

COMMONWEALTH OF KENTUCKY
KENTUCKY DEPARTMENT OF EDUCATION
DIVISION OF EXCEPTIONAL CHILDREN SERVICES
AGENCY CASE NO.: 1718-04

■

PETITIONER

VS.

KENTON COUNTY SCHOOLS

RESPONDENT

DECISION AND ORDER
OF
THE DUE PROCESS HEARING OFFICER

Introduction

This Due Process Hearing was requested by letter filed with the Kentucky Department of Education (KDE) by Counsel for the Petitioner on August 28, 2017 pursuant to the Individuals with Disabilities Act (IDEA), (*20 U.S.C. § 1400, et. Seq.*)

This matter heard over seven days, namely November 29, 30, December 1, 2017, January 9, March 8, and 9, 2018. (*Corrected prior to posting*) Additionally, the Petitioner and Respondent submitted sequential briefs and the Petitioner a Reply Brief.

ABBREVIATIONS OR ANACRONYMS

Acronyms or abbreviations include ABA (Applied Behavior Analysis), ARC (Admission and Release Committee), ABS (Applied Behavior Services) Children's Hospital (Refers to ■ Children's Hospital), CVI (cortical visual impairment) IDEA (Individuals with Disabilities in Education Act), J.E. (Joint Exhibit and Respondent's Exhibits), Kentucky Department of Education), KAR (Kentucky Administrative Regulations), CFR (Combined Federal Regulations), ESY (Extended

School Services), FAPE (Free and Appropriate Education), FMD (Functional Mental Disability), LRE (Least Restrictive Environment), OT (Occupational Therapy), PT (Physical Therapy) T.T. (Trial or Hearing Transcript), VI (Vision), the Student in this matter will be referenced as the Student, Petitioner and/or Student Petitioner. The School District will be referenced as the District, the Respondent and/or the Respondent School District.

BURDEN OF PROOF

As this Due Process Hearing is an administrative proceeding in Kentucky, there are two guides for who has the burden of proof. As the party seeking relief, Student Petitioner bears the burden of proving her entitlement to relief by a preponderance of the evidence. ***Schaffer v. Weast***, 546 U.S. 49, 62 (2005). The Supreme Court in ***Schaffer*** ruled that the party seeking relief has the burden of proof and thus the burden of persuasion as the party seeking relief. see also ***City of Louisville, Div. of Fire v. Fire Serv. Managers Ass'n by & Through Kaelin***, 212 S.W.3d 89, 95 (Ky. 2006) Citing ***KRS 13B.090(7)***—" 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". See also- ***McManus v. Ky. Ret. Sys.***, 124 S.W.3d 454, 458 (Ky. App. 2003) (citing ***KRS 13B.090 (7)***). In this situation, the Student Petitioner is the party requesting action or seeking a benefit.

Relief Requested By Petitioner

Pursuant to Petitioner's request for a Due Process Hearing on August 28, 2017, the Student is requesting the following relief:

1. A determination that the Respondent School District violated provisions of ***707 KAR Chapter 1*** et. Seq.:
2. That the Respondent School District be Ordered to pay the Student's Mother the cost of education in the private school placement until he is no longer in need of such a program; and
3. That the Respondent School District be Ordered to provide daily transportation to and from the Student Petitioner's educational placement or reimburse the Mother for the costs of such; and
4. That the Student Petitioner be awarded compensatory education, via the costs of educational placement and transportation at the private placement, for the time in which he was denied a free and appropriate public education; and
5. That the Respondent School District be Ordered to reimburse the Student's Mother for any and all out of pocket educational, evaluation and related services expenses, including transportation cost, the she incurred on the Student's behalf; and
6. That attorney fees be awarded to the Petitioner's attorney of record; and
7. All such other relief that the Hearing Officer may deem appropriate.

Respondent made a motion for a Motion for Dismissal and/or Clarification of the Petitioner's Due Process Request. After due consideration of the Motion, this Hearing Officer dismissed Petitioner's claim for a violation of "Child Find".

On page 3 of Petitioner's Clarifications, the following was written. It has been italicized to note it is quoted directly from the Petitioner's submission.

D. Describe or list what is needed to be included in the IEP that is not in it currently or if it I, (sic) what is not or was not being provided.

The main item that was not included in the Petitioner's IEP was a focus on the development of communication. Initially, in 2012, the focus was on teaching the Petitioner to use sign language as his method of communication. Sign language instruction was a part of the Petitioner's specially designed instruction for each and every goal on his IEP. This was not consistently implemented because not everyone in the Petitioner's school environment knew sign language. Ultimately, because the district was unable to implement this consistently throughout the Petitioner's day, sign language was removed as his specially designed instruction for all goals except the communication goal because this was the goal that the speech pathologist worked on with the Petitioner and she was fluent in sign language.

The Petitioner was not taught by a highly qualified educator throughout the school day. He only received the benefit of a special education teacher for approximately ten minutes per day, spending the remainder of his day with aides. These aides were not allowed to communicate with the Petitioner's mother.

The Petitioner's educational program was not data-driven, so no one in his education environment was certain whether or not the techniques they were using with him were working. As he regressed in his skills or failed to make progress, the expectations were lowered and the services of Occupational Therapy, Physical Therapy and Speech Therapy were decreased.

E. List what services are being provided at new school that are not being provided by the Respondent School District.

The main thing that is provided at the new school that wasn't being provided is consistency, follow through, data-driven programming and access to highly qualified staff throughout his entire school day.

The new school is based upon the model of applied behavior analysis. This model uses a systematic approach for influencing learning and gaining socially appropriate behavior. Consistency is the implementation of a treatment plan is utilized across all staff members and data is kept daily to measure the effectiveness of the approach. The Petitioner's individualized program is designed and supervised by a board-certified behavior analyst and intervention specialist. The Petitioner receives intensive communication training throughout each classroom period. The teacher to student ratio is two students with one highly trained teacher. The Petitioner also receives intensive Speech and Occupational Therapy. Also available to the Petitioner are 1:1 intensive intervention sessions, social skills counseling, home therapy, intensive toilet training, intensive eating program and case management and support.

FINDINGS OF FACT

1. The Student Petitioner is an eight- year old, fourth grade student in the Respondent School District during the following school years: 2011-2012 (half-day), 2013-2014 (half-day), 2014-2015 (full-day), 2015-2016 (full-day) and 2016-2017 (full day) school years (11/30/2017; p T.T. 67; J#6; p.J407)
2. The Student Petitioner has multiple disabilities, including deafness, cortical visual impairment, a genetic disorder involving an anomaly of chromosome pair 17 and 22, developmental delay and sensory processing disorder. (J#1; p. J0145-146)

3. When the Student first enrolled in the district he had severe cognitive delays, severe hearing loss, low muscle tone, tight masseter muscles in his jaws, and feeding disorders. (J#2 at J0185)
4. When the Student first started attending school in the Respondent District, he was attempting to communicate via sign language with sign approximations. (3/9/2018; T.T. 22-23, 33)
5. The Student has had cranial surgery due to ASD. He has a chromosomal abnormality (duplicated chromosome 17) and microcephaly. He has a profound sensorineural hearing loss bilaterally. He has bilateral cochlear implants. He wears orthotics. (J# 20; p. 505)
6. His Speech-Language Evaluation, conducted on May 25, 2011, showed that his oral-motor skills were delayed and that he had a limited repertoire of speech sounds compared to hearing and deaf children who were one year post cochlear implant. (J#15; p. J0446)
7. At his summer 2011 evaluation, the Student Petitioner scored very low on social and motor skills. (J#11; p. J0434)
8. The Student's Integrated Assessment Report with the date of 7/14/2011 states that he was born with low birth weight of 5 pounds and 13 ounces. He has had 8 surgeries since birth including cranial surgery, heart surgery due to ASD, cochlear implant on one side and a hearing aid in the other ear, feeding tube, and surgery for an undescended testicle. At that time, the Petitioner's Mother indicated that he will have surgery for a second cochlear implant as soon as he begins to walk. He walks with a walker and wears orthotics a has congenital hearing loss (J#11; p. J0431)

