

**KENTUCKY DEPARTMENT OF EDUCATION  
AGENCY CASE NO 1718-12**



**PETITIONER**

**V**

**FINAL DECISION AND ORDER**

**MONTGOMERY COUNTY SCHOOLS**

**RESPONDENT**

This matter involves a student qualified for special education under emotional behavioral disorder (EBD). The incident that triggered filing for due process, and that was primarily the focus of the hearing, was the student’s assault of a teacher on November 20, 2017, during a “cooling down” period in the school hallway. There was a videotape of the incident, as well as a second videotape showing the student being escorted from the scene of the incident. The videotapes were viewed repeatedly during the hearing and were admitted into evidence as a joint exhibit (or Resp. #11 per the court reporter). As a result of the incident, criminal charges were lodged. A condition of the criminal bond required that the student keep away from the victim, the teacher, and therefore prevented the student from being on campus. Accordingly, the school provided services at home. As of the date of the date of the due process hearing, the criminal matter had not been resolved.

Some remedies the parent sought initially, such as dismissal of the criminal charges and action against school personnel the parent believes failed to implement the IEP or caused the incident are not matters over which the hearing officer has jurisdiction. Provision of services by the school or change in placement necessitated by the criminal bond after the incident is not at issue. What is at issue is proper implementation of the IEP, which also includes the BIP or

Behavior Intervention Plan developed for the student, on the day of the incident and whether school personnel were properly trained to implement the IEP. (See parent testimony, TE 9).

The matter was heard on April 20, 2018. The parent appeared pro se, without counsel, and remained under oath after her initial testimony so that statements she made while questioning witnesses during the hearing could be treated as part of her testimony. After reviewing the transcript and the post-hearing brief of Respondent (Petitioner chose not to file one), the hearing officer makes the following findings of fact, conclusions of law, and final order.

### **FINDINGS OF FACT**

**1. The student will be 21 years old on June 18, 2018, and is physically large.**

The age is undisputed and the student's size in relation to other students and adults is evident in the videotapes.

**2. It is well-documented that the student has a low IQ, problems managing anger, and a long-standing evaluation of disability in the category of Emotional Behavioral Disorder (EBD).**

The parent testified that the student has had Intermittent Explosive Disorder (IED):

He has intermittent explosive disorder.

Q. Okay. How long has that been diagnosed?

A. His whole life.

Q. His whole life.

A. They need to update his records because he's had it his whole life. He's got brain damage from birth.

(TE 33). While it is undisputed that the student had brain damage, the record does not mention a diagnosis of IED. The student's most recent evaluation report was August 24, 2017.

(Respondent's Ex. 9), and it details the findings of prior evaluations. Below is a history of the student's evaluations.

The student became eligible for special education services as a student with Developmental Delay (DD) in 2000. The student was reevaluated in 2002, and the examiner noted that the student displayed characteristics consistent with an Autism Spectrum Disorder. In 2005, the student testing showed a Full Scale IQ of 60. The examiner found a low probability of autism but noted that the student exhibited characteristics of schizophrenia and Asperger's Syndrome. His disability category was changed to Other Health Impairment (OHI) and he continued to receive speech/language and occupational therapy as related services.

However, that same year he was hospitalized due to severe anger control issues and was diagnosed with Schizophrenia Disorder and placed on homebound services from October to December of 2005. When he returned, his placement was changed from OHI to Emotional Behavior Disability (EBD), which has remained his disability category ever since.

In 2008, the student was reevaluated while attending sixth grade. Testing reported a Full Scale IQ of 52 and an overall adaptive behavior score in the poor range. "[The student] continued to show difficulty regulating his behavior as well as difficulty building and maintaining appropriate relationships with others." (Respondent Ex. #9, p. 3). In 2011, the student was reevaluated while attending ninth grade. Testing reported a Full Scale IQ of 50 and the student "demonstrated behaviors characteristic of ADHD, Conduct Disorder, and Oppositional Defiant Disorder.

