KENTUCKY DEPARTMENT OF EDUCATION
AGENCY CASE NO 1920-04

[redacted] **PETITIONER**

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

[redacted] **SCHOOLS** **RESPONDENT**

Petitioner is a [redacted]-year-old [redacted] grader qualified for special education as functionally mentally disabled. [redacted] claims that the school district denied him a free and appropriate public education (FAPE) by (1) failing to make appropriate placement decisions; (2) failing to develop an appropriate I.E.P.; and (3) failing to implement the I.E.P. Also at issue is Petitioner's contention that there are claims not barred by the three-year statute of limitations (the due process request was filed August 15, 2019) and Respondent's contention that Petitioner's failure to accept Respondent's settlement offer bars an award of attorney fees to Petitioner pursuant to 34 CFR 300.517 (c)(2) (C). Petitioner seeks compensatory education and that the student be educated in an alternate education environment, such as [redacted] home, with special education and related services.

This matter was heard virtually on November 9, 10, 12, 13, 17, and 19. Counsel have submitted post-hearing briefs. Petitioner bears the burden of proof. *Schaffer v. Weast*, 546 US 49, 62 (2005); KRS 13B.090(7). Being sufficiently advised, the hearing officer makes the following findings of fact, conclusions of law, and final order

FINDINGS OF FACT

1. **The student is a [redacted]grader who resides in Campbell County and is enrolled in [redacted] School (TE Vol. I, p. 484) where, [redacted].**

TE Vol. I, p. 484;TE Vol. II, p. 588; TE 362

2. **The student was enrolled in [redacted] School for kindergarten, [redacted].**

This is undisputed.

3. **Since March 2020, due to COVID, the student has been attending [redacted]**

This is undisputed..

4. **The student is qualified for special education in the category functionally mentally disabled (FMD. Prior to that, [redacted] was qualified under mild mental disability (MMD).**

TE p. 595; JE 116

5. **Since 2015-2016, until school became virtual due to COVID, the student has received special education services in the FMD.**

The FMD is a room where students with MMD and FMD receive special education services. One was created at [redacted] before the beginning of 2015-2016 school year and the student, at that time qualified as MMD, attended that school so [redacted] could receive services

in the FMD. The following year an FMD was created at [redacted] and the student returned to [redacted] and received special education in the FMD at [redacted] Advantages of the FMD are the small class size (five or fewer students) and the presence of a special education teacher and 3 paraeducators to work with disabled students needing special education.

6. The student is severely disabled.

At age [redacted], according to a [redacted] multidisciplinary evaluation by the school, the student's communication skills were severely delayed (J010), [redacted] language skills were severely impaired (J011), and [redacted] "scores on Standardized instruments were 2 or more standard deviations below the 2nd percentile." (J011).The same evaluation found [redacted] at or below the 1st percentile in communication, daily living skills, and socialization. (J005)

An evaluation by [redacted] Children's Hospital in January of 2017 found the student scored below the 1st percentile in the Godman-Fristoe Test of Articulation (J022), was moderately deficient in receptive language, and was severely deficient in expressive language. (J024). A written communication report by the school in February 2017, shows that the student scored below the first percentile on the Peabody Picture Vocabulary Test 4 (J033). A multi-disciplinary evaluation in January of 2017 found the student scored below the first percentile on all scales in the Comprehensive Test of Nonverbal Intelligence (J044). [redacted] adaptive behavior assessment in the same report was at the first percentile or below based on ratings provided both by the student's mother and by one of [redacted] teachers in all areas except social, where the mother's data put him at 7th percentile and the teacher's data put him at 2nd percentile. (J046).

The multidisciplinary report of January 22, 2018, found the student's non-verbal IQ to be 42, which is below the 1st percentile. (J482). The student's adaptive skills were found to be

below the first percentile in communication, daily living skills, and motor skills based on data from both the mother and the teacher. In socialization, the mother's data put the student at the 2nd percentile and the teacher's data put the student below the first percentile. (J486).

While Petitioner raised questions about a slight discrepancy between a test given early in the student's life and ones that were given later, that discrepancy was explained by the school psychologist to the effect that the earlier test was designed to measure something different than the later tests. On balance, the great weight of the evidence is that the student has been accurately assessed with severe disabilities over a long period of time.

7. **Respondent made an offer of settlement that included an independent evaluation, drafting a behavior plan, providing Edmark reading programs for at-home use, transportation from an after-school program, and out-of pocket educational expenses for services outside school of up to $6,500, and payment of Petitioner's attorney fees. The offer was declined.**

See TE 827-829.

FINDINGS CONCERNING THE IEP

8. The IEP provided education in a general ed setting to the extent the student could manage it, given [redacted] disability, and in light of [redacted] special education needs; the student needs a great deal of specialized instruction in order to make progress.

The student has a history of receiving a mix of special education in the resource room and time in the general education environment; all of the IEPS provided for 40-80% of time in a general education setting but the amount of special education time has increased over the years because the student's need for increased special education became apparent.

During 2015-2016, [redacted] IEP 140 minutes of special education with 40-80% time in the general education programs. (J124, 130). [redacted] next IEP, dated March 24, 2016, also provided for 40-80% of [redacted] time in a general ed setting but increased special ed time to 200 minutes per day. [redacted] February 10, 2017 IEP also provided for 200 minutes special education per day (J115). [redacted] September 29, 2017 IEP provided for 120 minutes of special ed in the resource room per day together with 225 minutes of special ed per week provided in collaboration (J 105). [redacted] February 6, 2018 IEP, February 15, 2019 IEP, and January 29/2020 IEP all provided the same. (J089, J079, J065).

