

**KENTUCKY DEPARTMENT OF EDUCATION
DIVISION OF LEARNING SERVICES
AGENCY CASE NO. 2223-22**

██████████

PETITIONER

v.

██

SCHOOLS

RESPONDENT

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

This Due Process Hearing was requested by letter filed with the Kentucky Department of Education (KDE) on June 7, 2023 by legal counsel for the Petitioner, ██████████ pursuant to the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. Section 1400, et. seq. At that date ██████████ was five (5) years old and identified as a student with a disability who needs special education and related services under the category of Autism. Respondent was informed of the Petitioner's Complaint by the KDE through the KDE Notice of Idea Due Process Hearing which had been sent to both parties' counsel and to the undersigned Hearing Officer by email on June 12, 2023.

Petitioner had alleged in the Complaint that Respondent violated IDEA per the following:

- A. Respondent's proposed IEP : (1) violates Sec 504 of the Rehabilitation Act of 1973 as amended, 29 USC Sec 794; (2) violates the Americans with Disabilities Act of 1990, 42 USC Sec 12101 and 42 USC Sec 12132;
- B. That the school district failed to design an appropriate IEP in violation of 707 KAR 1:320;
- C. Respondent's proposed IEP will deny student: (1) the right to be educated in the least restrictive environment in violation of 707 KAR 1:350, and (2) a free appropriate public education in violation of 707 KAR 1:290.

Petitioner requested the following determinations and relief:

- A. The proposed IEP violates Sec 504 of the Rehabilitation Act of 1973 as amended, 29 USC Sec 794;
- B. The proposed IEP violates the Americans with Disabilities Act of 1990, 42

USC Sec 12101 and 42 USC Sec 12132;

- C. Respondent failed to design an appropriate IEP in violation of 707 KAR 1:320;
- D. The proposed IEP will deny student the right to be educated in the least restrictive environment in violation of 707 KAR 1:350;
- E. The proposed IEP will deny student a free appropriate public education in violation of 707 KAR 1:290;
- F. An Order requiring Respondent:
 - (1) Create and implement an appropriate IEP for Student that will allow [REDACTED] to fully participate in the general education curriculum as well as extracurricular and non-academic activities;
 - (2) To provide the supplementary aids and services of a 1:1 paraeducator specially trained as a behavior technician and other appropriate behavioral supports so Student may be educated in the least restrictive environment;
- G. An Order finding Student to be the prevailing party and that attorney's fees be awarded to Student's attorney of record (pursuant to 34 CFR 300.517); and
- H. All such other relief the Hearing Officer may deem appropriate.

At the Initial Prehearing Telephonic Conference the parties agreed, requested and were granted extension of the regulatory deadlines.

Respondent's Response to Due Process Complaint, Objections to the Sufficiency of the Complaint and Motion to Dismiss the Non-IDEA Claims pled in the Complaint which, pursuant to 34 C.F.R. Sec. 300.508(d)(1) was timely filed by Respondent on June 22, 2023. ¹ By Order issued June 30, 2023 Respondent's *Motion to Dismiss* was **sustained** with specific reference to the **Issues for the Hearing Officer**, Nos. 1) which refers to Section 504 of the Rehabilitation Act of 1973 as amended, 29 U.S.C. Sec. 794, and 2) which refers to The Americans With Disabilities Act of 1990, 42 U.S.C. Sec. 12101 and 42 U.S.C. Sec. 12132; and to the **Relief Sought**, Nos. 2) which refers to Section 504 of the Rehabilitation Act of 1973 as amended, 29 U.S.C. Sec. 794, and

¹ The three (3) page undated letter submitted by the [REDACTED] as attorney for [REDACTED] which requests a due process hearing is referred to herein as the "Complaint".

3) which refers to The Americans With Disabilities Act of 1990, 42 U.S.C. Sec. 12101 and 42 U.S.C. Sec. 12132, cited by Petitioner in the Complaint. The remainder of the **Issues and Relief Sought** remain undisturbed. With the dismissal of the items in the Complaint identified above, the remainder of the Complaint was deemed sufficient. 34 C.F.R. Sec. 300.508(d)(1).

