

COMMONWEALTH OF KENTUCKY
KENTUCKY DEPARTMENT OF EDUCATION
DIVISION OF LEARNING SERVICES
AGENCY CASE NO. 1819-26

■

PETITIONER

VS.

■

RESPONDENT

HEARING OFFICER'S
DECISION
AND
ORDER

This Due Process Hearing was requested by letter filed with the Kentucky Department of Education (KDE) by Counsel for the Petitioner on or about April 30, 2019 pursuant to the Individuals with Disabilities in Education Act (IDEA), (***20 U.S.C. § 1400, et. Seq.***)

Respondent filed a Motion to Dismiss based upon ***KRCP 12.03*** on the basis that the Petitioner failed to state a claim for which relief may be granted on or about July 19, 2019. The motion was denied by an Order entered August 12, 2019. This matter was heard over two days, namely, August 19, and September 20, 2019.

Background

This is a case where a student with an IEP is on schedule to earn the requisite number of credits at the end of his 12th year of school. The student as part of the transition requirements of his IEP desires an additional year or 5th year of high school in

order to participate in an employment skills program called Project Search. The Student's post-secondary goals include full-time employment.

In addition to participating in Program Search, the Student Petitioner desires to participate in graduation ceremonies with his peer cohorts at the end of his 4th year of high school.

PARTIES AND OTHER REFERENCES

The Student will be referenced interchangeably as Student, Student Petitioner, Petitioner and [REDACTED]. The School District will be referenced interchangeably as the Respondent, the Respondent School District, and the District.

ABBREVIATIONS

Applied Behavioral Analysis (ABA); Attention Deficit Hyperactivity Disorder (ADHD); Admissions and Release Committee (ARC); Community Based Instruction (CBI); Director of Special Education (DOSE); Free Appropriate Public Education (FAPE); Individualized Education Plan (IEP); Individuals with Disabilities Education Act (IDEA); Individuals with Disabilities Education Improvement Act (IDEIA); Joint Exhibit (JE); Kentucky Administrative Regulations (KAR); Local Education Agency (LEA); Northern Kentucky University (NKU); Office of Vocational Rehabilitation (OVR); Respondent's Exhibit (R.E.); Site-Based Decision-Making Council (SBDM); Trial Transcript (T.T.)

ISSUES FOR THE STUDENT/PETITIONER

1. The Respondent's refusal to offer Project Search is a denial of FAPE.
2. The Petitioner requires Transition Services in order to receive FAPE.

3. The Respondent had failed to offer Transition Services which would confer any meaningful educational benefit.
4. Petitioner desires that the Hearing Officer order the Respondent to offer Transition Services for Petitioner which includes Project Search and a fifth year of high school.

POSITION OF THE RESPONDENT SCHOOL DISTRICT

1. Respondent School District has provided the Student Petitioner appropriate Transition Services and therefore did not deny him FAPE.
2. Once the Student Petitioner earns sufficient high school credits that would qualify him to receive a high school diploma, Respondent School District's legal obligation to provide FAPE ends.
3. There is no legal basis for allowing the Student Petitioner to "socially" graduate with his class.

BURDEN OF PROOF

As this Due Process Hearing is an administrative proceeding in Kentucky, there are two guides for who has the burden of proof. As the party seeking relief, Student Petitioner bears the burden of proving his entitlement to relief by a preponderance of the evidence. ***Schaffer v. Weast***, 546 U.S. 49, 62 (2005). The Supreme Court in ***Schaffer*** ruled that the party seeking relief has the burden of proof and thus the burden of persuasion. see also ***City of Louisville, Div. of Fire v. Fire Serv. Managers Ass'n by & Through Kaelin***, 212 S.W.3d 89, 95 (Ky. 2006) Citing ***KRS 13B.090(7)*** "the party proposing the agency take action or grant a benefit has the

burden to show the propriety of the agency action or entitlement to the benefit sought”. See also- **McManus v. Ky. Ret. Sys.**, 124 S.W.3d 454, 458 (Ky. App. 2003) (citing **KRS 13B.090 (7)**). In this situation, the Student Petitioner is the party requesting action or seeking a benefit. According to the Petitioner’s Due Process Request; *“...proposed resolution is for the District to allow ■■■ to participate in a normal senior year and ‘socially’ graduate, and then complete a 5th year of high school in the Project Search program.”*