The increase in special ed minutes was a function of the needs of the student. The special education director [redacted] testified that the student "does require a great deal of specially designed instruction individually tailored to him and [redacted] needs, and … it has become less efficient to provide that in a general education only environment." (TE 60). While it is desirable for the student to have experience being around [redacted] non-disabled peers, "it's very hard for [redacted] to participate to the fullest extent being in a general education classroom with all of the attendant distractions." (TE 61). Regarding inclusion in the general classroom, [redacted] said students like the one in this case require "instruction …constructed, specifically designed instruction for that particular student for their particular level and needs" (TE 64) and "if the issue…[in a general education setting] is the number of people and the busyness and activity in the classroom, then you would have to reduce the number of people and reduce the activity. Therefore you're trying to make the regular ed classroom into a special ed classroom." (TE 110-111).

Even now, under the tutelage of special education teacher [redacted], whom the parent says is doing a great job, the student still has difficulty coping with the noise and numbers of people in a general education classroom. [redacted] testified

> it's kind of overwhelming for him. We would get to the door and we'd find a friend – so [redacted] made it probably in the gen ed classroom one out of the two time frames that [redacted] had… We tried every day, but sometimes [redacted] would get to the door and just a bit overwhelmed."

(TE 117). [redacted] does not believe more supports would increase the student's ability to be successful in a general education setting. (TE 132). Ironically, although Petitioner contends that the school should have considered mainstreaming the student, the student requests in this due process proceeding that the hearing officer order that [redacted] be educated at home, away from non-disabled students.

9. The student did not need a formal behavior intervention plan.

Petitioner contends failure to adopt a formal behavioral intervention plan made the IEPs defective. However, the evidence shows that the student did not need a behavior plan and the real issue, to the parents, concerned increasing the amount of time the student spent in a general ed setting.

The parents wanted the student to be in the general ed setting more and believed [redacted] was not attending classes in the general ed setting because [redacted] had behavior issues with transitions. Consequently, the parents requested an FBA at an ARC meeting in October of 2017. (TE 395-396). [redacted], assistant director of special education and, before that, the district behavioral specialist (TE 389-390), testified concerning the FBA report. The conclusion of the FBA was that" 83 percent of the days… [the student] didn't have any behaviors that were impeding [redacted] from transitioning. So that's what indicates that [redacted] didn't need a behavior plan for transitioning." (TE 408)).

[redacted] testified that often students are successful with behavior supports and don't need the rigor of a formalized behavior intervention plan. (TE 397). At the time the FBA was conducted, the student had in place "use of visuals for positive transitions and a transition reinforcer already in pace from August of 2017." (TE 403) A video model of positive transition was added to that. To the extent the student has behavior issues, [redacted] testified [redacted] believes they would be "driven by [redacted] lack of ability to understand all the instructions that's being given in the general education classroom without it going through that process of being individualized for [the student] himself." (TE 61). Also, as described elsewhere in these findings, the noise and distractions in the general ed setting present difficulties for the student. In short, difficulties and stress the student experiences with reference to time in the general ed setting are a function of the setting itself rather than the student's inability to control [redacted] behavior.

10. The IEPs provided appropriate support for the student, given the student's disabilities.

Regarding adaptive skills, "[the student's scores] indicate that [redacted] relies significantly on adult support for either assistance or reminders for the common activities that he's required to do both at home and at school." (TE 704). At school, when the student is in a general ed setting, [redacted] has either the special ed teacher or a paraeducator (or both) to support [redacted] and has a paraeducator with [redacted] at lunch.

11. **Petitioner failed to prove that an IEP providing for delivery of special ed services in the FMD was not reasonably calculated to provide an educational benefit or is an inappropriate placement for the student; procedural issues concerning the decision to deliver special ed instruction to the student through the FMD unit are barred by the statute of limitations**.

The student first began receiving special ed instruction in the FMD unit at [redacted]. In fact that was the reason [redacted] attended [redacted] for a year instead of [redacted]. [redacted], an FMD unit was created at [redacted] and the student returned to [redacted]

The student's mother testified that the decision to deliver services at the [redacted] school was not made at an ARC meeting. (TE 486). [redacted] the special education director, testified that placement in the FMD unit

> is an ARC decision under the supervision of the principals and the special ad director. And that is just so that I can ensure, as the special ed director, that no ARC just suddenly places a student in a unit where there's not been considerable amount of work done. And so what we say is, if you think you're going to have a student that's going to be assigned to a unit in the district, you have to involve the central office staff.… There has to be a period of observation, and then you have to ensure that their IEP has enough accommodations on it that you're ensuring that it's not just the lack of accommodations that is available, but it's a material change in the instruction needed for that student.

(TE 76-77). The principal testified similarly regarding the requirements to be placed in the FMD unit. (TE 72-73).

Such evidence as there was on the issue indicates the decision to deliver special ed services in the FMD was made thoughtfully. There was not evidence that would support finding delivery of services in the FMD was inappropriate for the student. Regarding procedural issues on the extent to which the ARC participated in the decision, the record reflects that the student attended [redacted] 2015-2016, so the decision to provide instruction through special ed resources at [redacted] would have been made more than three years prior to filing the due process request on August 15, 2019 and is not an issue that can be addressed in this proceeding.