An in-person administrative hearing was conducted on July 24 and 25, 2023 at Respondent's facility in ██████████ KY. The ██████████ represented Petitioner ██████████ Present at the hearing were Petitioner's parents, ██████████. The ██████████ represented the Respondent, ██████████ Schools. Present at the hearing on behalf of Respondent was ██████████ Director of Special Education for ██████████ ██████████. During the hearing six (6) witnesses offered testimony; four (4) for Petitioner and two (2) for Respondent. A number of exhibits were offered by both parties. The hearing was conducted pursuant to 34 CFR Part 300, KRS 13B and 707 KAR 1:340.

FINDINGS OF FACT

1. ██████████ is a five (5) year old ██████████ of kindergarten age who resides within the boundaries of the ██████████ School District. (T, p 10). ██████████ has been identified as a student with a disability who needs special education and related services under the category of Autism. (T, pp 12, 31; R 17,² T, pp 13-14). One of the ways ██████████ autism is manifested is through elopement. In July 2023 ██████████ was also diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). (T, pp 13-14). ██████████ is primarily nonverbal and uses a communication device to communicate with adults and peers. (T, pp 40-43; R 21). Since ██████████ was 18 months old ██████████ has participated in early intervention at First Steps, including Applied Behavior Analysis (ABA) therapy. (T, p 10; R 1; R 11).

2. ██████████ parents, ██████████ and ██████████ began the Individual Education Plan (IEP) process in 2020 when ██████████ was two years old. An IEP was developed for ██████████ when ██████████ was three years old (R ; R 8). Due to the COVID-19 pandemic ██████████ IEP began in a virtual setting. ██████████ mother discontinued the IEP in the belief ██████████ was not receiving any educational benefit by

² Petitioner's exhibits are identified as "P" followed by a Bates Stamped page number, and Respondent's exhibits are identified as "R" followed by the tab number.

being online. [REDACTED] then attended [REDACTED] a licensed child care facility, for private preschool services, rather than utilizing Respondent's preschool services. It was also more convenient for [REDACTED] to attend the entire day at [REDACTED] rather than the Respondent's 3-hour preschool. [REDACTED] had no issues with the IEP previously developed for [REDACTED] or with the special education services offered by Respondent at that time (R 1-8, pp 1-38; T pp 15-17).³

3. While attending [REDACTED] received Applied Behavior Analysis (ABA) therapy provided by a private company called [REDACTED]. The ABA team, employees of [REDACTED] consisted of a board-certified behavioral analyst (BCBA) and four (4) registered behavior technicians (RBTs). The BCBA managed the ABA team and the RBTs worked with [REDACTED] on a daily Monday through Friday basis developing certain skills. The RBTs rotated their time with [REDACTED] one (1) worked with [REDACTED] in the morning and another worked with [REDACTED] in the afternoon. (T pp 149-151, 223-226).

4. Due to the COVID-19 pandemic, as therapists were not allowed to attend [REDACTED] the ABA services were provided at the [REDACTED] home from June 2020 to August 2021. From such services they helped [REDACTED] become potty-trained and assisted [REDACTED] with reading, math and classroom behavior; used an Augmented Alternative Communication (AAC) devise. (T pp 19-20, 40-41).⁴

5. In August 2021 when therapists were again allowed to attend [REDACTED] was re-enrolled. The RBTs worked one-on-one with [REDACTED] and prompted [REDACTED] throughout the day to complete tasks. They modified [REDACTED] education to support [REDACTED] disability and made accommodations to the work [REDACTED] was assigned. [REDACTED] Board Certified Behavioral Analyst (BCBA) testified the modification of [REDACTED] assignments and communication with the general education preschool teacher was like a special education teacher's role in a general education classroom environment, as [REDACTED] lacked teachers trained in special education as well as education of students with autism. (T pp 18-19, 66, 153-154, 183-185).

³ "T" denotes citation to the hearing Transcript. Transcripts from Days 1 and 2 of the hearing are sequentially numbered.

