

**KENTUCKY DEPARTMENT OF EDUCATION
AGENCY CASE NO 1718-09**

██████

PETITIONER

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

HARDIN COUNTY SCHOOLS

RESPONDENT

This case involves ██████, a student (age 11 at the time of the hearing) with an emotional-behavioral disability whom Hardin County Schools (“Hardin”) believes should be placed in an alternative school called College View. College View delivers services in a more restrictive environment and the parent objected to the change in placement. The last agreed-upon placement was at Bluegrass Middle School (“Bluegrass”) and stay-put requires that the student continue at that placement until the dispute between the parties is resolved.

Technically, “placement” refers to points along the continuum of options available for a student with a disability and “location” refers to the physical location where the services are delivered. Herein, however, unless otherwise indicated, when witnesses and parties speak of “placement at College View” and change of placement, the meaning intended is both the manner in which services are delivered and the location where they are delivered.

The student was suspended for disciplinary reasons in the fall of 2017 at Bluegrass and when the period of suspension approached 10 days, the school did a manifestation evaluation, found that the event was an manifestation of the disability, and, relying upon an FBA and BIP that had been developed prior to that, proposed changing placement to College View, which would be a more restrictive environment. The mother objected that this would deny the student FAPE and additionally contended that the school was not providing adequate psychological and

social skills services. Instead of changing placement to College View, the mother proposed that when the student had behavioral issues, the student simply be allowed to remove himself from the Bluegrass classrooms to a private location in the hall until he could reorient and regain control of his behavior.

A hearing was held on March 9, 2018, at the Hardin County Board of Education offices in Elizabethtown. Based upon prior phone conference discussions with the parties, the issues to be tried were (1) whether failure to bring or permit the parent to bring a therapist to provide services to the student at Bluegrass Middle School in lieu of the proposed placement at College View was a denial of FAPE, by not providing services in the least restrictive environment; (2) whether not allowing the student to remove himself from the PASS classrooms at Bluegrass Middle School was a denial of FAPE; and (3) whether the change of placement to College View will constitute a denial of FAPE because it is not the least restrictive environment.

Additional issues considered by the hearing officer, are (4) whether the school denied FAPE by failing to conduct evaluations, hold ARC meetings, modify BIPs, and take other steps to attend to the student's special education needs after the student returned to Hardin in spring of 2016; (5) whether the school denied FAPE by failing to implement appropriate social skills services at Bluegrass; (6) whether the school denied FAPE by making changes in a BIP before completing another FBA; (7) whether the school denied FAPE by proposing a change of placement prior to completing a previously-authorized FBA; and (8) whether the school denied FAPE by failing to give proper notice of the November 15, 2017, ARC meeting, and by failing to provide the parent with a copy of notes from that meeting.

After the hearing, the parties were permitted to submit written arguments and both did so. Having reviewed those arguments as well as the record, the hearing officer makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. The student was found to be a student entitled to special education services when he attended Hardin schools beginning in pre-school. His category of eligibility is and at all relevant times was Emotional Behavioral Disorder (EBD). After his third grade year in Hardin, the family moved to Tennessee, then returned to Hardin in the spring of the student's 4th grade year with an IEP and BIP that had been in effect in Tennessee.

This is undisputed. (TE 15-16)

2. The student completed spring of 2016 and the 2016-2017 school year in elementary school in Hardin. The 2017-2018 school year is his first year of middle school.

This is undisputed. (TE 15-16)

3. Upon the student's return to Kentucky the school appropriately reviewed the Tennessee IEP and BIP and conducted a reevaluation as well.

A finding on this point is made because the parent's testimony suggested that the school simply adopted the Tennessee IEP without considering whether it was appropriate. The IEP and BIP from Tennessee is Defendant's Exhibit 8. DoSE Adkins testified that the BIP and IEP were comparable to what the student had been operating under in Hardin the prior hear. (TE 88-89). The parent testified "the setting that he was in [in Tennessee] was exactly like Bluegrass" and "there was a classroom that was a PASS classroom." (TE 201). The parent testified:

That particular program [in Tennessee] was the same process that would be here for him to – he was able to go in the gen ed setting if he – as he could, and then he would return

to that classroom. The difference with that particular setting was whereas in Kentucky you go to gen ed and as you need to you will go to the PASS classroom, in [Tennessee] he would start in the PASS classroom and work his way out of the classroom into the general ed setting. So he would go as he worked his way out of it.

(TE 202). DoSE Adkins compared the IEP from Tennessee with the one the student had been operating with the previous year in Hardin:

[T]hey saw much of the same behaviors and... output that the student gives that we saw....I don't know how much more aggressive it was, but they put him on very comparable IEP... as we had had him in our PASS program....[I]t looks like they took what we had... and they tried to do comparable services for him as well. And then, when he came back, we, of course, put comparable services back into place.

(TE 90). However, Hardin also did a reevaluation as required by Kentucky law:

[A]ctually, we did a re-eval. It's [page] number 247 through 250. There's a re-eval that's dated for the ARC 4-15-16. And there was an ARC meeting on 4-15-16. And there was an ARC meeting on 4-15-16, where they did the new... Kentucky eligibility. Mom was present at that meeting.

(TE 92; see pages 222-265 of the initial school disclosure). The parent asked to participate in this ARC by speaker phone and gave her signed consent to convening the ARC meeting. (TE 190).

4. The school held multiple ARC meetings after the student's return to Kentucky in 2016 and prior to the ARC meetings in the fall of 2017 that resulted in the proposed change of placement.

The parent testified that the current IEP was the Tennessee IEP created in 2015 (TE 41) and that from the time of his return in spring 2016 until fall of 2017 there were no ARC meetings. (TE 17-18; 23). The impression given by the parent was that the school had neglected the student's special education until it proposed changing placement in fall of 2017.