12. **The student has a history of receiving related services.**

The April 14, 2015 IEP provided for thirty minutes occupational therapy (OT) and

thirty minutes physical therapy (PT) once a week. (J 130). [redacted] March 24, 2016 IEP provided for 30 minutes per week of OT, but no PT, and added speech therapy delivered in a in different locations that appear to add up to an hour per week. (J122) [redacted] February 2, 2017 IEP provided the same OT and speech as was provide in the previous IEP. [redacted] September 29, 2017 IEP provided the same OT and speech weekly as the previous IEP, but the hour of speech was 30 minutes in the speech room and 15 minutes twice a week in the special education room. (J105). [redacted] February 6, 2018 and IEP provided the same. (J089). [redacted] February 15, 2019 IEP provided the same OT and 55 minutes per week (rather than an hour) total of speech. (J079). [redacted] January 29, 2020 IEP provide the same OT but provided for 25 minutes of speech delivered 6 times a month which works out to about 35 minutes per week of speech. (J065).

13. Petitioner did not prove that the related services provided for in the IEPs were inappropriate or insufficient.

Weighing the evidence as a whole, the hearing officer finds that Petitioner did not prove the related services provided the student were inappropriate or insufficient. Evidence was not presented from any expert called by Petitioner nor elicited through cross-examination of Respondent's professionals to establish that additional or different services were needed in order for the student to be able to receive and educational benefit from [redacted] IEP

14. Because of the severity of the student's disabilities, the student is appropriately in alternate assessment.

[redacted], assistant director of special education, testified that alternative assessment provides the student with "skills that are needed …. in order to become as independent and as employable as possible…[I]t offers academic skills as well as employability or functional skills." (TE 737). A student eligible for alternative assessment "does not have the cognitive

ability to acquire the skills that are being taught in a gen ed classroom… and therefore the time that should be being spent on other skills are not being" taught (TE 746). [redacted] also testified that if the students numbers and abilities change, [redacted] can be moved from alternative assessment to general education (TE 745).

15. Petitioner failed to prove that the student needs an IEP that provides for no time with non-disabled peers or that such would be the student's least restrictive environment.

Students with disabilities should be educated in the least restrictive environment feasible, given their disabilities and needs. An ongoing complaint of the parents was that the student was not in the general ed setting as much as they wanted. However, in its request for relief, Petitioner wants a finding that the student should be educated at home. There was no proof that this student's least restrictive environment is one without exposure to [redacted] non-disabled peers.

16. The severity of the student's disabilities necessarily means [redacted] progress will be much slower than other students.

[redacted], the school psychologist, testified that

> [f]or a student who scored in the range where [the student] is, the expectations are going to be that [redacted] will make progress at a much lower rate than compared to a student with an average IQ or even with IQ that's in like the 70s."

TE 703. A charting of data in the multidisciplinary report of January 22, 2018 indicated that the there was progress on three of five goals but not on the other two (J478-485). The student's mother testified that the student was making progress with [redacted] current special ed teacher, [redacted] but even with that progress [redacted] testified the student is still at kindergarten level (TE 121).

17. Petitioner failed to prove that the student's limited progress demonstrates a

defect in the IEP

Petitioner compared selected details in particular reports at various times as evidence of regression. For example, looking at data during 2015-2016 (1st grade) the student's ability to hang up [redacted] backpack without assistance varied from month to month (J 249). In second grade the student required assistance to unpack, pack and hang up [redacted] backpack (J 107).

However, there was much evidence of progress. The speech pathologist testified that when [redacted] first began working with him, [redacted] typically used one-word utterances and a few signs but now [redacted] is learning to using longer sentences and using [redacted] device more often to communicate, and he's able to name more items. (TE220). The student's mother testified that the student was making progress with [redacted] current special ed teacher, [redacted] (TE 586). At the January 29, 2020 ARC meeting the mother reported that she'd observed the student's progress at home, was happy to attend school, and [redacted] was pleased with the work from [redacted] (TE 640). [redacted] testified as follows:

> [In 2019-2020 we] got him out into the gen ed classroom , and recess and lunch with peers. And then we did two 30-minute sessions with one reading in gen ed and one math session in gen ed…. [In 2020-2021] we've been working on Orton-Gillinham and he's made a lot of progress when it comes to phonics, which last year we did not have much of those verbal pieces. Reading, [redacted] really did do well with Edmark and [redacted] actually enjoyed it very much. For math it was hit or miss with numbers one through ten, but we did work on those and [redacted] has made a lot of progress on those. Letters, this year right now we're at about between 10 and 15 letters we're doing for phonics, which he's made a lot of progress in that.

(TE 116-117)

A comparison of the goals in the IEPs indicates progression over time. For example, in 2016, [redacted] had a goal of making two-to-three word requests; in 2017 that had progressed to 4-word request; in 2019, to prefacing requests with "I want"; and in 2020 using sentence starters and adjectives; In 2016 [redacted] had a goal to count objects; by 2019, [redacted] goal had progressed to

solving single digit addition and subtraction. In 2016, [redacted] had a goal of identifying words from three choices; in 2017 the goal was matching sight words to pictures; by 2019 [redacted] goals included filling in the blanks in sentences and answering comprehension questions involving story elements; in 2020 [redacted] goals included identifying vocabulary words when given an oral definition. In 2017, [redacted] goal was to identify coins; in 2018, to match the coins to their value and cost of an item purchased; by 2020, [redacted] goal was, given an item to purchase, calculate the correct dollar and coin combinations needed. (Also see testimony to similar effect from [redacted] in TE 802-807).