9. On the second page of the Student's Integrated Assessment Report of 7/14/2011, under "Evaluation Results and Discussion:" "Health, Vision, and Discussion" it states: "According to his mother his vision is fine per ██████████ Children's Hospital (2010). (J#11; p. J0432)
10. The July 20, 2011 IEP had had four goals:
 - 1) X will exhibit effective forms of communication,
 - 2) X will exhibit independent behavior,
 - 3) X will demonstrate basic fine and gross motor development,
 - 4) The Student will demonstrate a basic understanding of the world in which he lives. (J#1; p. J0003-J0004)
11. During most of the 2012-2013 school year, the Student's Mother placed him at ██████████ School a private school in ██████████ County. (3/7/2018; T.T. 42-43)
12. The Student attended ██████████ School for all but the last three weeks during the 2012-2013 school year. (J#8; p. 0412; J#2; p. 0212)
13. As a preschooler and during his first year of attendance in Respondent School District, the Student attended ██████████ Voices, a program for deaf children in ██████████, Ohio. He attended their programs every day for a half day in the morning. (11/30/2017; T.T. 35)
14. The Petitioner's Grandmother testified that at the top of the Student's special needs were that fact he is deaf, he had an eating disorder and he is developmentally delayed. (11/29/2017; T.T. 34)
15. Student was first tested for general intelligence and cognitive functioning in 2011. At that time, he was unable to follow any directions to complete any of the subtests, and the certified school psychologist who performed the evaluation determined he was extremely low in overall intelligence. (J#11, p. J0434-35)

16. During the re-evaluation in 2014, the Student was not able to stack two blocks of the same color, and could not complete two puzzle pieces, he could not follow directions to complete the other cognitive tests, and again the school psychologist again determined he was in the extremely low cognitive range. (J#19; p. J053-0504)
17. Additional ARC meetings were held when the Student was not making progress during a grading period and when new medical information was available. His Speech-Language Evaluation, conducted on May 25, 2011, showed that his oral-motor skills were delayed and that he had a limited repertoire of speech sounds compared to hearing and deaf children who were one year post cochlear implant. (J#15; p. J0446)
18. By the end of 2011-12, the Student had made progress on some of these goals. Concerning the communication goal, he was verbalizing and imitating syllables and producing some phrases. (J#1; p. J0012-13) He had made significant progress with speech, but he was still limited compared to hearing and deaf students his age. (J#1; p. J0012-13) Concerning the independent behavior goal, he had learned to complete the steps of his arrival routine at school, was imitating simple movements when in a group of students. (J#1; p. J0012-13; J#2; p. J0197-198) Concerning the fine and gross motor development goal, he had started to scribble on paper, and could throw a bean bag. (J#1; p. J0012-13) He could also walk five feet independently 100% of the time. (J#2;p. J0197) Student was beginning to explore toys, but there were concerns about the Student's imitation skills and his ability to identify classroom objects. (J#1; p.J0013) He could not pick a requested

- object from a choice of three. (J#1; p. J0012-13) provided by his mother—three were held during the 2011-2012 school year. (J#2; pages J0179; J0186; J0092)
19. An IQ score was obtained by Children's Hospital and provided to Respondent School District in 2012. This IQ score showed the Student Petitioner was more than three standard deviations below the mean. The mean was 100 and he was at 50 and a standard deviation was 15. That would make three standard deviations below the mean 55—the Student Petitioner was below that at a score of 50. (J#52; p. J0650)
20. In 2012, Student continued to have a goal for demonstrating basic fine and gross motor movement, but the benchmarks were made more difficult to reflect his new skills. (J#1; p. J0015)
21. Additional ARC meetings were held when the Student was not making progress during a grading period and when new medical information was provided by his mother—three were held during the 2011-2012 school year. (J#2; p. J0179; J0186; J0092)
22. In May 2012, both school staff and Student's mother agreed the Student had made a lot of progress during the 2011-2012 school year. (J#2; p. J0198) Based on the student's progress, the ARC changed two of his goals for the upcoming school year. In response to his communication progress, a speaking goal and a goal for making sense of messages to which he listens were added. (J#1; p. J0014-15)
23. The Student continued to have a goal for demonstrating basic fine and gross motor movement, but the benchmarks were made more difficult to reflect his new skills. (J#1; p. J0015)

24. Because the Student had not made much progress with the basic understanding of the world around him goal, it remained the same but the benchmarks changed and additional specially designed instruction was added to help him make progress. (J1#; p. J0015-16)
25. The IEP written on May 11, 2012 was not implemented at the start of the 2012-2013 school year, because the Student's mother transferred him from the Respondent's school and placed him at [REDACTED], a private preschool. Student experienced severe regression while at [REDACTED]. [REDACTED] did not implement the Student's IEP. (J#2; p. J0205, J0210)
26. When the Respondent School District's staff observed him at [REDACTED], they noted the staff did not speak to his face which is very important for a deaf child. His grandmother confirmed this. (11/29/17; T.T. 17 and 52)
27. The Student's Mother testified the Student also regressed in vocalizing while at [REDACTED]. (2/7/18; T.T. 168)
28. A few days after the Student returned to the district in 2013, his ARC met and, knowing his IEP had not been implemented at [REDACTED], added 60 additional minutes daily with the teacher of the deaf and hard of hearing teacher ("TDHH") for the remainder of the school year. J#1 at J0030. They also added 112 minutes daily of services TDHH for the next school year. J#1 at J0030. The ARC also added 120 minutes a month to his speech therapy and offered summer services ("ESY"). (J#1; p. J0030-31 and 3/9/2018; T.T. 18:6-12)
29. Due to his removal from the Respondent School District for most of the previous year, Student experienced serious regression and had not yet been able to recoup the skills he had at the end of the 2011-2012 school year. J#2 at J0219. His

mother expressed concerns about his regression, telling the ARC he no longer used words to express himself. (J#2 at p. J0218)

30. When the Student returned to the Respondent School District at the end of the 2012-2013 school year, his speech therapy was raised from 240 minutes a month to 400 minutes a month. (J#1; p. J0017 & J0030-31)
31. Three ARC meetings were held during the 2013-14 school year. (J#2 at J021, J0221, J0228)
32. To further assist Student in his communication, the ARC added a dynamic display voice output device to his supplementary services. (J#1; p. J0043) The school tried several devices with him during the evaluation process and used the chosen device at school for a while before sending it home. (J#2 ;p. J0225) After this introductory period, the device was used at school and sent home each day so his mother could provide him with consistency using the device. (3/9/2018; T.T 9, 19, 20 and 148)
33. Despite these changes to the Student's program, during his first year back in the district, the Student did not recoup all the skills he lost while at [REDACTED]. Heather Reed testified the Student is cognitively low functioning, and, as a result, a lot of repetition and modifying assignments is required in order for him to learn things. He regressed a lot over the long break in instruction
34. The IEP beginning on page J#1; p. J0037 has a start date of November 25, 2013. The meeting date is incorrectly listed as October 4, 2013. This discrepancy is the result of the ARC team amending the October 4, 2013 IEP to add the communication device rather than drafting an entirely new IEP at the November

meeting caused by his enrollment at [REDACTED], and he did not fully recoup all skills during the 2012-2013 school year.