Findings of Fact

Jurisdiction

1. A “Due Process Hearing” was requested in this matter on or about April 30, 2019. (J.E. #40)
2. ■■■ is a student with an IEP and a primary disability of Autism. (J.E. #1, p. 10)
3. ■■■ lives with his family in the Respondent School District. (T.T. Vol. I, p.9)
4. ■■■ is presently 19 years old and is classified as a senior at the Respondent District’s only high school and on schedule to obtain enough credits to obtain enough credits to obtain a diploma on the diploma track. (T.T. Vol. I, p.10)
5. ■■■ began attending school in the Respondent School District in the Fall of 2003. (T.T. Vol. I, p. 10) He left the Respondent School District during his fourth and fifth grade years, returning at the start of sixth grade. (T.T. Vol. I, pp. 15-16)

The Student Petitioner

6. ■■■ is a student with disabilities-autism, ADHD, anxiety, and epilepsy. (T.T. Vol. I, p. 11) Math and science have been ■■■'s most difficult academic areas. (T.T. Vol. I, pp. 13-14)
7. The Student Petitioner is "very routine driven" as written in his IEP with the date of March 22, 2016. (J.E. #2)
8. The same IEP noted that the Student Petitioner has difficulty "comprehending abstract language and needs further explanation beyond the literal, concrete meaning of things." It is thought he will continue to have difficulty "generalizing his pragmatic language skills". "His pragmatic language deficits adversely affect his ability to maintain peer relationships and handle anxious situations without guidance and assistance." (J.E. #2)
9. At the same ARC meeting where this IEP was developed, it was agreed that the Student Petitioner should be on a diploma track program with modifications set forth in his IEP. (J.E. # 3)

Background

10. Due to his autism, he is very "black and white" and does not comprehend the nuances of communications, such as sarcasm. (T.T. Vol. I, p.11) Everything is "literal" to him. (T.T. Vol. 1, p.14) Routines are extremely important to ■■■ His mother testified: "you don't mess with his routine." (T.T. Vol. I, p.15)
11. His disabilities impact him physically as well. For example, he has "idiopathic toe walking," which is frequently seen with autistic students. (T.T. Vol. I, pp. 11-12) He struggles with his coordination. (T.T. Vol. I, pp. 11-12)
12. ■■■ who has been the Student's special education teacher for five (5) years, testified that, due to his autism ■■■ "had to learn a lot of social skills that

come naturally to other people, which is very typical of students with autism.”
(T.T. Vol. I, p. 153)

13. The Parties agree that [REDACTED] qualifies for Special Education services under the Individual with Disabilities in Education Act (IDEA). (T.T. Vol. I, p.91)
14. Student-Petitioner’s ARC of 03/22/2016 developed his IEP for 03/22/2016 through 03/21/2017. (J.E. #2) On the third page of that IEP, there was a page titled “Transition Services Needs”. It included Student Interview, Interest Inventory, Individual Learning Plan and Parent Interview. Vocational Assessments were not checked.
15. The ARC meeting of 03/07/2017 developed his IEP for 03/07/2017 to 03/06/2018. Under “Transition Services Needs” on the second page, the following were checked: Student Interview, Interest Inventory, and other Elective selections, Naviance surveys. Vocational Assessments were not checked. (J.E. #4) On the fourth page under “Postsecondary Goal(s) Related to Education/Training & Employment” it stated: “After high school, [REDACTED]’s goal is to: [REDACTED] would like to work somewhere after graduation”. He does not know what he would like to do, but he would rather not have more post-secondary education to be able to have a full-time job.
16. On the same page of the IEP, under Transition Services it says: “Conduct assessments regarding the student’s desired employment and career interests for adult life beyond college and/or postsecondary vocational training”. Conduct a learning styles inventory to identify preferences and strength modes. Agency Responsible: High School-teacher/job coach/adult transition panel. (J.E. #4, p.3)

17. The ARC of 03/01/2018 developed the Student Petitioner's IEP for the period 03/01/2018. (J.E. #5) On the second page of this IEP, the areas of need identified by the Admissions and Release Committee (ARC) were "Instruction" and "Employment". On the third page, the Student's Postsecondary Goal(s) were "to obtain full time employment at a retail or customer service agency."
18. The ARC meeting of 03/01/2018, page 3 of the Summary Notes said the purpose of the meeting was: "To develop, review, and/or revise the student's IEP and make placement decisions" and "To discuss post-secondary transition needs and/or services". (J.E.#8)
19. Within the Summary Notes of the ARC meeting of 03/01/2018, under Parental Input: "The team discussed the option of [REDACTED] participating in the Project Search program". The Student's Mother expressed interest and would like to pursue this in the future for a 5- year option. She is concerned about him losing his fifth year as administration has changed. The team assured her (Student's Mother) that his plan for a fifth year will remain the same. We also discussed the option of meeting again to discuss concerns about graduation. (J.E. #8, page 5 after two pages marked 4)
20. In the Summary Notes for the ARC meeting of 11/11/2018 (with typed date of 10/25/2018) it says: "([REDACTED]'s Mother) brought up the topic of Project Search. Mr. [REDACTED] stated that he had talked with [REDACTED]" (director of Project Search in [REDACTED] County). He suggested (Mother) attend the information night and go through the application process (February). (J.E. #9, p. 4)

