked like.

8. The [REDACTED] IEP provided as a “special education service,” 120 minutes per week of “language therapy (including pragmatics) in the ESE classroom.

P0328. It was not clear from the testimony at the hearing whether “language therapy” to be delivered by [REDACTED] in the ESE classroom was the same thing as speech therapy that the student received when he came to Kentucky. However, elsewhere in the [REDACTED] IEP it states that the student will receive Language Therapy/Social Skills Training along with his disabled peers, so the [REDACTED] plan initially did not provide for one-on-one speech therapy. P0332.

9. The [REDACTED] IEP was NOT based upon the evaluation [REDACTED] had just performed and is not a reliable guide to what the student needs.

The mom testified as follows:

So in the development of this May 2018 IEP you -- or the committee did not consider the evaluation that had just happened three months before?

A. They did not feel -- based on the results they did not feel that the testing was done properly.

TE Vol. III, p. 93. The mother testified further as follows:

Is it fair to say that your opinion as well as the [REDACTED] ARC's] opinion that as of May of 2018 at the end of his fifth grade year public school still did not have an idea after having [the student] in school for an entire year of how to help him?

A. Yeah. I mean, this is what we've been all trying to figure out .

TE Vol. III, p. 95. The [REDACTED] records indicate that [REDACTED] thought the student needed to be re-evaluated by Kentucky.

10. The student began the 2018-2019 school year in August of 2019 at [REDACTED].

This is undisputed.

11. The student continued to have serious behavior problems under the [REDACTED] IEP at [REDACTED].

Although the student was at [REDACTED] for only a few weeks before moving to Kentucky, his behavior issues were not any better under the [REDACTED] IEP. As set forth in [REDACTED]'s staffing record for August 16, 2018, (P 0357-0359), the school scheduled a meeting on August 16, 2018, which the parent was unable to attend, to discuss the student's behavior over the previous two days and his suspension from school for one day. (PO357). Escalation of behaviors was a major issue and "numerous de-escalation techniques attempted today" were evidently without success. The student's behaviors included "physical aggression towards peers and adults." A meeting was held the next day, August 17, 2018, (PO350-352) where it was reported that the student "has been hitting other students with the items from the sensory bag" and spitting on and kicking others. These behaviors were like behaviors the student would exhibit when he came to Kentucky.

12. The [REDACTED] IEP was modified during the few weeks the student attended [REDACTED] in fall of 2018 before moving to Kentucky to add services.

Notwithstanding that the IEP had just been created at the end of the previous year and was undergoing its initial test run in August of 2018, records (P0350-352) indicate the IEP was amended on August 17 to include "change of support facilitation to direct instruction." At the August 17 meeting, it was suggested that the student have "one-on-one" and that "the support of

the self-contained unit would benefit [the student] at this time.” Concern was expressed that ██████’s paraprofessionals needed to be trained in de-escalation.

At the August 29, 2018 meeting, (P0307-309), more changes were made. The purpose of the meeting was “review of IEP and update.” The “need for a one-on-one para” was discussed and ██████ already was contemplating release from responsibility for this student, stating “re-evaluation needs to continue at new school,” evidence that ██████ believed its own elaborate evaluation only months before was insufficient. Evidently, the one-on-one para discussed at the August 17 meeting had not been implemented as the August 29 notes say “team recommends the support of a para for implementation of an IEP.” More changes were made in the plan. Family counselor minutes were stipulated at 30 minutes per week; language minutes were increased from 50 minutes per week to 120 minutes per week. ██████ assured the mother that Kentucky would complete an assistive technology evaluation if ██████ didn’t. It was noted that the student’s BIP on file was the one used in elementary school and needed to be updated based upon an FBA to be initiated and that presumably Kentucky would follow up on.

13. The changes made in the ██████ IEP do not appear to have been the result of a thoughtful process.

None of the changes made only days before the student left for Kentucky appear to have been based upon any new data other than the fact that the student was exhibiting behavioral issues that ██████ was unable to manage. The mother testified as follows:

[The student] was transitioning in middle school to different classes, which ended up being very overwhelming with thousands of kids in middle school there. So we had to redo, you know, things and put things in. You know, **we just decided we were just going to throw the book at it**, because we really, really wanted to see him be successful.

TE Vol. III, p. 30, emphasis added. The student's behavioral issues seemed to have been precipitating a crisis that ██████ did not know how to address. "Throwing the book" at something does not connote a thoughtful process. Some of the last-minute additions, such as increasing minutes of speech therapy, are not obviously connected to managing behavior. The ██████ evaluation was not considered trustworthy and the ██████ school didn't know how to help the student. Consequently, they just started "adding things" to the IEP. The mom testified that

based on what we had and the information that we had when he went into middle school, we continued to add things, continued to change things, continued to upgrade things, continue to offer more services and not take services away.

TE Vol. III, p. 95. Given that the mother was on her way to Kentucky, the last-minute additions tacked on to the IEP were ones ██████ knew it would never have to implement.

14. The mother believed that whatever was added in ██████ would have to be implemented in Kentucky.

The mom testified that

[The ██████ school] told me is that [the Kentucky school] would be using the same ██████ IEP until we could sit and have our meeting. So they would use the ██████ IEP until we could sit down and have a meeting and discuss things.

TE Vol III, p. 42. The mom was under the misapprehension that Kentucky had to duplicate the ██████ IEP:

If they put on IEP in ██████ that ██████ has to run around a tree five times at 12:00 noon and I move to Kentucky ██████ has to run around the tree five times at noon; that if he has, you know, 120 minutes of speech in ██████, then he has 120 minutes of speech in Kentucky, then it doesn't matter where he goes, whether it's Kentucky, Hawaii, California, that that will be what he receives. ...And that's not allowed to be changed. That was my understanding.

TE Vol. III, p. 46.

15. The student enrolled in [REDACTED] County on September 18, 2018.

This is undisputed.

16. The mom provided to the school (the Respondent in this case) the [REDACTED] IEP and the evaluation that had been performed there.

TE Vol. 1, p. 8.

17. The mother also contacted [REDACTED] and had them send her “everything they had” on the student and forwarded it to the school.

Mother’s testimony, TE Vol. III, p. 34.

18. The school contacted and spoke with personnel at [REDACTED] to be informed about the student.

[REDACTED], the school guidance counselor spoke with staff in the [REDACTED] school and was told the student, who only attended the school two or three weeks and had behavioral problems including suspensions. TE Vol. II, p. 631-632. The person she spoke with had been recommended both by the mom and the dad as someone knowledgeable about the student. TE Vol. II, p. 655. [REDACTED] said the typical practice would have been to request any monitoring data and recalled that “they didn’t have a whole lot of data from their school.” TE Vol II, p. 656.

19. The first significant behavioral incident in Kentucky occurred on October 3, 2018.

TE Vol. II, p. 433-434.