Overall, there has been progress. While progress has been modest, it is not unsubstantial in light of the severity of the student's disabilities. There was not evidence sufficient to prove that the IEP was not designed to provide an educational benefit or that [redacted] progress would have been greater had the IEP been different.

FINDINGS CONCERNING IMPLEMENTATION

18. The school made a good faith effort to expose the student to a general ed setting and the student was spending substantial time in the general ed setting.

The mom believes that the school did not have the student in a general ed setting as much as [redacted] would have liked. There was some testimony from the student's [redacted] who has until this year been in the same grade as the student and sometimes in the same classes, that [redacted] rarely saw the student in general ed. The special ed teachers for the student prior to 2019-2020 were not available to testify, but [redacted] the paraeducator who has been with the student for the past four years did testify.

Over the four years, ending at the end of the 2018-2019 school year, [redacted] primarily worked with the student in this case and one other student. (TE 427) in the FMD unit. Most of the time there were approximately five students total in the FMD unit. (TE 429). The FMD unit had a special ed teacher and three instructional people (TE 429). Most of the time it was [redacted] without the special ed teacher, modifying work for the student when [redacted] was in a general ed classroom (TE 431). During the fourth grade year, [redacted] would take the student to the general ed classroom in the morning and try to have him there for 45 minutes, then take a break. Generally the student would be in the general ed classroom with [redacted] for two solid hours in the morning, but it depended upon whether activities that were occurring were ones the student could participate in and the student's moods. (TE 431-435). [redacted] testified the student enjoyed being around non-disable peers and liked sitting at lunch with [redacted] and her friends. (TE 441). [redacted] was a witness called by Petitioner and was not questioned by either party regarding testimony of the [redacted] or challenged in any way regarding the amount of time that the student spent with her in a general ed setting. The hearing officer finds that the school made a good faith effort to expose the student to a special ed setting and that the student was spending substantial time in the general ed setting.

19. Petitioner proved that delivery of special education minutes in a collaborative setting during 2016-2017, 2017-2018, and 2018-2019 was at times without the presence of the special ed teacher although the IEP listed the special ed teacher as the provider of the services.

The IEPs call for some special education to be provided in the general ed setting in collaboration with the regular education teacher. Based upon testimony generally, it appears this primarily involved modifying work in the general ed setting to adapt it to the needs and abilities

of the disabled student. When [redacted] was the student's special ed teacher, paraeducator [redacted] usually accompanied the student and adapted the general ed work to the student's abilities. (TE 431).However, the IEPs all list the special education teacher as the provider of these services. [redacted] the student's current special ed teacher, testified that when the student goes to general ed classroom, [redacted] and one of the paraeducators go with him, with [redacted] leading the instruction. (TE 127-128).

It is not crystal clear whether the special education teacher must be physically present or that adaptation of specific material cannot be performed the paraeducator acting according to general instructions or training given by the special ed teacher. Principal Enzweiler testified that were [redacted] to have observed the student in a general ed classroom, [redacted] would have seen a classroom teacher and "a paraeducator **or** the special education teacher." (TE 48, emphasis added). However, [redacted] the special education director testified as follows:

> Q. Who provides the special education minutes when it calls for that to be done in the general ed setting at collaboration time, who provides that?
> A. Well, **it has to be a special ed teacher.**

(T 112, emphasis added). Unfortunately, [redacted] was not asked directly whether this could be accomplished by a paraeducator executing adaptations according to instructions of the special education teacher. Given the record that exists, [redacted] testimony on this point is sufficient to meet the burden of proof. The hearing officer finds that the school failed to implement special education support in the manner required under the IEP from time to time from during school years 2016-2017, 2017-2018, and 2018-2019 when the paraeducator provided the adaptations in the classroom.

20. There is insufficient evidence to find that harm resulted when the paraeducator

did the adaptations rather than the special ed teacher and therefore no basis for crafting special education to undo such harm.

[redacted] has not taken the Kentucky paraeducator exam or been certified and her formal collegiate education was in nursing. (TE 472). The only training [redacted] has in education is what [redacted] received through the school district when [redacted] was hired as a paraeducator. (TE 472). However, her job was to assist the special education teacher. Apparently, [redacted] felt comfortable creating the adaptations, which indicates [redacted] had received instruction from the special ed teacher on how the adaptations should take place. There was not proof that the adaptations that [redacted] facilitated were different than how the special ed teacher would have adapted the material or did adapt material when the special education teacher was in the general ed classroom. While it is a violation, the hearing officer cannot find that this violation caused particular harm to the student and cannot craft compensatory education to undo such harm.