He was reevaluated in 2014 in twelfth grade. Testing resulted in an IQ Composite of 52 and the following:

Behavioral ratings completed by [the student's] special education assistant produced scores ranging from At-Risk to Clinically Significant range on the Externalizing Problems, Internalizing Problems, School Problems, and Behavioral Symptoms composites .... Teacher ratings also ranged from At-Risk to Clinically Significant range on the Hyperactivity, Conduct Problems, Anxiety, Depression, Somatization, Attention

Problems, Learning Problems, Atypicality, Adaptability, and Functional Communication scales.

(Respondent Exhibit 9, p. 3).

The student's most recent evaluation, August 24, 2017, found a composite IQ of 60 and the following:

[T]he parent rating indicated elevated concerns in the areas of overall adaptive skills, adaptability, social skills, leadership skills, and activities of daily living. . . . [T]he parent rating indicated significantly elevated concerns with executive functioning and elevated level of concerns with anger control, developmental social disorders, resiliency and functional impairment. The teacher rating noted significantly elevated concerns in the areas of aggression and atypical behaviors. Elevated level of concerns were noted in overall externalizing problems, hyperactivity, conduct problems, overall internalizing problems, depressive symptoms, learning/academic problems, adaptability, and study skills. . . . [T]he teacher rating showed significantly elevated concerns with anger control and elevated level of concerns with bullying, developmental social disorders, emotional self-control, executive functioning, negative emotionality, and functional impairment. Both raters rating scale indicated Emotional Behavioral Disability probability with the At-Risk range, which indicates elevated level of concerns overall.

(Respondent's Exhibit 9, p. 6)

The record supports a finding that the student has a low IQ, has problems managing anger, and has a long-standing disability in the category of Emotional Behavioral Disorder (EBD).

**3. The student becomes very aggressive and violent when he feels threatened.**

The IEP states that "[the student's] weakness are reported as when the Student feels threatened he becomes very aggressive and violent." (Resp. #3, TE 10).

**4. The student has an IEP that provides for a teacher assistant to be with him throughout the day.**

The student's IEP (Respondent Ex. #3) provides for specially-designed instruction, supplemental aids and services, and a behavior intervention plan. His measurable goals are:

- (1) By his next Annual Review, when given conversational prompts, [the student] will repeat, recall, and retell information while maintaining topic and define target vocabulary with 80% accuracy over five consecutive therapy sessions as recorded by SLP.
- (2) [The student] will demonstrate appropriate behavior when in classroom or in a school setting with other students on 9 of 10 trials.

Under Least Restrictive Environment and General Education, the student receives SLP services in resource during nonacademic periods, is in a resource class three times a day, with both a special education teacher and a teacher assistant, and when in the regular classroom, has the teacher assistant with him. The teacher assistant is with the student the entire day and does not provide educational instruction but instead provides crisis management and behavior intervention per the Behavior Intervention Plan (BIP).

**5. The teacher assistant was properly trained for his role in implementing the IEP.**

The teaching assistant has a GED with some college courses. (TE 49). The teaching assistant received training on how to intervene with this specific student's behaviors:

- Q. And when you first started working with [the student], you had some training, I believe, from somebody else about how to work with him, didn't you?
- A. Yes, ma'am. His previous aid and another special ed teacher.
- Q. Had talked to you about how to work with him?
- A. Yes, ma'am.
- Q. And did they tell you about his outbursts?
- A. Yes, ma'am.
- Q. And did they tell you they started verbally?
- A. Yes, ma'am.
- Q. And did they tell you the thing we looked at to do with him that you needed to talk him down and let him walk?
- A. Yes, ma'am.

(TE 74). He also has been through crisis intervention training annually during the past three years. (TE 51-52). There was testimony regarding who provided the instruction and the length of instruction.

The hearing officer finds that the teacher assistant was properly trained for his role in implementing the BIP.