This is simply incorrect. In addition to the ARC in April of 2016 referenced elsewhere hereinabove, an ARC was convened December 8, 2016, at the request of the parent (TE 195) and which the parent attended (TE 134) and which occurred "because [the] parent actually requested

this ARC meeting in December because she had concerns about behavior at school and at home.”

(TE 135). Another ARC meeting was convened in April of 2017. (TE 153) for which Adkins testified that the parent signed the notice (TE 196). At that ARC meeting, they also reviewed ‘PLAT”, which DoSE Adkins explained

are the present levels of academic performance that talks about monitoring, any information we have for updates as far as where his levels are for social emotional status, academic performance and concerns that we might need to look at. ...[T]hey’ve added in... his explicit social skills instruction. They’ve added in supplementary extra services, behaviors, monitoring sheets, feedback, verbal prompting hearings, de-escalation corrective feedback, token economy, extended time.

(TE 154). Contrary to the mother’s testimony that no planning took place for the student’s transition from elementary to middle school, the April 2017 ARC (page 150 of the school’s initial disclosure) reflects, as Adkins testified, that

[the student] will participate in 100 minutes of resource and social skills lessons weekly which will end August 9, 2017, and starting in August 10, 2017, will participate in 45 minutes of resource life skills daily. That’s to show where he will be transitioning over to the middle school schedule.

(TE 155). The life skills curriculum addresses the same thing as social skills, but it is age or grade specific (TE 156-157). Elsewhere hereinbelow are described other efforts and adjustments the school made prior to proposing a change in placement.

5. The student has had a series of behavior intervention plans (BIP), as well as three functional behavioral assessments (FBA), and various evaluations.

The student has had multiple BIPs throughout his schooling (TE 112), four of them in total by estimate of the parent and one Hardin employee (TE 126). The student’s first FBA (D Exhibit #2) was performed in 2012 when the student was in kindergarten and a BIP was put into place. (TE 64). At an ARC meeting in September of 2012, the BIP data was evaluated. The parent expressed concern about the student’s behavior and the student was showing the same

type of behavior at home. The outcome from the discussion was a change in his IEP to placement into the PASS program at the elementary school. (TE 66-67). Under the 2012 IEP (D Exhibit #3), described in detail by Kim Adkins, DoSE (TE 68), the student also was pulled twice a day, thirty minutes each time, for a total of one hour of social emotional services. (TE 69; D Exhibit #3).

The student was reevaluated in the spring of 2014 and as a consequence of that evaluation the ARC changed the student's classification to emotional behavioral disability. (TE 70; D Exhibit #4). (The text of the evaluation appears in pages 472-483 of the original disclosures of Defendant). In May of 2014, another ARC meeting occurred and the parent was present with an advocate. (D Exhibit #5) The ARC agreed that the placement in the PASS program should continue. (TE 78).

The student moved to Tennessee after third grade, but returned to Hardin in spring of fourth grade. As found elsewhere herein, the school reviewed the Tennessee IEP and BIP and found the behaviors observed and the services provided comparable to what the student had been receiving in Hardin prior to moving to Tennessee. As described elsewhere herein, the student was reevaluated. Also described elsewhere herein, the BIP continued to be modified from time to time and a third FBA was initiated in the fall of 2017.

6. The student has a long history of behavioral issues at school that have reached a point where the student routinely frightens, threatens and endangers other students and school personnel.

The school system maintains a database of behavioral referrals. Kim Adkins, the DoSE, testified as follows:

All behavior issues don't get entered into the database because many of those issues are dealt with in the classroom or with special support services. But anything that is... being

a sustainable offence or reason to remove student from the school setting would be entered into the database, who keeps a running log for data collection.

(TE 78). The student had 33 behavioral referrals that appear in the database from first grade through third grade. (TE 78; D Exhibit #6). Adkins testified as follows concerning the elementary school years, prior to the move to Tennessee:

[T]hey noticed at [the elementary school] through...the data that they have collected, his language started to be very vulgar....I know I had spoken to mom at times on the phone about – about those concerns. He had started to become more aggressive...[H]e had started, at that time, to act out physically toward teaching staff.... [H]e did have success out of the classroom with PASS, into the gen-ed setting. But there were bouts of periods where he had to be pulled back into the PASS classroom for services within that classroom because he was unable to manage or keep his behavior under control in the gen-ed setting.

(TE 79-80). The student moved to Tennessee after third grade but returned in spring of fourth grade. DoSE Adkins testified regarding review of the Tennessee IEP and BIP as follows:

[The BIP] talks about the target behaviors, of physical aggression... and gives procedures for decreasing or strategizing to work on the physical aggression for behavior ... it does have on the back that he is currently resorting to physical aggression on a daily basis in order to express wants and needs. Often requires physical intervention from an adult. And he cannot be convinced to use his replacement behaviors, and continues aggression on staff and peers. So that – that is what he came in with when he came back to Hardin County in 2016.

(TE 88-89).

An ARC was convened December 8, 2016, at the parent's request "because [the] parent actually requested this ARC meeting in December because she had concerns about behavior at school and at home." (TE 135). She reported she had "she can tell when he's starting to escalate as far as his behavior is concerned. She notices he does not have a concept of boundaries." (TE 135). The parent testified that she pulled the student from the middle school basketball team because

[h]e was having some behavior and I just thought that that would be...he needed to have some consequences, uh, for his behavior. I told him that basketball is... a privilege and if you can't... do things that you need to do then he can't play.

(TE 30).

The principal of Bluegrass Middle School, Michael Elmore, testified at some length concerning the escalation of disruptive behaviors by this student, who physically is considerably larger than a typical sixth-grader, beginning in Fall of 2017. There have been numerous and frequent behaviors that frightened, threatened, and endangered students and teachers at the school. It serves no purpose that will benefit the student to recount the details of those behaviors in these findings, but accounts appear in Defense Exhibit #22 and Elmore testified as to some of them (TE 296-320). Evidence of the seriousness of the behaviors, the magnitude of the disruption the student causes, and the inability of the student to control himself, or to learn how to do so in his current placement, is indisputable and overwhelming.

