KENTUCKY DEPARTMENT OF EDUCATION
DIVISION OF EXCEPTIONAL CHILDREN SERVICES
EXCEPTIONAL CHILDREN APPEALS BOARD
AGENCY CASE NO. 2122.02

[redacted] **APPELLANT**

V. **FINAL DECISION AND ORDER**

[redacted] **SCHOOLS** **APPELLEE**

Appellant, [redacted] (hereafter "Student"), by counsel, timely filed *Petitioner's Notice of Appeal* on August 3, 2022, appealing the *Findings of Fact, Conclusions of Law and Final Order* rendered June 30, 2022 by Hearing Officer, the Hon. Susan Gormley Tipton. That *Final Order* was rendered following seven (7) days of hearing. Student was represented by the Hon. [redacted] and the [redacted] Schools (hereafter "District") was represented by the [redacted].

This appeal comes before the Exceptional Children Appeals Board (hereafter "ECAB"). The panel, consisting of Mike Wilson, Kim H. Price and Roland Merkel was appointed August 3, 2022 to consider the appeal of the Student. The parties timely submitted written briefs. Having reviewed and carefully considered the administrative record in its entirety, including the briefs of the parties, this ECAB issues its Final Decision and Order.

PRELIMINARY MATTERS

A. JURISDICTION OF THE APPEAL

This is an appeal of a due process decision issued by Hearing Officer Susan Gormley Tipton on June 30, 2022 as permitted under **707 KAR 1:340, Section 13** which

provides that**:**

> [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. 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 the date of the hearing officer's decision.

The Hearing Officer issued her decision on June 30, 2022. Counsel for the Student timely appealed to the Kentucky Department of Education. Thus, the appeal was perfected within thirty (30) calendar days of the date of the Hearing Officer's decision.

The decision from which the student appeals found:

> ...Petitioner failed to prove by a preponderance of evidence that Student was denied FAPE. Specifically, Petitioner did not demonstrate that the IEP proposed by Respondent is inappropriate, that it cannot offer [Student] an LRE, and that it cannot offer [Student] a free appropriate public education (FAPE). It likewise failed to prove that [redacted] is the LRE for [the student].

B. ISSUES RAISED ON APPEAL

On appeal, Appellant alleges the hearing officer made the following fact-finding errors:

1. Finding the hearing was conducted.in [redacted] and that [redacted] Director of Special Education was present as Respondent's representative throughout the hearing.

2. Finding the hearing was at Respondent's offices in [redacted].

3. Finding the student's "cognitive functioning was also determined to be low. *Findings of Fact #2.*

4. Finding an aide proficient in ASL was provided for [the student] when [redacted] was in the classroom to work with [redacted] teacher, [redacted], and related service providers. *Findings of Fact #4.*

5. Finding the student can hear and understand spoken English in spite of [redacted] hearing

loss. *Findings of Fact #5.*

6. Finding the student did not sufficiently trial assistive technology in the educational setting. *Findings of Fact #12.*

7. Finding that child advocate [redacted] attended each of the meetings and attempted to take complete control of the discussions to steer the ARC towards a [redacted] enrollment for the student but made no findings regarding the aggressiveness of the school district's attorney and her prohibiting the student's parents from talking and refusing to answer their questions. *Findings of Fact #17; R 531.*

8. Finding [redacted] who used to work at [redacted], attended some of the March 24, 2021, meeting to advocate for a [redacted] placement." *Findings of Fact #18 (incorrectly cited by Appellant as 17).*

9. Finding "little evidence of [the student's] progress at the school aside from a report card..." *Findings of Fact #27.*

10. Finding the Services Plan put in place for [the student] at [redacted] "was not drafted until November." *Findings of Fact #28.*

11. Finding the "Expert witnesses called by Petitioner...did not present evidence that the District cannot meet [the student's] needs." *Findings of Fact #31.*

12. Finding that [redacted] and [redacted], the expert witnesses called by the Petitioner/Appellant, "expressed concerns about a placement where [the student] would not receive supports from a special education teacher and necessary related services, including the support of a teacher for the visually impaired." *Findings of Fact #32.*

Each of those claimed fact-finding errors is expressly addressed by ECAB elsewhere hereinbelow. Regarding errors in conclusions of law, Appellant's appeal broadly states, "With all

the factual findings above being in error, all of the Conclusions of Law made by the Hearing Officer are completely unreliable and should be set aside."