21. Petitioner failed to prove the school fabricated data collected on the student but did prove that some dates reported for the data collection were erroneous

Part of how the student's progress is assessed is by collecting data. [redacted] testified that "Data for every annual goal should be entered on a weekly basis, at least a weekly basis." (TE 89). The data sheets are stored in binders in locked cabinet and at some point are entered into a program capable of translating the data into a progress report. The principal testified that the parent came to school the morning of May 17, 2019, Field Day, and asked for progress data. [redacted] located [redacted] and asked for progress data, [redacted] printed out the progress report and the principal provided it to the parent, but was missing data from April or May. When the principal asked [redacted] to explain, [redacted] said [redacted] hadn't inputted the data. (TE 28-30). According to [redacted] (but denied by the principal), the principal asked to use Younse's key to the locker

where the data binders were kept and later that afternoon returned the binders. Regardless, the April and May data was entered (it is not clear by whom) and the report was provided to the parent. Petitioner also introduced proof that data in the past (extending back to 2015) on occasion had been entered on dates that the student was not present to be assessed. From these facts, Petitioner seeks an inference that the data had been fabricated.

However, there was proof that data was being collected. [redacted] the paraeducator called as a witness by Petititioner, was critical of the special education teacher whom [redacted] assisted, but testified that [redacted] saw the special education teacher "did sit down with him when it came time to collect data. We would be in the room while they were there in the room." (TE 447). There was testimony that it is common for teachers collect the data but not enter it until a later date when they have time to do so. For example, data might be collected the week before spring break but not entered until during spring break when the teacher has more free time. In this case, the more plausible explanation of the missing April and May data is the teacher had put off entering the data for some time.

There was testimony that the data entry program used by school district defaults to the date and time the data is entered and must be manually adjusted to reflect the date the data was collected. This was a problem affecting data entry in the entire district. When the director of special ed became aware of this problem, [redacted] called the problem to the attention of special ed teachers and "hopefully, that corrected the problem." (TE 91). There was not testimony regarding when special ed teachers were informed of the problem. Petitioner observes that the April 4, 2019 entry date is during spring break, points out that on May 17 data from April and May were entered after the special ed teacher informed the principal that "[redacted] needed to input some remaining data into the system," and infers that the April 4 date was fabricated by

whoever entered data on May 17. However, that assumes the April 4 dated data entry was entered on May 17. There was not testimony that *no* data had been entered for April prior to May 17, only that the special ed teacher said [redacted] needed to input data. The most plausible explanation concerning data entry on dates the student was not at school is that whoever entered the data failed to manually adjust the date to reflect the date it was collected.

22. The errors in dating data collection extend back longer than three years.

The errors concerning dating of data entry extend back to 2015, but is a continuing violation for reasons stated in the conclusions of law.

23. Petitioner failed to prove that the errors in dating caused harm to the student or present evidence that would provide a basis for compensatory education for this violation.

While many witnesses agreed that it is important to record the date the data is collected, there was nothing to indicate that general patterns and trends would not be detectable even if the dates entered were later than the date the data was collected. [redacted] testified that, while data dates should be accurate, it's more important to look at patterns across time and whether the numbers are trending up or down. (TE 95) There was plenty of testimony that the student did better in the mornings and was tired in the afternoons, but no other evidence that the student was being assessed for performance on a particular day of the week or some other aspect for which the exact date the data was collected would be important. Even if the dates were off, it appears the data was collected, entered chronologically, and would show trends over time and provided usable data. Without some causal link to an identifiable harm, there is not a sufficient basis to craft any compensatory education to undo such harm.

24. There was not testimony establishing whether data sheets are preserved after the data has been entered in the program.

If the data still exists, the dating problem can be partly remediated by reentering the data with the correct dates.

25. The school failed to implement the Edmark reading program in a timely manner but Petitioner.

[redacted] is the special education instructional coach for the district to support teachers working with disabilities. (TE 289). [redacted] had a variety of planning sessions with [redacted] on components for a reading program for the student. During the first months of 2019, [redacted] consulted with Willaims "to looking at the Edmark curriculum as a tool, and our focus did switch onto Edmark." (TE 296). In a January 10, 2019 email from DoSE [redacted] to the mother, copied to [redacted] tells the mother that [redacted] will contact the mother to go over the materials and training [redacted] has been working on with the special ed teacher. (R046). The hearing officer infers from this email that the decision to go with Edmark had been made by January 10. On February 26, 2019, in email from [redacted] to the special education teacher and other school personnel, [redacted] says

> In my research, [redacted] does have the initial level of Edmark (Level 1). At this point I think it would be beneficial for us to do the assessment and explore adaptations that might make it more accessible for [the student].

R047. On February 27, 2019, the special education teacher sent an email to [redacted] stating

> I don't really understand Edmark, as I could not figure out a way to really use it….I do use the picture cards with my functional word lists. I would appreciate some guidance with that. Afternoon meeting times are usually better for me.

Evidently the use of picture cards with words is a structural feature of Edmark which may account for why [redacted] testified that [redacted] had seen evidence of the Edmark structure in the classroom. (TE 294-296). [redacted] responded by email that same day, saying

> Please do not stress at all. I'll send you a calendar invite and we can dig into the Edmark materials and make a plan. That will help us to know which direction will be best for [the student].

R0048. On March 4, 2019, [redacted] sent an email to the special education teacher and the principal stating:

> We do have Edmark in [the special education teacher's] room. At this point I think it would be beneficial for us ([redacted] and I) to do the assessment and explore adaptations that might make it more accessible for [the student]. We have time set aside this week to work on this.

R049. [redacted] testified that on March 6, 2019, [redacted] discovered that the special education teacher did not even have the Edmark reading material and [redacted] arranged to have it purchased for her. (TE 346).

