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**KENTUCKY DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND EARLY LEARNING
AGENCY CASE NO. 2324-29**

██████████

PETITIONER

v.

████████████████████

SCHOOL DISTRICT

RESPONDENT

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

The Request for Due Process Hearing for ██████████ (the “Complaint”, title redacted) filed by ██████████ (Petitioner) was received by the Kentucky Department of Education (KDE) on June 28, 2024. ██████████ School District (Respondent) was informed of Petitioner’s Complaint by KDE through the KDE Notice of IDEA Due Process Hearing sent to counsel for both parties and to the Hearing Officer via email on July 1, 2024. The Complaint is subject to the requirements of 20 U.S.C. Sec. 1415, 34 C.F.R. Sec. 300.507-508, the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. Section 1400, et. seq., KRS Chapter 13B and 707 KAR 1:340. At that date ██████████ was six (6) years old and diagnosed with Congenital Myasthenic Syndrome (CMS), delay in development, Gastroesophageal Reflux Disease (GERD), Laryngomalacia, Hypotonia, and prematurity. ██████████ is identified as a student with a disability who needs special education and related services under the primary category of *Other Health Impairment*. Pertinent ARC Summary Reports also indicate Petitioner qualifies in the category of *Developmentally Delayed*.

Petitioner had alleged in the Complaint, and must prove by a preponderance of the evidence (KRS 13B.090(7)) that Respondent violated IDEA by a denial of a free and appropriate public education (FAPE) in violation of 707 KAR 1:290, more specifically as alleged in the Complaint:

- Count I: That Respondent made repeated attempts to remove student from Special Education Developmentally Delayed services;**
- Count II: That Respondent refused to provide medically recommended and academically required Assistive Technology Device (Zippie TS Tilt in Space wheelchair with Efix joystick activated power assist);**

Count III: That Respondent initially refused to provide ESY services to student due to lack of teachers and participation in summer school;

Count IV: That Respondent refused to provide Speech Therapy based on insufficient testing/data, and provision of inadequate Occupational and Physical Therapy; and

Count V: That Respondent failed to make reasonable efforts to create a safety plan that will insure student's safety while at school.

Petitioner requested the following relief:

- The recommended wheelchair be provided at no cost to the student or parent;
- Compensatory Education be awarded for time spent without appropriate accommodations;
- Speech Therapy be awarded as recommended by Speech Evaluation;
- Increased Occupational and Physical Therapy be awarded;
- Training for staff about student's medical condition; and
- Any and all other relief to which he is entitled.

At the 07-24-2024 Initial Prehearing Telephonic Conference the parties agreed, requested and were granted extension of the regulatory and statutory deadlines.

Respondent filed its *Response to Petitioner's Due Process Complaint* on 08-19-2024.

The parties engaged in two (2) Resolution Sessions: 08-02-2024 and 08-13-2024. The 08-16-2024 *Report on Resolution Sessions* stated the "...parties were unable to reach resolution on most of Petitioner's claims or issues. The parties agreed to proceed with scheduling an ARC to secure consent for an independent evaluation for Speech Therapy."

In the 09-13-2024 *Joint Status Report* the parties advised "...issues 3 and 4 in the due process complaint were resolved or in the process of resolution and are no longer issues to be decided by the Hearing Officer"; ¹ and that the "...items remaining for decision by the Hearing Officer are items 1, 2 and 5 in the Due Process Complaint, as all of these issues arise from or are

¹ Identified earlier as Counts III and IV.

related to Petitioner's demand for the District to independently obtain and provide a motorized wheelchair for Petitioner's use at school."²

A Telephonic Prehearing Conference was held on 09-26-2024. The issues in the case were narrowed to what had previously been identified as Counts I, II and V, prehearing deadlines were set, and the administrative due process hearing was scheduled for 11-07 & 08-2024.³

An in-person administrative due process hearing was conducted on November 7, 2024 at Respondent's facility in [REDACTED], KY. Present at the hearing were the [REDACTED] [REDACTED] counsel for Petitioner, [REDACTED], as well as [REDACTED] Petitioner's mother, and [REDACTED], Petitioner's Aunt. Also present at the hearing were the [REDACTED], counsel for the Respondent, [REDACTED] School District,⁴ as well as [REDACTED], Superintendent, and [REDACTED], Director of Special Education.