C. BURDEN OF PROOF AND LEGAL STANDARD FOR PROVIDING A FREE AND APPROPRIATE EDUCATION (FAPE)

The party seeking relief bears the burden of proving, by a preponderance of the evidence, their entitlement to relief. In this case the student filed the Due Process Complaint and bears the ultimate burden of persuasion on the elements of the student's claims. *Schaffer v. Weast,* 546 U.S. 49, 57-58 (2005) and KRS 13B.090(7).

The Court in *Board of Education of Fayette County v. L.M.,* 478 F. 3rd 307, 314 (6th Cir. 2007) described the obligations of a school district in providing FAPE to a student determined eligible for services under the IDEA as follows:

> "Under IDEA, the School is required to provide a basic floor of educational opportunity consisting "of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Rowley*, 458 U.S. at 201, 102 S. Ct. 3034. There is no additional requirement, however, "that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children." Id. at 198, 102 S. Ct. 3034."

The U. S. Supreme Court revisited the *Rowley* decision in *Endrew F. V. Douglas City School District,* 137 S. Ct. 988 (2017) and opined that in order to "...meet its substantive obligation under the IDEA, a school must offer an IEP reasonable calculated to enable a child to make progress appropriate in light of the child's circumstances." 137 S. Ct. 999. The IEP must *aim* to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and *functional advancement. Id.* (emphasis added). The Court further stated:

> "[E]ducational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately

> ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives." 137 S. Ct. 1000.

D. THE ECAB REVIEWS THE RECORD DE NOVO

Kentucky has a two-tier administrative process which requires the appellate review to be conducted in accordance with 20 U.S.C. Sec. 1415(g). *See also* 707 KAR 1:340, Section 13.

The ECAB is required to conduct an impartial review of a hearing decision and to make its own, independent decision upon completion of such review. 20 U.S.C. Sec. 1415(g). The ECAB must also review the entire hearing record before making its decision. 34 CFR Sec. 300.514(b)(2). The only limitation to this required de novo review pertains to Hearing Officer findings based upon credibility determinations. Credibility judgments may be overturned but only if non-testimonial extrinsic evidence in the hearing record would justify a contrary conclusion or if the hearing record, read in its entirety, would compel a contrary conclusion. *Carlisle Area School v. Scott P. By and Through Bess P.,* 62 F. 3rd 520, (C.A. Pa.)(1995). In other words, credibility determinations supported by the record require deference to the Hearing Officer's determinations. The ECAB may make fact findings contrary to those of the Hearing Officer as long as the ECAB's fact findings are supported by substantial evidence in the record and not based upon different views about credibility of witness testimony. Id. at p 529. The existence of conflicting testimony does not necessarily mean that any particular finding of fact was implicitly a credibility determination by the Hearing Officer. Id. at p 529.

E. FACTUAL BACKGROUND

Student was a six (6) year old kindergarten student at the time of the underlying due process action, who lives in the [redacted] School District (hereafter "District") (see: Due Process Complaint). Student was diagnosed with multiple disabilities including fluctuating mild

to moderate hearing loss, a cortical visual impairment, paroxysmal tonic upgaze, a chromosomal disorder (microdeletion syndrome), sacral agenesis, and apraxia. Joint Exhibit ("JE") 1; T-5--8-15; JE 242. Student was identified as a child with a disability by the District in 2018. The District's initial evaluation of Student found evidence of having very low scores in the areas of communication and adaptive skills and a cognitive score of less than 50. (*Id.* at 272-274).

During the 2018-2019, 2019-2020 and 2020-2021 school years the District provided Student preschool services. During student's first two (2) years in preschool Student was offered services four (4) days a week for about 3 hours each day (T-4-174). Under an exception requested by the parents, Student attended preschool two (2) days a week for a total of about 6 hours per week. (*Id.*).

During the first two (2) years of attendance in the District's schools, Student also attended preschool at the [redacted], an intensive intervention program operated by [redacted] Hospital.

During the 2018-2019 school year Student started preschool at [redacted] Elementary School in [redacted] home district. The ARC discussed the option of Student attending [redacted] Elementary where there was a teacher with a background in sign language (6.30.22 Decision at p 3). There was no indication the teacher at [redacted] was a certified interpreter. Student's parents decided to have Student attend [redacted].

Student used signs. Many of [redacted] signs were approximations due to [redacted] fine motor challenges. (T-2-195-196, 229; T-6-131; T-7-174). During the September 2019 ARC meeting staff reported Student utilized some sign and understanding when others signed to [redacted]. (6.30.22 Decision at p 4). At that meeting Student's Mother requested an increase in speech services and the District modified Student's speech services schedule in consideration of [redacted] attention span.