7. The student's behavior problems are not caused by stereotyping, unsympathetic school personnel or exposure to bad behaviors of other students.

The parent testified that "When [the student is] in a place where no one knows about his disability, no one knows about his behavior issue, he does really well." (TE 29). "[The student] said [to me] that every little thing that he does [the teachers are] just picking at." (TE 48). The student testified that "one of the teachers is always there behind me like I can't like be a regular kid without them always following me around." (TE 57).

The parent also testified that "I felt like that with being... in that PASS classroom, that the way that things are in there that those kids do pick up other behaviors... from other students." (TE 200). The parent testified that "these students [in College View] are students that are there

for disciplinary actions as opposed to disability, having a disability.” (TE 50). The parent was concerned that her student would mimic bad behaviors of students at College View. (TE 50).

The parent, in this exchange with the principal of Bluegrass Middle School, suggested that the student’s felt insecure because he was snubbed by other students and that could be causing his behaviors:

Parent: [D]o you feel like that that may be one of the issues with [the student] is that he does feel a little insecure because the students ... don’t want to talk to him, don’t want to play with him, he feels a little bit like an outsider, do you feel like that that could cause behaviors?

Principal: I almost think it’s the opposite. I think his behaviors has created a situation where students, just like it was mentioned a couple of times that students didn’t even know [the student] but yet... the way he came across, they didn’t want to go any further. Or, if they did know him, what I have noticed they do know him, that, because of his threatening and aggressive behaviors, that they do not want to go any further, they’ll let him have the chips. So I think if he learned to manage that piece it would turn around the social piece.

(TE 330).

The student’s history of repeated, frequent, and escalating behavior problems that clearly interfere with his ability to learn and the school’s ability to teach others cannot be explained by, nor was there evidence of a causal link to, stereotyping, unsympathetic school personnel, or bad behaviors of other students to whom he is exposed.

8. The PASS placement in grades 1 through 3, before the move to Tennessee, had mixed results.

DoSE Adkins testified regarding those years as follows:

I felt like academically his serves and needs were being met in the PASS room and in the gen-ed setting. He’s always been academically strong. He did struggle there at some point with math... [W]e thought that most of his deficits that he was having in math came because he was having such behavioral problems in the math room and was having to be removed from the math room to go to the PASS classroom...[T]eachers do bring the instruction down to teachers that’s in the PASS classroom is certified to provide that instruction, but he – he did miss a lot of content, either because he was not in the

classroom or his behavior was preventing him from participating in the curriculum in your classroom.

(TE 82-83).

9. The PASS program, even with a modified BIP, is no longer working for the student.

Discussions with the parent about alternative placements began as early as February 2017. College View was not the only alternative examined. Ms. Adkins made inquiries at Hardin County Day Treatment, a DJJ facility that has a Hardin school there, but they would not take such a young student. (TE 150). The school was not seeking a change of placement at that time, but was offering to explore alternatives because the student was having difficulties in the PASS program and the school and the parent both were concerned. (TE 150-151). Contemporaneous with this expression of concern, there was an incident described in the parent contact log entered by the principal of the student's school:

[T]his was an altercation where [the parent] was called to come pick up her student after he had been in an altercation with another student....[H]e refused to follow the directions of any staff member, refused to go to PASS classroom. He had to be escorted to the PASS room. He managed to get out of the classroom, go back upstairs and confront that student again. He had to be escorted back to the gym, wait for his mother. He ran from the staff and went after the student again. He was then...taken down to a different room. And when his mother arrived to the school she asked that the school call the police.

(TE 151-152). In the April 2017 ARC meeting, the following was noted:

[the student's] typical behaviors include being disruptive in class, talking out, singing, getting out of his seat, running across the classroom, verbal aggression, speaking disrespectfully to others, calling names, cursing, threatening, defiance, refusal to complete assignments, tearing papers, throwing items, he is argumentative with adults and peers....When in class he calls other students names, laughs, makes fun of them. His behavior has improved when there's clearly outlined expectation given by a male or someone he is not able to intimidate. He is very disrespectful to females.

(TE 155; page 146 initial disclosure).

Jennifer Roy, who provides support for the PASS coaches, testified as follows:

[The student has] continued to show... behaviors that have been detrimental to his education as well as other students' education....[L]ately, it's been very – very difficult for [the student] to be able to learn in the setting that he's in.... [T]he few times I have been there have been a few times that I've been in the classroom... I periodically go around and just check... on the PASS coaches in the program itself...have witnessed disruptive behaviors by [the student] to the point where the teacher cannot teach the lesson.

(TE 107). She described witnessing an incident in the PASS classroom prior to Christmas of 2017:

I came to give Mr. Morrow...the PASS coach, a document... and he was ... in the middle of a social skills lesson with [the student] and a couple other students that are in that class – that were in that classroom. And [the student] was very disruptive, kept interrupting... very loud and defiant. It was very difficult. Mr. Morrow was trying to get him to understand, to clam down and so forth and – and it just escalated.... I saw [the PASS coach] attempt to de-escalate, attempt to use positive behavior strategies with [the student] and he was unable to teach [the student] or the other students because of the behavior.

(TE 107-108).

DoSE Adkins testified that in the September 2017 ARC meeting, which the parent attended (TE 159), based on data the school had collected, the ARC

changed [the student's] IEP to include the, as you all were calling it earlier, the smaller class they added in the resource language arts class that's shown on page 111, at the bottom, special education services. They were going to add in, in addition to the social skills, they added in 40 minutes of resource time for language arts. And at this meeting is when they also, because of the behaviors, they took formal consent form the parents to do a formal FBA, a new formal FBA.

(TE 159). In addition, a modification of the BIP was made (D Exhibit 17), which included participating in the bullying prevention program. (TE 161).