During the hearing six (6) witnesses offered testimony and were examined by the parties: [REDACTED], and by ZOOM-[REDACTED]⁵ A number of exhibits were offered by both parties and admitted as follows: Joint Exhibits 1 through 27; Petitioner's Exhibits 2, 3 and 4. The hearing was conducted pursuant to 34 CFR Part 300, KRS 13B and 707 KAR 1:340.

At the conclusion of the hearing an Order was entered setting out brief and decision deadlines.⁶ The parties each timely submitted their respective briefs and the matter was submitted to the Hearing Officer for decision.

FINDINGS OF FACT

² Identified earlier as Counts I, II and V.

³ 09-25-2024 *Order Following Telephonic Prehearing Conference and Setting Hearing Dates and Deadlines*.

⁴ [REDACTED] participated via ZOOM by prior agreement of the parties and in accordance with KRS 13B.080(7).

⁵ [REDACTED] participated via ZOOM by prior agreement of the parties and in accordance with KRS 13B.080(7).

⁶ See: 11-08-2024 *Order Setting Brief and Decision Deadlines*.

1. Petitioner timely filed a letter requesting a due process hearing.
2. All witnesses who offered testimony were deemed credible, subject to matters cited hereinbelow.
3. On November 1, 2024 the parties submitted their *Joint Stipulations*. Such stipulations of fact are incorporated by reference herein as follows:
 - A. [REDACTED] date of birth is January 30, 2018.
 - B. [REDACTED] is currently enrolled in the first grade at [REDACTED] School in the [REDACTED] School District.
 - C. [REDACTED] resides with [REDACTED] mother [REDACTED] and father [REDACTED].
 - D. [REDACTED] has a diagnosed medical condition of congenital myasthenia syndrome which is a condition characterized by muscle weakness. Per [REDACTED] medical records, [REDACTED] experiences daily episodes of global fatigue and significantly decreased motor control throughout the trunk and bilateral upper and lower extremities. As a result of this condition, [REDACTED] does not recover from exertion in the same manner as [REDACTED] non-disabled peers.
 - E. [REDACTED] fatigue can be noticed when [REDACTED] tongue is protruding, [REDACTED] eyes become droopy, and [REDACTED] begins to have frequent falls.
 - F. Although [REDACTED] is capable of walking on [REDACTED] own, [REDACTED] uses the mobile chair devices for energy preservation or when [REDACTED] is too fatigued to maintain [REDACTED] balance.
 - G. [REDACTED] has had an IEP with the School District since 2022.
 - H. [REDACTED] IEP provides that [REDACTED] has a 1:1 nurse with [REDACTED] at all times throughout the school day to make all medical decisions and to assist when [REDACTED] experiences periods of fatigue due to [REDACTED] medical condition. The nurse provides the following services daily: medication administration, tube feeding and cough medicine; and help with [REDACTED] toileting needs. The nurse pushes [REDACTED] in the mobile chair/stroller while at school when it is needed, including when [REDACTED] is dropped off at school by [REDACTED] parent. The nurse also will use the suction machine, oxygen, SPO2 monitor, Neb machine, and G-tube supplies when needed.
 - I. [REDACTED] IEP provides that medical equipment maintained for [REDACTED] at school when needed and this equipment includes: Assisted mobile chair/stroller; Cough machine; Suction machine for nasal suction; O2 tank or concentrator; SPO2 monitor; Neb treatment machine;

Medication administration; G-tube Bolus supplies; G-tube dressing supplies; Supportive Chair.

J. [REDACTED] IEP also provides for supplementary aids and services to include: Visual prompts; Shortened assignments as necessary due to fatigue; Modified seating and changes in positioning as necessary for fatigue; Individual instruction; Small group instruction; Touchscreen Chromebook; Use of highlighter, as opposed to pencil when fatigued; Daily rest time at 9:30 daily and as nurse recommends; Use of a cot in a quiet area; Access to a motorized wheelchair.