20. On October 11, 2019, an ARC was convened and the school adopted a temporary IEP that mirrored the [REDACTED] IEP generally and provided comparable services.

All the goals from the [REDACTED] IEP except one appeared on the temporary IEP in effect prior to adopting a Kentucky IEP. (TE Vol. 1, p.15-18). However, the related services on the

temporary IEP in Kentucky were fewer in total minutes than provided for in the [REDACTED] IEP. (TE Vol. 1, p. 19-24). For example, OT was 30 minutes per month rather than 60 minutes per month, which the DoSE said was probably a judgment call on the part of those working with the student. (TE Vol. 1, p. 20). There was not evidence presented to show that 30 minutes rather than 60 minutes would be so different in its net effect as to make it not comparable. The [REDACTED] IEP provided for weekly consultation with OT and the Kentucky IEP provided for ongoing consultation with OT. (P0061).

Speech therapy was 30 minutes a week rather than 120 minutes per week. When asked why speech therapy was less than provided for in the [REDACTED] IEP, the DoSE (TE Vol. 1, p. 21) testified as follows:

I would say due to the fact that the goals are worked on in the special class also, so -- with consultation, the speech therapist works in the classroom. So the 30 minutes is her direct service with [REDACTED], but the teacher also works on those communication goals.

[REDACTED] (“[REDACTED]”) is the student’s speech therapist and provided him services in the classroom or in the student’s calming room or, when the student went on home hospital, at the student’s house. TE Vol. III, p. 204-206 [REDACTED] thought the speech services on the [REDACTED] IEP were high for this particular student’s needs. TE Vol. III, p. 208. [REDACTED] said the student is very high functioning in the area of speech and even 30 minutes a week is a little high, given his functionality. TE Vol. III, p. 210-212. The student had good success with his speech goals TE Vol. III, p. 212. There was not evidence that work by teachers in the classroom on speech goals coupled with 30 minutes direct speech services would not be comparable in its effect to what the [REDACTED] IEP provided.

Regarding training mentioned in the [REDACTED] IEP, the persons working with the student in [REDACTED] County had already been trained and there was ongoing training regarding the specifics

of the student as they got to know him better.(TE Vol. I, p. 22-24). A paraeducator was recommended for the student in the [REDACTED] plan. In Kentucky, there were paraeducators in the classroom to provide that support as needed, albeit not exclusively to this student.

The [REDACTED] IEP provided for 30 minutes per week individual counseling and the temporary IEP provided for none. [REDACTED], the school counselor, testified that individualized counseling per the [REDACTED] IEP had been offered but the mom turned it down and therefore it was not included on the IEP:

We did talk about that in the [October 10] meeting. Mom had talked about doing outside services for that. We had offered [REDACTED]. We have [REDACTED] in our building. And she did not want to do that, she was going to seek out her own counseling services.

TE Vol. II, p. 611. Student's counsel pointed out in cross-examination that [REDACTED] account did not appear in the minutes of the meeting, but the hearing officer finds [REDACTED] testimony on this point credible and corroborated by email exchanges with the mom in December, in which counseling services again are offered. R091. Counseling services were offered many times. TE Vol. II, p. 640.

The student's initial BIP, copied from the [REDACTED] BIP, had a reinforcement plan of five minutes of a reward of student's choice at the end of class time. TE Vol. II, p. 519-520. Kentucky's plan did also.

The [REDACTED] IEP provided for the student to have ongoing access to a "preferred person." [REDACTED], the special education coordinator, testified that she believed Mrs. [REDACTED], the student's special education teacher, was the student's "preferred person" for purposes of the IEP:

[T]he access to a preferred person daily during all settings, I would say was Ms. [REDACTED]. She would have had access to him – he would have had access to her all day.... he worked with her on a daily basis, that was his teacher, so that's why I would say that was his preferred person.

TE Vol. II p. 616. This interpretation is corroborated by the mom's email of December 3, 2018, in which the mom suggests that maybe the preferred person should be someone other than someone who works in the classroom daily (i.e., Mrs. [REDACTED]). R 090-91.

21. The student tends to get over excited and have escalating behaviors when there are other students around.

TE Vol. II, p. 457. The record as a whole supports this conclusion.

22. The school took steps to try to minimize the over-excitation.

The student had a calming area with dimmed lights in the special education classroom and a separate cool-down room two doors down. TE Vol. II p. 452. The student also had access to sensory equipment that he used at times. TE Vol. II, p. 454-455.

Initially, the student came to school and ate breakfast with the rest of the students but that didn't work out. TE Vol. II, p. 478-479, Consequently, the student began his day in the calming room, eating breakfast and then doing the ten minutes work/ten minutes play with two para-educators until the other students exited the special ed room at 8:20. Then the student would go to the special education room. The reason for this procedure, [REDACTED] the student's special education teacher, said, was

[the student] tended to amp when there were other students. He'd get overly excited and then start the behaviors. So that was a way of having him -- of keeping his morning really calm, is that we had all the other kids go out, he came in the room, and then we worked at the big table, and it was a one-on-one type situation with me.

TE Vol. II, p. 457. Allowing the student to begin his day alone was appropriate to the goal of trying to make the beginning of his morning calm.

23. The school created a systematic step-by-step response to escalating behaviors.

See P0052.

24. At an ARC convened on October 22, 2019, the mother brought up shortening the student's school day but was persuaded by the school's recommendation to give the student a chance to try full school days to provide more opportunities to interact with peers and learn social skills; and the ARC made some minor changes to the IEP created on October 11.

See TE Vol. I, p. 64; P0082.3. The mother also said, at this time, that while the student's start wasn't perfect, it had been better than last year at [REDACTED]. TE Vol. II, p. 529.

25. The student made some progress on the goals for reading and math goals during October and November of 2018 and had made great progress on monitoring for self-calming and personal space until the Thanksgiving holidays, although the progress was up and down.

See P0096, and TE Vol II, p. 530; TE Vol. I, p. 295.

26. A technology consult was provided on November 16, 2018.

See P0044.

27. The decline in behaviors after Thanksgiving was partly caused by factors outside of school.

Regarding monitoring for self-calming, the school used terminology of green zone, yellow zone, red zone to indicate the student's degree of agitation and self-control. Unlike prior to Thanksgiving, the student had begun to arrive at school already in the yellow zone and they had to work to get him back in the green zone. The mother mentioned that she thought the decline in behaviors was caused in part due to family that student was close to coming to visit and then leaving. She also mentioned that the student was starting a new medication. See P0096.

28. As of December 5, 2018, the student's mother appears to have been happy with

the school's provision of FAPE.

This testimonial by the mother in a December 5, 2018 email speaks for itself:

I am so thankful for all that you are doing. ██████ County is a million steps above ██████ County ██████ in your compassion and willingness to go the extra mile to help children with disabilities. I can't tell you how many times I talk about you guys and how lucky we are to have gotten to come here. I literally cry every time because I feel so blessed for [the student].

R077.