35. In the 2013-2014 school year, the ARC reduced his goal of labeling items from 30 to 10 and reduced his counting to 10 goals to counting to 5. (J#1; p. J0042) Despite his speech regression, three goals concerning articulation and spoken communication were retained as the Student's Mother was very concerned that he was no longer using words to express himself. (J#1 at J0048-50 with J#2 at J0218)

36. The Respondent School District re-evaluated the Student in March 2014. The evaluation revealed that the Student had adaptive skills falling significantly below the average range, that his speech sound production was delayed. The Student also had trouble with the receptive and expressive language parts of the evaluation and barely articulated at all during the articulation test. (J#19; p. J0501)

37. The Student's Re-Evaluation Report was dated 3/24/14. He was re-evaluated as he was due to his three-year re-evaluation. At that time, he qualified for special education services due to Multiple Disability category (Hearing Impairment and Functional Mental Disability). (J#19; p. 0498)

38. The Re-Evaluation Report noted that based upon the evaluation of July, 2011, the Student qualified for OT and PT services. (J#19, p. J0498)

39. Based on the re-evaluation results, the ARC re-segmented the Student's articulation goal to let him focus on making individual vowel and syllable sounds rather than whole words and focused more on a total communication approach for him. (J#1; p. J0060) The staff needed to focus on developing some communication mode for Student so he could move on with his education.

40. A review of IEP Progress Monitoring Data—Heather Reed Special Education

Teacher indicated the following for the 2014/2015, school years.

a. J#83, p. 849; Given a verbal and visual prompt, Student will increase his ability to identify vocabulary words and pictures on 4 out of 5 measured opportunities. –“Student on target to meet goal”. (03/24/15 to 05/24/15)

b. J#83, p. Jo850; Throughout the school day the Student will improve his fine motor skill on 4 out of 5 measure opportunities”. Adequate Progress-student on target to meet goal”. (03/24/15 to 5/24/15)

c. J#83, p. Jo851; “Throughout the school day, the Student will work and play collaboratively in large and small group settings on 4 out of 5 measured opportunities. –“Adequate Progress-student on target to meet goal”. (03/24/15 to 05/24/15)

d. J#83, p. J0852; “Throughout the school day, the Student will improve his gross motor skills on 4 out of 5 measured opportunities”. “Adequate Progress-Student on target to meet goal”. (03/24/15 to 05/24/15)

e. J#83, p. 854; “Student will exhibit developmentally appropriate play skills at 90% accuracy”. “Adequate Progress-student on target to meet goal”. (04/15/14 to 02/15)

f. J#83; p. J0855; “During cooperative play activities, the Student will engage in turn taking for 4 exchanges independently on 4 out of 5 measured occasions”. “Student on target to meet goal”. (04/15/14 to 04/15/15)

g. J0856; “With guidance and support from adults, the Student will focus on a topic and respond to questions and add details to strengthen writing at

80% accuracy”. “Adequate Progress-student on target to meet goal”. (04/15/14 to 02/15/15)

h. J0857; “Given a visual prompt, the Student will count to tell the number of objects on three out of five (60% accuracy) measured opportunities. “Inadequate Progress-student lacks consistent progress to achieve goal”. (03/15/15 to 09/26/15)

i. J0858; “Given a visual prompt, the Student will count to tell the number of objects in three out of five (60% accuracy) measured opportunities”. “Inadequate Progress-student lacks consistent progress to achieve goal”. (03/26/15 to 09/26/15)

41. A review of IEP Progress Monitoring Data—Heather Reed Special Education Teacher indicated the following in 2015/2016.

a. J#83, p. J0861; “After listening to a story, the Student will answer questions about questions about key details in a story with 80% accuracy on observed opportunities” Under Select Level Achieved Below:” it says “Adequate Progress-student on target to meet goal”. But within the “NOTES” “I have stopped recording data since he is struggling to use three pictures. I have focused on two pictures instead”. Mrs. Wolfzorn, DHH Teacher (03/26/15 to 09/26/15)

b. J#83, p. J0859; “Given a visual prompt, the Student will count to tell the number of objects on three out of five (60% accuracy) 1 opportunities”. “Inadequate Progress-student lacks consistent progress to achieve goal”. (03/26/15 to 01/26/16)

42. The following results were found on IEP Monitoring Data –V. Armbruster, Special Education Teacher.

a. J#83, p. J0867; “Throughout the school day, the Student will improve his fine/gross motor skills on 4 of 5 measured occasions”. The skill exhibited— “When given verbal and physical prompts, the Student will jump on command”. “Inadequate Progress—student lacks consistent progress to achieve goal”. (04/19/16-05/09/16)

43. The ARC met on 4/26/2016. The IEP was amended as Amendment date was not entered correctly. On the second page of the IEP, it was noted” “Vision: Not an area of concern at this time”. (J#1; p. J0129)

44. Student’s mother reported a vision problem to the ARC on October 19, 2016; she told the ARC that Student had myopia. (J#2 at J0292) At that time, she stated that she was going to have his vision more thoroughly tested on November 30, 2016 and that she would report back with the results. (J#2 at J029)

45. Student’s mother reported to the ARC on February 14, 2017 that the Student may have CVI, but that this had not yet been diagnosed. She reported that another appointment for further evaluation was scheduled at the end of February. (J#2, p. J0302)

46. During the February 14, 2017 ARC meeting, the reevaluation data was reviewed. (J#2; p. J0301)

47. During the February 14, 2017 ARC meeting, additional adult assistance was added to the IEP. The ARC determined to remove the articulation goal as the Student was not progressing and needs to develop a primary mode of communication. (J#1; p. J0145).

48. During the February 14, 2017, ARC meeting, the ARC determined that the Student Petitioner had shown regression. It was determined that he was eligible for ESY. He would receive ESY for 5 days a week for social goals, communication, and fine motor. (J#2; p. J304)
49. According to the Summary Notes of the 02/14/2017 ARC meeting, the Student's Mother noted that Children's Hospital is requesting that the Student receive intensive PT services twice a week and as a result he will miss school. Student's Mother asked whether the Respondent School District would consider a specialized school program. There is no indication that Petitioner's Mother received a response. (J#2; p. 304)
50. During the February 14, 2017 ARC meeting, the ARC decided to use pictures and signing, as the Student was responding to picture exchange, was more attentive, and was learning tactile signs. (J#1; p. J0147-148) under Functional Hearing, Listening, & Communication Assessment. was diagnosed with CVI, the school would evaluate him—i.e., evaluate how this issue affects his education. (J#2; p. J0302).
51. At the March 31 meeting, the ARC, based on the CVI diagnosis, immediately made plans to reevaluate the Student's program in light of this issue. (J#2; p. J0310)
52. The district did several cognitive tests with the Student (3/9/18; T.T. 44; 46; 48) He scored very low on each one. The staff used these low scores to determine he is FMD. (3/9/2018; T.T. 48)
53. Student's Mother knows he is low functioning and takes a long time to learn new skills. (3/8/2018; T.T. 3-8-18 at 60- 61)