K. [REDACTED] received physical therapy and occupational therapy to address fine motor deficits as well as deficits from fatigue, and decreased endurance related to [REDACTED] medical condition.

L. On May 4, 2023, [REDACTED] pediatrician, [REDACTED] communicated by letter to the ARC recommendations for [REDACTED] IEP to accommodate [REDACTED] medical disability. [REDACTED] wrote [REDACTED] could benefit from using a mobility device (wheelchair or stroller) for longer distances to curb fatigue and muscle weakness. [REDACTED] friend or other appropriate peer can assist with pushing [REDACTED] wheelchair/stroller at school if [REDACTED] uses a mobility device". (name redaction supplied).

M. [REDACTED] letter made other recommendations to assist [REDACTED] from maintaining any type/level of activity to the point of fatigue. [REDACTED] muscles do not recover from this as [REDACTED] peers do. [REDACTED] noted that [REDACTED] fatigue is clinically significant. [REDACTED] recommendations were considered by the ARC and incorporated in [REDACTED] IEP on May 24, 2023. (name redaction supplied).

N. [REDACTED] parents, [REDACTED] purchased through private insurance a full power wheelchair that was personalized to [REDACTED] needs with input from [REDACTED] healthcare providers. Per the healthcare providers, the purpose of the motorized wheelchair was for use within [REDACTED] home, school, and community.

O. [REDACTED] parents requested and received approval for a shortened school day attendance for [REDACTED] due to [REDACTED] medical condition. [REDACTED] based upon medical recommendations of [REDACTED] healthcare providers, was approved for shortened school day attendance in 2023-2024 school year and in the 2024-2025 school year.

P. [REDACTED] IEP prescribes the length of the shortened school day (7:50 a.m. to 1:30 p.m.), a continuum of services, including physical therapy, occupational therapy, speech, and special education hours, with the goal stated in the IEP that [REDACTED] increase [REDACTED] physical endurance to eventually be able to attend for a full day.

4. ██████ stated ██████ CMS condition is "...very rare...Estimates are anywhere from 25 to 125 per 1 million people." (T: p. 211).

5. In addition to the diagnosis of congenital myasthenia syndrome (CMS) ██████ has also been diagnosed with: delay in development, Gastroesophageal Reflux Disease (GRD), Laryngomalacia, hypotonia, and prematurity. The CMS is characterized by weakness and fatigue resulting from problems where the nerve and muscle cells meet (Joint Exhibit ["JE"] 17, p 105). While ██████ is able to walk on ██████ own, ██████ becomes fatigued easily which results in decreased motor control (JE 16, p 100; T p 68).

6. ██████ currently uses a stroller at school, provided by ██████ parents.

Alleged refusal to provide medically recommended and academically required Assistive Technology Device (Zippie TS Tilt in Space wheelchair with Efix joystick activated power assist)

7. In the May 2023 letter from ██████, he made several recommendations ██████ ██████ School District (the "District" or "Respondent") "...in order to maximize ██████ medical outcomes while optimizing ██████ educational experience and daily function..." (JE 17, p 105). The recommendations included: provision of a 1:1 aide to assist ██████ throughout the day, partial attendance school days, elevator usage, "a mobility device (wheelchair or stroller)", access to a water bottle, rest periods, and supportive therapies. (JE 17, pp 105-106). ██████ testified at hearing he would not presently change his recommendations described in his May 2023 letter (T p 199). It is noted he did not make a recommendation that the wheelchair was required to be motorized.

8. On referral from ██████, ██████, M. Ed., OTR/L, ATP conducted an occupational therapy comprehensive wheelchair evaluation-combined on May 11, 2023 (JE 16). He assessed a prognosis of "Good for a save consistent means of independent functional mobility for the completion of MRADL within ██████ home, school, and community if provided with the requested Zippie TS wheelchair with Efix joystick activated power assist." (JE 16, redacted). In the "Plan of Care" he gave a complete description of ██████ equipment (wheelchair) recommendations including several attachments suggested specifically for ██████

9. In the September 18, 2023 IEP there had been included access to a motorized wheelchair (JE 72). Special Education Teacher ██████ testified the motorized wheelchair had initially

been included in the IEP but was removed because the parent refused the ones offered by the Respondent (T: pp 136-137).