29. The spike in behaviors after Thanksgiving triggered the ARC to reconsider the idea of a shortened day. An ARC was convened December 13, 2018 to discuss and adopt shortened school day that the mother had previously requested and minutes were adjusted for a shortened school day; the school also was going to try to arrange for someone to be a mentor with the student and meet with him for half an hour at the end of the day.

See P0097 and TE Vol. I, p. 67-69; TE Vol. I, p. 113; TE Vol. II, p. 532,

30. The student made progress in utilizing calming strategies and improvements in behavior when school reconvened in January after Christmas break.

See TE Vol. II, p. 533.

31. In January of 2019, the student began to receive math tutoring at a tutoring center called Mathnasium; Mathnasium neither attempted nor is qualified to provide special education services.

Jennifer Dawn Houston (Houston) is the director of Mathnasium, a math tutoring center in Northern Kentucky that the student began attending early to mid-January, 2019. TE Vol. II, p. 339-345; 348; P0377.5. Records indicated he went there four times in January and five times in February prior to the student's February 18 suspension. P0377.5-377.8. He attended four more times in February and five or six times a month in March, April, and May. P0377.8-14.

The instructors at Mathnasium who worked with the student did not have teaching certificates but are educated through Algebra II and receive training provided by Mathnasium. TE Vol. II p. 380-383. No one at Mathnasium has a special education background. *Ibid.* Mathnasium does not know how its curriculum compares with the student's IEP math goals, does not take into account disability when assigning curriculum, and does not instruct students with disabilities differently than non-disabled students. TE Vol. II p. 388-390. Instructors are not informed if a student has a disability because it might "bias" them. TE Vol. II, p. 399-400. Mathnasium has no protocols for dealing with students who are acting out, other than phoning the parent, because they've never had that problem. *Ibid.*

32. Mathnasium provides services in a large room where each student works individually or with an instructor.

Although many students may be having sessions at the same time, there is no group instruction at Mathnasium or student-to-student interaction.

33. The student's behaviors at school were better in January; one factor contributing to those improvements may have been the absence of contact with the dad.

In a January 16, 2019 email to [REDACTED], the school guidance counselor, the mom, in reference to recent improvements in behavior, stated:

[The student] has been very happy that he has not had to talk to this dad for several weeks. I am hoping that the continued better behavior that we have had will stay on course.

R106. The record reflects some information about the alleged prior events that could account for why contact with the dad could be an upsetting event.

34. An ARC meeting was held January 25, 2019 to discuss the completed

assessment and FBA and a decision was made to modestly increase the student's school time, given the improvements he'd shown during January.

See TE Vol II, p. 533. [REDACTED], the student's special education teacher, testified that the student had been making meaningful progress during the times when she could get him to work.

TE Vol. II, p. 534. The summary of the ARC meeting states:

The committee agreed that time will be added to his school day from 15-30 minutes.... Mrs. [REDACTED] and Mrs. [REDACTED] will be meeting with [the mom] every two weeks informally to review progress and they will look at adding 15-30 minutes based on the data.

P0118.

35. At the end of January, 2019, behaviors suddenly worsened due, at least in part, to an upsetting event, a phone call from the dad.

On February 4, the student had a meltdown during which the student snapped a leg off a metal table and struck the glass of a door, but the school implemented the behavioral intervention plan and informed the mom the student had recovered enough that he would be able to ride the bus home. TE Vol. III, p. 141. An email from the mom's home behavior therapist to the school's special education coordinator dated February 4, 2019 states the following:

I wanted to touch base with you if that's okay to discuss how [the student] is doing in the classroom. It seems as though until last Thursday and today he had been doing overall better making progress with staying out of the red zone and needing to be restrained. I do know that there were possibly a few setting events before coming into school last week including the 2-hour delay and a phone call from his father which could have effected [sic] [the student's] anxiety levels as I also saw him Thursday within the home and I felt it more difficult to redirect him.

The relationship with the father is discussed some in the record and no purpose would be served by detailing it in these findings but the hearing officer finds it quite plausible that an event connected with the father contributed to the two incidents in February described elsewhere

hereinbelow. The student's special education teacher testified that personnel had observed that outside events impacted the student's behaviors quite a bit, testifying that

having problems with his Dad was definitely an issue, as far as like whenever -- I mean, [the mom] would tell us that he was talking to his Dad, and those days definitely had an impact on him. We would see a lot of behaviors on those days. When company from home, you know, when they were leaving, that impacted him a huge amount. When his dogs didn't come from [REDACTED] when they were supposed to, that had an impact.

TE Vol. II, p. 537. The mom confirmed that the late January/early February call from the dad had had an impact on the son. TE Vol.III, p. 150.

Even at Mathnasium, more troublesome behaviors were observed during this time period. The student initially attended Mathnasium sessions for an hour. On some days, the student lost focus after 30 minutes and was unwilling to work, instead taking multiple trips to the water fountain or going to the bathroom and singing. On other days worked the full hour. His ups and downs seemed to correlate with whether he came in a good mood or a bad mood. TE Vol. II, p. 351-353. However, beginning in February, the student seemed more distracted and exhibited behaviors that distracted others. Mathnasium instructors were told to limit instructional time to 30-35 minutes and to play games with the student instead of instructing. Explaining the reason for giving the instructions, Houston, the director at Mathnasium, testified:

[The student] was distracting other [Mathnasium] students and just, you know, him distracted from not wanting to work on the work at a certain point. So at that point it's like I have to protect my instructors as well. And, you know, sometimes instructors, they don't know how to respond.

TE Vol. II, p. 362. However, Mathnasium never needed to restrain or remove the student from the classroom. TE Vol. II, p. 364-365.

36. On February 7, 2019, an incident occurred in which the student broke a door window, struck 5 different staff members several times and spit on several also; the student ran out of the school and was chased down by Deputy [REDACTED], who escorted the student back to school with his wrist behind his back. It appears from the report of the incident that [REDACTED] wrote that he responded to the noise of the event rather than being called by the school to intervene.

See TE Vol. I, p. 72-73. Petitioner Ex. 25., P0270.

37. Deputy [REDACTED] is an employee of the [REDACTED] County Sheriff's Office stationed within the school and the school has no control over what the deputy does.

TE Vol. I p.74.

38. Deputy [REDACTED] made a report of the incident but no charges were filed.

TE Vol. I, p. 74. P0270-0271.

39. The student was suspended for 3 days as a result of the February 7 incident.

P0263.

40. The mom believed she'd been misled regarding the length of the suspension.

The mom testified that she was initially told the February 7 incident would result in a one-day suspension and was upset to learn the school decided it would be a three-day suspension. TE Vol. III, p. 165. This appears to have contributed to the breakdown of the relationship between the mother and the school.

41. A staff meeting was called on February 11, 2019 to discuss what the school was doing and what they could do differently; the student's home behavioral therapist was invited, consulted with the mom prior to attending the meeting, and came with questions or comments jointly composed by the mom and the home behavioral therapist.