⁴ The AAC is similar to an iPad and contains a program [REDACTED] can use to press a button to generate words. The device allows [REDACTED] to communicate with others.

6. While at ██████████ spent the entire day with ██████████ peers except for about two (2) hours when ██████████ peers were napping. During naptime, as ██████████ did not nap, ██████████ was taken to another room by ██████████ RBT to work one-on-one developing math and writing skills, and practice using ██████████ AAC to communicate with peers, all tools ██████████ could use in the general education classroom setting (T pp 38, 165, 181-182). During a 5-day week ██████████ was taken out of the general room for 10 hours.

7. While at ██████████ eloped many times: In June 2022 ██████████ climbed a playground gate during recess while two (2) teachers were distracted by other students fighting. ██████████ ran away to a ██████████ restaurant and was returned by ██████████ workers (R 15, p 58). ██████████ attempted to sneak outdoors while no one was watching. ██████████ left class and was later found in a storage closet. ██████████ attempted to climb through a window at ██████████ to get to the playground (P 13, pp 97-100; T pp 14, 63, 93-94, 106-109, 111-113).

8. The Cabinet for Health and Family Services in its 06-16-2022 Inspection Report, cited ██████████ for failure to provide adequate supervision of children at all times by a qualified staff person who ensures the child is within scope of vision and range of voice. (P 13 pp 99-100). The Plan of Correction reported to the Cabinet by ██████████ included: "We have implemented that the child not be here without ██████████ ABA therapist to ensure ██████████ safety at all times while in our care. Along with the staff completing more frequent child verifications checks to ensure all children are safe." Such Plan was accepted by the Cabinet (P 13, p 97).

9. Following the elopement to ██████████ ██████████ Director at that time, conditioned ██████████ attendance on the parents providing at their own expense, a one-on-one RBT to be with ██████████ full-time for safety reasons. She emailed ██████████ "It is important for [█████████] to have a qualified one on one person to ensure ██████████ safety daily in our classroom." (P. 15, p 109; T p 117; bracketed information supplied). This was directed to certain health issues and that the children would be spending more time outside the building. ██████████ had no special education teachers, autism specialists, or speech and language specialists on staff. (T pp 63-64, 67, 86, 106, 116-117, 202; R 19, p 98).

10. ██████████ on one occasion eloped from ██████████ home to a creek across the street. ██████████ has been known to run into the road without regard to traffic, towards bodies of water, away from

caregivers.

11. [REDACTED] during an act of elopement, will now stop if commanded by an adult. [REDACTED] will respond to direct instructions unless [REDACTED] is fixated on something else. [REDACTED] does not require restraint; an adult who catches up with [REDACTED] need only tell him to stop. (P 11; T pp 62, 162-163, 185, 187, 191-192).

12. [REDACTED] created an elopement plan for [REDACTED] where an adult is required to be in the general vicinity of [REDACTED] and maintain [REDACTED] supervision. It required [REDACTED] be brought back to the area from which [REDACTED] eloped; how the RBT was to interact with [REDACTED] after the elopement (eg. "Do not provide any attention to the elopement. Keep a straight face and avoid eye contact while bringing [REDACTED] back to the original area [REDACTED] eloped from.") (P 11). [REDACTED] had defined "elopement" as any movement of four feet or more without adult permission. Each time [REDACTED] actions met this definition, such incident was recorded as an elopement (P 11; T p 187). [REDACTED] elopement is believed to be caused by impulse control issues. [REDACTED] elopes when the adult supervision focused directly on [REDACTED] is diverted. (R 15, p 61). [REDACTED] pediatrician suggested ADHD medication may help with [REDACTED] impulse control and elopement issues. To date, [REDACTED] has not taken such medication. (T pp 63-64, 67, 86, 106, 116-117, 202; R 19, p 98)

13. Testing and data elicited therefrom show [REDACTED] struggles with peer interaction. [REDACTED] is nonverbal which impacts [REDACTED] social communication skills. The data collected by [REDACTED] show: there were no requests made by [REDACTED] to interact with [REDACTED] peers in an 8-hour session; [REDACTED] had zero independent back and forth conversations with peers; there was an anecdotal statement by a [REDACTED] team member that [REDACTED] occasionally interacted with other students during sensory play time and recess (T pp 303-3-4; P 11; T pp 59, 114, 281, 303-304, 309; R 12, p 43).