(*Id.*).

Due to COVID-19 a state-wide mandate closed public schools in March of 2020 and remote learning took place thereafter. The following school year the preschool operated in a hybrid format, with part remote and part in-person learning. (See footnote 2 to the 6.30.22 Decision at p 3; T-6--37-38). The ARC convened on March 27, 2020 where the District reported that prior to school closings Student was observed to have increased peer interaction, speech therapy progress, and ability and stability to walk (6.30.22 Decision at p 4). The District's speech language pathologist reported [redacted] had been utilizing several modes of communication with Student and recommended to the ARC that to maximize benefits to Student, Student should utilize all tools, including available technology and devices (6.30.22 Decision at p 5). Student's parents opposed this suggestion and stated a clear preference for sign as well as the exclusion of other modes of communication. (J. 162-163).

The ARC convened again in September 2020 near the beginning of the 2020-2021 school year. At this meeting Student's parents expressed concern that ASL was not being utilized enough and they wanted the District to place Student at [redacted], a private school located in [redacted] (hereafter "[redacted]").

The ARC convened again two months later to review the IEP. District staff noted Student was making significant progress in classroom engagement and expressive communication (J. 191-192). Student's mother wanted discontinuance of the use of assistive technology devices. [redacted], speech pathologist, explained such devices were offered to boost overall language development (*Id.*). Student's mother expressed concerns about Student's safety due to recent developments pertaining to Student's health (*Id. at* 194). Staff agreed they would craft a plan to provide training to bus staff so they could understand Student if an issue arose.

[redacted], Assistant Director of Special Education, stated [redacted] would review Student's daily schedule to ensure no safety concerns existed (*Id. at* 195).

Student's mother retained the services of [redacted], a parent advocate, in January 2021 to assist her. [redacted] contacted psychologist [redacted] on January 20, 2021 to secure "testing" of Student (BCS 223). [redacted] conducted an interview with Student on February 3, 2021 (BCS 194). Following assessment by [redacted], [redacted] issued a March 24, 2021 letter informing Student's parents their child could enroll in the Fall of 2021, however, "...because of the variety of services listed in [Student's] IEP, [redacted] attending [redacted] will be contingent upon the school district agreeing to place [redacted] at [redacted] (6.30.22 Decision at p 7; J.E. 251-256, 228-229).

Four (4) ARC meetings totaling more than 11 hours, convened thereafter: March 24, 2021, April 7, 2021, April 26, 2021 and May 17, 2021 (6.30.22 Decision at p 7).

On or about May 13, 2021 Student's Mother informed the District there had occurred a traumatic event affecting Student, on or about April 5, 2021. It is unclear what may have occurred (6.30.22 Decision at p 9; BCS 157, 528; T-6-126-127). District physical therapists [redacted] and [redacted] testified they recall Student being upset on April 5. [redacted] stated Student resisted and was upset when the sign aide told [redacted] to get up from sitting on her lap and to go play with other students (T-7-81-85).

Student's attendance during the 2020-2021 school year was impacted by a variety of health issues, the occurrence of a family vacation, and the decision by Student's parents to remove her from public school in April 2021 (BCS 115, 520-528). On May 13, 2021 Student's Mother informed the District that Student would not be attending school for the remainder of the year (6.30.22 Decision at p 8). They believed the District failed to offer and to provide Student a free, appropriate, public education (FAPE). Student ceased school attendance in the District

after April 5, 2021 (6.30.22 Decision at p 8). Student's parents unilaterally placed Student into [redacted] in August 2021 for the Fall.

At the fourth (4th) and final ARC meeting with the District for the 2020-2021 school year, the ARC determined Student's IEP could be implemented in the public school setting and the District could provide FAPE to the Student. The parents then read a prepared letter regarding their decision to enroll Student at [redacted] (J.E. 27-34; 6.30.22 Decision at p 9).

Student started Kindergarten at [redacted] at the start of the 2021-2022 school year . [redacted], a private school, assesses annual tuition at $42,000.00 (6.30.22 Decision at p 10). The tuition was reduced by [redacted] for Student's parents to $19,000.00; as of the last day of the hearing the parents had paid nothing to [redacted] (6.30.22 Decision at p 10).