21. In advance of the December 3, 2018 ARC meeting, Student Petitioner's Mother wrote a hand-written note to ARC requesting confirmation regarding Project Search. (J.E. #11)
22. According to the Summary Notes of the ARC of 03/07/2017, "Project Search program was discussed and will be a program that they wish to explore more." (J.E. #5, p.5)
23. The Parents seek a fifth year of educational services for [REDACTED], specifically asking that he be provided a program called "Project Search". (T.T. Vol. I, p.16)
24. Project Search is offered in [REDACTED] County at Northern Kentucky University (NKU). (T.T. Vol. I, p.17) Project Search is designed for students with disabilities who seek to transition from high school to competitive employment. (T.T. Vol. I, p.17)
25. [REDACTED] County Public Schools have accepted students from outside its District to attend Project Search. (T.T. Vol. I, p.307)
26. An IEP Team or ARC must refer a prospective student to [REDACTED] County's Project Search. Presently, [REDACTED] County's Project Search program has accepted every student referred to it by an ARC. (T.T. Vol. I, p.17)
27. The [REDACTED] County School District offers Project Search as well. Its students attend Project Search at a company called Cengage. (T.T. Vol. I, p. 17)
28. In the NKU Project Search program, the students meet with an instructor at the beginning of each day and receive workplace instructions and vocational training on a daily basis. They then proceed to perform a specific job. The

- students rotate among various jobs throughout the school year. (T.T. Vol. 2, pp. 474-476)
29. ██████████ testified that Project Search “is a program actually specifically designed for students like ██████, students that are not necessarily going to access college but students that can be competitively employed.” (T.T. Vol. I, p. 204)
30. Mrs. ██████ testified that ██████ would benefit from Project Search. (T.T. Vol. I, p. 158) She said:
- “Because he’s on the regular education track, he didn’t get the full value of some of the transition skills that some of our students on the alternate assessment track receive. For example, we do a lot more community-based outings, job shadowing much more in-depth, and I feel that he would get that at Project Search...”
31. The Student’s Parents know several autistic students who participated in Project Search at both Cengage and NKU. Project Search enabled these students to transition from school to competitive employment. (T.T. Vol. I, p. 18)
32. While the Student Petitioner has taken a class at the District’s High School called Pathway to Careers, he has been unable to fully participate, as he cannot miss his core classes to attend the community-based outings. (T.T. Vol. I, p. 16)
33. ██████████ is the Student Petitioner’s ABA behavioral support person.
34. In January 2016, when the Student Petitioner was in the 8th grade, Special Education Director emailed the Student Petitioner’s Mother to set up a meeting to discuss the Student’s transition to high school. (T.T. Vol. I, p. 19)

35. The Student's Mother mentioned the possibility of the Student attending Project Search in a fifth year of education. The Special Education Director was not familiar with Project Search but promised to "look into it". (T.T. Vol. I, p. 19)
36. After the January 20, 2016 meeting, Project Search became an "ongoing subject" at the Student's ARC meetings. (T.T. Vol. I, p. 21)
37. The Student Petitioner's need for transition services has not changed since March 1, 2018 ARC. (T.T. Vol. I, pp. 42-43; pp. 180-181)
38. The "concerns about graduation" remark in the March 1, 2018 Conference Summary refers to "social graduation". (T.T. Vol. I, p. 46) [REDACTED] and the Student's Mother both felt it was essential that the Student walk with his class at graduation, as it was "the end of the Student's high school career and it's with the people he's been in high school with for...11 years".(T.T. Vol. I, p. 46) Participating in commencement exercises after Project Search "would not mean anything" to the Student Petitioner and he would be graduating with his younger brother's class. (T.T. Vol. I, p. 46)
39. [REDACTED] testified that "social graduation" is a "really common practice" throughout Kentucky and Ohio. (T.T. Vol. I, p. 201)
40. Graduating after the fifth year after completing Project Search would be detrimental to the Student Petitioner. He would graduate with his younger brother, without his peer group, and he would see his younger siblings catching up with him. (T.T. Vol. I, p. 221)
41. The March 1, 2018 IEP confirmed that the Student Petitioner required Transition Services in order to have FAPE. (J.E. #7, p. 3) The IEP also

confirmed the goal of full-time employment. However, the IEP failed to document the ARC's decision that the Student would attend the Project Search in his fifth year. (T.T. Vol. I, p. 51)