14. In November of 2022 [REDACTED] began the process to obtain an updated IEP for [REDACTED] to be able to attend Kindergarten in the 2023-2024 school year at [REDACTED] Elementary School (T p26). In February 2023 the District was given permission to observe [REDACTED] at [REDACTED]. An Admissions and Release Committee (ARC) was formed. The ARC members were: [REDACTED] the Assistant Director of Special Education for the District; [REDACTED] an autism behavior coordinator for the District; [REDACTED] the Special Education Coordinator for [REDACTED]

the general education Kindergarten Teacher; as ARC chairperson; a Speech Therapist; an Occupational Therapist; a School Psychologist; and staff (T pp 29, 237-238, 251; R 11, p 43; R 15, p 75). An ARC meeting was held 02-02-2023 to discuss reevaluation needs for development and implementation of an IEP (R 11).

15. A number of ARC members observed in setting at . Such observations lasted various intervals up to 1 ½ hours. (T, p 327). In observations by and they did not see participate or interact with peers nor any peers interact with (T pp 240, 327). sat on the floor by with RBT sitting behind doing a puzzle while two groups of peers interacted among themselves (T p 324). When the class sat together on the floor in a “circle time”, sat behind the circle in a chair next to RBT. The RBT prompted to participate with AAC device, however, did not interact until prompted. (T p 241). observed required 12 prompts to participate in class during that particular observation. (T pp. 77, 238-242, 265, 324-325, 327-328; R. 15, p 59; R 16, p 76).

16. Neither nor observed any elopement attempts (as defined by) during the time of their observations. was observed using AAC requesting to leave the room (“I want to go outside”) and to go outside when the room was loud (T pp. 242, 332; R. 15, pp 60-61).

17. An Integrated Psychological Evaluation (IPE) dated 04-21-2023 was conducted. Results indicated demonstrated sensory regulation difficulties, including difficulty with frequent fidgeting, missing directions, and struggling in large group activities. When compared to same age peers demonstrated below average communication skills, cognitive functioning scores were slightly underdeveloped, scored in the average range on academic function, adaptive behavior and social functioning fell in the “low” range. (R 15, pp 6-9). The IPE also reported “Struggles with using verbal and non-verbal communication appropriately to initiate, engage in, and maintain social contact.” (R 15, p10). mother reported often chose to play alone and generally did not seek out the company of other children.(R 15, p 10).

18. An IEP was subsequently developed by the ARC based on direct observations, testing information, input from parents and staff, professionals, evidence-based

practices, and strategies used with other autistic children, a Communication Evaluation Report (R 12), and an ST, OT, SpEd Service Evaluation Report (R 14). The IEP was focused on social communication, interaction with peers, and communication using the AAC device. This IEP draft was reviewed at an April 25, 2023 ARC meeting (T pp. 31, 246, 251, 336; R. 16).

19. The proposed IEP suggested receive 180 minutes of specialized instruction per day in the Resource Room. It was proposed that while in the Resource Room, would work on socialization skills in a small group environment with individual attention from a Special Education teacher; that would develop social skills, the ability to initiate conversations with peers, and have back-and-forth conversations in a small setting away from distractions and noise of the general kindergarten classroom. believed students with autism often need these interactions broken down for them in a separate environment with more intense instruction before they are able to utilize those skills in the classroom setting (T pp. 59-60, 249, 253, 268, 280, 351, 359-360; R. 19, pp. 94, 97-98). The proposed amount of time was suggested based on Respondent's understanding of the time spent outside the general education classroom in during peers' naptime and other times was taken out due to possible distraction of the other students (T p. 354). disagreed with removal of from the general education classroom.