In [redacted] attendance at [redacted], Student is served by a teacher, [redacted], who is not certified as a special education teacher (T-1-54-55, 178-179). There are no nondisabled students in Student's class that contains two (2) other students, nor do those students speak verbally. (T-1-113-114, 169, 171, 220). When Student engages with larger classroom groups up to 12 students, all such students have some disability (T1-171). [redacted] did not have a finalized written plan for academic goals for Student (6.30.22 Decision at p 10). The Service Plan for Student was drafted in November 2021, nearly three (3) months after Student started attendance at [redacted] (6.30.22 Decision at p 11). None of the [redacted] staff members who testified at the hearing stated the [redacted] School District could not meet Student's needs (T-1-100, 200, 285-286). At hearing neither [redacted] nor [redacted], Appellant's experts, could state that [redacted] was appropriate for Student (T-3-51-53, 263-264, 281-282).

Petitioner filed a due process hearing request on July 15, 2021 (6.30.22 Decision at p 12). A Hearing was held November 17, 19, and December 6-10, 2021. The Hearing Officer's

Findings of Fact, Conclusions of Law and Final Order issued June 30, 2022. Petitioner filed a *Notice of Appeal* with the Kentucky Department of Education on or about July 29, 2022.

I. CLAIMS OF FACT-FINDING ERRORS

Appellant took issue with certain findings of fact by the hearing officer. Regarding same, ECAB finds as follows.

1. The Appellant is correct that the hearing was in [redacted] and references to [redacted] in the fact-findings were typographical errors.

2. The hearing officer is correct, in Finding of Fact #2, that the student's cognitive functioning was low. Specifically, testing found an IQ level of 50. While there was testimony to the effect that test results may be unreliable given the age and disabilities of the student, there also was testimony from teachers evidencing difficulty in cognitive functioning. (See [redacted], T-4-52; [redacted], T-4-188-189; [redacted], T-6-231). Additional IQ testing subsequently took place at [redacted], but the parent was unable to say what the results were (T-5-256-258). Appellant's expert witness, a psychologist, declined to test the student prior to age six, but after the student turned age six continued to see the student but did not conduct cognitive testing. (T-5-128-129) While the student's IQ indeed may or may not be exactly 50, the weight of the evidence supports a finding that the student's cognitive functioning is low.

3. In Finding of Fact #4, the hearing officer correctly found that "An aide proficient in sign was provided for the student when the student was in the classroom to work with [redacted] teacher, [redacted] and related service providers." [redacted] was the student's special education teacher at [redacted] from 2019 through 2021. However, Appellant takes issue with this finding by citing testimony of [redacted], the student's pre-school teacher at [redacted] and

[redacted] (See T. 146-147), years before the student attended [redacted]. The testimony cited by Appellant is irrelevant to the Finding of Fact # 4.

4. Appellant takes issue with the hearing officer's Finding of Fact # 5 that the student "can hear and understand spoken English in spite of [redacted] hearing loss." ECAB modifies that finding to insert the qualifier "some" in front of "spoken English." Appellant cites testimony raising issues about whether the school can measure exactly what the student is hearing, but there was testimony evidencing that the student is hearing some voiced instruction and communication. (See [redacted] T-1-227; [redacted] T-2-231-232; [redacted], T-3-238; [redacted]: "p 13-14 "I could communicate with [redacted] -- because of the level of [redacted] hearing loss, [redacted] was picking up in our close proximity in a quiet environment much of what I was saying…" T-4-13,14; [redacted], T-4-262-264; [redacted], T-6-209-210; [redacted], T-6-74; also, see [redacted], BCS 191).

5. The Hearing Officer correctly found, in Finding of Fact #12, that "[the student] did not sufficiently trial assistive technology in the educational setting…" Appellant cites testimony from some providers that the student didn't like assistive technology and had "chosen" ASL as "[redacted] language," essentially arguing that ASL is better for [redacted] than a device. However, the finding made concerns the trialing and potential of assistive technology as part of total communication for the student. There is testimony regarding successful use of devices, the need for that option as part of total communication, and potential promising technology the school was unable to trial because the student stopped coming to school. (See [redacted], T-1-195-196; [redacted] T-4-74-77)

6. Regarding Finding of Fact #17, ECAB has reviewed the extensive testimony

regarding the conduct of ARC meetings and has listened to the recordings that were made part of the record. ECAB agrees with Finding of Fact #17. No additional finding regarding actions of the school's counsel at ARC meetings is required or appropriate.

7. Appellant takes issue with the portion of Finding of Fact #18 that states "[redacted], who used to work at [redacted], attended some of the March 24, 2021 meeting to advocate for [redacted]." ECAB amends the finding to state "[redacted], who *used to perform contract work* for [redacted], attended some of the March 24, 2021 meeting to advocate for [redacted]." Regarding [redacted] advocacy for [redacted], there is ample evidence in the record to conclude that [redacted] both acted and testified as an advocate, rather than as an impartial professional and impartial expert.