42. On page 5 of the Summary Notes for the ARC of 03/01/2018; the last four sentences say:

The team discussed the option of the Student participating in the Project Search program. The Student's Mother expressed interest and would like to pursue this in the future for a 5- year option. She is concerned about him losing his fifth year as administration has changed. The team assured the Student's Mother that his plan for a fifth year will remain the same. We also discussed the option of meeting again to discuss concerns about graduation. (J.E. # 8 p. 5)

43. The School's Employment Specialist is [REDACTED]. (T.T. Vol. I, p. 70) The "Program" suggested by the School District "does not exist". (T.T. Vol. I, p.71) Mr. [REDACTED] has no "existing set program" and no "coordinated set of activities." (T.T. Vol. I, pp. 70-71).

44. The School has never supplied a written program setting forth what specific services it intends for Mr. [REDACTED] to provide to the Student Petitioner. (T.T. Vol. I, pp.144-145)

45. Mr. [REDACTED] does not offer immersion into a job site, internships, the repetition or one on one training which Project Search offers. (T.T. Vol. I, pp. 259-260, 318-320) [REDACTED] [REDACTED] Guidance Counselor, testified that she and Mr. [REDACTED] would set up "something to enable the Student to be successful", but she had no idea what that "something" would be, as no program had been established. (T.T. Vol. I, p. 399-400) Mr. [REDACTED]

- acknowledged he had never produced a written plan for the Student's transition services. (T.T. Vol. I, pp. 457-458)
46. Mr. [REDACTED] has no certifications or degrees as a vocational counselor or a vocational consultant. (T.T. Vol. I, pp. 443-444) Mr. [REDACTED] testified he is not qualified to perform a vocational assessment. (T.T. Vol. I, p. 450) Nor is he qualified to gauge or determine a student's intellectual or academic capabilities. (T.T. Vol. I, p. 450)
47. Mr. [REDACTED] works 18 hours per week with the Respondent School District. (T.T. Vol. I, p. 444). He spends 2/3 of that time (12 hours) with the alternate assessment students and 1/3 (6 hours) with the diploma track students. (T.T. Vol. I, pp. 444-445).
48. Mr. [REDACTED] described his "program" as being "able to hustle up little jobs" for non-diploma track students. (T.T. Vol. I, p. 408) These "little jobs" were at rehabilitative service agencies, not competitive employment. They were "basically places that the Respondent could send the Petitioner when they got done with him." (T.T. Vol. I, p. 448) Mr. [REDACTED] testified he spends less than 12 hours throughout the entire school year working with diploma track students. (T.T. Vol. I, p. 412)
49. Mr. [REDACTED] involvement with the Student Petitioner has been to speak to him about how to present himself so people will like him, which is not difficult in the Petitioner's case because "he's a very nice, outgoing guy, and he's very likeable." (T.T. Vol. I, p.415). Due to his limited work hours and the size of his caseload, Mr. [REDACTED] would sometimes go for an entire month without any interaction with the Petitioner. (T.T. Vol. I, p. 448) There is no way that he

- can provide the reinforcement that could be provided by Project Search. (T.T. Vol. I, pp. 448-449)
50. Mr. ██████ testified he cannot offer a total immersion program geared toward getting a student such as the Petitioner into the workforce. (T.T. Vol. I, p. 446) His focus is very different from Project Search. (T.T. Vol. I, p. 447)
51. Mr. ██████ does not offer the rotating internships (which allow a student to experience a variety of jobs) as does Project Search. (T.T. Vol. I, p. 447). Through those Program Search internships, the student receives a lot of repetition, which is vital for the Student Petitioner. He requires constant repetition to reinforce what he has learned and how to perform a job. (T.T. Vol. I, p. 447)
52. ██████, Director of ██████ County's Project Search program, testified the program would accept a student for a fifth year of education, even if that student had earned enough credits to graduate. She would not question an ARC decision to refer a student to Project Search under those circumstances. (T.T. Vol. I, pp. 325, 327)
53. ██████ testified that her son is autistic. (T.T. Vol. I, p. 331). He also attended ██████ County High School. (T.T. Vol. I, p. 330). He earned enough credits to graduate in 2018 and he walked with his class in 2018. He then attended Project Search for one year. His school district deferred his diploma for one year while he attended Project Search. (T.T. Vol. I, pp. 332-333) His IEP dated August 15, 2018 stated that "[w]ithout assistance and accommodations in job placement and training, his skill deficits will adversely affect his ability to secure and retain employment." (P.E.#D) Although this