20. The IEP proposed May 8, 2023 revised and reduced the amount of time for out of class specialized instruction from 180 minutes per day to 30 minutes per day. It also suggested special education collaborative work for 20 minutes two times per day, when a Special Education Teacher would work with in the general classroom on communication skills learned in the Resource Room (T pp. 45, 49, 246-248, 267, 275, 339, 342, 354; R. 16; P. 6-7, 10). disagreed with leaving the general classroom for any amount of time in the Resource Room and believed it did not make sense for to be taken out of the general classroom from nondisabled peers. She agreed could be taken out of the general classroom for speech and occupational therapy (T pp. 38-39, 45, 64, 341; R. 16, p. 77).

21. Petitioner timely filed a letter requesting a due process hearing.

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, according to the Complaint allegations, that:

- The school district failed to design an appropriate IEP in violation of 707 KAR 1:320;
- Respondent’s proposed IEP will deny the student (1) the right to be educated in the least restrictive environment in violation of 707 KAR 1:350, and (2) a free appropriate public education (“FAPE”) in violation of 707 KAR 1:290.

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 alleges that the proposed IEP is inappropriate and denies FAPE for the following reasons:

- That it fails to provide the ABA model that has proven to help [REDACTED] make meaningful academic progress;
- That it fails to provide adequate safety supports to prevent [REDACTED] elopement;
- That it proposes to remove [REDACTED] from the general education environment unnecessarily (Petitioner’s Post Hearing Brief, page 3; hereafter “PPHB”) denying [REDACTED] the right to be educated in the least restrictive environment

Petitioner claims the above items constitute violations of 707 KAR 1:290, 1:320 and 1:350.

Failure to Provide the ABA Model

7. In examining whether a proposed IEP is a denial of FAPE, the Sixth Circuit Court of Appeals has utilized the two-step analysis cited by the U.S. Supreme Court in *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. V. Rowley*, 458 U.S. 176, 206-207 (1982): (1) Has the state complied with the procedures set forth in the IDEA; and (2) Is the IEP developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits? *Reutig v.*

Kent City Sch. Dist., 720 F. 2d. 463, 465 (6th Cir., 1983). There is no allegation in the instant matter that the District did not comply with the procedures set out in the IDEA. What then, is the evidence presented by Petitioner that the proposed IEP was/is not reasonably calculated to enable [REDACTED] to receive educational benefits?

8. Petitioner alleges the Respondent refused to provide ABA therapy services, **“specialized services that have already been proven to work.”** (PPHB, p 3). A critical reason emphasized by Petitioner for ABA and one-to-one services was to effectively prevent [REDACTED] from eloping. [REDACTED] County did include as part of the IEP a proposed elopement plan (R 20). The evidence indicates such Plan included many of the steps previously taken by [REDACTED] with hindsight of whether some of the past practices were ineffective, while adding additional protective elements of its own. Testimony from [REDACTED] Board Certified Behavioral Analyst with [REDACTED] indicated the Respondent’s Plan met all the expectations of on-going adult supervision contemplated by [REDACTED] (T pp 188, 190).

9. Petitioner alleged in the brief that the decision not to include ABA services in the IEP, even in view of the parents’ offer to pay for such services, was a “pre-determined position” (PPHB, p. 4).⁵ To the contrary the evidence shows the extent to which Respondent prepared itself prior to composing the IEP and the included elopement plan. Prior to drafting the initial IEP, Respondent conducted reviews of [REDACTED] academic and medical records, had certain staff make a number of visits to [REDACTED] to make observations of [REDACTED] in that environment, reviewed psychological and academic assessment data, conducted an independent psychological evaluation (IPE) and conducted many discussions at the ARC meetings.

10. The question of the validity or effectiveness of ABA as a therapy support for [REDACTED] is not in issue. The issue is whether the proposed IEP is reasonably calculated to enable [REDACTED] to receive educational benefits. Although [REDACTED] parents prefer the ABA model, parental preference is not a basis for denial of FAPE. As stated by the Florida U.S. District Court case cited by

⁵ The Hearing Officer, however, gave little weight to Respondent’s argument that the school district could not “do business” with [REDACTED] was not registered to do business in Kentucky and lacked the legal capacity to deliver services as a vender to a KY public school; that the Respondent was precluded by statute and KY Constitution to obtain [REDACTED] services. In the instant case it was the parents who proposed they would be the ones to hire and pay for ABA services provided by [REDACTED] and requested such contractor be permitted to provide the services to [REDACTED] within the school setting.