54. In early 2017, the Student's re-evaluation, he was not able to respond to standardized testing. Thus, the examiner had the parent and the teachers complete developmental profiles for the Student. The mother and the teachers scored him the same on cognitive skills. (J#20; p. J0515) When a student cannot complete testing, it is standard practice to use parent and teacher completed developmental profiles to assess a student's functioning level. (3/9/2018; T.T. 43-46)
55. There was no reason until late 2016 to suspect that the Student's vision was making it difficult for him to learn. His mother was taking him to ██████████ Children's to see several medical professionals on a regular basis; these health professionals did not notice that the Student has cortical vision impairment ("CVI"). In June of 2013, the Student Petitioner had an eye exam. At that time, the ophthalmologists at Children's Hospital deferred prescribing glasses. He was diagnosed with astigmatism, myopia, hypertropia and inferior oblique overaction. (P#2; p. 0099)
56. The ARC noted at this meeting (2/14/2017) that if the Student was diagnosed with CVI, the school would evaluate him—i.e., evaluate how this issue affects his education. (J#2; p. J0302.)
57. The Student's Mother did not bring a diagnosis of CVI to the ARC until the meeting on March 31, 2017. (J#2; p. J0310).
58. At the March 31 meeting, the ARC, based on the CVI diagnosis, immediately made plans to reevaluate the Student's program in light of this issue. (J#2; p. J0310)
60. CVI is difficult to diagnose. (3-9-18; T.T. 133)
61. The district did several cognitive tests with the Student. He scored very low on each one. The staff used these low scores to determine he is FMD. (3/9/2018; T.T. p. 44,46 and 48)

62. The Student Petitioner was first tested for general intelligence and cognitive functioning in 2011. At that time, he was not able to follow any directions to complete any of the subtests, and the certified school psychologist who performed the evaluation determined he was extremely low in overall intelligence. (J#11; p. J0434-35)
63. Based on the re-evaluation results in March 2014, the ARC re-segmented the Student's articulation goal to let him focus on making individual vowel and syllable sounds rather than whole words and focused more on a total communication approach for him. (J#1; p. J0060) The staff needed to focus on developing some communication mode for the Student so he could move on with his education and he was having great difficulty expressing himself verbally. (1/9/2018; T.T. 89-90; 212-214; 252)
64. During the March 31, 2017 ARC meeting, Student's Mother provided her doctor's vision report with a new diagnosis of cortical vision impairment. In response, the ARC planned a functional vision learning media assessment to determine the student's educational needs based on the new diagnosis. Student's Mother noted he would be missing a lot of school in the near future to go to medical appointments. In response, the ARC discussed the possibility of a modified school day but decided to wait on that until after the new educational evaluation and any new strategies are employed. (J#2 at J0312).
65. The Student had a "Functional Vision Assessment/Learning Media Assessment on 4/3/17. As the Student has CVI and an acuity of 20/260 he is legally blind. On the last page of the assessment it states: "His vision impacts her(sic) educational

performance and therefore qualifies for Blind Low Vision services”. (J#27; p. J0545-J0547)

66. The ARC met on 04/19/2017/ On that day an IEP with the start date of 04/18/2017 and end date of 04/17/2018 was implemented. (J#1 p. J0159-J0171)

67. During 2017 while the Student was in Grade 3, he took the “Alternate Kentucky Performance Rating for Educational Progress” (K-Prep) (J#28; p. J0548)

68. The Student’s scores on his K-Prep were 20 in Reading which is considered Proficient and 22 in Mathematics which is also considered Proficient. (J#28; p. J0548)

69. Student developed sensory issues (stimming), stomach issues, and vision disorders. (J#2; p. J0301; J0292; 3/8/2018; T.T. 149)

70. Throughout his educational career, the Student was often absent from Respondent School District. (J#8)

71. The Student was pulled from the district entirely when he was four years old; an age when it is critical to have intensive support for speech acquisition, which contributed heavily to his slow progress in articulation. (1/9/2018; T.T. 214-215)

72. Preschool attendance was taken only when the students entered the room for the day, not when they left early. (3/8/2018; T.T. 7:1-8:11)

73. Preschool attendance is not mandatory. (3/7/2018; T.T. 231)

74. Missed therapy services were made up and may not have been noted in the Medicaid logs. (1/20/2018; T.T. 106; 257)

75. The Student’s mother, and sometimes others, such as his grandmother, attended these meetings. There is no evidence that the Student’s Mother and Grandmother did

not fully participate in these meetings. The Summary notes indicate, they provided input, and saw their suggestions incorporated into the Student' IEPs. (J#1 and J#2)

76. The IEP Conference Summary from February 19, 2016 supports that the Student's Mother agreed to his placement in FMD. The Conference Summary states, "the student" will receive special education services in his MSD classroom and in pull-out resource classrooms." (J#2; p. J0269)

77. The LRE section of the February 19, 2016 IEP also states that the Student will begin to spend a majority of his school day in the MSD classroom. (J#1; p. J0110) Both of these documents evidence that the change to the MSD classroom was discussed during the ARC and that the Student's was present; no objection from her is noted. (J#2; p. J0269; J#1; p. J0110)

78. Working in small groups was discussed in numerous IEPs. Small group instruction is listed as part of the Students specially designed instruction in the IEPs written on May 11, 2012, the May 6, 2013, October 4, 2013, March 31, 2014, January 23, 2015, March 19, 2015, February 19, 2016, April 26, 2016; February 14, 2017, and April 18, 2017. (J#1; pages J0015; J0027; J0040; J0060; J0075; J0084; J0100; J0132; J0147; J0166)

79. It sometimes takes a child with cognitive impairment double the time or more to recoup from speech language regression after breaks in instruction than it takes higher functioning children. (1/9/2018; T.T. 16-24) When a student regresses, educators must adjust to the student's present level, rebuild basic skills, and then begin to scaffold on more difficult skills. (1/9/18; T.T. 193) When the Student returned to the School District at the beginning of the 2013-2014 school year, he was not making any verbal sounds. (1/9/2018; T.T. 200-201) The Student could have

lost his oral speech because his IEP was not implemented during the year at

██████████. Age four is a critical period for speech language development. (1/9/2018; T.T. 214)

80. The Student was often absent from school. His mother took him to a wide variety of outside therapies during school hours. (J#8)

81. At the ARC held on 09/15/2016, in the Summary Notes at “Medical History” it says: “There have not been any major medical or health issues since his last evaluation, which was conducted three years ago. The Student’s Mother shared that she has yet to see the Student run, and school personnel indicated that the Student has grown significantly over the course of the past year. Mrs. Wolfzorn inquired about the Student’s behavior of closing his eye. School personnel with validation from the parent, concurred that this is a behavior trait for his eyes. It is a sign of disinterest in whatever may be going on at that time.” (J#1; p. Jo285)

82. During the February 14, 2017 ARC meeting, the reevaluation data was reviewed. (J#2; p. J0301)

83. During the February 14, 2017 ARC meeting, additional adult assistance was added to the IEP. The ARC determined to remove the articulation goal as Student was not progressing and needs to develop a primary mode of communication. (J#1; p. J0145)

84. During the February 14, 2017, the ARC determined that the Student Petitioner had shown regression. It was determined that he was eligible for ESY. He would receive ESY for 5 days a week for social goals, communication, and fine motor. (J#2; p. J034)

85. According to the Summary Notes of the 02/14/2017 ARC meeting, the Student’s Mother noted that Children’s Hospital is requesting that the Student receive

intensive PT services twice a week and as a result he will miss school. Mother asked whether the Respondent School District would consider a specialized school program. There is no indication that Mother received a response. (J#2; p. 304)

86. During the February 14, 2017 ARC meeting, the ARC decided to use pictures and signing, as the Student was responding to picture exchange, was more attentive, and was learning tactile signs. (J#1; p J0147-148 under Functional Hearing, Listening, & Communication Assessment)

87. The Student was often absent from school. During the 2013-2014 School Year he was absent a total of 16 days. 14 days were excused and two were unexcused. During the 2014-2015 School Year, he was absent 19 days of those 16 were excused and 3 were unexcused. During the 2015-2016 School Year, he was absent 30 days and of those 30 days 29 days were excused and 1 day was unexcused. During the 2016-2017 School Year, he was absent 42 days and of those 42 days 35 were excused and 7 were unexcused. (J#8; p. J0413-J0419)

88. The Respondent School District offered the Student Petitioner ESY every summer except the summer of 2012. During the summer of 2013, the District offered and the Student attended 24 hours of ESY. During the summer of 2014, the District offered and the Student attended 36 hours of ESY. During the summers of 2015 and 2016, the District offered and the Student 60 hours of ESY each of those summers. During the summer of 2017, the District offered ESY, however the Student's Mother chose not to send him. (J#1; pages J95, J143, J210, J239, J242, J327.