- student had completed the requirements to graduate, he needed assistance transitioning to a work environment. When this student left Project Search, he obtained employment. (T.T. Vol. I, p. 343)
54. Respondent School District introduced Student Petitioner's Vocational Evaluation of 05/08/19. This was based on five things. They were: Wide Range Achievement Test, Career Orientation & Placement Evaluation Survey, Kaufman Brief Intelligence Test, Meyers-Briggs Intelligence Test, Meyers-Briggs Type Indicator and Client Interview. (R#11)
55. The proposal for the Student Petitioner to have a fifth year for Project Search was neither approved nor denied by the ARC.
56. The Site Based Decision Making Council decided that Student Petitioner could not participate in graduation ceremonies at the end of the 2019-20 school year if he deferred his diploma and attended Project Search as a fifth year. (R#7)

A review of the Student-Petitioner's IEPs and ARC Meetings

57. The Student Petitioner's need for transition services was addressed in each of his IEP's beginning in March 2016. (See F.F. 49, 54, 58, 59, 60, 63, 64,)
58. During the ARC Reevaluation Report of 03/22/2016, when the Student Petitioner was age 15. On page 10 under Eligibility Determination (Reevaluation Determination (Completed by the ARC) Does the ARC need additional information in any of the following areas: Transition Needs (student in 8th grade or age 14 years or older) was blank. On page 14 in the second page of the Eval Meeting Notes; in the fourth paragraph from the top

of the page it says "████ stated that he was looking forward to high school especially lunch and after being told about the Pathway to Career course this was something that he was interested in". (J#1)

59. On the top of page one of the IEP for Start Date 03/22/2016 End Date 03/21/2017, two lines under the title "Present Level of Academic Achievement and Functional Performance" is the statement: "(For preschool children include the effect in appropriate activities; Beginning in the child's 8th grade year or when the child has reached the age of 14, as statement of transition needs is included.)" On page 2, of the IEP at the bottom "Transition Needs" Instruction is checked. On page 3, things checked are "Student Interview", "Interest Inventory", "Individual Learning Plan" and "Parent Interview"
60. The Student Petitioner's "Pre-Transition Vocational Assessment" was completed on January 27, 2019 during the second semester of his junior year and when he was age 18.
61. The Student Petitioner's "Progress Report" of 12/20/2017, did not contain any "Goal/Outcome" for Transition. (J.E. #23)
62. The Student Petitioner's Progress Reports for plan 03/01/2018-02/2019 with the date of 10/17/2018 does not have a "Goal/Outcome" for "Transition". (J.E. #24 & #25)
63. The Student Petitioner's Progress Report for plan 02/27/2019-02/26/2020 with the date of 05/24/2019 does not have a "Goal/Outcome for "Transition". (J.E. #26)

64. The first time [REDACTED] and OVR Counselor attended an ARC Meeting for the Student Petitioner was on December 3, 2018. (T.T. II, pp. 504-507 & J.E. #13 at p.7)
65. [REDACTED] through [REDACTED] (T.T. pp. 510- & J.E.# 14, p5,) had the Student Petitioner take a vocational assessment. She said that the Student Petitioner would not be able to obtain competitive employment after high school without support. He has issues with communication with others and “soft skills”. (T.T. Vol. II, pp. 517-516)
66. Based upon the evidence provided, for the Student Petitioner to be eligible for Project Search his local school district would have to participate. As it says: “The IEP Team will make the final determination”. (J.E. # 9)

TRANSITION SERVICES

This case deals with the issue of “Transition Services” for a student with an IEP and whether this student is receiving the services needed to assist him to transition to employment after high school.

IDEA Improvement Act of 2004 contains the requirement for Transition Services which is specifically promulgated at **34 CFR § 300.43**.

(a) Transition services means a coordinated set of activities for a child with a disability that—

(1) Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

(2) Is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and includes—

(i) Instruction;

- (ii) Related services;*
 - (iii) Community experiences;*
 - (iv) The development of employment and other post-school adult living objectives; and*
 - (v) If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.*
- (b) Transition services for children with disabilities may be special education, if provided as specially designed instruction, or a related service, if required to assist a child with a disability to benefit from special education.*

(Authority: **20 U.S.C. 1401(34)**)

In Kentucky the applicable regulations are found in the **KAR** set forth below.