**6. Specific interventions called for in the BIP are talking to the student to bring the issue to his attention and ignoring negative behaviors of others.**

See Respondent's Exhibit 7. The parent testified that she understood that "talking to the student" meant calling to the student's attention that he was becoming upset or angry. (TE 17). In the present case, it is undisputed that the student was aware of his anger. That is why he was pacing in the hallway rather than in class.

**7. Though not listed as an intervention in the BIP or a feature of the IEP, the student was permitted to phone the parent when he desired.**

The parent testified that "he was supposed to be able to call me if he felt like he needed to talk to me, take walks just to deescalate." (TE 11). The parent testified that the student always was permitted to do so whenever he wished and he did so many times. (TE 22-23). In fact, on the morning of the incident, the phone call the student made to the parent, which put him in a state of agitation, was made on the teacher assistant's cellphone. (TE 26).

**8. The BIP targets physical touching/hitting and verbal outbursts and seeks to instill replacement behaviors of (1) walking away from stressful situations and (2) talking to adults about his aggressive thoughts.**

See Respondent's Exhibit 7.

**8. The student was engaged in the replacement behavior of “walking away from stressful situations” at the time of the incident.**

The parent testified that walking away from a stressful situation was what the student was doing in the hallway the morning of the incident. (TE 17). The parent did not know whether the student had talked with adults that morning about his stressful situation. (TE 17). The teaching assistant testified as follows:

Q. And [the BIP] talks about walking away from stressful situations. Did you do that with [the student]?

A. Yes, ma'am.

Q. Describe to us how you would do that. Now, first of all, most of [the student's] anger was verbal outburst, was it not?

A. Yes, ma'am.

Q. And what did he do when he would have these verbal outbursts? Talk to us a little bit about that.

A. A lot of profanity. Just, he would get really tore up. He was very emotional.

Q. Okay.

A. And we would walk it off.

Q. Okay. So you would let him walk it off?

A. Yes.

Q. Because that's what you had been trained --

A. Yes, ma'am.

Q. -- and told? So it says, "Let him walk away?"

A. Let him walk away, yeah.

Q. Would he ask you sometimes, "I need a walk?"

A. Yes, ma'am.

Q. Okay. The morning of the incident when he hit [REDACTED] in the hallway, had he asked you to let him walk?

A. Yes, ma'am.

Q. And so you let him go into the hallway and walk --

A. Yes, ma'am.

(TE 55-56).

**9. The BIP does not call for the student to “walk off” his anger in isolation from other persons.**

It is undeniable that had the student been removed to an isolated location he could not have been in a position to strike the teacher. The parent testified that “[h]e should never have

been in the hall with any children at all if he's in that state. And we have discussed that many times.” (TE 11). The parent testified that

this was so preventable. If [the teaching assistant] had just removed him. He had that bond at that point with him. He would have went with him at that point in time before that woman came out. He would have left with [the teaching assistant]. He would have went to a walk with him because I picked him up many times and [the teaching assistant] was outside walking with [the student].

(TE 19). The parent further testified as follows:

Q. And so it's your understanding that what should have happened is, [the teaching assistant] should have done what?

A. He should have got [the student] out of there. And he would have went. If you watch that video for seven minutes, [The student] was deescalating himself. None of this would have happened if he had just removed [the student]. And then when the woman came in, he -- she got him right back up.

Q. when you say, "remove [the student]," where would you have expected him --

A. Just took him outside for a walk. Just take him to the gym. Just get him out of that area.

(TE 11-12).

The teaching assistant's job is to implement the BIP as written. When asked whether the IEP or BIP itself required the protocol she described, the parent testified as follows:

Q. Do you know if there's anything in the IEP that describes what you were saying about how to deescalate him?

A. Well, that is why I had asked for Mr. Dettwiller [the student's special ed teacher]. He's been with me and [the student] for many years. We've done this IEP over and over and over. And he will tell you that these are the things, the plans, that we have designed for q[the student] when he was in that state of mind.