10. The school conducted a manifestation determination in the November 2017 ARC meeting.

The parent was under the misapprehension that the proposed change of placement was punishment rather than related to addressing the student's needs due to his disability, testifying that

for them to recommend a change of placement and say that it is not a manifestation of his disability, I don't understand that at all. ... [T]hey said it was not...due to his disability and I, I don't understand that, how it's not.

(TE 33).

There was an ARC meeting on November 14, 2017, attended by the parent. The record concerning this meeting is D Exhibit #18 and also appears in pages 90 -104 of the original disclosure by the school. DoSE testified that part of the reason for the meeting was to discuss the manifestation determination, which had been triggered by the student's suspension from school for disciplinary reasons:

[The student] was approaching ten days [of time removed from school and] we always do on or before the 11th day, we conduct a manifestation determination...[T]hey met on this date, looked to see if it was manifestation, and they said, yes, it was manifestation of his disability...and then the next question is has behavior intervention plan been developed or include instructions for strategies of instruction and behavior management, yes. And then did the ARC determine placement for the services, yes.

(TE 165-166).

Under the regulations, if the behavior at issue is a manifestation, the next question is whether the IEP was being implemented. The ARC determined it was. (TTE 215). The next steps should be to conduct an FBA, unless one has already been conducted. DoSE Adkins testified that "Two had been conducted at that point" and another was in process. (TE 166). The two that had been conducted were from 2012 and on 11-6-15 during his matriculation in Tennessee. (TE 167). Although the school did not have the actual FBA from Tennessee, because the end product is a BIP, the contents of the BIP provide the information needed. (TE 169).

The parent also was under the impression that the ARC could not consider placement change unless another FBA was conducted *after* the incident for which the student had been suspended.(TE 217). Adkins testified that there is no rule that a formal FBA must be conducted within a certain time of the conduct that triggers the manifestation determination and that school had enough current information to draw conclusions about whether the IEP or BIP should be modified or placement should be changed. (TE 167). The conclusions of law will address this question of law.

11. The school did not give proper notice of the November 15, 2017 ARC meeting because it was not given seven days in advance of the hearing.

The summary notes for the meeting state as follows:

Phone call was placed on 11/10/2017 to set up today's meeting. Mom agreed to meet on 11/15/2017 and to waive 7 days meeting notice. Notice was developed and sent home on 11/10/2017.

(D Exhibit #18, p. 100). There was no testimony explain what "sent home" means. The hearing officer interprets that to mean sent home via the student. Regardless, assuming the notice was delivered on 11/10/17,that was not seven days in advance of the meeting.

By earlier ruling, it was ordered that statements made by the parent during cross-examining school witnesses would be treated as testimony from her and that she would still be under oath. DoSE Adkins and the parent testified as follows in this exchange:

Adkins: ... the notice that you actually get for a meeting

Parent: um-hm.

Adkins: and I would have to find that one for that meeting

Parent: I didn't – I didn't get one. Remember, he sent the e-mail?

Adkins: You should have still gotten a notice.

Parent: I signed the notice at the ARC meeting.

Adkins: Correct.

Parent: Yeah. I didn't' receive one prior.

Adkins: But there still would be a notice

(TE 218-219).

Neither party referenced in post-hearing briefs the notice sent by the school and where it could be found in the record. The same is true regarding the email the parent says gave her notice of the meeting. Therefore, no finding is made regarding the content of the notice.

12. The parent waived the notice requirement for the November 15, 2017 ARC meeting.

The parent testified that she agreed to the meeting but did not intend to waive the notice requirement:

[I]n actuality I didn't intend to waive the 10 days [notice requirement]. The reason why I agreed to a meeting 3 days later is because he said in the e-mail [the student] was due to go back on Monday. He's only suspended for 3 days. He said the [the student] is not to return until the ARC meeting. So of course I said well we're going to all agree to it. I don't want him out of school until...we can get this ARC meeting together, so I agreed to the meeting.

(TE 31). The hearing officer finds that the parent's statement to the school that she agreed to the meeting constituted waiver of the notice requirement. The fact that she had a motive or reason for doing so does not make it any less of a waiver.

13. The school proposed a change of placement in the November 2017 ARC meeting, to wit, being in resource class for all support class work, language, arts, math, science, and social studies in the College View program.

Ms. Roy, who participated in the ARC's deliberation on change of placement, described the thought process that led the ARC to consider a change of placement:

The school – the members of ARC at the school... had been attempting various things. They had an ARC earlier in that year to place [the student] in a small group classroom, a resource special education for language arts in attempts to – that was a classroom that he had been having more behaviors in, so they thought they would try that....[T]he had worked on that. Had not really seen any success, [the student] continued to be – to be disruptive and had to be brought back to the PASS classroom for re-

orientation....[T]hey decided that he – it appeared that he just needed more supports...than what the PASS program offers....[S]o that is why the ARC met in November was to discuss other options for [the student].

(TE 109). Roy testified what they'd tried with PASS was the most restrictive classroom that was offered in Hardin except for College View, that the student needed more mental health counseling and that College View had full-time counselors, and that the student would be best served educationally at College View, based upon the data that the school had gathered. (TE 109-111).

Adkins testified that “the ARC determined that... these are behaviors that he’s been displaying, it’s not something new that we haven’t addressed, these are behaviors that he has had.” (TE 216). She testified that

[o]ne of the proposals that they were making, because of the behaviors, was to change the placement to try something new. Try something different. Because the programming didn’t seem to be meeting his needs or it wasn’t appropriate for him because he wasn’t making enough progress in his current setting.