10. Petitioner's parents purchased the customized Zippie wheelchair through ██████████ Hospital in December of 2023 which was paid by Petitioner's insurance for use at home, school and in the community (T: pp. 30-31, 67). Petitioner's parents own a van but do not own a motorized wheelchair van. The purchased Zippie has 9 separate parts that require disassembly in order to transport it in the vehicle and re-assembly once you reach the destination (T: p 31).

11. The Zippie purchased by the parents is not used by Petitioner at school. When ██████████ mother arrives with ██████████ at school about 7:20 a.m. the nurse assigned to ██████████ brings out the stroller. ██████████ sits in the stroller and the nurse pushes ██████████ into the school where ██████████ goes to eat breakfast with ██████████ peers (T: pp 32-33, 37).

12. At the April 2024 and May 14, 2024 ARC meetings the mother requested Respondent purchase a 2nd Zippie wheelchair for use at school (JE 2, pp 6-7, JE 5, p 30). At the May 14, 2024 ARC meeting the Respondent clarified that in the IEP dated September 18, 2023 the statement that ██████████ has access to a wheelchair meant ██████████ can use the motorized wheelchair purchased by ██████████ parents (JE 2, p 7).

13. The purchase of a second Zippie wheelchair was not suggested or recommended by anyone other than Petitioner's parents.

"Plaintiff's parents are seeking an ideal education for their child. Their aspirations are understandable, even admirable. But neither they nor any other parents have the right under the law to write a prescription for an ideal education for their child to have the prescription filled at public expense." *Kenton County Sch. Dist. v. Hunt*, 384 F. 3d 269, 280 6th Cir. 1983), citing *Cordrey v. Euckert*, 917 F. 2d 1460, 1474 (6th Cir. 1990).

14. The term "assistive technology device" means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of a child with a disability. 20 U.S.C. § 1401(1)(A).⁷

⁷ Which definition also appears at 707 KAR 1:002, Section 1 Definitions, (3).

15. An “assistive technology service” means “...any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device.” 20 U.S.C. § 1401(2).

16. The described Zippie wheelchair purchased by the parents (plus custom attachments) is an assistive technology device, and is not a service per the applicable definitions. Not only does it aid [REDACTED] with [REDACTED] mobility, but per the testimony of [REDACTED], and his description of Petitioner’s medical condition and its effects on Petitioner’s diminishing stamina/energy levels during the course of a day, a wheelchair aids [REDACTED] in preservation of energy levels:

“Generally strollers are recommended for younger children in the preambulatory phase. Chairs are typically recommended as they get larger due to difficulty with posturing and difficulty with getting comfortable posturing in a stroller.” (T: p 199).

“...neuromuscular junction condition, repeated use of the muscle will cause fatigable weakness over time. So if you are sitting in a wheelchair, you are not using those muscles as frequently. So you are able to preserve energy by not completely contracting the muscles, right, as if you are ambulatory and walking around you’re contracting and exhausting those muscles.” (T: p. 199).

In the recommended use of a wheelchair [REDACTED] also testified:

“...[REDACTED] should be using it [the wheelchair] not only when [REDACTED] tired, but to conserve energy. Especially for like long trips or days that would require excessive motor activity like walking.” [bracketed information supplied],(T: p. 199).

He acknowledged in testimony the Zippie wheelchair would facilitate [REDACTED] in the home, community and school (T: p. 205). In his May 4, 2023 letter [REDACTED] did not indicate a motorized wheelchair was required. He did recommend:

“...could benefit from using a mobility device (wheelchair or stroller) for longer distances to curb fatigue and muscle weakness. [REDACTED] friend or other appropriate peer can assist with pushing [REDACTED] wheelchair/stroller if [REDACTED] uses a mobility device.” (Redacted), (JE17, p 105).

17. Although the existing Zippie wheelchair is at times used by Petitioner in the home and in the community, such use does not eliminate the need for a mobility device at school to conserve [REDACTED] energy through the day, which could only contribute to maintaining or improving [REDACTED] functional capabilities over time - the course of his school day.