On March 29, 2019, [redacted] sent an email to [redacted] and [redacted] requesting time for the education teacher to observe another teacher's use of Edmark and her organization system and data collection with Edmark. R0050. On April 10, 2019, [redacted] emails the special education teacher and the teacher that will be observed and suggests that they "schedule time together in the coming weeks" R0051. But as of May 1, 2019, in an email from [redacted] to the same parties, it's not clear that this observation has occurred. [redacted] states "Did you all find a date to meet? Please let me know – I am going to try and swing in – I can certainly learn from you all on this." R052. On April 17, 2019, [redacted] met with the special education teacher to prepare her to conduct the assessment needed to adapt the Edmark program for the student, but [redacted] does not know if the special ed teacher ever did the assessment. (TE 348). At the end of the school year in May, the special education teacher resigned. When [redacted] who took over as the student's special education teacher in August of 2019, the Edmark Reading Program was still wrapped in cellophane. [TE 115].

The unfolding of events depict an inexplicable indifference to implementing a reading program that apparently was decided on in January but still hadn't been implemented as of the end of school in May. What makes this especially tragic is the student did especially well with Edmark once [redacted] finally started using it in August of 2019 and has moved on to another program (TE 116-117).

26. Petitioner failed to prove that the reading instruction the student received prior to implementing Edmark was not designed to provide an educational benefit.

While the student might have made more progress had Edmark been implemented during March, April and May, there was not proof that what programs [redacted] was utilizing during that period was not reasonably calculated to provide a benefit.

27. The school failed to adequately supervise the student's use of [redacted] iPad in March, April, and the first two weeks of May of 2019 with the consequence that on at least 22 days the student spent substantial parts of [redacted] school day engaged in non-school, non-educational activity.

N. T. is the student's 11-year-old [redacted] testified that [redacted] had, until the 2020-2021 school year been in the same grade as the student (TE 363-364) In fourth grade (2018-2019 school year) they had the same homeroom. (TE 365). When [redacted] did see him during general ed instruction in the fourth grade, it was in reading class in homeroom. (TE 372). When the special ed teachers weren't working with him, [redacted] would watch videos on [redacted] iPad. (TE 372). "[P]retty much just most of the time when [redacted] was in there that's what [redacted] would be doing." Because [redacted] sat next to him, [redacted] could see what [redacted] was watching. "[I]t was the cartoon kind of stuff that [redacted] watches, like Peppa Pig. So I always pretty much saw him watching either Peppa Pig or trains." (TE 373)

There was not direct testimony that N.T.'s observation prompted the mother to investigate use of the iPad at school, but in fact [redacted] did investigate. The student's mother testified

> [I]n March [of 2019] I started to question what was happening I the classroom. And the reason was I had [the student's] iPad – [redacted] iPad that has [redacted] communication device. [redacted] can also access videos or whatever if [redacted] wanted to in between ….And I set a time limit on that iPad for three hours of anything that was educational. More like video time or YouTube time. I set that on the iPad because I suspected that [the student] was maybe doing something in the classroom that didn't involve general education.

(TE 528-529). The mother began keeping a record of this use during school by taking screenshots of the data (see PE 1-125 and testimony of the mother generally TE 533-548). [redacted] also discovered that the student was taking selfies and pictures of other students and the staff (TE 530) Mother testified that it also appeared that pictures had been deleted (not by her) and it also appeared that someone at school had tried to override the code that limited You Tube time. (TE 531). [redacted] also testified that it appeared that browsing history had been deleted by staff at school on March 13 (TE 537). After creating a record of how the iPad was being used from March 5 to May 15, 2019 by noting her findings on a calendar (PE 496-498), the mother told the principal [redacted] would no longer be sending the iPad to school with the student. (TE 570).

The mother was unable to keep data for every day:

> [T]here were days I wasn't able to keep data because we had some doctor's appointments and stuff in between where we were in Cleveland …at Cleveland Clinic. But over the dates that I kept in March and April, a little bit of May, I found that [redacted] was watching YouTube during classroom time for two and three and four hours at a time.

(TE 529). Examining the records of the mother (PE 496-498), the hearing officer finds that use of iPad is excessive and indicates a disturbing lack of supervision on at least the following 22

dates: March 5,12,13,14,21,22,27; April 8,9, 10,11, 12, 16,18, 25,26, 29, 30; May 2, 10, 13, and 15.

Regarding Respondent's argument that the mother should have informed the school right away when [redacted] realized the student wasn't being supervised, Petitioner is correct that a child's entitlement to special education is not dependent upon the vigilance of the parents. *M.C. v. Central Region Sch. Dist.,* 81 F.3d 389 (3rd Cir. 1996). It is the school's responsibility to supervise the student and see that [redacted] is receiving special education, not the parent's responsibility to supervise the school.

28. The school failed to provide meaningful special education on 22 days in 2019, which constitutes failure to provide FAPE.

These facts speak for themselves. The student's use of the iPad for entertainment is so extensive that the hearing officer concludes the student was not receiving special education instruction during this period of time meaningful enough to constitute provision of FAPE. This lack of supervision suggests an indifference to the student's education that in part is corroborated by the special education teacher's apparent indifference to implementing the Edmark reading program in a timely manner. during the spring of 2019.

Petitioner would argue for a finding that the failure to implement occurred over a much longer period because the student was with the same special education teacher under similar circumstances and settings. However, such an extrapolation would be speculative without more proof to support the inference.