(TE 217). Adkins testified “It was proposed that he would be in resource class for all support class work, language, arts, math, science, and social studies. And also participate in social skills for 50 minutes a day.” (TE 171) Under placement options, the proposed IEP provides “part-time gen ed and part time special ed” but with “all his core content classes would be the resource classroom, which [would include] the social studies, science, social skills, math, language arts” with lunch and other classes in a gen-ed environment (TE 172). Quoting from the proposed IEP, Adkins recited the reason given for the placement change:

The intensity level of the instruction, areas of reading, writing, math and behavior support can best be provided in the resource setting to address [the student’s] skill deficits. The resource setting will allow for modeling, guided instruction, behavior intervention, skill practice that can be provided – than can be provided in a co-taught gen ed class. [The student] requires more intensive Specially Designed instruction and supplementary agent services than can be provided in a gen ed classroom setting.

(TE 173; see D Exhibit 18, p. 98). College View has a special ed resource room to provide this service but Bluegrass does not. (TE 174). The notes from the meeting reflect that the parent “did not agree to change of placement without seeing College View first” (TE 171) and because shortly thereafter a due process complaint was filed, the student remains at Bluegrass under stay-put. (TE 175).

14. The proposed placement at College View is more restrictive than the current IEP administered at Bluegrass, but it provides more intense, immediate and one-on-one services.

Jennifer Roy, who is in charge of the PASS placement program, testified that PASS coaches are special ed teachers with training in PASS (TE 100-101). She described the program as follows:

[I]t’s an acronym for positive approach to student success. It is a program that we have in several of our schools, specifically for special education students that have behavior disorders.... [T]he goal of the program itself is to equip the student with understanding of replacement behaviors, giving appropriate social skills instruction and having them in the general education classroom as quickly and as much as is possible. ...[I]t’s very individualized program. Once the student has shown that they understand the program and how it works, and...has understanding of their replacement behaviors, and has behavior that is.. acceptable enough to be able to go out into the classroom where they have an understanding of what’s going on, then they are immediately put out into their regular classrooms..... They are frequently monitored by the teacher as well as the assistant that works with the PASS program.... What I mean by that is at least every 15 minutes... they go around, they check on the student to see how things are going. They have a communication system that the regular class teachers use with the student and the PASS coaches, and if things are going fine then they remain in the class, no interruptions....[I]f a student is exhibiting a target behavior then, and they are not responding to the redirection that is given by the classroom teacher then they would come out of the classroom to work with the PASS coach. We call that reorientation....[T]hey may do reorientation quickly in the hallway if the student is able to de-escalate and understands what they’re...supposed to be doing and are ready – they show readiness to go back in the classroom then they immediately go back. Sometimes they have to come back into the PASS room where they work on de-escalation there. They go over replacement behaviors, they get re-taught social skills, they may complete some assignments just to kind of get back in the groove, and then they are... put back in the regular classroom as soon as possible. The length of the reorientation can vary... [they

might be there for] a class period, they might be there for the rest of the day, they might be in there for a week or so.... [I]t all depends on the needs of the student.

(TE 99-100). When asked how College View would be more restrictive than the PASS program,

Ms. Roy testified as follows:

Smaller environment, more one-on-one. ...[T]he class sizes are much smaller than what we – what they offer at Bluegrass or the other schools.

Q. And why would that matter?

A. Get more one-on-one individualized support....[T]hey work through a level system....[T]hey have more.... Mental health counseling there that they are on a daily basis... where at other schools it is not on a daily basis for the students.”

(TE 116-117).

Robert King, Principal of College View, gave the following overview of the program:

[W]e have a smaller class size setting. The maximum size that we can have in a class is 15. Most of our classes run anywhere between 8 to 12 at this time. Upon entry into our system...middle school students are given a series of tests for math, for reading, a social emotional screener to see if there's any at-risk behaviors that need to be immediately identified and supported.[T]hey are automatically paired with a therapist. We have full-time therapists at our school to support and assist these students and an individual... plan is created for them for their therapy, whether they're to look at the antecedents for behavior, to look at the root causes of why the behavior's manifesting that caused them to be placed in an alternative placement to begin with.

(TE 259-260). King explained how therapy is interwoven with core content classes:

They have core content classes that follow the pacing guides, just like any other middle school.[But what] we do is we enter, we weave therapy into College View. We work extensively with Communicare...[T]hey provide our therapeutic support services for...our students. We have SCA's which is our community support assistants that work directly with students. We also have licensed therapists, 2 full-time licensed therapists that meet with students individually, depending on what their needs are, sometimes bi-weekly, weekly,.. bi-monthly....And then we also have group counseling for the middle school students to work on anger or depression or anxiety.

(TE 262-263). King explained that because of the small class sizes and full-time counseling staff, if a student has an issue he or she “can immediately be pulled and counseled by their therapist, or by licensed therapist...” (TE 264).

Students basically work their way through levels of behavior under a point system, beginning at level one with the goal of reaching level four:

[L]evel 2 takes about 10 days. Level 3 takes roughly about 15 days and then they’re on level 4. Once they get to level 4 they don’t have to wear a uniform anymore, their hands come out of their pocket...they have a lot more privileges. They have access to the unstructured events at their home school, such as Bluegrass Middle...[S]o that way we can see how they relate with peers before they actually get back into the classroom. But once they do reach level 4, they’re eligible to have a transition meeting set up so that we they can return back to their home school.

(TE 266-267). While it’s possible to complete the program in 30 to 35 days, King testified that the average stay at College View is 10 weeks. (TE 271). King described success as follows:

[A] success is a student back at their home school, enjoying all of the benefits of being in a regular public school, without having all the emotions and all the stress of not knowing how to handle a situation that they get into [W]hat’s going on with them inside has been adjusted to the point where now they feel comfortable with themselves, their self confidence is up, and now they can have appropriate peer-to-peer relations that allow them to stay in the classroom, allow them to get good grades, and allow them to graduate high school and go on to college.

(TE 270).

15. The proposed IEP with placement at College View provides the student needed services in the least restrictive environment that is feasible.