8. ECAB agrees with the portion of hearing officer's finding #27 stating there was "little evidence of [the student's] progress at [redacted] aside from a report card…" Appellant cites as evidence to the contrary testimony of [redacted] speech pathologist [redacted] that [redacted] collected data to establish a baseline for purposes of coming up with a plan for the student at [redacted], but that is not evidence of progress or lack of progress while attending [redacted]. Appellant also cites anecdotal testimony of [redacted], but ECAB does not find it persuasive or sufficient to traverse the hearing officer's finding.

9. ECAB agrees with the portion of Finding of Fact #28 that states the services plan was not developed until November of 2021. [redacted], President of [redacted], testified (T 1-266) as follows:

> Q: So [the student] has not been getting OT in August, September or October, right?
> A. Not from us; not from [redacted], no.
> Q. So explain to me why [the student] did not have a services plan developed until November.
> A. It took a while to get on [redacted] schedule and us gathering information for that service plan.

10. ECAB inserts the word "sufficient" to amend Finding of Fact #31 to state that

"Expert witnesses called by Petitioner….did not present *sufficient* evidence that the District cannot meet [the student's] needs." Petitioner's witnesses argued that only [redacted] or a similar signing environment could meet the student's needs, but Petitioner did not meet the burden of proof on that point.

11. ECAB agrees with Finding of Fact #32 that [redacted] and [redacted], the expert witnesses called by the Petitioner/Appellant, "expressed concerns about a placement where the student would not receive supports from a special education teacher and necessary related services, including the support of a teacher for the visually impaired." Appellant cites in support of contesting Finding of Fact #32 some testimony by [redacted] to the effect that special education certification isn't important if the teacher communicates well with the student, (T-3-72), a proposition the hearing officer and ECAB reject. Elsewhere, [redacted] states [redacted] would be concerned if the student's teachers were not trained and certified to provide specially designed instruction (T-3-66). Fact-Finding #30, not contested by Appellant, is that the student's teacher at [redacted] is not certified to provide special education. Regarding involvement of a visual expert, [redacted] testified (T 3-62) that the student "needs a TVI for sure, if [redacted] has CVI." (T-3-62). Regarding involvement of a visual expert, [redacted] testified [redacted] would defer to someone with experience with vision impairments regarding the effect on the student of vision fatigue (T-3-267-269).

Except as modified hereinabove, ECAB agrees with the hearing officer's fact-findings.

II. THE PARENTS HAD MEANINGFUL PARTICIPATION IN THE IEP PROCESS

The IDEA requires that the public agency ensures that the IEP team for each child with a disability includes the parents of the child. 34 C.F.R. Section 300.321(a)(1). The record is clear that the student's parents were heavily involved in the ARC meetings and IEP processes, and the ARC made several changes during the student's enrollment in [redacted] in response to requests of the parent and [redacted] advocate's requests.

It is true that the ARC did not approve parent's primary request, placement at [redacted] However, the District was not required to do whatever the parent wanted. *Letter to Burton*, 17 IDELR 1182 explains that, as no single factor can be determinative in placement, parental preference can be neither the sole nor predominant factor in placement decisions; parents must be involved in educational decisions under the IDEA, but their preferences do not have preemptive weight. The ultimate responsibility for developing the IEP and offering a FAPE is on the District. OSEP addressed this issue in *Letter to Richard*, 55 IDELR 107 (OSEP 1.7.10). If the team cannot reach agreement, the public agency must determine the appropriate services and provide the parents with prior written notice of the agency's determinations regarding the child's educational program and of the parent's right to seek resolution of any disagreements by initiating an impartial due process hearing or filing a State complaint.

The parents were provided all rights of meaningful participation. The record is replete with their heavy involvement in the IEP process. The hearing officer found, and ECAB agrees, that the parents were not denied meaningful participation.

III. THE IEP PROPOSED BY THE SCHOOL DISTRICT ADEQUATELY ADDRESSED THE COMMUNICATION NEEDS OF THE CHILD.

The IEP sought to address the student's communication needs in a variety of ways. Although the parents preferred all direct instruction be in American Sign Language (ASL), the IEP focused on a total communication approach. That total communication approach is appropriate in light of the specific circumstances of this child. First, [redacted] is a hearing child. The evidence does show that [redacted] does not always hear everything that is said due to the issue of the frequency at which content might be delivered. However, [redacted] can hear. Accordingly, the IEP took steps to address this problem by providing for an aid who was proficient in sign language. Further, the latest proposed IEP addressed the need for an actual certified interpreter. This would have been made available had the child remained in the [redacted] School District. Said interpreter could have made actual academic subject content instruction available directly to the child.