29. **The failure to provide special education for 22 days in 2019 can be compensated by giving the student what [redacted] failed to receive.**

The other FAPE violations, such as dating the data incorrectly or allowing the paraeducator to craft the adaptations in general ed classes, are not compensable because measurable harm was not proved. However, with regard to the iPad, we know that the student did not receive meaningful special education on 22 days when [redacted] should have received it. [redacted] is in effect 22 days behind where [redacted] should have been.

30. Under the IEP in effect during spring of 2019, the student should have received 120 minutes per day of special education instruction in the resource room each day and 225 minutes per week (45 minutes per day) of special education in collaboration in a general education setting.

See J079.

CONCLUSIONS OF LAW

An IEP must be reasonably calculated to provide confer an educational benefit. *Deal v. Hamilton County Board of Ed.*, 392 F3d. 341 (6th Cir. 2004); *Endrew F. v. Douglas Count Sch. District*, RE-1, 137 S.Ct. 988, 996 (2017). To the maximum extent appropriate, a student should be educated with children who are not disabled. 20 USC 1412(a)(1)(5). The IEP also must be properly implemented, but failures of implementation must be significant to rise to the level of denial of FAPE. *J.P. ex rel. Peterson v. County School Bd. of Hanover County*, 447 F.Supp.2d 553 (E.D. Va. 2006) holds that merely failing to implement some de minimis component or components of an individual education plan (IEP) does not constitute the denial of a free appropriate public education (FAPE) under IDEA; rather, for a failure to be legally significant, that is, material, the parents must show the school board or other authorities failed to implement

substantial or significant provisions of the IEP. Designing a compensatory education remedy "will require a fact-specific exercise of discretion by either the district court of a hearing officer. *Reed v. DC,* 401 F3d 516 (DC Cir. 2005).

1. Respondent's motion for a directed verdict, for which the hearing officer reserved ruling at the hearing, is denied.

Petitioner presented proof sufficient to establish denial of FAPE and merit compensatory education. Therefore, a motion for a directed verdict must be denied.

2. The IEP was reasonably calculated to provide a meaningful educational benefit.

In terms of the substance of the IEP, there was not proof that the goals or instruction were inappropriate or not designed to achieve an educational benefit. Petitioner contends that the IEP was deficient due to lack of a BIP and insufficient time in general education setting. However, the evidence demonstrated that a formal BIP was not necessary and there was not evidence sufficient to prove that a BIP would have enabled the student to be more successful in the general education setting or that any different form of special education would have served the student better.

The hearing officer does not find that the student was in the resource room because it was "convenient" to put him there, but that the resource room has features helpful to this student, including a special education teacher and three paraeducators to provide special education in an environment of only a handful of other students in the room. The student needs delivery of special education in such a setting because, due to [redacted] disability, [redacted] cannot tolerate

the noise and distraction of a general ed classroom for long periods of time. [redacted] also needs instruction in skills that are not part of what's taught in the general ed setting.

3. The IEP provided for education in the least restrictive environment as appropriate to the student.

An IEP that provides for special education in the resource room with some exposure to a general ed setting was appropriate for this student. The weight of the evidence established that in order for the student to make progress on [redacted] goals this student needed a substantial amount of special education and could not function well for long periods of time in a general education setting. To the extent appropriate, given the particulars of [redacted] disability, [redacted] was educated with [redacted] peers. Petitioner argues that under *L.H. v. Hamilton County Department of Education*, 900 F.3d 779 (6th Cir. 2018), the yardstick is whether the child, with appropriate supports, can make progress in the regular education setting. However, there was no proof that additional supports would have enabled the student to be more successful in the general education setting. [redacted] current special education teacher, testified that additional supports would not have increased the ability of the student to tolerate the general ed setting. To make progress on [redacted] goals, [redacted] had to spend time in the resource room as well with the advantages that setting provided for him. [redacted] also needed to work on functional skills that are not taught as in the general ed classes. Petitioner did not prove that the division between special ed time and general ed time did not educate the student in the least restrictive environment.

4. Respondent's failure to correctly enter dates of data collection over a period of years constitutes an error in implementing the IEP.

5. The error in dating data collection was a continuing violation that takes it outside the three-year statute of limitations.

There are two exceptions to the three-year deadline set forth in the statute. The first exception is for a violation that is "continuing in nature." The second exception applies where a party has been prevented from asserting a claim due to certain school misconduct specified in the statute. Petitioner did not prove such misconduct. Consequently, the question is whether the violation is continuing in nature. It is.

KRS 157.244(6) states that

> [a] parent, public agency, or eligible student may only request the administrative hearing within three (3) years of the date the parent, public agency, or eligible student knew about the alleged action that forms the basis for the complaint, **unless a longer period is reasonable because the violation is continuing**

The hearing officer interprets "continuing in nature" as used in KRS 157.224(6) to be a reference to the continuing violation doctrine which, according to *Middleton v. Sampey*, 522 S.W.3d 875, 879 (Ky. 2017) has not been extended by Kentucky courts beyond workplace civil rights claims. However, KRS 157.224(6) specifically makes continuing violation a potential exception to the three-year limitation for denial of FAPE claims.

The difference between a continuing violation and one that is not continuing is that the latter consists in discrete actionable acts but the former consists of an interconnected series of acts that, individually, would not be actionable but, collectively and cumulatively, could constitute a single violation. *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 1010 (2002).