89. At the final ARC meeting before Student's Mother enrolled him in ABS, on August 14, 2017, the Student's Mother did not inform the LEA that she was rejecting the proposed LEA placement, nor did they state specifically Student's Mother's concerns

or her intent to enroll the child in a private school at public expense. The Conference Summary for this meeting says nothing about the Student's Mother stating she was rejecting the placement of the ARC in the Respondent School District and intended to enroll the Student at ABS. Exhibit J2. In fact, the Conference Summary Notes end by stating that the Student's mother indicated she would request another ARC meeting after she has reviewed additional documentation the school has agreed to provide. (J#2; p. J0331)

90. At the ARC held on August 14, 2017, the Respondent School District offered to reevaluate the Student, but the Student was not made available. (J#2 at J0331)

91. The Student's Mother made it difficult for the ARC to make a decision at the last ARC meeting before he left the district, on August 14, 2017, to place her son at ABS. At the meeting she stated only that she wished for the Student to go to ABS because she believed ABS could provide him with more "small group instruction" than his current school and that the student to teacher ratio at ABS is 2 to 1. (J#2; p. J0326-37)

92. The Student's Mother requested on August 17, 2017 that the ARC place the Student at [REDACTED] (ABS) a private program in [REDACTED], Ohio. This request was denied by the Respondent School District. On or about August 21, 2017, the Student's Mother provided written notice of her intent to unilaterally place the Student at ABS. The Student began attending ABS for 3 hours a day on September 18, 2017. (J#326-331; 11/29/2017; T.T. p. 181)

93. While the Student is at ABS, he does not receive OT or PT because these services would require additional costs. (3/8/2018; T.T. 166)

94. ABS is a year-round private program that provides educational services, outreach services and other therapies to children with disabilities, parents and schools in Ohio and Kentucky. ABS has been providing these services for 19 years and has 3 locations in Ohio. (11/29/2017; T.T. pgs. 157-162, 166-167, 280)
95. Members of the ABS Staff working with the Student have at least a bachelor's degree with some having advance certification as Board Certified Behavior Analysts. (11/29/2017; T.T. 173-178)
96. The Student's speech services at ABS are a minimum of 120 minutes monthly. (J#18; p.471)
97. ABS provided no academic curriculum services during the 2017-18 school year. Instead, ABS provided the Student with "treatments" under a "treatment plan." There was no academic instruction whatsoever. Lori Watson, Executive Director of ABS testified that four people worked with the Student during the 2017-18 school year: a behavior analyst, a behavior technician, a speech and language pathologist, and an intervention specialist. (11/29/2017; T.T. 173) She stated that these individuals would work with the Student during the entire time he was at ABS, individually or in small groups. (11/29/2017; T.T. 187-189.)
98. Ms. Watson did not mention any teachers working with the Student—because he was not taught academics. She stated that his "transition goals" included "walking nicely, walking with a peer, hanging up a book bag, [and] following a morning routine." (11-29-17; T.T. 187-189) She also described some other things ABS is teaching the Student including toilet training, feeding skills, "independent development," and peer social engagement. (11/29/17; T.T. 187 189)

99. Within the Supplementary Aids and Services section of Student's IEP for 2017-2018, there is assistance for toilet services (J#1; p. J0153, Jo168)
100. Ms. Watson explained that ABS has some "academic plans" but that the Student-Petitioner is not on such a plan. (11/29/2017; T.T. 195)
101. Ms. Watson admitted that what ABS has provided the Student for the last school year was "therapy" not a curriculum. (11/29/2017; T.T. 265)
102. Ms. Watson admitted that ABS had no academic plan for the Student Petitioner. (11/29/2017; T.T. 269)
103. Ms. Watson testified that ABS has implemented a Kentucky IEP before but she did not testify that she had even looked at the Student Petitioner' IEP. (11/29/2017; T.T. 166).
104. Ms. Nixon, the Respondent's Special Education Director stated that in the four years she has been with the district, it has not placed special education students in schools outside the district. (3/9/2018; T.T. 187-188)
105. The Respondent School District offered to re-evaluate the Student during the August 2017 ARC meeting. (3/9/2018; T.T. 188)

ISSUES

A. Did the Respondent School District fail to properly determine the Student's eligibility for special education and related services in violation of 707 KAR 1:310—Determination of Eligibility?

The Student Petitioner alleges that the Respondent School District failed to properly determine his eligibility for special education and related services in violation of **707 KAR 1:310**. In making his argument, Petitioner is basing it primarily on the fact the Respondent School District did not perform a vision screening on the Student

Petitioner prior to 2017. (F.F. 64) The Respondent School District relied upon the reports supplied from Children's Hospital concerning the Petitioner's vision. (F.F. 9)

The specifics of **707 KAR 1:310** are set forth below in **Section 3 of 707 KAR 1:310 (3)**:

*(3) In making eligibility determinations, an LEA shall draw upon information from a variety of sources, which **may** (emphasis added) include:*

(a) Response to scientific, research-based interventions;

(b) Vision, hearing, and communication screenings;

(c) Parental input;

(d) Aptitude and achievement tests;

(e) Teacher recommendations;

(f) Physical condition;

(g) Social or cultural background;

(h) Adaptive behavior; or (i) Behavioral observations.

(4) An LEA shall ensure that information obtained from these sources as appropriate for each student, is documented and carefully considered. (5) In making a determination under the category of mental disability, the ARC may apply a standard error of measure, if appropriate. (6) If a determination is made that a child has a disability and needs special education and related services, an IEP shall be developed for the child.

Petitioner is alleging that because the Respondent failed to consider a vision screening as part of his examination, there was a continuing violation. It is the Petitioner's position that even though the Respondent was examined in other areas and found to have disabilities in the areas of a Functional Mental Disability or (FMD). (F.F. 76)

In respect to case law, ***District of Columbia Public Schools, Mildred Green Elementary School*** (District of Columbia State Educational Agency) 109 LRP 41055 (August 11, 2004) was a situation where the school district failed to perform the student's Clinical Psychological Evaluation as part of his initial eligibility determination. There was a continuing violation of FAPE in that case. In that situation the student was

supposed to have received the Clinical Psychological Evaluation as part of his initial eligibility determination but the district had failed to do so in a timely manner.

In the situation here, the Parties relied upon the Parent's input that there was not presently a visual issue based upon previous reports from Children's Hospital. (F.F.9, 55) The regulation says "in making eligibility determinations, an LEA shall draw upon information from a variety of sources, which *may* include"; it then lists eight plus sources. Due to the use of the word "may", vision testing is not mandatory in every eligibility determination.