The student’s behavioral problems, described elsewhere herein, make it not feasible to educate the student in a general ed setting until he learns to better control those behaviors. As the parent herself pointed out, “I also felt that he was in PASS – that when he is in PASS room for behavior he is not getting the same academic... when he is in the regular class.” (TE 199). The

solution is to provide core content instruction in a controlled special ed setting, which is what the proposed IEP provides.

The parent raised a concern if the student attended College View and then returned to Bluegrass Middle School, differences in the curriculum would cause the student to be behind. King testified that ameliorating emotional and behavioral issues would more than offset that concern:

[I]f a student is getting in behavior and being removed from instruction at the regular school at an increased level that's causing them to be even considered for my placement, then they're not having access to the instruction anyway. So, yeah, they might have a little bit behind academically, but when they're socially emotionally and self-confidence able to absorb the information and stay in classes when they come back, I would say it takes them a very short time to catch up, and then they have far more success than had they stayed in that environment continuing to miss classes....

(TE 283).

Michael Elmore, the principal of Bluegrass Middle School, testified that

[t]his is a young man that has a wonderful heart and that by not giving him the tools that I think College View could give him we're just doing him a disservice, because he's a good young man, he just needs some extra tools for really a short amount of time.

(TE 325).

16. The services needed under the proposed IEP could not be delivered at Bluegrass, even if the parent hired private therapists to come there and provide additional services.

College view has “more [mental health] services every day all day at College View” than in any other school and the extent of those services is not replicated anywhere else in the district (TE 139). The parent testified that “I think he should absolutely receive ... some therapy from the outside.” (TE 27). However, the parent believes that the school should provide or allow her to employ a therapist to deliver services to the student at the middle school as an alternative to changing the placement to College View. The parent testified:

I've asked the school, several times ... if we can bring in... a therapist to the school. I know that they have people come into the school, that's an option for a child on IEP. And they just keep saying ... they can give him that at the new school.

(TE 26). It was unclear whether the parent wanted to school to hire these outside therapists or was offering to pay for and contract with therapists herself to come to Bluegrass, which is permitted. (TE 328). Regardless, in terms of providing special education, the intense instruction in all core classes in a special ed setting, described hereinabove as the reason for a change in placement, cannot be met simply by hiring therapists to come to Bluegrass as the parent has proposed. College View has a special ed resource room to provide the core class instruction in a special ed setting that the student needs, but Bluegrass does not. (TE 174). Robert King, Principal at College View, explained how the hands-on intervention in the resource classroom at College View works:

Q. So why can't the home school [Bluegrass Middle] just do this?

A. Well, unfortunately the home school has a lot more kids....[W]e're a little different- a lot different, actually. We have lower class sizes....[W]e really are able to – because we have lower class sizes, one of the first things that we can do that the regular school can't do is we can answer questions right away. They don't have to wait all period and maybe sometimes not even have their questions answered because we do have lower class sizes...[I]n addition to that, we have more therapy support because of our relationship and arrangement with Communicare, so that the way they – when kids get pulled out they're not pulled out ...by just an assistant principal, they're pulled out... by a behavior coach who triages them, and if the behavior coach says something else is going on then he contacts a therapist, which is on site, and the therapist has... a conversation with them and a meeting with them, counseling session with them, to try to find out exactly what the antecedents were, what happened, what triggered this?...[W]e can hopefully help put the student on the right pat of making the better choices or at least start to develop those skills necessary to handle those situations better when they come back again.

(TE 268-269). The student's serious behavioral problems cannot be addressed at Bluegrass. College View, on the other hand, is designed to address such problems. Bluegrass is not equipped to provide what the student needs, but College View is.

17. The student was not permitted to sit outside in the hall or go to the PASS classroom unescorted in at Bluegrass Middle School, though he had done so in elementary school.

Regarding leaving the classroom as part of the PASS program, the parent testified that during his elementary school days, the student was free to leave the classroom when he liked:

[H]e's tried to run out of the classroom or leave the classroom, when previously – when he was in elementary school... where he would be in the gen-ed setting... if he felt... anxious or fidgety or upset, anything that he felt – which is normal for a child with ADHD – he didn't have to interrupt a class, he didn't have to say I need to leave. Um, they placed something on the door. He was allowed just to get up, quietly walk out, flip the sign over to let the teacher know I'm going to the PASS classroom. He would remove himself and go to the PASS classroom, or they would set a desk outside and just – he would just sit there.

(TE 34-35). Kim Adkins, DoSE, testified that removal from the classroom also occurred at the request of the teacher:

[The parent] referenced the colors [on the classroom door], that is part of [the PASS program]. They will ...have a continual monitor that monitors the classrooms that the students are in. If a teacher in a classroom feels that the student is struggling or needs to be pulled out the colors will change on the door so that someone knows to come in and remove the student. ... The teacher of the classroom, or the student themselves, can ask to be excused to go to the PASS classroom.

(TE 80-81). There was no testimony regarding how often the student's removal was at the request of the teacher rather than the voluntary choice of the child. However, at middle school, the student was not given the option to remove himself. The parent testified that

[t]hey won't allow him to – I've asked them, they said that they can't allow him to do that. They did say – they said he's disruptive in the hallway... when he sits out there... and then in the ...general ed setting he's not allowed to do that at all...[T]hey said...when you sit him in the hallway...he can be disruptive...but they don't allow him to just kind of quietly get up and walk back to the PASS classroom from the gen ed setting.

(TE 35-36).

18. The school's decision that the student could not sit outside in the hall

unsupervised or go to the PASS classroom unescorted in middle school was appropriate and in the best interests of the student as well as other students.

Elsewhere herein the student's behavior issues are discussed. The behaviors escalated in 2017 and negatively impacted the student's learning as well as disrupting the learning of others.

Additional supports were added to the BIP, Adkins said

because of the severity of the problems he was having in transitions. And not only for protections of other students but for protections of [the student], too. I think he feels like, like he said, he felt like they were following him or watching him. This [was an escort] to assist him with his transition....[T]hat was part of the new thing that was added in at some point.