Petitioner proved that as early as November of 2015 some data entries on progress for the student's goals are dated on dates that attendance records indicate the student was absent entirely or for part of the day. The school basically admits that the errors in dating, but contended, and the hearing officer found, that they were due to an automatic date

default to the current date when entering data, which must be corrected manually by those entering data, and that this problem was district-wide. While one error in dating data entries would not be actionable, the facts in this case show a pattern of error over a period of time that, collectively and cumulatively, constitute a single violation.

6. **Neither harm nor a basis for compensatory education was proved regarding errors in dating data entry, and this failure in implementation is *de minimus*, but the errors should be corrected if possible.**

Petitioner cites *JP v. County School Board of Hanover County*, 447 F.Sup.2d 553 (E.D. Va. 2006) for the proposition that sporadic data collection not properly recorded is of no value. However, under the facts of that case, there was expert testimony that the data collected was worthless and there was proof that such data as was collected was not utilized. In the present case, there is proof that the data was being collected regularly and no proof that it was collected improperly or did not measure relevant skills being assessed. There was proof the data was charted to show trends over time. The hearing officer finds the errors in dating to be *de minimus* and do not constitute a denial of a FAPE.

While there was not proof that small errors in dates of data collection mattered regarding this particular student's situation, everyone agreed that the data should be dated correctly. For whatever benefit or use it may have in the future, the records should be corrected if the data sheets or other information needed to do so are still in existence.

7. Respondent's failure to have the special education teacher, rather than the paraeducator, fashion the adaptations of work in the general education setting constituted failure to implement the IEP as it was written.

The IEP itself, and some witnesses, testified that the adaptation of general ed work to the student's abilities should be done by the special education teacher.

8. **Neither harm nor a basis for compensatory education was proved regarding the adaptations made by the paraeducator rather than the special education teacher, and the failure is *de minimus*.**

Per the findings of fact, there was not proof that the adaptations by the paraeducator were different than the ones that would have been crafted by the special education teacher or were in any way deficient. The hearing officer concludes that this failure to implement was *de minimus* and did constitute failure to provide FAPE.

9. **Respondent failed to provide a FAPE by failing to provide meaningful special education for 22 days.**

Morgan M.. v. Barbara B., 64 IDELR 309 (E.D. Pa. 2015), cited by Respondent, vacated an award of compensatory damages "because Plaintiff did not prove that the Defendant failed to provide a FAPE" for some non-specific period between the date the student was diagnosed with autism and the date ■ began receiving services where "it seems that at some point during the … school year the diagnosis was conferred, but the initial source of the diagnosis and the date that the District became aware of that diagnosis is not revealed in the record." In the present case, there is credible and specific proof that the student's use of the iPad was so extensive that it warrants an inference that the student was not receiving meaningful special education. Unlike in *Morgan M.,* we know the actual dates on which this occurred.

This failure to implement is significant enough to constitute denial of FAPE on 22 days.

10. The student should receive as compensatory education the hours of special education instruction [redacted] should have received but did not receive. This would consist of 22 Days X 120 minutes per day (2,640 minutes total) of special education of (or exceeding) the type typically provided in the resource room and 22 Days X 45 minutes (990 minutes total) of the type typically provided in collaboration.

This is not a situation where, to craft compensatory education, one must measure the difference between a subpar implementation and an appropriate implementation and calculate the difference in terms of its effect on the student. The student in effect failed to receive meaningful special education instruction on 22 days and was left to [redacted] own devices (no pun intended). It is reasonable, under these circumstances, to provide as compensatory education the equivalent of 22 days of special education to catch the student up to where [redacted] would have been had this failure not occurred.

11. Petitioner's failure to accept Respondent's settlement offer does not bar an award of attorney fees to Petitioner pursuant to 34 CFR 300.517 (c)(2) (C) and 34 CFR 300.517 (c) (3).

The applicable regulation bars an award of attorney fees to the parent if

> [t][redacted] court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement…..[unless] a parent who is the prevailing party … was substantially justified in rejecting the settlement offer.

Respondent's settlement offer was not greater than, and is different than, the relief awarded by the hearing officer. The school offered to conduct an IEP, to provide money for educational expenses outside school, and to provide a copy of the Edmark program for home use. None of that was requested by Petitioner in Petitioner's request for relief. What was requested, at least in part, was compensatory education, which has been awarded herein. While Petitioner did not receive all of the relief requested, such as education delivered at home, the hearing officer finds Petitioner was substantially justified in rejecting the settlement offer.

FINAL ORDER

1. Without reducing the minutes of special education already provided for in the current IEP, Respondent shall provide the student 2,640 additional minutes of special education of (or exceeding) the type typically provided in the resource room and 990 minutes of the type typically provided in collaboration. This additional minutes need not be delivered all at once, but may be spread out over a period of one year. If providing the additional minutes requires providing special education outside normal school hours, and that creates transportation issues for the student, the school shall provide transportation.

2. Respondent shall correct dates on data entry from 2015 through spring 2019 to the extent, if at all, data sheets or other records provide information sufficient to do so.

NOTICE

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

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

April 20, 2021.

_____/s/ Mike Wilson_____
MIKE WILSON, HEARING OFFICER

CERTIFICATION:

A copy of the foregoing was served by email on April 20, 2010 on the following

[redacted]

[redacted]

KDE
KDElegal@education.ky.gov

/s/ Mike Wilson_____
MIKE WILSON, HEARING OFFICER