18. Although Respondent argues a 2nd motorized wheelchair somehow converts this item from an assistive technology device to a personal medical device and, therefore, not required to be

purchased/provided by Respondent, the briefed argument and cases cited are unconvincing to call such device something other than what the statutes and regulations say it is. Nonetheless, as there already exists a Zippie wheelchair and several proposed modes of transportation have been offered but remain untried, the Hearing Officer believes for such reasons stated herein and below, there is a lack of preponderance of evidence that Respondent's refusal to purchase a Zippie wheelchair (the 2nd one) for seemingly exclusive use at school, constituted or contributed to a denial of FAPE.

19. The letter and recommendations of [REDACTED] were incorporated in its entirety in the October 24, 2023 IEP (JE 8, p 9). The IEP also stated [REDACTED] uses the assisted/motorized wheelchair daily" although it is not clear if this refers to use at school. Also noted to be provided per the IEP was "Access to a motorized wheelchair".

20. The Respondent made several alternate proposals for the transport of the Zippie wheelchair purchased by the parents in order that [REDACTED] could use it at school. All of the proposals were rejected by the parents. Those proposals included:

- A. The school would transport the wheelchair fully assembled (T: 38, 70). Superintendent [REDACTED] testified "I'm concerned with what is best for [REDACTED]. And that we know there is a wheelchair that's available and that we can transport that wheelchair." (T: p 129).
- B. A bus would pick up the wheelchair from [REDACTED] home on Mondays, the chair would remain assembled, and then be delivered home on Fridays. (T: 38). [REDACTED] wanted access to the wheelchair at home throughout the week. (JE 2, pp 7, 38-39).
- C. [REDACTED] could take the wheelchair accessible bus to school every day with other disabled students (T: p 39). [REDACTED] [REDACTED] believed the morning pickup would be at 6:30 a.m. and result in [REDACTED] experiencing fatigue earlier than normal in [REDACTED] school day (JE 2, p7; T. P 39).
- D. The school offered, so [REDACTED] could continue eating breakfast at school, to an early transport of the wheelchair from home to school, which would then be waiting for [REDACTED] when [REDACTED] arrived (JE2, p7; T: p. 70). [REDACTED] [REDACTED] was concerned the wheelchair would arrive later at school later than [REDACTED] arrival (T: pp 70-71).

- E. The District offered to provide someone at [REDACTED] school who was trained to re-assemble and disassemble the wheelchair on a daily basis (T: p 70). This was proposed to allow Petitioner to arrive at school at the time [REDACTED] normally does and to eat breakfast, while providing access to the motorized wheelchair. Student's mother did not accept this plan.
- F. The District proposed transporting [REDACTED] and the assembled wheelchair daily to and from home. [REDACTED] would be the sole student on board, accompanied by the driver, personal nurse, and a bus monitor (JE 27). The driver would pick up [REDACTED] after completion of a different bus route, which would result in [REDACTED] late arrival to school. The District would employ a driver who would be ready to take [REDACTED] home whenever the Student became fatigued during the school day. Two secondary standby bus drivers would also be appointed in the event the regular driver was unavailable (JE 27).⁸ In the event [REDACTED] had to be transported to the hospital via EMS, the driver would, depending on the parents' directive, drop the wheelchair off at the hospital or the residence (JE 27). [REDACTED] mother rejected this proposal as her [REDACTED] would arrive late to school, miss the opportunity to eat breakfast at school with [REDACTED] peers, and miss some academic instruction, specifically [REDACTED] reading class.

It is unknown whether any of the above proposals would have sufficed and been a successful solution, as each one was rejected by the parent when it was proposed.

21. Respondent attempted to provide either of two (2) motorized wheelchairs possessed by the School District for use at school by [REDACTED] (T: p 43, 137) In December of 2023 [REDACTED] met in the school library with [REDACTED], the physical therapist, and "[REDACTED]" from [REDACTED] to examine a wheelchair the District would make available. The District proposed to fit [REDACTED] in its own motorized wheelchair. Student's mother did not accept the proposal claiming the chair was "dirty", "looked like it had been in a storage room for ten years", was missing a headrest and chest strap and was too large for [REDACTED] (T: pp 43-44).