The issue of examining the Petitioner for vision did not come to fruition until late 2016 and early 2017. At that time, Respondent did have the Petitioner examined and his IEP re-aligned. (F.F. 44, 45, 51, 56, 57,58)

The Petitioner in this situation did not have enough evidence to sustain his burden of proof in this instance. The Respondent School District found the Student Petitioner eligible for services under IDEA when he was a preschooler. (F.F. 13)

B. STATUTE OF LIMITATIONS

Due to the nature and extent of the Student's disabilities, there is a significant amount of his historical background provided in this case. (F.F. 2, 3, 4, 5, 6, 8) Additionally, the Petitioner has made an argument concerning alleged violations being continuing. The Petitioner has argued that the Hearing Officer can determine there were continuing violations from May 2013 (when he returned to the Respondent School District) until the end of the 2016-2017 school year.

In support of that position, Petitioner cites *Scruggs v. Meriden Board of Education*, 3:03 cv 2224, United State District Court of Connecticut (2005), **707 KAR 1:340. KRS 157.224 (6)**.

KRS 157.224(6) establishes a three-year statute of limitations for a claim that a student has not received FAPE.

The relevant section is as follows.

*“All administrative hearings conducted under authority of this section shall be conducted in accordance with **KRS Chapter 13B**. The provisions of KRS Chapter 13B notwithstanding, the decision of the hearing officer in hearings under this section shall be the final order and shall be rendered pursuant to **34 C.F.R. 300.511**. A parent, public agency, or eligible student may only request the administrative hearing within three (3) years of the date the parent, public agency, or eligible student knew about the alleged action that forms the basis for the complaint, unless a longer period is reasonable...”*

A longer limitation period may be permitted if doing so is reasonable because of a continuing violation. Petitioner asserts that he has provided evidence of such continuing violation to justify an extended limitations period, but this argument is not supported by the testimony of Student’s Mother or by the other evidence in the record. The Student Petitioner has the burden of producing evidence of a continuing violation by the Respondent School District such that the general three-year statute of limitations should not apply to this case.

With regard to the 2011-2012 school year, the Student Petitioner’s first year with Respondent School District, his mother testified that he had made lots of progress by the end of the year. (F.F. 18, 22) In addition, although the Student attended public school for only two hours a day, because he spent more than half of his day at [REDACTED] [REDACTED] Voices, the Student made good progress during the 2011-2012 school year. (FF 5,13)

Respondent School District asserts that no violations occurred at all during the 2011-2012 school year as a matter of law as the Student was at [REDACTED] (F.F. 25), and certainly no continuing violations occurred. But, at the very least, even if arguable violations did occur, there could be no continuing violation because any such link would

have necessarily been broken by the fact that the Student moved from Respondent School District and placed in a private preschool, [REDACTED], for all but the final three weeks of the following school year, 2012-2013. (F.F. 25, 28,29)

As the Due Process request was filed on August 28, 2017, Student Petitioner's claims can only be considered from August 28, 2014 forward.

C. Did the Respondent School District fail to create an appropriate IEP for the Student in violation of 707 KAR 1:320?

In reviewing this question, the IEP from 2014-2015, 2015-2016, and the 2016-2017 IEPs as the proposed IEP for 2017-2018 will be reviewed as well. The IEPs (unless otherwise noted) begin and end in March. The Respondent School District did create an IEP for the Student Petitioner for each of those school years. The question is: was it an appropriate IEP?

In evaluating the four IEP, **707 KAR 1:320**; sections 1-3 and 7-10 will be used as a guide. At the same time, there is a need to keep in mind the Student Petitioner has multiple disabilities. (F.F. 2) These disabilities include deafness, a genetic disorder involving an anomaly of chromosomes 17 and 22, developmental delay and sensory processing disorder. (F.F. 2) He wears orthotics. (F.F. 5)

In the recent case of **Andrew F. v. Douglas County School District** 580 U.S.____ (2017) (Slip opinion No. 15-827), the Court after citing **Rowley** v. 458 U.S. at 179 stated, "The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." The Court goes on to reference Andrew's argument. In doing so, the Court said:

"Andrew's parents argue that the Act goes on even further.

In their view, a FAPE is “an education that aims to provide a child with a disability opportunities to achieve academic success, attain self-sufficiency and contribute to society that are substantially equal to the opportunities afforded to children without disabilities.” Brief for Petitioner 40.”

2014-2015 IEP

On March 31, 2014, the Petitioner’s ARC met and an IEP was adopted. There were services for several periods. They were as follows.

1. 3/31/2014 to 6/30/2014---Special Education Services for 112 minutes a day provided by Special Ed Staff in the Hearing-Impaired Classroom
2. 3/31/2014 to 6/30/2014--Special Education for 20 minutes a day by Special Ed Staff in Regular Classroom
3. 7/1/2014-3/30/2015—Special Education for 30 minutes a day by Special Ed Teacher in Self Contained reading
4. 7/1/2014-3/30/2015—Special Education for 30 minutes a day by Special Ed Teacher in Self Contained Writing
5. 7/1/2014-3/30/2015---Special Education for 30 minutes a day by Special Ed Teacher in Self Contained math
6. 7/1/2014-3/30/2015---Special Education for 20 minutes a day Special Ed Teacher in Hearing Impaired Teacher direct service MSD room
7. 7/1/2014-3/30/2015---Special Education for 30 minutes a day in the Self Contained social skills

Related Skills

1. 3/31/2014-3/30/2015—Transportation ---School Bus
2. 3/31/2014-3/30/2015—Speech/Language Therapy—80 minutes total a month 4 times a month with a Speech Pathologist in the resource room
3. 3/31/2014-3/30/2015—Physical Therapy—20 minutes a week—Physical Therapist—Separate Classroom
4. 3/31/2014-3/30/2015—Occupational Therapy –20 minutes a week—Occupational Therapist—Separate Classroom

2015-2016 IEP

For the 2015-2016 school year with the Respondent School District, the Student's IEP provided the following Special Education Services.

Special Education 60 minutes 4 times per day with a Special Education Teacher in the Special Education Classroom; and

Special Education 20 minutes 3 times a week with a Special Education Teacher in the Hearing Impaired Classroom; and

Special Education 20 minutes 1 time a day with a Special Education Teacher in the Special Education Classroom; and

Related Services

Speech/Language Therapy 20 minutes 3 times a week with a Speech Pathologist in the resource room; and

Feeding Methods 20 minutes 2 times per day with the Nurse at the Nurse's Station; and

Occupational Therapy 20 minutes 1 time per week with Occupational Therapist in the Special Education Classroom; and

Transportation 30 minutes 2 times per day on the Respondent Bus Route; and

Physical Therapy 30 minutes 1 time a week with the Physical Therapist in the Special Education Classroom. (J#1; p. J0087-J088)

2016-2017 IEP

During the 2016-2017 school year, with the Respondent School District, his IEP provided the following Special Education Services.

Special Education Services of 240 minutes or 4 hours a day with Special Education Staff in the MSD classroom.

Special Education 20 minutes a day with a Special Ed Teacher in the MSD Classroom.

Special Education 30 minutes a day with a Special Ed Teacher in the Hearing Impaired Resource Room.

Related Services

Feeding Methods 10 minutes 2 times per day with a Nurse or Designee in the Nurse's Office.

Occupational Therapy 20 minutes 4 times a month with Occupational Therapist in the Special Education Classroom.