(TE 180). The school's decision was an appropriate response to the circumstances.

19. At all relevant times qualified professionals were appropriately teaching social skills, measuring the results by collecting and analyzing data, and sharing the results with the parent.

The parent raised issues concerning whether social skills were being taught, how they were being taught, and whether the parent was being kept informed. The facts pertinent to those issues are addressed below.

The parent testified she's been in the PASS classroom approximately 15 times (TE 54) and the most students the parent saw in the PASS classroom at any one time was 5. (TE 37). "I've gone in there and kids have been physically fighting." (TE 37). The parent testified that "I've been in [the PASS] classroom and it is chaotic. It's completely chaotic." (TE 36). Jennifer Roy, who is in charge of the PASS program, concede that on occasion there might be disruption in the PASS classroom – students go to PASS when they are unable to control their behaviors in the gen-ed setting - but it would not happen with frequency. (TE 115). As described elsewhere,

one instance when Roy did observe a student out of control in the PASS classroom, it was the student who is the subject of this proceeding.

Jennifer Roy, the consultant for the PASS program, testified that the PASS coaches are special education teachers who receive special training, that they collect data and share that with the parents, and that the PASS coaches themselves are subject to evaluation by their administrator (TE 100-105). Teachers also collect data:

[M]ost recently the school developed an additional behavior intervention plan and was implementing that. When we met in December [2017] at the ARC... an additional updated behavior plan was presented and discussed and... the teachers in the school ... have been keeping documentation of when interventions had been provided... who's been providing them and so forth. They've been keeping a daily log of when those things have occurred. Those positive behavioral strategies.

(TE 112). Roy described some of the techniques used to teach social skills and behavior replacements:

[Y]ou can do role playing..., you can model for them, you can... give them check list and reminders and so forth where they have the skills written down that they can actually have as a reference... [Y]ou can work with them ...if they're in class you can have verbal cues, non-verbal cues and so forth to remind them of the steps. You might have visual cues.... I mean, there's a multitude of ways to – to do that. And the social skills lessons that are done are – the programs that are used are research-based programs that help the teachers that help the students with those particular skills.

(TE 113). The parent acknowledged that such instruction was included in the current IEP (TE 38), but testified “I believe he is getting social skills [instruction]... [but] I don't know what it consists of and how it's being done.” (TE 40). However, in other testimony, the parent acknowledged that she has been informed about the techniques used:

[A] lot of it...is not even written down that they said that they were doing.... [School personnel] verbally told me some things that were being done. I didn't know anything about them because they're not in any of the paperwork, but she said that they're getting done.

(TE 38). Regarding documentation of the school's collection of data, analysis, and sharing results with the parent, the parent acknowledges receiving the results:

Q. [A]nother concern you have is about whether they're actually teaching him social skills in the PASS classroom?

A. Correct.

Q. Have you received any data or reports from the school about that?

A. I have. I have.

Q. you have?

A. I have. It just basically shows... how he's done...the percentage of where he needs to be as opposed to the percentage of where he is. As far as specifics... on exactly what he's doing in that social skills, what they're talking about, what questions he's being asked, what... projects they've been doing, I don't know, I haven't received that.

(TE 49). The hearing officer finds providing a list of all the techniques special ed teachers used to teach social skills together with a list of everything they did in a given day is not necessary for meaningful parental participation.

20. The school appropriately made changes to the BIP after initiating a formal FBA in September but before the formal FBA was completed.

The parent's examination of DoSE Adkins (TE 229-238) makes the point that there were changes to the BIP before the formal FBA was completed. Adkins makes the point, which is controlling, that FBA is a term that applies to an assessment of collected data to hypothesize what the function of the behavior is and does not require a formal document labeled 'FBA':

There are informal FBAs, there are formal FBAs. There are FBAs that teachers do, there are FBAs that psychologists do....[I]t is a matter of just a hypothesis of what is a function of the behavior, and we're going to kind of,... collect some data and try to hypothesize what the function of the behavior is. ...[Y]ou don't have to have an FBA to have a BIP.

(TE 231). Given that the student's behaviors got worse in the fall of 2017, it was appropriate for the school to make modifications to the BIP. While the parent speculated that the student's behaviors might be due to deficiencies in the BIP, she did not establish that any of the provisions of the BIP were deficient or contributed to the student's escalating bad behaviors.

21. The student's placement at College View is not a punishment.

The parent testified that

I just feel like [placement at College View] is disciplinary. ... I feel like that's kind of being changed a little bit...because...he's going to an alternative school. I mean, it's an alternative school... [N]o matter how you flip it and turn it... he's going to an alternative school and he will be in a classroom setting in a classroom with kids his age that are there for disciplinary actions.... So ... I don't see how it's not disciplinary.

(TE 254).

However, DoSE Adkins testified that “not all students at College View are there for disciplinary reasons.” Other reasons students attend college view include the smaller setting, the therapy services, and the 22-credit rather than 26-credit high school program, and more flexible schedule. (TE 255). Robert King, principal at College View, testified “[College View has] students coming for a variety of different reasons.” (TE 260). One reason middle schoolers attend is they have been victims or perpetrators of bullying. The more controlled environment at College View prevents both, allowing the students to concentrate on studies and therapy. (TE 261). Some students are there for anxiety depression, because they have trouble following rules, because they've experienced traumatic events and “need a safe place to work through them.” (TE 261-262).

22. The parent failed to prove that she was not given a copy of the summary notes of the November 15, 2017 ARC meeting or that when she did receive them that the notes were false and inaccurate.

The parent alleged the foregoing in the due process complaint. There was no proof that the notes of the November 15, 2017 ARC meeting are false or inaccurate.