⁸ One of the standby drivers would be Superintendent [REDACTED] (T: p. 122).

22. There was a lack of a preponderance of evidence to support a claim that Respondent's refusal to effect a purchase of a 2nd Zippie wheelchair constituted, contributed to, or resulted in a denial of FAPE.

Alleged failure to make reasonable efforts to create a safety plan that will insure student's safety while at school

23. At the May 14, 2024 ARC meeting the mother raised concerns about [REDACTED] ability to evacuate the building in case of an emergency (JE 2, p 8; T: p 53). [REDACTED] took on the responsibility of creating an emergency exit plan but would be unable to reveal its details as it would be the school plan that would include an active shooter event, which is not to be revealed (T: pp 53-54).

24. Testimony revealed the District's Policy 5.4 requires it have a specific plan for disabled students to ensure that they are safely evacuated from school in the event of an emergency; that such plan does exist (T: pp 95, 176).

25. There is a crisis plan in the District and [REDACTED] school that trains students and staff for active shooter drills. [REDACTED] has participated in these drills. (T: p 175).

26. Mother testified provision by the District of a motorized wheelchair at school was required partially due to concerns about [REDACTED] needing an adult or other student to push [REDACTED] out of the building when an emergency arose (JE 5 p 31, T: p 54).

27. [REDACTED] has a personal nurse with [REDACTED] at all times in school. The most recent IEP (May 14, 2024, JE 3) indicates the nurse makes all medical decisions "...including choices such as [REDACTED] walking versus riding in the hallway and/or changing positions in the classroom."

28. [REDACTED] participates in school safety and evacuation drills (T: p 94). [REDACTED], [REDACTED] kindergarten teacher, testified the nurse stays with [REDACTED] as [REDACTED] walks out of the building; there is a crisis plan in place that trains students and staff for active shooter drills; she has never seen [REDACTED] have any difficulty getting to [REDACTED] designated safety area or evacuating the school (T: pp 174-175).

29. Teachers' training for emergency situations require teachers not leave the school until their classroom is cleared of students (T: 175).

30. The preponderance of evidence supports that there is a reasonable safety and/or crisis

plan in place, such plans are "drilled" with students and staff, [REDACTED] has been able most times to walk out of the school building during these drills, that the Nurse who is with [REDACTED] all times decides whether or no [REDACTED] may walk or be pushed by her/him to a safe place via stroller, and that there has been no failure on the part of Respondent to plan for - safety in emergency situations at school.

Alleged attempts to remove student from Special Education Developmentally Delayed services

31. The IEP dated January 21, 2022 shows- primary disability as *Developmental Delay*. (JE 24, p 129).⁹

32. At the May 23, 2023 ARC meeting for eligibility determination, which included - mother, the ARC committee completed the Re-Determination of Eligibility for Developmental Delay and determined -**met** the criteria for such category (JE 15, p 95). The Conference Summary Report for the same date also indicate:

- A. [REDACTED] asks if, will still be under developmental delay as well as OHi. [REDACTED] states [REDACTED] is still considered developmental delay for a ap lve. [REDACTED] sa es that they want [REDACTED] to stay de-elo mental delay for cogni lve an a aptive, OHi, as well as communication. [REDACTED] states that due to school criteria that we follow [REDACTED] qualifies for adaptive goa s. [REDACTED] a doctor sends a statement sa ing a child qualifies for a disability, we have to follow school criteria. [REDACTED], stated she's concerned about the cognitive goals [REDACTED] currently has a asn een met. The next step is to complete a full inaeendent evaluation..." (JE 14, p 87).
- B. "The ARC determined that - [REDACTED] will be eligible for developmental delay for cognitive and adaptive goals **based** on this information." (*Id.*).
- C. "The evaluation data was triangulated and the Kentucky Eligibility forms for MMD, DD, and OHi were completed." (*Id.*).
- D. "... [REDACTED] found not eligible for services under the disability MMD." (*Id.*).
- E. "... [REDACTED] has been identified for IDEA services under the category of Other Health Impairment." (*Id.* At p 88).