Physical Therapy 30 minutes 4 times a month with the Physical Therapist in the Special Education Classroom.

Transportation 20 minutes 2 times a day on the school bus from home to school and return; and

Speech/Language Therapy 20 minutes 12 times a month from a Speech Pathologist in the resource room. (J#1; p. J0143)

2017-2018 IEP

In respect to services for what would have been the Student's 2017-2018 school year with the Respondent School District, his Special Education Services were to be as follows.

Special Education 30 minutes once a day with a Special Ed Teacher in a DHH Classroom;

Special Education 30 minutes once a day with a Special Ed Teacher in a DHH Classroom (social);

Special Education 30 minutes once a day with a Special Ed Teacher in a MSD classroom (By DHH teacher)

Special Education 60 minutes once a day with a Special Ed Teacher in a MSD classroom; and

Special Education 30 minutes three times per month with a Special Ed Teacher in a MSD class room with VI teacher.

Related Services

Speech/Language Therapy 15 minutes 7 times a month with a Speech Pathologist in the Resource Room.

Occupational Therapy 20 minutes 4 times a month with an Occupational Therapist in the Resource Room; and

Physical Therapy 20 minutes 4 times a month with a Physical Therapist in the Resource Room; and

Transportation 20 minutes 2 times a day for Transportation on the Bus Route. (J#1; p. J0171)

What is troubling in this case are inconsistencies in the IEPs along with the Student Petitioner's progress and regression. (F.F. 34, 40,) During the 2014/2015 school year, Student made progress in 9 of 10 areas as found in IEP Monitoring Data. (F.F. 40) During the February 17, 2017 ARC meeting, the Student was not progressing with his articulation goal and it had to be removed. (F.F. 47) At the same ARC, it was

stated that the Student responding well to picture exchange and signing. (F.F. 50) But it was noted that the Student had shown regression. (F.F. 48)

In school year 2014 the Student a hearing-impaired child has special education services from March through June for 112 minutes a day in the Hearing-Impaired Classroom. Then for July 2014 through March 2015, he has special education services for only 20 minutes a day with a Hearing-Impaired Teacher. On the 2015-2016 IEP, Student's work with a Special Education Teacher in the Hearing-Impaired Classroom is reduced to 20 minutes three times a week. In 2016-2017, Hearing Impaired Services are increased to 30 minutes per day in the Hearing Impaired Resource Room. Time for Hearing Impaired Services are increased in the 2017-2018 IEP to two Special Education periods for 30 minutes a day with a Special Education Teacher in a DHH Classroom.

In the area of related services there are concerns due to the disabilities facing this Student. During school year 2014-2015, the Student received PT 20 minutes a week. P.T. was increased to 30 minutes a week in 2015-2016, where it stayed in 2016-2017. On 2/14/2017, the Student's Mother requested the School District provide additional P.T. so the Student would not have to miss more school. The Respondent School District did not respond to the request. Within the proposed IEP for 2017-2018, P.T. is reduced to 20 minutes once a week.

What is troubling in this case, within the IEP for 16/17 and 17/18 there are comments within the sections for Extended School Year that indicate an issue with regression. (J0143, J0171) check 15/16 and 14/15) (F.F.48, 84, 88)

The Student Petitioner's progress is inconsistent if any as reflected in the reports of regression. Regression has many causes. One is breaks in instruction. The which is ARC overlooked the Student Petitioner's significant number of absences during the

school year as an element of concern within the IEPs. During the 2015-2016 School Year, he was absent 30 days and of those 30 days 29 days were excused and 1 day was unexcused. During the 2016-2017 School Year, he was absent 42 days and of those 42 days 35 were excused and 7 were unexcused. (F.F. 87)

Both the Respondent and the Petitioner agree that 2015-2016 and 2016-2017 school years the Student missed a lot of school. In Kentucky the average number of days for students is 170 a year. **KRS 158.070 (1)(f)(h)** It was also noted that the Student Petitioner missed more than 10% of the school year in 2015-2016 and more than 20% in 2016-2017. A review of the Summary Notes of the ARC meetings for those years indicates that the issue of absences was not adequately addressed (though they were mentioned) or considered in creating an IEP. In the case **West Lyon Community School District and Northwest Area Education Agency**, 48 IDELR 232; 107 LRP 30759, it was held that if excessive absences are related to the student's disability, then the district at the minimum should have requested an evaluation of the student.

It has been written that if a student misses 10% of the school year they are considered chronically absent. (*The Problem of School Absenteeism: What You Need to Know*; by Kate Kelly; <https://www.understood.org/en/school-learning/partnering-with-childs-school/working-with-childs-teacher/the-problem-of-chronic-absenteeism-what-you-need-to-know>) Using this standard, the Student Petitioner has been chronically absent even if it is for health reasons related to his disability. The Respondent School District has a responsibility to evaluate the student and consider those absences in light of his disabilities when creating an IEP.

In addition to consideration of the Student Petitioner's absences in creating his IEP, have the IEP's been too ambitious considering the extent of the Student's disabilities

and educational development. The note in the IEP Monitoring Data where the teacher writes: "I have stopped recording data since he is struggling to use three pictures. I have focused on two pictures instead". (F.F. 41) In ***M.N. v. School Bd. Of the City of Virginia Beach***, 118 LRP 4984 (E.D. Va. 02/05/18), the court noted that the IEP was too ambitious to provide FAPE once it was implemented. This is what we have here as reflected in the repeated regression reflected in the Student Petitioner's overall progress.

Based upon the Student Petitioner's overall lack of progress, the Hearing Officer finds that the Respondent failed to provide an appropriate IEP for the Student for the school years 2015-2016, 2016-2017 and the proposed IEP for 2017-2018. The Student Petitioner has not met his burden in respect to the 2014-2015 school year.

Was the private placement chosen by the Student's Mother an appropriate educational placement for him and should his Mother be reimbursed for the costs of the placement to date by the Respondent School District and for payments for such a placement moving forward?

It is the Petitioner's position that the Student's placement at ABS is appropriate and that his Mother should be reimbursed tuition and expenses related to the placement. In making a determination, an examination of ***707 KAR 1:370*** will be made in light of the evidence provided.

Private Placement

KAR 707 1:370 Section 1 applies--

Section 1. Children with Disabilities Enrolled in Private Schools by Their Parents when FAPE is at Issue. (1) An LEA shall make FAPE available to each child with a disability. If a parent decides to place his child with a disability in a private school after the offer of FAPE, the LEA shall not be required to pay for the cost of the private education. Disagreements between a parent and the LEA regarding the availability of a program appropriate for the student and financial responsibility shall be subject to the due process procedures in 707 KAR 1:340. (2) If a parent of a child with a disability, who previously received special education and related services under the authority of the LEA, enrolls the child in a private school without the consent of or referral by the LEA, a hearing officer or a court

may award financial reimbursement to the parent if it is determined that the LEA did not offer FAPE to the child in a timely manner and the private placement is appropriate. (Emphasis Added) This may be awarded even if the parents did not receive consent from the LEA for the private placement and the LEA did not make a referral to the private school. A hearing officer or a court may determine a private school placement to be appropriate even though it does not meet state standards that apply to an LEA. (3) The amount of the financial reimbursement described in subsection (2) of this section may be reduced or denied if: (a) At the most recent ARC meeting prior to the removal by the parents of their child with a disability to the private school, the parents did not inform the LEA that they were rejecting the proposed LEA placement, including stating their concerns and their intent to enroll the child in a private school at public expense; (b) The parents did not give written notice to the LEA of the information described in paragraph (a) of this subsection at least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child; (c) Prior to the parent's removal of the child, the LEA informed the parents of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or (d) There is a judicial finding that the actions taken by the parents were unreasonable. (4) The amount of financial reimbursement shall not be reduced or denied for the failure to provide the notice described in subsection (3) of this section if: (a) The parent is illiterate; (b) Compliance with the notice requirement would likely result in physical or serious emotional harm to the child; (c) The school prevented the parent from providing the notice; or (d) The parent had not received notice from the LEA of his obligation to provide this notice.