The evidence was clear that the child used approximations of ASL due to [redacted] fine motor skill problems. The school personnel could not always understand what [redacted] was saying with these approximations. Further, this child has visual impairment. In light of these circumstances and the complexity of this child's diagnoses, which affect many different areas, using only ASL would limit the child's ability to communicate both receptively and expressively given [redacted] total situation. The use of a total communication approach is completely appropriate. Although the child at this time seems to prefer ASL as [redacted] mode of communication, [redacted] vision and/or fine motor skills may impede that ability going forward making it all the more important that [redacted] have access to assistive communication devices as well as verbal instruction. It would be counterproductive to take away one possible method of communication for the child this early in [redacted] life.

Issue was also made with the allegation that the child was unable to enjoy interactions with peers. This is simply not the case. First, the majority of time in issue in this case is during the Covid-19 pandemic when the children were being taught either on a limited in-person schedule or completely virtually, which limited all children's interactions. It is correct that not everyone in the school could sign, and that few, if any, of the child's classmates could sign. Schools cannot control the qualifications of other students to communicate with the student but can and did provide the bridge for these communications with the sign aids. Three capable aids throughout the course of [redacted] time with the school district were with [redacted] at all times assisting in [redacted] communication with peers. Testimony was given they signed what [redacted] was saying to other children and vice versa. The [redacted] would have given [redacted] little, if any, more peer interaction since there were only two other peers in [redacted] classroom, both of whom are non-speaking.

In addition to the sign aid and communication devices which were made available to this child, there were other opportunities for [redacted] to have instruction in sign language from [redacted] Deaf and Hard of Hearing Teacher and [redacted] Speech Language Pathologist. The proposed IEP would have allowed for a placement in a classroom with a Special Education Teacher who had received training in sign language and had used it for several years. This would have made direct instruction in sign language, as requested by the parents, available daily to this child. "34CFR300.324(a)(2)(iv) states that when developing an IEP an ARC must consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for

direct instruction in the child's language and communication mode; and (v) consider whether the child needs assistive technology devices and services."

The IEP provided for attendance at [redacted] where student would receive instruction from a Special Education teacher who had an extensive background in sign language, and with the services of an instructional aide proficient in American Sign Language. (J. 341-345, J 323-328, J 226-237, J 243-248; J 226-233; TE Vol. 4, pp. 60-62, TE Vol. 6 pp 217-218). In addition, at [redacted], the Speech Language Pathologist working with the student testified that [redacted] uses both voice and sign to teach student how to better communicate, and that the student was progressing with this modeling. Further, there are communication devices in the classroom and a second, lower-technology device in the classroom that the student utilized. Even though the mother preferred that staff communicate exclusively in sign language with the student, [redacted] explained that scholarly studies in speech pathology have shown that children who are exposed to different modules of language and communication increase their overall language skills and in fact, that was the case with the student while [redacted] attended [redacted]. (J 189-198).

In addition to that, [redacted], the hearing-impaired teacher reported on student's progress made with signing and using communication boards with student. The Occupational Therapist and Physical Therapist also testified to the progress they observed. (J 189-198, J 195, J 232, J 245-47, J 307, J 325-26; TE Vol. 2, pp 65-66, 130-131).

School districts are not required to provide or offer the educational program to serve a parent's personal preferences. *Doe v. Bd. Of Educ. Of Tullahoma City Sch.,* 9F. 3d. 455 (6th Cir., 1993). With regard to the parents' demands for a certain sign language methodology, school districts are not required to offer services that exactly "match" those available in a private

setting. R.*G. v Downington Area Sch. Dist.,* 528 F. App'x 153 (3rd Cir., June 3, 2013). All that is required is that the program offered is reasonably calculated to produce some educational benefit for the student. *Kings Local Sch. Dis. v Zelazny*, 325 F. 3d 724, 729 (6th Cir., 2003). The IEPs in the case at bar met the local standards and, in fact, produced some educational benefit for the child. The school met this requirement by including all of these areas within the IEP, although in a method different then that preferred by the parent.