TE Vol. 1, p. 75. The principal testified that the school wanted to use the 3-day suspension period to have a meeting and discuss what changes they could make in the IEP or the manner of implementing it in light of the incident. TE Vol. I, p. 132. The mother was not in attendance, but the mom's home behavior therapist was and had consulted with the mother in advance regarding the meeting to develop a list of questions she and the mom jointly prepared which were sent to the school prior to the meeting. TE Vol. I, p. 168-169.

42. The student's home behavior therapist, who attended the February 11, 2019 meeting, reported that she did not see at the student's home behaviors like those that occurred in school on February 7.

TE Vol. I, p. 77.

43. Discussion of possible causes of the student's recent behaviors as well as a review of how the school was implementing the IEP took place at February 11 staff meeting.

One concern discussed at the February 11 meeting was that the student was arriving at school in such an agitated state that staff were required to spend a lot of time deescalating in the morning; a possible cause was the mother's use of tech (cellphone) for transition rather than eating, which works better for the student. Other possible causes discussed include the matter with the father referenced in the home behavior therapist's February 4 email discussed elsewhere hereinabove. The home behavior therapist was to talk with mother about using something other than tech in morning for transition; they verified that the team was following the existing plan and that all staff had been trained on its implementation; a more restrictive setting might be required, but the school believed all needs still could be met at the school; EBD observations were to be set up; the mom's home behavior therapist agreed that the provisions for de-escalation were "great preventive strategies." See R121; TE Vol. I, p. 169.

Note that this staff meeting was **not** an ARC meeting. No changes were made in the IEP. TE Vol. I, p. 204.

44. At the February 11 meeting, it was observed that “contacting a squad may be an option if staff feels as though he cannot calm himself and is a danger.”

See R121.TE Vol. I p. 77. Testimony from the DoSE was that what was referred to in the notes quoted above was a medical squad.

And then in the notes there it does say contacting a squad. That was more of a medical squad. I don't know how that was interpreted, but -- I mean, that was discussed. I mean, the idea that is the child so out of control that he needs the support of a hospital. So that's where that came into.

The student has argued that the reference to “squad” meant calling law enforcement and that discussing this possibility amounted to changing his IEP to require police intervention instead of de-escalation techniques. However, [REDACTED] testified, and the hearing officer finds, that restraint of the student was a last resort used only after other options failed in order to protect the student and others, not as a de-escalation method. TE Vol. I, p. 265. The notion that having the student arrested had been adopted as part of the student’s behavior plan may have been fueled by home behavior therapist’s misunderstanding of the discussion:

[I]t was stated to me that I just need to let Mom know that if there was a situation that called for it, that the school had the ability to get police or resource involvement involved, if needed.

TE Vol. I, p. 171. When the home behavior therapist reported the results of the February 11 meeting to the mom, the mom was unhappy “with the answers I gave her” (TE Vol. I, p. 185).

Later in her testimony, however, the home behavior therapist admitted that she may have misinformed the mother:

You know what, [the word “squad”] may have been the term that was used, and I may have thought that meant police officers or resource officers. So I will say that. That may

have been the word they used, and maybe in my mind that's what I thought.... I don't know what squad means.

TE Vol. I p. 196. Also, see TE Vol. I p. 202-204. Squad connotes a group, and there is a single deputy stationed on campus, so it is more plausible that “squad” as used in the meeting meant medical squad or whatever 911 recommended if a call was made. It does not appear that calling a “squad” was intended to replace de-escalation but to acknowledge that if de-escalation failed and the student was in a state such as the one on February 7 when he assaulted multiple staff, calling 911 was an option. Regardless, the fact that calling 911 was discussed suggests that the student had been extremely out of control on February 7 and the school was worried for the safety of the student and others.

45. The autism complex needs specialist was with the student all day on February 14 and recapped with the team things that were working that day.

See R. 147. [REDACTED] is a district-wide Special Education Teacher and Autism Complex Needs Specialist. [REDACTED] testified:

I was e-mailing the team everything it says in here, increasing the reinforcement and the variety of reinforcement that we are using, using some technology strategically, and those specific instructional strategies like describing and reading out loud, not asking a bunch of open-ended questions or asking [REDACTED] to reflect on his own behavior, et cetera. So that was my attempt to recap with the team things that were working in that moment for him.

TE Vol. I, p. 261. [REDACTED] testified that when the student’s behaviors were escalating into the yellow zone, it was a not helpful to ask the student to reflect upon what was making him anxious because it only added to the student’s anxiety. TE Vol. I, p. 261-262.

46. A second incident occurred on February 19, 2019, in which the student broke a glass window in the cooldown room and assaulted a paraprofessional. Deputy [REDACTED] responded to the incident, the paraprofessional was listed as the person reporting the

crime, and the student was charged with third degree assault and third degree criminal mischief; the principal took responsibility for the decision to press charges.

P0265; TE Vol I, p. 126.

47. The decision to press charges damaged the mom's trust in the school.

██████████, the special education coordinator, had a 45-minute phone conversation with the mom after the February 11, 2019 staff meeting, during which she explained to the mom that "police were not part of her son's IEP or behavioral plan." TE Vol II, p. 592. The subsequent email from the mom on February 19, 2019 accusing ██████████ of having lied to mom both corroborates ██████████'s account of the February 12 phone call and is evidence that charging the student with crimes seriously damaged the mom's trust in the school. See TE Vol. II, p. 589-590.

The hearing officer does not find the decision to press charges is a FAPE violation. Applicable law specifically protects the right of schools to invoke criminal laws. But an unfortunate consequence of the decision, going forward, is the effect it has had on the relationship between the mom and the school.

48. As part of the student's plan, he has access to a calming room or cooldown room.

The student's calming room was a place where he could work, take a break, have his own space, distraction free. It also was a place where the student could de-escalate or if he otherwise needed to be in a low-stimulus area. The room contained a desk, a couple of chairs so he could do academic work in there if he wanted to as well as items he could take a break with, such as puzzles, Play-Doh, some interesting books, a bean bag, and some posters on the walls. TE Vol. 1, p. 253-254. If the student escalated out of control, staff would remove the furniture in the room to prevent him harming himself or others. The table was in the room as a work space so the

cooldown room could be useful as well. See TE Vol. I, p. 127-128. The table in the calming room also comported with the suggestion of the home behavioral therapist hired by the parent. TE Vol. I, p. 165-166.

49. The school did not foresee that the student would break a leg off the table in the calm room to use as a weapon to break the glass of the cooldown room.

In a February 4, 2019 email, the mom's home behavior therapist conveyed a concern of the mom that the calm room should have only a bean bag chair so that if the student decided to throw something, it would be something soft (R154). In the February 19 incident, the student did not throw the table – it was too heavy to throw – but turned it over and broke off a leg. The hearing officer finds persuasive the principal's testimony that they did not foresee that this 12-year-old was strong enough to turn over the table and break off a leg.