⁹ The date cited by Petitioner of 1/19/22 was en-oneous.

33. The May 24, 2023 IEP lists the primary disability as "Other Health Impairment". (JE 13, p 75). Comparing the Special Education and Related Services in this IEP with that in the January 21, 2022 IEP, the latest IEP had 15 minutes more special education service per week (75) than the earlier IEP (60) and the same Related Services service minutes (60) as the earlier IEP (JE 13, p 82; JE 24, p 135).

34. The October 24, 2023 IEP lists [REDACTED] primary disability as *Other Health Impairment*. (JE 8, p 44). The Conference Summary Report shows [REDACTED] mother participated in this ARC meeting; that [REDACTED] "...continues to be identified for IDEA services under the category of Other Health Impairment and developmental delay." It also notes "The ARC members signed the conference summary minutes." (JE 7, p 41). There is no indication [REDACTED] mother disagreed with the disability category as stated or discussed. The Special Education and Related Services in this IEP were the same as in the May 24, 2023 IEP (JE8, p 53).

35. A Conference Summary Report was generated from the April 24, 2024 ARC meeting (JE 5). [REDACTED] mother was in attendance. The Report stated [REDACTED] continued to be identified for IDEA services "...under the category of Other Health Impairment and developmental delay"; the ARC proposed to develop an IEP. (JE 5, p 29). There is no indication [REDACTED] mother disagreed with the disability category as stated or discussed.

36. [REDACTED] current IEP dated May 14, 2024 indicates services are provided under the primary disability category of "Other Health Impairment". (JE3, p 11). Special education minutes are administered weekly in the general education classroom and in the special education resource room (JE 3, p 23). [REDACTED] receives 75 minutes per week of special education instruction (JE 3, p 23). [REDACTED] spends 30 minutes per week of specialized instruction in the reading resource room, 30 minutes per week of specialized instruction in the math resource room, 15 minutes per week of specialized instruction in the general education classroom, 30 minutes per week of occupational therapy and 15 minutes per week of physical therapy as related services. (JE 3, p 23).

37. Mother agreed [REDACTED] has been receiving the same service minutes for special education throughout [REDACTED] three most recent IEPs (JE 3, p 23; JE 8, p 53; JE 13, p 82; T: pp 90-93).

38. It is unclear from the evidence whether the term "Primary Disability" on the IEP forms requires listing the most significant among qualifying disability categories, or whether all qualifying

disability categories are to be listed. It appears from Conference Summary Reports the ARC considered [REDACTED] categories to include Other Health Impairment and developmental delay, and developed each IEP accordingly.

CONCLUSIONS OF LAW

1. This Due Process Hearing is an administrative hearing in Kentucky and as such, there are two sources that identify the party that has the burden of proof. In this instance Petitioner, the party seeking relief, bears the burden of proving entitlement to relief by a preponderance of the evidence. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). In addition, KRS 13B.090(7) provides 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.” Here, Petitioner is the party requesting action or seeking a benefit and, therefore, must carry the burden of proof and establish by a preponderance of the evidence that Respondent violated IDEA.

2. Petitioner has the burden in this case to establish, by a preponderance of the evidence, that Respondent violated IDEA by denial of a free and appropriate public education (FAPE) in violation of 707 KAR 1:290, more specifically as alleged in the Complaint:

Count I: That Respondent made repeated attempts to remove student from Special Education Developmentally Delayed services;

Count II: That Respondent refused to provide medically recommended and academically required Assistive Technology Device (Zippie TS Tilt in Space wheelchair with Efix joystick activated power assist);

Count V: That Respondent failed to make reasonable efforts to create a safety plan that will insure student’s safety while at school.

3. School districts have a duty to provide FAPE to all children with disabilities in their districts. 20 U.S.C. Section 1412, 707 KAR 1:290. “FAPE” is defined as special education and related services that:

(a) Are provided at public expense, under public supervision and direction, and without charge;

(b) Meet the standards of the Kentucky Department of Education included in 707 KAR Chapter 1 and the Program of Studies, 704 KAR 3:303, as appropriate;

(c) Include preschool, elementary school or secondary school education in the state; and

(d) Are provided in conformity with an individual education program (IEP) that meets the requirements of 707 KAR 1:320, 707 KAR 1:002(27).