707 KAR 1:320 – Individual Education Plan

Section 7. Transition Services.

(1) In the child's eighth grade year or when the child has reached the age of fourteen (14) years, and in alignment with the child's Individual Learning Plan (as required by 704 KAR 3:305), or earlier if determined appropriate by the ARC, the IEP for a child with a disability shall include a statement of the transition service needs of the child under the applicable components of the child's IEP that focus on the child's course of study. This statement shall be updated annually.

(2) By the child's 16th birthday, the IEP shall include: (a) Appropriate, measurable, postsecondary goals based upon age-appropriate transition assessments, related to training, education, employment, and, where appropriate, independent living skills; and (b) The transition services (including the course of study) needed to assist the child in reaching these goals.

(3) Transition services for children with disabilities may be special education, if provided as specially designed instruction or related services, and if required to assist a child with a disability to benefit from special education.

(4) If an agency, other than the LEA, (or state agency responsible for developing the child's IEP) fails to provide the transition services described in the IEP, the LEA (or the state agency responsible for developing the child's IEP) shall reconvene the ARC to identify alternative strategies to meet the child's transition objectives set out in the IEP.

(5) A participating agency shall not be relieved of the responsibility under IDEA to provide or pay for any transition service that the agency would otherwise provide to children with disabilities who meet the eligibility criteria of the agency.

Transition planning must:

- a. Start before the student turns age 16; and

- b. Be individualized; and
- c. Be based on the student's strengths, preferences and interests; and
- d. Include opportunities to develop functional skills for work and community life; and
- e. Be measurable.

In the event the IEP team determines that an individual student does not need services in one or more of these areas, the IEP must contain a statement to that effect and the basis upon which that determination is made. ***OSEP Letter to Cernosia IDELR 933.***

However, the question here is whether the Student Petitioner's IEP considered his employment goals in preparing him for transition beyond high school. ***Yankton Sch. Dist. v. Schramm, 900 F.Supp. 1182 (1995)*** Transition services are defined as: a coordinated set of activities in the areas of instruction, community experiences, development of employment and post-school adult living objectives and, if appropriate, acquisition of daily living skills and functional vocational evaluation.

In the case of ***Somberg v. Utica Community Schools, 67 IDERL 139, US District Court, Eastern District of Michigan (March 30, 2016)*** A hearing officer determined that the transition plan was "woefully inadequate."

Although the district conducted a variety of transition assessments, the Hearing Officer observed that it did not identify those assessments or provide their results.

Furthermore, the transition services identified in the plan did not appear to bear any relationship to the student's postsecondary goals.

The question here is: did the Respondent School District prove the Student Petitioner with a coordinated set of activities which furthered his goals toward transition after high school or postsecondary education?

In looking at the checklist the Student Petitioner's "Transition planning started before he turned age 16." (F.F.14 ,15, 36 & 41) Transition Services were addressed each year in his IEP. (F.F. 34, 58, 59, 60, 64, & 65) He took "Pathways to Careers" (F.F. 32). He has been unable to fully participate or attend community- based outings because of a conflict with his core classes. (F.F. 32)

The Respondent has an Employment Specialist, [REDACTED]. (F.F. 43) Mr. [REDACTED] worked very little with the Student Petitioner due to the Petitioner's diploma track schedule and Mr. [REDACTED] busy schedule. (F.F. 47, 48, & 49)

In looking at the evidence, there were no coordinated activities or goals for the Student for the goal of post- secondary employment. (F.F. 43, 44) Mr. [REDACTED] acknowledged that he had never produced a written plan for Student's transition services. The same was acknowledged by the Guidance Counselor. (F.F. 45 . In this situation, this it was noted prior the Student Petitioner's 16th birthday, his IEP noted "Transition Needs" (F.F. 15)

Within **707 KAR 1:320**, transition goals must be "measurable" and in this Student's goals be related to employment. A review of the Student's IEP for 2016-17, contained a list of things to do including the goal of full- time employment post high school but no measurable goals toward that end during that time period. (F.F. 14) In the IEPs for both 2016-17 and 2017-18, vocational assessments were listed. However, nothing was done with the data to further the Student's transition goals. (F.F. 15,16& 17)

With the development of the IEP for 2018-2019, there was a discussion of post-secondary transition needs but no indication “measurable goals were set. (F.F. 18 & 19) Moreover, many of Student Petitioner’s Progress Reports do not have “Goal/Outcome for “Transition”. (F.F. 61,62, & 63)