50. The student was suspended for 1 day as a result of the February 19 incident.

P0264.

51. The school scheduled a meeting to discuss this disciplinary incident which the school understands can be scheduled with 24-hour notice if it involves discipline

There was testimony that the school attempted to schedule a meeting after the second suspension (TE Vol. 1, p. 44) and that the meeting “would have looked at manifestation.” TE Vol. I, p. 44. In cross-examination, using a document to which Respondent objected, the hearing officer overruling the objection, the student's attorney established that the notice of this meeting did not use the words “manifestation determination.” TE Vol I, p. 309-310.

52. Two days after the incident the student filed for due process and sent a letter from student's attorney canceling the meeting and requiring that future meetings be scheduled through the attorney.

TE Vol. I, p. 82-85.

53. An ARC meeting was scheduled for March 6, 2019 at which the school was going to suggest modifying the IEP to provide services in a one-on-one setting.

An ARC was held on March 6, 2019, at which time the school planned to propose continuing the current placement but with one-on-one assistance used to try to integrate the student back into school:

He would get his education in a one-on-one situation. He would still be in the school and we would work on integrating him into the school, because he was having a hard time being around other students at that time.

DoSE testimony, TE Vol. 1, p. 46. [REDACTED], the special education coordinator testified as follows concerning what the school proposed on March 6.

Well, we were using the data that we had collected and the information that we had provided in order to develop the plan. We presented it and we worked together as a team to do it. The plan focuses on the fact that we knew that [REDACTED] responded well to one-to-one adult attention, that he did well with visuals, that keeping demands low at first was beneficial, and that building complexity and stamina would follow. And then we proposed that [REDACTED] have a classroom within [REDACTED] Middle School that would have been for himself and a one-to-one teacher.

Q. And so your initial recommendations for [REDACTED] at this meeting were that he stay in school and that we develop a plan to work to stabilize behaviors so that we could keep him in school, correct?

A. Yes.

However, at that meeting the student's mother requested home hospital and presented a note from a doctor supporting same, so the school complied with the mother's request.

54. The school is prepared and has offered to transition the student from home hospital to a classroom setting with one-on-one initially, with BCBA support, to prepare him for a classroom setting; the school believes it is in the best interests of the student to be educated in a classroom setting.

TE Vol. I, p. 98.

55. Since enrolling on September 18, 2018 until February 19, 2019, the student was excused to leave school early 17 times; on 7 of those days, there were documented disciplinary issues; from February 21 to March 5 the mom kept the student at home and these were unexcused absences.

TE Vol. I, p. 100, 115.

56. Three of the excused absences on 7 days when disciplinary issues occurred and the student left early are, for purposes of manifestation determination requirements, the equivalent of suspensions for part of a day.

The characterization of the days when the mom was called and allowed to pick up the student was ambiguous. There is evidence throughout the record that school personnel who worked with the student were under the impression the mom wanted the school to phone as soon as the student escalated and that they usually complied with the mom's request. At first, the principal testified that technically they should have been characterized as suspensions. He explained that "[i]t was our attempt at working with Mom to not suspend him and communicate to her and let her make the judgment as to whether she can pick him up or not." Later, the principal testified that it was

[i]t was minutes when Mom would come pick him up early and -- again, at Mom's request and her decision to pick him up. We did not direct her to say you have to come pick him up, so.

TE Vol I, p. 137. The principal testified that this arrangement at the request of the mom was that she be called whenever the student's behavior started to escalate "so she can pick him up before it gets real bad." TE Vol. I, p. 139. The mother's reaction when called often was to come pick the student up, but not always, as she was concerned that the student would realize that by acting out

he would get to come home. TE Vol II, p. 546-548. However, it does appear that prior to filing for due process the mom was taking responsibility for decisions to bring the student home early:

Any time [the student] has been picked up early it has been for appointments to help him and/or because he was having a difficult day. I do not just remove [the student] from school for fun. I have taken him in hopes that making it through to a very good end would help [the student] to feel successful but again, all of this was discussed with Mrs. [REDACTED]

Email from mom, December 3, 2018, at R092. However, [REDACTED], the student's special education teacher, testified that five times she asked the mom to take the student home, but that number of five included the two suspensions. TE Vol. II, p. 427; 495-503. The hearing officer finds that three of the early dismissal excused absences should be characterized as suspensions for manifestation determination requirements because [REDACTED] requested that the mom take the student home on those occasions.

57. The four days of suspension plus three early dismissals treated as the equivalent of suspensions is less than ten days.

See findings above and TE Vol II, p. 503-516.

58. The student has fewer behavior issues at home than at school.

The family behavior therapist reports observing no behavior issues at the student's home but is only in the home two or three hours per month. TE Vol I, p. 158. However, the mom and school witnesses who have been teaching or providing services in the home pursuant to his home hospital placement agree that the student does not have the kind of escalated behaviors at home that he has at school.

59. Speculations about IEP implementation made by the home therapist hired by the parent should not be given much weight.

The home therapist testified that since being hired by the mom, she's spent about 12 hours total with the student (TE Vol. I, p. 216), far less than some school personnel have spent with the student. Even in the home setting, due to home hospital, the school's behavior specialist has spent far more time with the student than this witness. (TE Vol. I, p. 216-217). The student has a calming room, which the home behavioral therapist testified she's never seen (TE Vol. I, p. 165). Yet the witness was willing to opine on a number of matters on direct examination.

The home behavioral therapist happened to be at the school on a day in December when the student had incident of escalated behavior. She testified that the student should have been escorted to a calming room prior to the escalation, though she was not present to observe until the situation already escalated out of control. She also suggested that all of the staff should have left the room when the student escalated, although "she was not sure if this would have been possible." TE Vol I, p. 164. The witness's willingness to opine on what should have been attempted in that incident without knowing what *had* been attempted is evidence of a lack of impartiality. She testified

I'm not sure how they were responding, because I'm not there to observe it. You know, I wasn't there -- you know, I haven't really observed, you know, any of the other things either.

TE Vol. I, p. 170. Similarly, this witness opined at the hearing that the calming room should only have had a bean bag chair though she testified that she herself had recommended to the school that the calming room have a table. TE Vol. I, p. 165-166. After praising the preventive strategies used by the school in the BIP (TE Vol. I, p. 194), this witness was willing to opine that they weren't being implemented properly though she had no information, first-hand or otherwise, that this was the case. (TE Vol. I, p. 195). Also, see TE Vol. I, p. 206-210, a series of questions going to her motivations for testifying and the manner she prepared, ending with being asked

whether her various opinions were based upon “a very small amount of information,” to which she responded “I would say so, yes, not directly seeing him.” The following exchange occurred on cross-examination:

Q. You don't really actually know what the district did in terms of actually implementing any of your recommendations in R 101 or 102?

A. No, I do not.

Q. So you can't say whether they did or didn't?

A. No. No. Absolutely.

TE Vol I, p. 227.