(TE 15). However, the IEP and BIP do not require isolation:

Q. There was nothing in the IEP though that said ■ was to be kept from other teachers – or [the student] was supposed to be taken away -- kept away from other teachers, was there?

A. But [the teaching assistant] knew that [the student] could become aggressive. All he had to do was say, "Ma'am, I got this." It would have ended in a much better scenario, I'm telling you.

(TE 38). In terms of practice, the teaching assistant testified that, while he sometimes had the student walk outside, the student often did his walking off of anger in the hallways if class was in session (TE 62) as it was on the date of the incident. He testified that he had not been instructed to keep the student away from other students and teachers:

Q. Now, on a regular basis, nobody had ever told you that you had to keep The Student away from other teachers, had they?

A. No.

Q. Did they tell you you had to keep him away from other students?

A. No.

(TE 74-75)

**10. The replacement activity of “talking to adults about his aggressive thoughts” means discussing, when the student is in a calm state, about making better behavior choices.**

The teaching assistant testified as follows:

Q. And talking to him, did you try to tell him how to make better choices in situations?

A. Yes, ma'am.

Q. Okay. And was he responsive to that?

A. At times.

Q. Did he sometimes say, "I'm sorry. I shouldn't have done it?"

A. Yes, ma'am.

(TE 56).

**11. The BIP calls for Crisis Prevention Intervention to ensure the safety of all persons involved in the event of an emergency.**

See Respondent's Exhibit 7. The parent testified that she understood this to mean removing the student from a stressful situation. (TE 19).

**12. On the day of the incident in question, the student was having a melt-down or was in an agitated state due to being informed by his parent that morning that he could not have something he wanted.**

The parent testified that the student

was upset with me that morning. He -- he was upset. He wanted me to do something for him, to buy something for him, and I was working in Lexington. And I could not answer him in the time manner that he felt was appropriate, but with [the student's] disorders, that's how he processes things.

(TE 13).

**13. The personal assistant was managing the student's agitated state by allowing him to walk in the halls to cool off and vent.**

This is not disputed.

**14. The personal assistant did not try to "talk the student down" during the cooling off period.**

The parent testified that she believed that the personal assistant should have "talked him down." The video makes clear that the teaching assistant was not talking with the student during the cooling off period.

**15. The teaching assistant properly kept a distance from the student consistent with protocol the teaching assistant was trained to follow.**

The special education teacher responsible for the student testified that the proper procedure when the student is pulled from class to cool down is "you correct him and then you back off and let him have time to -- to absorb it, to process it, and then once he has had time to process it, then you take further action." (TE 118). The teaching assistant testified that he was trained to keep a distance except if there is a crisis and intervention is necessary for safety reasons:

Q. And so as far as the talking them down and did they train you that if a student was having an angry outburst, you couldn't be right on top of them?

A. Yes, ma'am.

Q. Okay. So the only time you would be right on top of them, according to this training, would be to protect them or somebody else; is that right?

A. Yes, ma'am.

(TE 53).

**16. On occasion, for short periods of time, the student appeared to leave the line of sight of the personal assistant, but there were no consequences resulting therefrom.**

The parent testified that Mr. ■■■ should have kept the student in sight at all times. The videotape indicates that the student occasionally walked into an adjacent hall was temporarily not within Mr. ■■■'s vision.

**17. The teaching assistant did not observe the student closely during the cooling off period.**

The video shows that the teaching assistant spent most of the time looking at his phone while the student was pacing the halls. The teaching assistant's testimony was that he was texting with the parent during this period. (TE 79). The parent testified that was not true. (TE 79-80). Regardless, the teaching assistant was looking at his phone rather than the student most of the time.

**18. The student exhibited agitated behaviors during the minutes prior to the encounter with the teacher, but those behaviors may have been evidence of de-escalation.**

The parent pointed out (see TE 108-109), and the video confirms, that several times during the minutes of walking in the hall, the student had hit his own chest as he paced back and forth in the hallway. The parent testified that such behavior indicated that the student was about to have an outburst. (TE 83). The teaching assistant denied ever having seen the student "punch himself" (TE 84) and evidently did not see it prior to the incident.