Hearing Officer finds herein that as of the date of the hearing, Student Petitioner had not yet received adequate transition services. Additionally, he had not received transition services within his local community. (F.F. 30) Because the failure to have a transition plan which ultimately resulted in a substantive loss of educational opportunity, this procedural error constituted a denial of FAPE to STUDENT. ***W.G. v. Board of Trustees of Target-Range School District, 960 F.2d 1479, 1484, 18 IDELR 1019 (9th Cir. 1992); Chuhuran v. Walled Lake Consolidated Schools, 839 F.Supp. 465, 473, 20 IDELR 1035, 1040 (E.D. Mich. 1993).***

GRADUATION

A student's eligibility to receive special education services ends either when s/he reaches age 21 (or 22 in some states) or graduates from high school. Thus, in most cases the granting of a high school diploma will terminate services. Because of this, graduation is treated as a change of placement under special education law, and parents are therefore entitled to receive notice of their right to dispute the award of a diploma and to use the due process system to try to prevent loss of services. In one leading case, ***Stock v. Massachusetts Hospital School, 392 Mass. 205 (1984)***, the court ordered rescission of a high school diploma declaring that it would be "insidious if graduation proceedings were employed as a device to circumvent the Federal mandate by prematurely terminating special education services."

This is not to say that, for example, a student with a mild learning disability, who requires only minor classroom modifications cannot be expected to earn the same credits toward graduation as a non-disabled peer and graduate upon completing those credits. But students with more severe disabilities typically need to be measured on a different scale. For such a student the ARC needs to establish criteria for graduation that are based on IEP goals and objectives specific to that student. Criteria for the delivery of a diploma, or the termination of special education services before the student "ages out," should in good sense be based on achievement of functional living skills including community involvement and employability as well as meeting academic standards.

As to the issue of the Student Petitioner walking with the class or cohort that he attended school at a graduation ceremony or "socially graduating", there is nothing in case law that addresses this issue. Respondent School District has provided its policies regarding graduation. R#1 is Board or District **Policy #08.113**-Graduation Requirements, R#2 is District **Policy 08.1131**, Alternative Credit Options, R#4, District Policy 08,22, Placement, Promotion and Retention, R# 5, **Policy # 09.1223**, Persons Over Compulsory Attendance Age and R#6, The Respondent District's *Student Handbook for 2018-2019*.

Respondent's only exhibit which specifically addresses "Commencement" is on page 30 of the ***Student Handbook***.

It says: "**Commencement**"

*Participation in commencement ceremonies is a **privilege** not a right and is contingent upon completion of graduation requirements prior to the date of the ceremony. All student fees and fines must be paid in full for participation. Students completing the [REDACTED] [REDACTED] educational program at an alternative school will have a separate graduation program at the*

alternative site.

It should be noted that the Student Petitioner is scheduled to have completed the requirements for graduation. (F.F. 4,19) Graduation and commencement is symbolic of transition. **34 CFR § 300.43 (a)(1)** requires that transition services include “community participation”. As the Student needs to be involved in community participation, which includes his own class cohort. Therefore, he is eligible under Respondent School Policy to participate in in commencement activities.

A review of Kentucky law and the Respondent School District’s Policy is silent as to having the Student go through the commencement ceremony with his cohorts except the SBDM decision. As set forth above, commencement ceremonies are part of community development and participation. For a student with an IEP, community experiences and participation are an important part of the education. Denying a student with an IEP the ability to participate in commencement can as in this instance deny him or her FAPE in respect to transition services component of the IEP.

IDEA SERVICES AFTER RECIEPT OF HIGH SCHOOL DIPLOMA

Under existing case law for IDEA cases, there are at least two remedies for students who did not receive FAPE which includes transition services after receiving a high school diploma. These remedies include rescission of the diploma and or compensatory services.

In the case of ***Stock v. Massachusetts Hospital School, 392 Mass. 205 (1984)***, the court ordered rescission of a high school diploma declaring that it would be "insidious if graduation proceedings were employed as a device to circumvent the Federal mandate by prematurely terminating special education services."

***Puffer v. Reynolds*, 761 F. Supp. 838 (D.Mass. 1990)**, the court left the diploma in place because the student had achieved sufficient credits to graduate. However, the court ordered remedial services to support the student for her first semester at a community college to make up for the school system's failure to provide an IEP and services during her senior year.