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

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

5. The *Rowley* decision was revisited by the U.S. Supreme Court in *Endrew F. V. Douglas City School District*, 137 S. Ct. 988 (2017). The Court in *Endrew* considered a disagreement between the parents of a child with autism and the school district regarding development of an appropriate IEP and the provisions of FAPE to the student whose behaviors impeded his ability to progress academically. The Court opined that in order to “meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.* at 999. The IEP must aim to enable the child to make progress; it is to set out a plan for pursuing academic and functional advancement.

6. Petitioner failed to prove by a preponderance of the evidence that [REDACTED] was denied FAPE as the result of Respondent’s alleged attempts to remove [REDACTED] from special education developmentally delayed services. No such attempts were evident.

7. Petitioner failed to prove by a preponderance of the evidence that [REDACTED] was denied FAPE as the result of alleged refusal to provide medically recommended and academically required assistive technology device (Zippie TS Tilt in Space Wheelchair with Efix Joystick Activated Power Assist).

Also, Respondent made several good faith attempts proposing alternative methods by which Petitioner could use the already owned Zippie wheelchair at school without interfering with

its use by Petitioner at home or in the community. The parents did not show a willingness to attempt any of the proposals. Attempts at transport would have allowed the parties the opportunity to observe whether any of the proposals resolved the question of Petitioner's use of the Zippie wheelchair already in Petitioner's use, across [REDACTED] daily interactions at home, school and in the community.

8. Petitioner failed to prove by a preponderance of the evidence that [REDACTED] was denied FAPE as the result of Respondent failing to make reasonable efforts to create a safety plan. There is a reasonable safety and/or crisis plan in place, such plans are "drilled" with students and staff, [REDACTED] has been able most times to walk out of the school building during these drills, the Nurse who is with [REDACTED] at all times decides whether or not [REDACTED] may walk or be pushed by her/him to a safe place via stroller. There has been no failure on the part of Respondent to plan for [REDACTED] safety in emergency situations at school.

FINAL DECISION/ORDER

The undersigned concludes the Petitioner failed to prove by a preponderance of the evidence that [REDACTED] was denied FAPE or that there was a violation of the IDEA. Specifically, Petitioner did not prove by a preponderance of the evidence [REDACTED] allegations that a denial of FAPE occurred when:

1. Respondent made repeated attempts to remove student from Special Education Developmentally Delayed services;
2. Respondent refused to provide medically recommended and academically required Assistive Technology Device (Zippie TS Tilt in Space wheelchair with Efix joystick activated power assist); and
3. Respondent failed to make reasonable efforts to create a safety plan that will insure student's safety while at school.

IT IS HEREBY RECOMMENDED the Petitioner's *Request for Due Process Hearing for*

[REDACTED] be **dismissed** in its entirety.

APPEAL RIGHTS

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) as assigned by the Kentucky Department of Education. The appeal shall be perfected by sending, via certified mail, a request for appeal within thirty (30) calendar days of the date of the Hearing Officer's decision. The appeal request shall be submitted to:

Kentucky Department of Education
Office of Legal Services
300 Sower Blvd., 5th Floor
Frankfort, KY 40601

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

ISSUED THIS 10th DAY OF MARCH, 2025.

_____/s/ Roland P. Merkel
Roland P. Merkel, Hearing Officer
rolandmerkel@gmail.com

CERTIFICATION

I hereby certify a true and correct copy of the foregoing Findings of Fact, Conclusions of Law, and Final Decision/Order was served via e-mail this 10th day of March, 2025 to:

[REDACTED] - Petitioner's Attorney

[REDACTED] - Petitioner's Attorney

[REDACTED] - Respondent's Attorney

[REDACTED] - Respondent's Attorney

[REDACTED] - Respondent's Attorney

[REDACTED] Ms. Tina Drury,
Kentucky Department of Education
tina.drury@education.ky.gov

KDE Legal Department
kdelegal@education.ky.gov

/s/ Roland P. Merkel

Roland P. Merkel
Hearing Officer