In the end, Appellant's complaints about the use of assistive technology or total communication in contrast to a program based only on ASL is a dispute about methodology. *Keystone Cent. Sch. Dist.,* 102 LRP 5632, PA. SEA 10.20.99 (hearing officer deemed parental preference for ASL immersion program a dispute about methodology and found public school placement proper); *M.M. v. Sch. Bd. of Miami-Dade County,* 437 F.3d. 1085 (11th Cir. 2006) (IEP that offered research-based therapies to address student's needs proper though it did not include therapy preferred by parents); *Lachman v. Ill. State Bd. of Educ.,* 852 F.2d 290 (7th Cir. 1988) (IDEA relegates authority on selecting methodology to educate students to state and local education officials). On such matters, however, the District staff members are entitled to deference in their judgments about the appropriate methodology that can benefit the student in light of all [redacted] challenges and needs. *See id.* Since Appellant has offered no that instructional options offered by the District are insufficient to offer a FAPE, this aspect of Appellant's argument fails.

There was much discussion during the testimony as to whether the school was obligated to have a certified interpreter. The language in the IEP was always clear that there would be an aid in sign language who would help interpret. It never specifically stated, until the new proposed IEP that was rejected by the parents, that an actual certified interpreter would be

provided. Therefore, the portion of the Appellant's argument that the aids who had worked with the child violated KRS 309.300 concerning licensed interpreters is not applicable.

IV. THE IEP APPROPRIATLEY ADDRESSED THE CHILD'S SAFETY NEEDS AT SCHOOL.

There is no doubt that this child had numerous needs at school for safety precautions to be implemented. [redacted] had a cortical vision impairment which did not allow [redacted] to perceive depth and made accessing steps and playground equipment dangerous for [redacted], if not accompanied by another individual. [redacted] also had balance difficulties. Near the end of the time which [redacted] was in school, [redacted] had a feeding tube inserted which extended out from [redacted] body and would have been dangerous had [redacted] taken a fall. The mother testified to having seen the child without an adult with [redacted] on the playground while driving by the school, to an incident where the child came home with burns on the back of [redacted] legs possibly from a piece of hot playground equipment, and a situation where [redacted] fell while exiting the school at the feet of a school administrator. However, the testimony of school personnel was clear that there was a safety aid present with the child. Although the mother may have wanted the aide to be within the immediate reach of the child, a close proximity was appropriate. In driving by the playground, the mother could not have clearly seen all people present. The child was never seriously injured and there is no indication that [redacted] was left unattended at any period of time at school. It is common for children to sustain minor injuries at school.

The school offered the safety aid and had bus drivers and monitors attend training to help them to better communicate with the child through sign language in the event any emergency arose on the school bus. Further, testimony was given that the child made advances in [redacted]

stability due to the physical therapy intervention provided under the IEP. Thus, there is not sufficient proof that the school failed to appropriately address the child's safety needs in violation of IDEA. Neither IDEA nor Kentucky regulations require a written safety plan. See *Akron Bd. of Educ.* 116 LRP 10766, at p. 21. Further, Kentucky ECABs have held that "FAPE does not require a risk-free environment, but a reasonably-safe environment." *In re Student with a Disability,* 1213-16, 114 LRP 19510. The District met this requirement.

V. THE ARC CREATED AN IEP REASONABLY CALCULATED FOR THE STUDENT TO MAKE PROGRESS IN LIGHT OF HER CIRCUMSTANCES

Appellant's initial brief summarily asserts that the school's IEP failed to offer FAPE and that [redacted] is both the appropriate placement and the least restrictive environment. Appellant's reply brief argues in support of both contentions that numerous personnel at the school are not fluent in ASL. However, only if the school is unable to provide FAPE is the school required to consider placing the student in a private special education school. It is not the case that the school system opposes placing students at [redacted] on general principals. There was testimony that students sometimes had been placed there in the past. But in the present case, the school believed, the hearing officer found, and ECAB also finds, that the school can provide FAPE to this student.

Appellant's case rests almost entirely on one issue – direct instruction in ASL and the opportunity to sign with signing peers. As the parent stated regarding the final ARC meeting:

> [s]o then we quickly went through the IEP goals. I did reject them all, as I stated before, because they were not going to be given in [redacted] language. And there were no peers for [redacted] to communicate with. And then we issued the ten-day intent to enroll."