In ***Letter to Riffel*, 34 IDELR 292 (August 22, 2000)** in speaking about a school district's liability for compensatory education. "*Federal circuit courts of appeal have confirmed the independence of the right to compensatory education as an equitable remedy to address the denial of FAPE from the right to FAPE generally, which latter right terminates upon certain occurrences (including reaching the age at which the right to FAPE ends or graduating with a regular high school diploma). See generally, Board of Educ. of Oak Park v. Illinois State Board of Educ. et al., 79 F.3d 654, 660 (7th Cir. 1996) (noting "[c]ompensatory education is a benefit that can extend beyond the age of 21 [the terminating FAPE age in Illinois]."); Murphy v. Timberlane Regional School Dist., 22 F.3d 1186 (1st Cir.) (affirming award of two years of compensatory education to former student after student had reached the [otherwise terminating-FAPE] age of 21 given finding that FAPE had been denied to student), cert. denied, 115 S.Ct. 484 (1994); Appleton Area School Dist. v. Benson, 32 IDELR 91 (E.D. WI 2000) (authorizing award of compensatory education to a student who graduated with a regular high school diploma). See also, School Comm. of Town of Burlington v. Department of Educ., 471 U.S. 359, 369-70, 105 S.Ct. 1996, 2002-03 (1985).* A student's decision to graduate with a regular high school diploma does not automatically relieve a school district of its responsibility to provide that student with compensatory education and related services awarded to the student. The purpose of the award is to remedy the failure to provide services that the student should have received during []'s enrollment in high school when [] was entitled to FAPE. Compensatory services are often appropriate as a remedy even after the period when a student is otherwise entitled to FAPE because, like FAPE, compensatory services can assist a student in the broader educational purposes of the IDEA, namely to participate in further education, obtain employment, and/or live independently.

In the situation at bar, the Student has not graduated and there is a third solution. The Respondent can allow him to participate with his diploma track class. At the same time, the Respondent can withhold his diploma. FAPE in respect to transition services may be provided through a fifth year.

CONCLUSIONS OF LAW

1. The Student Petitioner was denied FAPE in the area of transition services. As set forth above, the Respondent School District while addressing transition services failed to provide measurable goals related to his post-secondary goal of gainful employment. Additionally, the Respondent School District failed to assist the Student Petitioner in obtaining the community- based experiences needed to successfully transition to employment.
2. There is nothing in Kentucky Law or Board Policy which would prevent the Student Petitioner from participating with his cohort in the Spring 2019 Commencement. This decision overrules the Decision of the Site Based Council as to the Student's participation in 2020 Spring Commencement.

ORDER

Based upon the foregoing, the Student Petitioner was denied FAPE in the area of Transition Services. This matter is remanded or referred back to the Student Petitioner's ARC to:

1. To revise the Student Petitioner's IEP to include Project Search for 2020-2021 as part of transition services; and
2. Set a goal on the IEP under transition services that has the Student Petitioner go through Spring Commencement in 2020 with his cohorts (as part of transition services) and the Respondent will withhold his diploma until the Student Petitioner completes Project Search in 2021.

ATTORNEY FEES

Under *IDEA, 20 U.S.C. § 1415* the award of attorney fees is under the jurisdiction of the district courts of the United States. Specifically, *20 U.S.C. § (i) (3) (A)* and *(B)* is set forth is set forth below.

(3) Jurisdiction of district courts; attorneys' fees

(A) In general

The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) Award of attorneys' fees;

(i) In general, in any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs—

(I) to a prevailing party who is the party of a child with a disability;

As this Hearing Officer is not with the district courts of the United States, he is without the jurisdiction or the ability to award attorney fees to a prevailing party in a Due Process Hearing.

This Order and Decision is entered 20thday of December 2019.

X Paul L. Whalen

PAUL L. WHALEN
Due Process Hearing Officer

CC:
Counsel of Record Via email and U.S. Postage Pre-paid

KDE: Todd Allen, Esq. & Jennifer Payne

Randy Blankenship, Esq., Counsel for Petitioner

Sue Cassidy, Esq, Counsel for Respondent

APPEAL RIGHTS

Pursuant to **707 KAR 1:340 Section 12**. Appeal of Decision. (1) A party to a due process hearing that is aggrieved by the hearing decision may appeal the decision to members of the Exceptional Children Appeals Board (ECAB) assigned by the Kentucky Department of Education. The appeal shall be perfected by sending it, by certified mail to the Kentucky Department of Education, a request for appeal, within thirty (30) calendar days of the date of the Hearing Officer's decision.

The address is: Kentucky Department of Education
Office of Legal Services
300 Sower Blvd.; 5th Floor
Frankfort, Kentucky 40601