The teaching assistant commented on the video as it was being played that he thought the video reflected that the student was deescalating the way he normally did:

Q. [Y]ou think he deescalated because he's not kicking anything, he's not shouting or cursing or anything?

A. Yes, ma'am. He seems to be calming down the way it usually happens.

(TE 64). Shortly after this point in the video, the student does kick the wall. (TE 65). However, consistent with the teaching assistant's interpretation of the behaviors, the special education teacher testified that those behaviors were indications of de-escalation, a way this student lets off steam:

Q. [Y]ou saw the video. Had you been the one with [the student] at that point, would you have let him pace?

A. Yes, ma'am.

Q. Did he appear to be calming down during the pacing?

A. Yes, ma'am.

Q. Because he might have kicked the wall once or hit the wall once, would you have thought that was – he was really deescalating?

A. Yes. I would have thought those were de-escalations for him because like I said, I've known him for many years and at first -- when I first met [the student], I may have thought those were escalations, things, but those were actually him deescalating. The frequency was lower, the intensity was less each time that he did it.

Q. Because when he first came out of the room he's really upset. He's kicking the wall repeatedly. So you say he's at a high level --

A. Yes.

Q. - of stress? And then, but that really helps him deescalate, right?

A. Yes, ma'am.

(TE 120). Also, see TE 123-124.

**19. It was not established that if the teaching assistant had tried to “talk down” the student that there would have been a different outcome.**

The parent believes a contributing factor to the incident, and a way in which the IEP was not properly implemented, was the teaching assistant's failure to “talk down” the student. The parent questioned the special education teacher on this point:

PARENT: I really feel like if [the teaching assistant] had talked to him, this is my question, I feel like we would have a different outcome. Do you agree with that?

SPECIAL EDUCATION TEACHER: Not -- not 100 percent. It is possible before a different outcome to a path, but I seen even with myself deescalating him as I try to talk to him, he may escalate more just because sometimes he needs that time -without discussion to deescalate, as you know. The pacing, walking, to gather himself where the kids are walking. Didn't hurt anything, didn't hurt himself. Take him around for a walk around the water fountain. Those are things that they -- for some children may escalate him. For him, at times that helps me escalate him to just get some energy out.

(TE 113-114). Given the special education teacher's testimony, there is not sufficient evidence to conclude that an attempt to "talk him down" would have made the situation better rather than worse.

**20. Until seconds before the incident, the student was pacing in empty hallways.**

Except for the occasional student passing by (see TE 64), the video reflects that the hallways were empty until moments before the incident because classes were in session. Then a handful of students and the teacher came into the building from a doorway that opened into the hall where the student was pacing. See the video and TE 66.

**21. The teacher he struck was not one of the teachers that taught him and was not instructed regarding this student's IEP, but doing so would have violated applicable laws.**

Coincidentally, the teacher he struck was a science teacher with experience working with teenagers with mental problems as a pretrial court-designated worker for Juvenile Justice. (TE 94-95) .The teacher had conversed with the student on prior occasions cordially and knew that the student had a condition for which he'd been assigned a personal escort. (TE 94). But it is undisputed that this teacher was not a person instructed regarding the student's IEP. As the special education teacher responsible for the student explained,

[w]ith FERPA, FEMA or whatever the verbiage is, I'm not allowed to discuss his IEP with every person in the school. I'm allowed to discuss it with people that have --  
Q. The IEP. But she said --

HEARING OFFICER: Let him finish whatever he's saying.

A. I'm only allowed to discuss it with the people that work with him every day. And that are privileged to that information.

(TE 137). The Director of Special Education corroborated this testimony concerning the privacy requirements of the law. (TE 151-152).

**22. Immediately prior to the incident, the teacher and some students came into the building from outside where they had been engaging in school activities.**

See TE 96.