60. Creating an effective BIP for a student such as this one requires experience and getting to know the student over a period of time; another appropriate way to gather information for creating a BIP is to plan an evaluation and conduct an FBA, as the school did beginning in October of 2018 and concluding in January of 2019.

See TE Vol 1, p. 285-288.

61. The school began systematically collecting data on the student's behaviors and adjusted strategies over time based on what they learned.

The school was measuring and documenting behaviors including quiet body, quiet hands, listening and paying attention, and reinforcing with self-comforting strategies such as candy, big chair, neck roll and quiet time. As time moved on, the school documented other reinforcement strategies such as coloring or play-dough. TE Vol. II, p. 438-444. The method of reinforcement after Christmas break was to allow the student to choose an curriculum activity to work on for ten minutes, followed by ten minutes of playing, working a puzzle, coloring, etcetera, as the student chose, alternating back and forth. TE Vol. II, p. 435-436.

Cara Brown (“Brown”) is a behavior analyst who treats children with autism and other developmental disabilities who was called as a expert witness by the school. TE Vol. III, p. 232.

Brown did not meet the student, but reviewed records and was qualified to give the expert opinions she expressed. TE Vol. III, p. 240. In summary, her opinion was that, given the facts and lack of information the school had about the student, [REDACTED] plan for behaviors was appropriate, was modified appropriately as they learned more about the student, used appropriate supports, and in certain respects was superior to the [REDACTED] plan.

62. School personnel worked in a coordinated fashion to gather data, share knowledge, modify the IEP according to what they learned, and implement the IEP.

[REDACTED] (“[REDACTED]”) is the special education coordinator who worked the school to help implement the student’s IEP. TE Vol. II p. 558 – 562. She and [REDACTED] the autism complex needs specialist, worked with Mrs. [REDACTED], the student’s special education teacher and case manager, to help [REDACTED] implement the IEP. [REDACTED] was in the classroom numerous times:

Q. You were in [REDACTED] classroom pretty frequently, correct? Multiple times, correct?

A. Yes.

Q. Would it be more than ten times?

A. Yes.

Q. Okay. So you don't know exactly what date or how long or how many times a week, but you know you were in that room numerous times working with Ms. [REDACTED], correct?

A. Yes.

Q. And you did things such as training and assisting Ms. [REDACTED] with behavior intervention strategies?

A. Yes.

Q. Did you do things to help train her and improve data collection and reviewing the data she collected?

A. We reviewed data together, yes, and I helped her create a more efficient form for data collection.

Q. And you participated in some of [the student’s] ARC meetings as well, correct?

A. The majority of them, I believe, yes.

TE Vol. II, p. 576-577. [REDACTED] worked with the student from October until the student left in February. TE Vol. II, p. 578. [REDACTED], the special education teacher, testified that the OT discussed sensory strategies with her “quite a bit.” TE Vol. II 469. The mom was an active participant. The record is replete with emails between the mom and the school regarding the

student. For example, [REDACTED], the special education coordinator, had extensive communications with the mom through texts, emails and phone calls, including a one hour phone call in December and a 45-minute call on February 12, 2019. TE Vol. II, p. 589. The record as a whole supports the conclusion that the members of the ARC were continuously gathering data, sharing what they learned, and making adjustments.

63. It's important for a student to be in a school setting if possible.

Applicable law mandates that the student be educated in the least restrictive environment consistent with providing an education tailored to the student's needs. [REDACTED] is the district-wide Special Education Teacher and Autism Complex Needs Specialist who worked with the student and the team implementing his IEP. [REDACTED] testified:

I think any kid needs to be around kids his or her age, learning skills, not just for the present moment, but for the future. That's where kids learn how to solve problems and be a part of groups and transition and do all of those life skills that can't be taught in a home necessarily and need to be taught in a school setting.

TE Vol. I, p. 304.

64. The student's medication frequently changed both at [REDACTED] and Kentucky but there was not sufficient evidence to find a correlation between adjustment to medication changes and escalated behaviors.

The [REDACTED] psychosocial evaluation notes that the student has been prescribed medication by psychiatrists that he was not taking. P0305. In Kentucky, the mom kept the school apprised of medication changes. [REDACTED], the student's special education teacher in [REDACTED] County, testified that the student's medication was "it was so off and on, and when he did try, it wasn't for very long before it was stopped." TE Vol. II, p. 531. Both in [REDACTED] and Kentucky, school personnel seem aware of and concerned about the possibility that medication adjustments

might be affecting the student's behavior, but there was not sufficient evidence to link specific medication issues to the instances of extremely escalated behaviors.

65. Lack of sleep may have been a factor contributing to behavior issues.

During the beginning days of his matriculation in ██████ County the student arrived at school tired, which seemed to have a negative effect on his behaviors. TE Vol. II p. 492. The mom confirmed reporting sleep issues for the student. TE Vol. III, p. 152.

66. The school did not have the student long enough and consistently enough to establish him in a routine.

██████████ is a district-wide Special Education Teacher and Autism Complex Needs Specialist who helps teams facilitate academic and behavioral success with students with autism or complex needs, such as the student in this case, using evidence based practices rooted in Applied Behavior Analysis and is trained to train teams. TE Vol 1, p. 243-245; 279. In addition to training other personnel on techniques to use with the student, she worked with student directly when she was present in the school. TE Vol. 1, p. 249. She also helped the team put together the student's BIP. TE Vol. 1, p. 249. When asked to account for the reasons the student had difficulties during his time at the school, ██████████ testified as follows:

I think there's a lot of factors that contributed to the difficulty ██████ was experiencing in school. As we looked at his data, it was really up and down. Some days were great, some days were not great. We were always trying to figure out what we could do to help, what would ease his anxiety, facilitate that success in school. And I've worked with ██████ over the course of this whole year. And when I think about, you know, what he struggles with, what he struggled with, I think back in the school setting he really struggled with not wanting to get to work and that whole idea of working was really, really challenging for him. And so we were always looking at ways to help him ease into the routine of getting to work. And some days we had better success than others. We didn't have a ton of time with him. And he came in September and it was only a few months. So I think that part of it we never got in a great routine.

TE Vol. 1, p. 251. [REDACTED], the student's special education teacher, also testified that in her opinion the school had not had sufficient time to determine whether the student could succeed in a classroom with other students. TE Vol. II, p. 533-538; 541. The student was on campus from mid-September to mid-February, but his time there was interrupted with numerous absences, some excused for things like appointments and others growing out of behavior issues, a shortened school day, and external factors disrupting the student's peace of mind, some of which are described elsewhere in these fact findings.

67. Presence of and interaction with other students tends to escalate the student's behaviors.

As [REDACTED], the student's special education teacher said, the student tends to "amp up" when other students are present. As described elsewhere in the findings, the student's calming room became where he would start the day. At home, where behaviors are not as extreme, there are no other students. At Mathnasium, where he did not experience extreme behaviors, there were students present but the method of instruction did not involve interaction with other students or group instruction – everyone worked individually and had an individual instructor assigned.