Petitioner (*L.M.P. v. Sch. Bd.*, 2016 U.S. Dist. LEXIS 194553 at 38 (S. Dist. Fl., Sept. 7, 2016): "Of course, a parent is not entitled to prescribe a particular methodology or program."

11. Respondent is required to make a good faith effort to provide the supports and programs that will address [REDACTED] particular disabilities. See: *Doe v. Board of Educ.*, 9 F. 3d 455, 459 (6th Cir. 1993). Cited by Petitioner is testimony of [REDACTED] current Special Education Coordinator for the [REDACTED] Schools. When asked whether providing additional support of a Registered Behavior Technician trained paraeducator to work with [REDACTED] would do any harm, [REDACTED] had said: "I don't think there would be harm..." (T p 367). In the remainder of her statement [REDACTED] testified: "...but when you have the staff available that's trained to work with [REDACTED] and have [REDACTED] grow, it's not necessary to bring in more...we have sufficient resources to meet [REDACTED] needs" (T p. 368).

12. Once the first IEP is in place and has been implemented for eight (8) weeks, a previously scheduled ARC meeting is held to review the data. IEPs can be modified based on the student's needs, but as stated by [REDACTED] "...we haven't got to work with [REDACTED] yet." (T pp 368-269).

13. Petitioner has not proven by a preponderance of the evidence that Respondent's non-inclusion of the ABA model in its IEP renders the IEP inappropriate or is a denial of FAPE.

Adequate Safety Supports to Prevent [REDACTED] Elopement

14. [REDACTED] has exhibited several instances of elopement while at [REDACTED]. In June 2022 [REDACTED] climbed a playground gate during recess while two (2) teachers were distracted by other students fighting- [REDACTED] ran away to a [REDACTED] restaurant and was returned by [REDACTED] workers (R 15, p 58); once [REDACTED] attempted to sneak outdoors while no one was watching; [REDACTED] left class and was later found in a storage closet; [REDACTED] attempted to climb through a window to get to the playground (P 13, pp 97-100; T pp 14, 63, 93-94, 106-109, 111-113). On one occasion [REDACTED] eloped from [REDACTED] home to a creek across the street. While with [REDACTED] parents [REDACTED] has been known to run into the road without regard to traffic, towards bodies of water, away from caregivers.

15. Following a violation citation from the Cabinet for Health and Family Services in 2022 for [REDACTED] failure to provide adequate supervision of children at all times by a qualified

staff person who ensures the child is within scope of vision and range of voice. (P 13 pp 99-100), [redacted] instituted a Plan of Correction that reported "We have implemented that the child [referring to [redacted]] not be here without [redacted] ABA therapist to ensure [redacted] safety at all times while in our care. Along with the staff completing more frequent child verifications checks to ensure all children are safe." (P 13, p 97; bracketed information supplied).

16. Following the elopement to [redacted] [redacted] Director at that time, conditioned [redacted] attendance on the parents providing at their own expense, a one-on-one RBT to be with [redacted] full-time for safety reasons. [redacted] had no special education teachers, autism specialists, or speech and language specialists on staff. (TE pp 63-64, 67, 86, 106, 116-117, 202; R 19, p 98).

17. [redacted] in its 05-2023 Treatment Care Plan, identified [redacted] elopement as a "maladaptive behavior" that occurred on average 1% elopement behavior per day. The plan was to decrease such behavior to an average of 0% over the next 6 months, with an estimated date of mastery of November 2023 (P 11, p 76). [redacted] created an elopement plan for [redacted] where it defined "elopement" as any movement of four feet or more without adult permission. It required an adult to be in the general vicinity of [redacted] and maintain [redacted] supervision; that [redacted] be brought back to the area from which [redacted] eloped and how the RBT was to interact with [redacted] after the elopement. (P 11).