**23. The teacher saw the student destroying work of other students and told him to stop.**

The teacher testified as follows:

He was -- it was a display on the wall and a stone or two stones. A culminating project again, for another unit for my astronomy class. And he was just walking along just using his finger to either split them in half or -- none of them fell off the wall, but just tearing them. And I told him to stop. I said, "You can't do that. Those students have worked really hard on those."

Q. Did he say anything at that point?

A. Oh, yes. At that point he turned his body toward me and just kind of went all the way around down, you know, other side of the hallway. And -- and was standing much nearer over to the right-hand side of me. And there were, you know, several students standing right there because they were either in the process of going out or coming in. And he was cussing very vulgar. And just very, very unpleasant to experience.

(TE 97).

**25. The teacher's behavior was not untoward or inappropriate.**

The parent blames the teacher for provoking the student:

She came to [the student] with her hands on her hip, pointing her finger, bobbing her head and that's when she took [the student] back up. He was down. You can see the video.... she was arguing with him and provoking him. That is what she was doing.

(TE 29-30). The parent further testified as follows:

The point of it is, that video speaks for itself. If that woman never said anything to [the student], that would have been over. It would have been done. [The student] would have called me, I would have picked him up, done. She had no business to intervene. She didn't know the student. She had no business to intervene. [The teaching assistant] should have said, "Hey, I have this under control."

(TE 38). The parent further testified during questioning of the teaching assistant and in this exchange with opposing counsel as follows:

PARENT: That's why he hit her.· Because she was arguing with him.· And with [the student] in every action is a reaction.· And [teaching assistant], would you agree with that?

WITNESS: What's the question?

PARENT: That with every action there's a reaction with [the student]?

WITNESS: I think that's fair.

MS. COMBS:· So are you saying that every time anybody does anything he doesn't like, he has some kind of reaction, upset reaction?

THE PARENT:· Yeah, he does.

MS. COMBS:· I'm asking the witness.

THE WITNESS:· Is that to me?

MS. COMBS:· Yeah.

- THE WITNESS:· I -- I can't speak to that I don't -- I didn't see a reaction to every single thing, no.· But –
- MS. COMBS:· But sometimes he would react?
  - THE WITNESS:· Sometimes he would react, yes.
  - THE PARENT:· This was preventable.· He was not [teaching assistant] was here (indicating).· He came down, he was calm. She came out, she was being in his face, and that's what happened.

(TE 89-90).

The hearing officer viewed the video and did not see behavior on the part of the teacher that was untoward or inappropriate to the situation.

**26. The teacher's correction of the student angered the student.**

This is evident from the video and the testimony of the teacher.

**27. The teacher, observing the student's anger, signaled the teaching assistant to come to her aid.**

The teacher testified as follows:

Q. And what did you do at that moment?

A. I waved to ■.

Q. To [the teaching assistant], that's who you're referring to, his aide.

A. Yes, [the teaching assistant] I waved to him.· Because I know he was the one who

knew what to do. He was the one that needed to intervene directly with the student. So my responsibility, I've got like where the students in the immediate area. And I was trying to get them to go on into the classroom. And just trying to, you know, protect them.

(TE 97-98).

**28. The teaching assistant saw the encounter beginning between the student and teacher and immediately went to intervene.**

The teaching assistant testified as follows:

Q. When [the student] was in the hallway earlier, had you started toward Ms. [REDACTED] because you saw her nod or because you've heard him say something?

A. No. I saw [the teacher's] face.

Q Okay. So he had not started to say anything to her at that time?

A. Not that I'm aware of.

Q. But by the time you got there, he was cursing at her?

A. Yes.

(TE 72)

The teacher assistant also testified as follows:

Q. So [the teacher] got your attention well before the hit?

A, Yes, ma'am.