68. The student has trouble focusing and needs a lot of adult attention to stay on task, both at home and at school.

TE Vol. I, p. 256. The record generally supports this conclusion.

69. The student thrives on attention from adults.

The student's acting out behaviors are less when he has the continuous and exclusive attention of one or more adults. TE Vol. II 460-461.

70. The student has greater problems with escalated behaviors at school than at

home.

Many witnesses testified that escalated behaviors of the type that occurred at school did not occur at home. ██████ testified

when we would try to keep him on task with the schedule and the reinforcements and all the evidence-based practices that we were using, there were times when he would escalate. And at home I did not see that to the degree that I saw it at school.

TE Vol. I, p. 257.

71. Reasons the student's behaviors were more escalated at school than at home were because of the differences in the two environments, the absence of a need to make transitions, and the shorter time period during which work was required. ██████ testified that reason home sees better behaviors is

the environment, first and foremost. It's a big difference to do work at home on your kitchen table than it is in a middle school full of, you know, hundreds of other students. So I think that that alone cannot be overstated. The environment of not having to -- you know, having to transition out of your home and then into another school building with hundreds of other kids can be very high anxiety provoking for some kids. And I think that that was a difficult transition for ██████ that we did not have. Also, at home we were only working for two hours a day. And at school the day was longer, so the end was coming quicker at home.

TE Vol. 1, p. 257-258. Although this is testimony from one witness, the hearing officer believes the record as a whole supports this conclusion.

72. Restraints should not be used on the student unless necessary.

A note from Children's Hospital dated February 25, 2019, (which is after the student stopped being educated at the school) recommends that the student not be placed in physical holds but instead offered time in an unlocked sensory room to calm because restraints can trigger past events of physical abuse and/or a fight or flight response that can lead to worsening behaviors. P0364.

73. The school's use of restraints were not part of the plan to deal with escalating

behaviors but a crisis management response necessitated when the plan to control behaviors failed and the student's behaviors posed a danger to himself or others.

There was proof that the student had been restrained at times, such as in the two incidents in February, but Petitioner did not prove that the school had not followed or could have followed the plan for dealing with escalating behaviors prior to using restraint.

CONCLUSIONS OF LAW

I. PETITIONER FAILED TO PROVE THAT LAW ENFORCEMENT INTERVENTION AND/OR CHARGING THE STUDENT WITH CRIMES IN FEBRUARY CONSTITUTED A CHANGE OF PLACEMENT OR OTHERWISE WAS A FAPE VIOLATION.

Petitioner claims that the school caused police reports to be filed. This is incorrect. A deputy sheriff is stationed on school property. The deputy sheriff was involved in two incidents and created a record of them, as deputy sheriffs must. There was no proof that the deputy sheriff was under control of the school or had the power to constrain the deputy sheriff from creating a report of the event any more than motorists in an accident have the power to direct the police to report or not report it.

For purposes of these conclusions of law, charging the student with crimes arising out of the second incident is being treated as a decision of the school. A school employee is listed as the complaining witness and the principal took responsibility for the decision. Wise or unwise, the decision did not violate applicable law. 20 USC 1415(k)(6). *Bensalem Township School District* 32 IDELR 26 (Penn. SEA June 6, 1999). Nor does referring criminal acts by disabled students to law enforcement constitute a change in placement. *Rochester Community Schools v. Papadelis*, 55 IDELR 79 (Mich. Ct. App. 2010); *Joshua S. v. School Board of Indian River County*, 37

IDELR 218 (S.D. Fla. 2002); *Commonwealth v. Nathaniel N.* 54 Mass. App. Ct. 200,203, 764 NE2d 883, 886 (2002).

Nor, per fact-finding hereinabove, was involvement of law enforcement the result of a unilateral change in the student's IEP. The fact-findings hereinabove address the use of the word "squad" at a February 11 staff meeting and find that no changes were made in the student's IEP. Law enforcement's involvement was not part of a behavior intervention plan, but occurred because two situations had escalated beyond what de-escalation techniques could address.

II. PETITIONER FAILED TO PROVE THAT THE STUDENT'S PLACEMENT WAS CHANGED THROUGH SUSPENSIONS REQUIRING A MANIFESTATION DETERMINATION; PETITIONER FAILED TO PROVE THAT USE OF THE CALMING ROOM, PART OF THE STUDENT'S PLAN, CONSTITUTED A CHANGE IN PLACEMENT.

Per the fact-findings, the suspensions and early excused absences that are treated as the equivalent of suspensions total less than ten days, so a manifestation determination was not required under provisions concerning disciplinary actions.

Petitioner argues that an increase in use of the calming room in effect was a change in placement. However, the calming room was part of the student's regimen from the very beginning and use of the room was conditioned upon behavior. It is true that it appears the use was increased. An example would be having the student eat breakfast in the calming room instead of with the other students. However, the record does not establish that the use of the room was so great or different than what was contemplated by the IEP that it constituted a change in placement.

III. PETITIONER FAILED TO PROVE THE SCHOOL FAILED TO CREATE AN APPROPRIATE IEP.

There was no proof from which one could conclude that the Kentucky IEPs in

their various incarnations did not “set out an educational program that is ‘reasonably calculated to enable the child to receive educational benefits.’” *Endrew F. v. Douglas County Sch. Dist.*, RE-1, 137 S.Ct. 988 (2017), quoting *Bd. Of Educ. V. Rowley*, 458 U.S. 176 (1982).

The school adopted an IEP that attempted to address the student’s needs based upon the information they had and the knowledge they developed and the IEPs were modified as the school learned more about the student. Petitioner’s challenge to the IEPs were focused on two ideas – Kentucky’s IEPs were not ██████’s IEP and the student had behavioral issues, hence the IEPs must have been defective. However, per the fact-findings, the student was making progress academically and behaviorally until the disastrous events of February which, per the findings of fact, were triggered in part by an event outside the control of the school.

The Petitioner presented evidence that the Kentucky IEPs were different than the ██████ IEP, but that is not proof that the Kentucky IEP did not provide FAPE. The ██████ IEP was suspect for reasons set forth in the findings of fact hereinabove and there was no data concerning its implementation. Petitioner had the opportunity to cross-examine Respondent’s witnesses or call his own witnesses to establish inadequacies in elements of the Kentucky IEPs but did not do so. The mom testified that the school had gotten the academic part of the plan right but she thought the behavioral part was lacking. Petitioner’s home behavioral therapist thought behavioral part of the plan was fine.

The ██████ IEP was not binding upon Kentucky. CFR 300.323(f) provides as follows:

(f) IEPs for children who transfer from another State. If a child with a disability (who had an IEP that was in effect in a previous public agency in another State) transfers to a public agency in a new State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) **must provide the child with FAPE** (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency—

(1) Conducts an evaluation pursuant to §§ 300.304 through 300.306 (if determined to be necessary by the new public agency); and

(2) Develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in §§ 300.320 through 300.324.