T-5-166. Regulations provide that the ARC must "**consider** the child's language and communication needs, opportunities for direct communication with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode." 34 C.F.R. §300.324, *emphasis added*. The school did consider language and communication needs of the student. Not all school personnel working with the student at the school are fluent in ASL, but some are. The signing skills of most others are sufficient, in light of the student's age, vocabulary, and cognitive abilities, to communicate with the student. Additionally, an interpreter is provided to facilitate communicating with peers and personnel who need the assistance. It is true that classroom teachers at the school, other than the deaf and hard of hearing teachers, will provide mostly mediated instruction rather than direct instruction. However, the student will receive instruction from certified special education teachers and will allow [redacted] to be, to the maximum extent appropriate, with non-disabled peers. ECAB does not agree with, and the law does not support, Appellant's contention that an environment with only disabled peers, such as [redacted], is less restrictive than one with non-disabled peers simply because there are more opportunities there for signing.

Appellant emphasizes the student's hearing impairment and contends that ASL is the only option for communication. However, the school believes, and the hearing officer and ECAB agree, that total communication is important for this student. The student has mild to moderate hearing loss and can hear some voice. The principal of [redacted] testified that the student's teacher at [redacted] does not voice (T-1-269) and that the student does not voice with the principal, teacher, or classroom assistant (T-1-222). [redacted], the student's speech language pathologist at [redacted], testified as follows:

> Q. So for a student with mild hearing loss, which is what [the student] has had, does it concern you and does it present any downsides that [redacted] would be in an environment for a majority or big portion of her day where the other students are not speaking and the teacher is not speaking?
> A. Yes, I feel that would limit [redacted] cognitive development of oral language, both expressively and receptively, and it would hinder [redacted] ability to -- any ability that [redacted] is going to have to produce sounds correctly, to speak, that is going to interfere with that development.

T-4-139. While the student's ability to voice is limited, the student's ability to understand and communicate with those who voice and do not sign cannot be overlooked. Similarly, assistive technology can aid in environments where signing is not an option. Additionally, there is ample proof that the student's fine motor impairment hampers [redacted] ability to sign, resulting in approximations of signs that those unfamiliar with [redacted] have difficulty understanding. (See, for example, T-4-52). The student's vision impairment also may impact [redacted] over-dependence on communicating via sign. The student's speech pathologist at [redacted], [redacted], testified as follows:

> I feel [redacted] vision is also a big part of [redacted] missing out on things in the classroom, and I don't feel that that part of [redacted] need is being addressed in the situation we have currently.
> Q. In terms of [redacted], or what do you mean?
> A. In terms of [redacted], in terms of [redacted] language use and the mode of communication that [redacted] using.
> Q. So are you concerned about use of sign, independence on sign, and sign exclusively almost for [the student] --
> A. Yes, I am.
> Q. -- due to [redacted] vision needs?
> A. Yes.
> Q. So let me make sure I understand. You don't necessarily think that it's a problem for sign to be incorporated in [the student's] program, correct?
> A. No, no, I would definitely incorporate it into [redacted] program.
> Q. It sounds like you're saying, though, a truly total communication approach that embraces other forms of communication may be helpful because [the student] has a variety of other deficits and needs including vision and fine motor; is that correct?
> A. Yes. Yes.

(T-4-68-69).

Whether or not hearing-impaired students often develop sign language more quickly in a deaf school where everyone signs is a fact question. However, it is only one fact and is not dispositive, by itself, of any legal question. The legal question in this case, which involves many other facts and factors, is this: Did the school offer an IEP reasonably calculated for the student to make progress in light of all of [redacted] circumstances? The burden was on Appellant to prove it did not. The hearing officer and ECAB find that Appellant failed to meet that burden.

FINAL DECISION AND ORDER

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

NOTICE OF APPEAL RIGHTS

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

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

(b) Time limitation: The party bringing the action shall have 90 days from the date of the decision of the hearing officer or, if applicable, the decision of the State review official, to file a

civil action, or, if the State has an explicit lime limitation for bringing civil actions under Part B of the Act, in the time allowed by that State law. (Emphasis added).

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

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

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

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

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

SO ORDERED this 20th day of December, 2022, by the Exceptional Children's Appeals Board, the panel consisting of Kim H. Price, Roland Merkel and Mike Wilson, Chair.

EXCEPTIONAL CHILDREN APPEALS BOARD

BY: /s/ Mike Wilson
Mike Wilson, Chair

CERTIFICATION:

The foregoing was emailed this 20th day of December, 2022 to the following:

Ashley Lant, KDE Deputy Legal Counsel
Ashley.Lant@education.ky.gov

With copies emailed to:

[redacted]

KDE Legal Services
kdelegal@education.ky.gov

____/S/_Mike Wilson_____
MIKE WILSON, CHAIR
EXCEPTIONAL CHILDREN APPEALS BOARD