In this situation notice of private placement was given prior to the Student beginning at ABS in September 2018. The Student's Mother at the ARC Meeting of 08/14/2017, requested that the Student be placed at ABS for the following school year. (F.F. 92) The Student's Mother was of the opinion that the Student was not making progress in his current placement with the Respondent School District. She indicated that the Student needed a smaller class size.

The Student Petitioner's IEP with the Start Date of 4/18/2017 and End Date of 04/17/2018 the Student was to be provided with the following services.

Under "Special Education Services" he will receive the following.

1. Special Education 30 minutes per day provided by Special Education Teacher in the DHH classroom.
2. Special Education 30 minutes per day provided by Special Education Teacher in the DHH classroom (social).

3. Special Education 30 minutes per day provided by Special Education Teacher in the MSD classroom with a DHH teacher.
4. Special Education 2 times per day provided by Special Education Teacher in the MSD classroom.
5. Special Education 30 minutes 3 times a month with a Special Education Teacher in MSD classroom with a VI teacher.

Under Related Services he receives the following.

1. Speech and Language Therapy 7 times per month provided by a Speech Pathologist in the Resource Room; and
2. Occupational Therapy 4 times a month provided by an Occupational Therapist in the Resource Room; and

On page 3 of the 04/18/2017 ARC, there is a discussion of his 3/1/17 diagnosis of Visual Acuity of 20/260 by Dr. Katherine Hogan, O.D at [REDACTED] Ophthalmology. (J#1; p. J0161)

Within the Summary Notes of the 04/18/2017 ARC, VI or Vision minutes were added to the Student's IEP. He was given VI minutes at the rate of times a month for 30 minutes each time. (J# 2; p. J0319)

Evidence provided by the Petitioner in respect to his education at ABS includes an Assessment of Basic Language and Learning Skills-Revised Skill Tracking System (J#17; p. Jo462-464) and the ABS Treatment Plan 2017-2018. (J#17; p. J0465-J0470).

The Treatment Plan has the following categories.

1. Cooperative & Visual Performance
2. Receptive Language
3. Imitation
4. Communication
5. Labeling Skills
6. Intraverbal Skills
7. Play & Leisure Skills
8. Social Interaction & Group Instruction Skills
9. Classroom Routines
10. Self-Help
11. Feeding & Fine Motor Skills
12. Reading Skills (with note "Student does not exhibit reading skills at this time)
13. Math Skills (with note "Student does not exhibit reading skills at this time)

One of the unique issues we have in this case, a review of the education being provided to the Student at ABS does not address all of his disabilities. While the Petitioner's Mother discusses wanting an education to address his communication skills there are a several things missing. First of all, the Student was diagnosed with having a severe vision impairment. There is nothing in the program at ABS to address his vision issue. Neither is there anything to address the Petitioner's issues with his hearing abilities. Within the proposed 2017-2018 IEP, there was the support of an ASL interpreter. (J#1; p. J0170) A sign language interpreter was a repeated concern of the Student's Mother.

If the private school can provide educational services that the public school cannot or will not, reimbursement would be appropriate. A review of the information or provided from ABS does not indicate that ABS has the resources to address the Student's educational disability. Nor has evidence been provided that ABS can address the concerns Petitioner's Mother had voiced to the Respondent School District.

As a general rule placement and reimbursement of tuition at a private school that is not providing or will not provide special education is not permitted under IDEA.

Berger v. Medina City School District, 348 F3d 513 (6th Cir.) 2003; ***Berger*** at 523, holds that private placement cannot be appropriate "when at a minimum provide some element of special education services in which the public was deficient." The 6th Circuit held similarly in ***Knable ex. Rel. Knable v. Bexley City Sch. Dist.***, 238 F.3d 755, 770 (6th Cir. 2001)

In this situation the Student Petitioner during ARC meetings had requested services dealing with his vision and hearing issues as well as OT and PT. Although he is receiving some speech services and is in smaller classes at ABS that is not enough to overcome

what the Respondent School District can offer the Student. The shortcomings of ABS in addressing the Student Petitioner's special needs impacting education are greater than any shortcoming of the Respondent School District. The Respondent School District are capable of developing an appropriate IEP and providing FAPE to the Student Petitioner.

Therefore, the Petitioner's request for reimbursement for private school tuition are denied.

ORDER

Based upon the discussion above:

1. The Respondent School District properly determined the Student Petitioner's eligibility for special education and related services; and
2. Although the Respondent School District properly determined the Student Petitioner eligible for IDEA; the Respondent failed to create an appropriate IEP for the Student in school years 2015/2016, 2016/2017 and 2017/2018; and
3. The Respondent School District was on notice that the Student Petitioner needed additional OT and PT from an evaluation from Children's Hospital and did not consider the Mother's request for additional OT and PT in February 2017; and
4. The Student Petitioner has failed to sustain his burden that ABS is an appropriate placement; and
5. This matter is remanded to the ARC herein to create an appropriate IEP for the Student Petitioner. In doing so, the Student shall made available for evaluation by the Respondent School District. Student shall also provide appropriate medical information to the ARC. Furthermore, the following shall be considered in creating an appropriate IEP:

- a. Whether the School District can provide OT and PT as recommended by Children's Hospital; and
 - b. Considering the Student's past and possible future absences and how they impact the Student's absences;
 - c. In doing so, determine whether the Student may need home/hospital services; and
 - d. Appropriate instruction considering the Student's combined disabilities including vision and hearing and set realistic goals within the IEP; and
6. This Hearing Officer is without the authority to award attorney fees in this matter. Under IDEA, **20 U.S.C. § 1415** the award of attorney fees is under the jurisdiction of the district courts of the United States. Specifically, 20 U.S.C. § (i)(3)(A) and (B) is set forth below.

(3) Jurisdiction of district courts; attorneys' fees

(A) In general

The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) Award of attorneys' fees;

(i) In general, in any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs—

(I) to a prevailing party who is the party of a child with a disability;

As this Hearing Officer is not with the district courts of the United States, he without the jurisdiction or the ability to award attorney fees to a prevailing party in a Due Process Hearing.

This Order and Decision is entered 23rd day of June 2018.

/s/ Paul L. Whalen

PAUL L. WHALEN
Due Process Hearing Officer

APPEAL RIGHTS

Pursuant to 707 KAR 1:340 Section 12. Appeal of Decision. (1) 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) assigned by the Kentucky Department of Education. The appeal shall be perfected by sending, by certified mail to the Kentucky Department of Education, a request for appeal, within thirty (30) calendar days of the date of the Hearing Officer's decision.

The address is: Kentucky Department of Education
Office of Legal Services
300 Sower Blvd.; 5th Floor
Frankfort, Kentucky 40601

CC: Via Email and Postage Pre-Paid to:
Tina Drury and Todd Allen, Esq.—KDE
Teresa Combs, Esq. and Tia Combs, Esq.—Counsel for the Respondent
Marianne Chevalier, Esq.—Counsel for the Petitioner