The regulation does not require that Kentucky implement the [REDACTED] IEP. **The regulation requires that Kentucky provide FAPE.** The hearing officer was unable to find case law construing “including services comparable” but believes it refers to related services and that the import of the regulation is that a student shouldn’t be cut off from special education or services necessary to obtain an educational benefit from special education while awaiting a determination of eligibility in the new state.

Per the findings of fact hereinabove, both the Kentucky IEP and the related services provided or offered were, overall, comparable to those provided for in the [REDACTED] IEP. The hearing officer does not find differences between Kentucky and [REDACTED] IEPs in minutes or the manner of delivery make the services not comparable. Most importantly, as found elsewhere herein, Kentucky provided FAPE, which renders any differences between Kentucky and [REDACTED] IEPs immaterial or a technical violation not constituting failure to provide FAPE.

Since going on home hospital in March of 2019, testimony was that behaviors are not interfering with the student’s academics at home. Per the findings of fact, the absence of having to interact with students and make transitions contributes to the better behaviors at home. Petitioner even suggests that an order issue requiring the student to be educated at home. Undoubtedly this would be less stressful to the student than attending a school, but FAPE requires education in the least restrictive environment and there is value to being educated with other students. The school has offered to have a classroom within the school that will be for the student and a one-to-one teacher as they work on stabilizing his behaviors and eventually integrating him into the school. The student must be educated in the “least restrictive environment” (707 KAR 1:250), balancing the goal of mainstreaming with “the equally

important objective of providing an education appropriately tailored to each student's particular needs." *P. v. Newington Board of Education*, 543 F.3d 111,122 (2nd Cir. 2008). While there is no guarantee that this student can be educated with other students, it is premature to conclude that he cannot. The hearing officer finds that the school's plan is reasonably calculated to deliver education benefits.

IV. PETITIONER FAILED TO PROVE THAT RESPONDENT DID NOT IMPLEMENT THE IEP OR BEHAVIOR PLAN

Implementation of the IEP requires that the school "make a good faith effort to assist the child in achieving the goals, objectives, or benchmarks listed in the IEP." 707 KAR 1:320, Section 9(1). There is not evidence from which one could conclude that a good faith effort was not made. The vast majority of the proof in this case concerned behaviors. There was not direct proof that behaviors in Kentucky were caused by failure to make a good faith effort to implement. Petitioner presented proof that the student continued to have behavior issues, but that had been this student's history in [REDACTED] as well. The mere fact that instances of behaviors occurred is insufficient to warrant an inference that the plan was not being implemented. Similarly, the fact that in some instances the behaviors escalated out of control and crisis management was required does not warrant an inference that de-escalation techniques were not attempted or could have been attempted prior to reaching the crisis point. There also was evidence that outside factors played a role in the student's behaviors as discussed in the findings of fact.

V. PETITIONER FAILED TO PROVE THAT THE SCHOOL MADE INAPPROPRIATE PLACEMENT DECISIONS

It is true that Kentucky IEP's initial goals of time in general education proved too

optimistic as the extent of the student's behavior issues became apparent. Petitioner complains that the student's time in a collaborative/general education setting was reduced over time and the student became isolated in the calming room. As described in conclusions of law hereinabove, the use of the calming room was part of the IEP from the beginning, was conditioned upon behavior, and did not constitute a change of placement. But were it a change, it is disingenuous to argue that the student should have been in the general education setting more. The Petitioner has asked as a remedy that the student be educated at home where there are *no* students.

VI. PETITIONER FAILED TO PROVE OTHER PROCEDURAL VIOLATIONS THAT CONSTITUTED DENIAL OF FAPE

A. THE SCHOOL COMPLIED WITH ITS OBLIGATION TO REQUEST RECORDS FROM [REDACTED]

When a student with an out-of-state IEP enrolls in a Kentucky school, the school has an obligation to seek records from the out-of-state school. 34 CFR 300.323(g) provides as follows:

To facilitate the transition for a child described in paragraphs (e) and (f) of this section—

- (1) The new public agency in which the child enrolls must take reasonable steps to promptly obtain the child's records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous public agency in which the child was enrolled, pursuant to 34 CFR 99.31(a)(2); and
- (2) The previous public agency in which the child was enrolled must take reasonable steps to promptly respond to the request from the new public agency.

The findings of fact establish that the school took reasonable steps to obtain the child's records and to get information from [REDACTED] personnel about the student.

B. THE STUDENT DID NOT PROVE THAT THE SCHOOL FAILED TO TRANSMIT EDUCATIONAL RECORDS OF THE STUDENT AFTER HE WAS CHARGED WITH A CRIME

When an agency reports a crime committed by a student, 20 USC 1415(k)(9)(B) provides as follows:

An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime.

Student's brief states "there is no evidence whatsoever that the Respondent school district complied with [the above-cited statute]." (Petitioner's post-hearing brief, p. 3). However, there was not evidence that they did not comply, and Petitioner had the burden of proof.

VII. PETITIONER DID NOT PROVE ENTITLEMENT TO REIMBURSEMENT OF EDUCATIONAL OR THERAPY EXPENSES, COMPENSATORY EDUCATION, OR ATTORNEY FEES

Petitioner did not prove failure to provide FAPE, so there is no basis for a compensatory education award. Expenses were occurred at Mathnasium for math tutoring but no basis was shown for requiring Respondent to reimburse them. No basis was shown for reimbursing therapy expenses incurred by the parent. Under applicable law, a prevailing student may be entitled to attorney fees but a hearing officer lacks authority to award them and the student was not the prevailing party.

FINAL ORDER

The hearing officer finds Petitioner failed to prove that the school did not provide FAPE and is not entitled to any relief.

NOTICE

A party to a due process hearing that is aggrieved by the hearing decision may appeal the decision to members of the Exceptional Children Appeals Board as assigned by the Kentucky

Department of Education at Office of Legal Services, 300 Sower Blvd., 5th floor, Frankfort KY 40601. The appeal shall be perfected by sending, by certified mail, to the Kentucky Department of Education, a request for appeal within thirty (30) calendar days of date of the hearing officer's decision.

November 8, 2019

/s/ Mike Wilson

MIKE WILSON, HEARING OFFICER

CERTIFICATION:

The original of the foregoing was mailed to Hon. Todd Allen, KDE, 300 Sower Blvd., Frankfort KY 40601, and copies to Mary Ann Stewart and Claire Parsons, Adams, Stepner, Woltermann & Dusing, 40 West Pike Street, Covington, Ky. 41011, and Marianne S. Chevalier, 2216 Dixie Highway, Suite 200, Ft. Mitchell, Kentucky 41017 on November 8, 2019.

/s/ Mike Wilson

MIKE WILSON, HEARING OFFICER