Regarding receipt of the notes, the parent did sign the conference summary minutes, which state “All documentation which includes Procedural Safeguards, special transportation

forms, Conference Summary, IEP, determination of education representative, and progress monitoring were given to Mom.” (See 100-102, initial disclosure by school). Additionally, according to the contact log, Mr. Murrow document in person “Gave her a copy of Procedural Safeguards, IEP, Conference Summary, Educational Representative form, progress monitoring and PASS data at conclusion of meeting.” (1040 – initial disclosure).

The conflict regarding whether she did or did not receive notes arose when the parent subsequently attempted to return the student to Bluegrass even though the ARC had changed his placement to College View on November 15, 2017. When the student was not accepted at Bluegrass, the parent phoned DoSE Adkins on 11/27/17 and complained to DoSE Adkins that “these decisions were made without her knowledge and that she had no information on this.” This cannot be true, because she was present at the meeting where the change was made. The hearing officer speculates that the parent was under the impression that she had to agree to the change of placement or the ARC decision of November 15, 2017 would be null and void. Regardless, she told DoSE Adkins that she had only been given the signature page from the ARC meeting. It seems improbable that she would be given one page but nothing else, or that she would not have noticed at the time and objected. Regardless, in response to her assertion, a full copy of the notes was mailed to her on 11/29/17. (see 1040, initial disclosure of school).

CONCLUSIONS OF LAW

The party seeking relief bears the burden of proving entitlement to relief by a preponderance of the evidence. In this case, the student filed the due process complaint bears the ultimate burden of persuasion on the elements of student’s claims. *Schaffer v Weast*, 546 U.S. 49,

57-58 (2005); KRS 13B.090 (7). The School's FAPE obligations are set forth in *Board of Education of Fayette County v. L.M.*, 478 F.3d 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.

(emphasis in *L.M.*)

I. THE SCHOOL'S DECISION THAT THE STUDENT COULD NOT SIT IN THE HALL UNSUPERVISED OR GO TO THE PASS CLASSROOM UNESCORTED WAS NOT FAILURE TO PROVIDE FAPE.

Per the fact-findings the decision was appropriate and in the best interests of the student as well as other students.

II. THE SCHOOL DID NOT FAIL TO PROVIDE FAPE BY IGNORING THE STUDENT'S CHANGING NEEDS AFTER RETURN FROM TENNESSEE.

Per the fact-finding, the school conducted evaluations, held ARC meetings, modified BIPs, and took other steps to attend to the student's special education needs after the student returned to Hardin in spring of 2016.

III. THE SCHOOL DID NOT FAIL TO PROVIDE FAPE BY NOT IMPLEMENTING APPROPRIATE SOCIAL SKILLS SERVICES REQUIRED UNDER THE I.E.P.

As found in the findings of fact, at all relevant times qualified professionals were appropriately teaching social skills, measuring the results by collecting and analyzing data, and sharing the results with the parent.

IV. THE SCHOOL DID NOT FAIL TO PROVIDE FAPE BY MODIFYING A BIP BEFORE A FORMAL FBA HAD BEEN COMPLETED.

There is no prohibition against modifying a BIP without first performing a new full and

formal FBA. BIPs are created and adjusted all the time based upon data collected and analysis of what is working and what is not working. The school was responding appropriately to escalating behaviors by including new and different supports.

V. THE SCHOOL DID NOT FAIL TO PROVIDE FAPE BY PROPOSING A CHANGE IN PLACEMENT PRIOR TO COMPLETING ANOTHER FORMAL FBA.

A determination was made that behavior for which the student was suspended was a manifestation of his disability. The next step is to perform an FBA if one has not already been performed. Per the fact-findings, two had been performed. Also, FBA is not defined by the regulations to require a formal document or even a written document. The fact that a formal FBA was in process did not prohibit the school from proposing a change of placement based upon the data and information they had accumulated over the years. Additionally, there was no evidence to suggest that the FBA in process, which was completed shortly thereafter, would have warranted a different placement decision had it been in hand on November 15, 2017.

VI. THE SCHOOL DID NOT FAIL TO PROVIDE FAPE OR COMMIT A PRECEDURAL VIOLATION BY IMPROPER NOTICE OF THE NOVEMBER 15, 2017 ARC MEETING OR BY FAILING TO PROVIDE NOTES FROM SAME.

Per the fact-findings, the late notice for the meeting was cured by the parent's waiver and the parent failed to prove that notes were not provided to the parent.

VIII. PLACEMENT AT COLLEGE VIEW DOES NOT VIOLATE REGULATIONS REGARDING LEAST RESTRICTIVE ENVIRONMENT

Per the fact-findings, Bluegrass was not working. 707 KAR 1:350, Section 1(1) provides that

[t]he LEA shall insure that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if education in the regular education environment with the use of supplementary aids and

services cannot be satisfactorily achieved due to the nature or the severity of the disability.

Ruling on issues #1 and #3 listed at the beginning of these findings are collapsed into this conclusion of law. College View will provide the student with intense instruction in all core classes in small classrooms in a resource setting with one-on-one attention to behavioral modification. Per the fact-findings, the manner in which services are delivered at the highly-structured College View program cannot be replicated by simply adding counselors at Bluegrass. However, even if Bluegrass could be completely remodeled to replicate College View, where two or more locations can meet the child's special education and related services needs, school administrators have the flexibility to assign the child to a particular school or classroom. Per the fact-findings, the student needs services delivered in the manner available at College View and it is the least restrictive environment that is feasible.

FINAL ORDER

The hearing officer finds for Respondent on all issues.

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.

Dated April 7, 2018.

/s/ Mike Wilson

MIKE WILSON, HEARING OFFICER

CERTIFICATION:

The original of the foregoing was mailed to Todd Allen, KDE, 300 Sower Blvd., Frankfort KY 40601 and copies mailed to [REDACTED]; [REDACTED] on April 7, 2018.

/s/ Mike Wilson

MIKE WILSON, HEARING OFFICER