18. Currently, [redacted] during an act of elopement, will stop if commanded by an adult. [redacted] will respond to direct instructions unless [redacted] is fixated on something else. [redacted] does not require restraint; an adult who catches up with [redacted] need only tell [redacted] to stop. (P 11; T p 62, 162-163, 185, 187, 191-192).

19. In the development of the IEP the Respondent included input from [redacted] parents, the staff from the school district and the elementary school where [redacted] would attend who are trained in elopement issues, and data about [redacted] elopement tendencies. A detailed Elopement Plan, with a draft dated 5/8/2023, was prepared as part of the IEP (P 8). Such Plan included: a definition of elopement (which was more liberal than the [redacted] definition); antecedent-based interventions; staff response strategies when it occurred; specific actions pertaining to walking in the hallway/in line, restroom, recess, lunch, special events, and arrival & dismissal.

20. [REDACTED] BCBA testified the provisions for adult supervision and re-direction of [REDACTED] were the same in the [REDACTED] and school district plans; that she had no facts to support a conclusion that the school district's elopement plan was insufficient (T 146, 177-178, 190, 193).

21. The elopement plan provided in the IEP is more detailed, instructive, and describes the use of more technology to assist in its implementation, than measures instituted previously by [REDACTED]

22. Petitioner has not proven by a preponderance of the evidence that Respondent's Elopement Plan as part of the IEP does not provide adequate safety supports to prevent [REDACTED] elopement and have therefore not proven that such Elopement Plan renders the IEP inappropriate or is a denial of FAPE.

The Least Restrictive Environment

23. Petitioner has asserted the proposed IEP violates the IDEA by not structuring the supports for [REDACTED] in the least restrictive environment: "the IEP offered by the school district calls for [REDACTED] to be educated away from [REDACTED] non-disabled peers for part of [REDACTED] school day." (Petitioner's Brief, p 2).

24. [REDACTED] had been observed by Respondent's staff to not initiate peer conversation or maintain such conversation without adult prompting (T p 241). [REDACTED] is also distracted by stimuli in the general classroom (T p 360).

25. "The appropriate yardstick is whether the child, with the appropriate supplemental aids and services, can make progress toward the IEP goals in the regular classroom setting." *L.H. v. Hamilton Cty. Dep't of Educ.*, 900 F. 3d 779, 793 (6th Cir. 2018).

26. [REDACTED] testified the goal is to have a student be a part of the general education environment as much as possible (T p 276). The technique proposed by Respondent to meet the goal of less time or no time away from the general education classroom is to assist [REDACTED] one-on-one in the resource room, away from distractions, to learn the skills to better initiate and carry on conversations and interactions with [REDACTED] peers and to lessen and eliminate prompting by an adult. The 30 minutes per day is thought by Respondent to be a minimal amount of time, but enough time for [REDACTED] to get direct instruction from the Special Education teacher without the

general classroom distractions; the matters instructed in the resource room will be reinforced and integrated in usage in the general classroom setting (T pp 359-360). As [REDACTED] learns these skills and uses them more in the general classroom, the ARC could revise downward or remove when appropriate, the resource room time depending on [REDACTED] achieving the intended goals. (T p 279).

27. Respondent's IEP limits [REDACTED] time outside the general education classroom to 30 minutes per day in the resource room, at times when peers are completing independent work and [REDACTED] if remaining in the general education classroom, would not otherwise be engaged with such peers. The general education kindergarten teacher provided input of different times [REDACTED] could go to the resource room when the students would not be interacting with each other, such as within centers when students would be working individually or on a type of technology (T 276-277).

28. [REDACTED] had previous success and made "tremendous strides" (Petitioner's Brief at 2) in social progress and how to speak to others using [REDACTED] AAC while in pre-school where, for two-hours each day, while [REDACTED] non-disabled classmates napped, [REDACTED] was taken to a separate room and received one-on-one instruction.

29. Respondent's Special Education Coordinator testified she could not articulate any potential harm by removing [REDACTED] from the general education environment (T p 381).

30. Although the IDEA has a strong preference for mainstreaming, it is not required in all cases where some time spent in the special education environment may be appropriate for the student. Complete mainstreaming at all times is not required. *Roncker v. Walter*, 700 F. 2d 1058, 1063 (6th Cir. 1983); *Kari H by & Through Dan H. v. Franklin Special Sc. Dist*, 1997 U.S. App. LEXIS 21724 (6th Cir. 1997) at p 10.

31. The greater weight of the evidence in the record supports, at the current time, that the minimal time [REDACTED] would spend away from the general education classroom at times [REDACTED] would not otherwise be interacting with [REDACTED] non-disabled peers, is outweighed by [REDACTED] needs for specific instruction in areas identified by the data, observations, testing and professional opinions to be those in which, along with the anticipated benefits of the services, [REDACTED] will receive. Petitioner has not proven by a preponderance of the evidence that the IEP fails to educate the student in the least restrictive environment or that the proposed resource room time denies FAPE to [REDACTED]

Provision of a Free and Appropriate Public Education (FAPE)

32. Cited hereinabove are the pertinent cases in the 6th Circuit setting out the matters to be examined to determine whether an IEP denies a student FAPE. An IEP must be reasonably calculated to enable the student to received educational benefits. The Respondent need only make a good faith effort to provide the supports and programs that will address the specific disabilities from which [REDACTED] suffers. *Doe v. Board of Educ.*, 9 F. 3d 455, 459 (6th Cir. 1993). The Court in *Doe* also observed that it is difficult, if not impossible, to find an IEP is not reasonably calculated to enable the child to receive educational benefits when "the IEP was never given a chance to succeed." *Doe* at 455, 459.

33. The record is replete with the steps and efforts taken by Respondent which resulted in the IEP rejected by Petitioner. Petitioner has failed to show by a preponderance of the evidence that Respondent failed to employ good faith efforts in providing its recommended supports and programs, or that the IEP was not reasonably calculated to enable [REDACTED] to receive educational benefits.

FINAL 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 that the IEP proposed by Respondent was inappropriate by failing to:

- provide the ABA model;
- provide adequate safety supports to prevent [REDACTED] elopement;
- educate [REDACTED] in the least restrictive environment; or

that it denies provision of a free and appropriate public education (FAPE).

IT IS HEREBY RECOMMENDED the Petitioner's Due Process Complaint 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

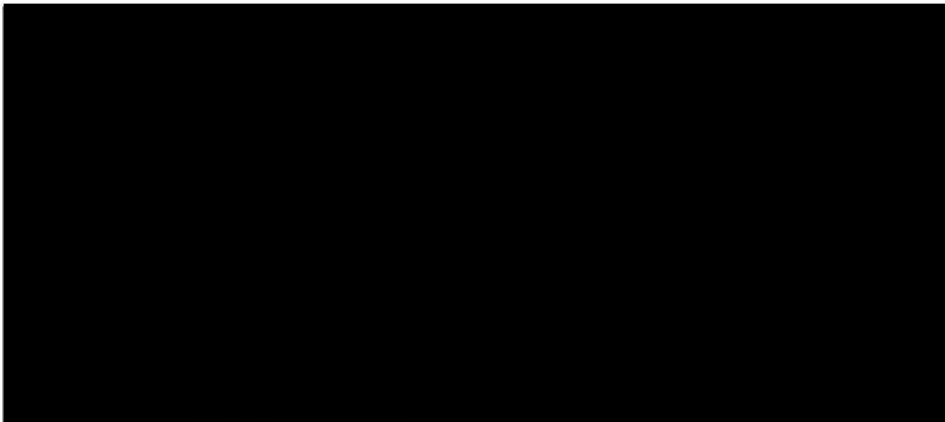
A decision made by the ECAB shall be final unless a party appeals the decision to state circuit court or federal district court.

ISSUED THIS 3rd DAY OF OCTOBER, 2023.

/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 was served via e-mail this 3rd day of October, 2023 to:



KDE Legal Department
kdelegal@education.ky.gov

/s/ Roland P. Merkel
Roland P. Merkel
Hearing Officer