Q. And you got there before the hit?

A. Yes, ma'am.

Q. And what was going on?

A. He was cursing at her. She asked him not to speak to her that way and then that's when

Q. She talk in a regular voice?

A. Yes, ma'am.

Q. So she knew you were with [the student] all the time?

A. Yes, ma'am.

Q. And that's why she got your attention to come to her?

A. Yes, ma'am.

Q; And you went immediately?

A. Yes, ma'am.

....

Q. So you went to him, you got between him and the teacher, --

A. Yes.

Q, -- and he hit her anyway?

A. Yes.

(TE 67-68). The video and the teacher's testimony (TE 98) corroborate that the teacher assistant

responded immediately.

**29. The student struck the teacher in the face.**

This is undisputed. The teacher testified “He hit me full in the face, right here (in the right cheek). Knocked my glasses off completely.” (TE 103-104). She testified that watching the video of the incident “gives me some recurring issues and feeling threatened.” (TE 103).

**30. It was not foreseeable that the student would strike a teacher.**

The student’s ability to control his behavior had been improving as he matured. The special education teacher responsible for the student testified as follows:

Q. Has The Student's responsive to whatever sets him off, has that changed much over the years you've known him?

A. Yes, ma'am. He has -- what do you say, matured or whatever. He has actually calmed down a whole lot in the years that I've known him. He doesn't get set off near as often. Near as much.

(TE 117). The student’s teacher assistant, who had been with him the past 2 ½ years, testified that the student had never become angry with him. (TE 73). According to the August 24, 2017, evaluation, the student “only had one major outburst last school year where he punched another student in the library. He was able to avoid any other conflicts.” (Respondent Exhibit 9, p. 4). During the prior three years, other than allegedly damaging a computer, the student had not had any other serious behavior issues. (TE 44-45; TE 131).

The student had never struck a teacher in the past (TE 73). The special education teacher responsible for the student testified as follows:

Q. Were you surprised when you learned he hit a teacher?

A. Yes, ma'am.

Q. Had he ever hit a teacher before to your knowledge?

A. Not to my knowledge.

Q. If he -- if you had seen him speaking with the teacher at the end of the hallway like [the teaching assistant] did, would you have been afraid he was going to hit the teacher?

- A. No, ma'am.
- Q. Because he had never done anything like that before?
- A. He had never done anything like that before. I had no reason to think he would have hit a teacher.
- Q. So he just mostly his aggression was verbal - is that correct?
- A. Correct.

(TE 134-135). Other school personnel who were asked uniformly expressed surprise that the student had struck a teacher.

**31. At the time of the assault, the student was manifesting and under the influence of his disabling condition.**

The student's behavior in the minutes leading up to the incident, including the pacing and chest-pounding, whether characterized as warning signs or signs of de-escalation, together with his history and all of the other evidence, demonstrate that the student was under the influence of his disabling condition at the time of the encounter with the teacher.

**32. After the incident, the teacher pushed the student away from the teacher; this action was appropriate consistent with his training in crisis management.**

The parent contends that the personal assistant should have exercised more restraint in dealing with the situation and should not have put his hands on the student. The video reflects that Mr. ■■■ did push the student away from the teacher and in the direction of the wall behind him, creating space between the student and the teacher. The teaching assistant testified as follows:

- Q. Okay. ■■■, after he hit the teacher in your training, your CPI training, what would you have been taught to do if he hits somebody?
- A. To remove him from the situation.
- Q. So did you just sort of push him away?
- A. I -- I reacted by getting in between. And then we kind of walked away.

(TE 69). The teaching assistant's task was not simply to ask the student to come with him. The touching was used to remove the student from striking distance of the teacher and was necessary for the teacher's safety. The Director of Special Education also testified that the teacher assistant's actions were appropriate:

Q. So in a situation you said, in a situation where somebody is likely to get in imminent likelihood of somebody might get hurt, it is appropriate under the training, some of the crisis prevention training, to put your hands on the student and push or pull them away?

A. He had -- yes. He had to work quickly to remove himself -- or sorry, remove [the student] from that situation.

(TE 154).

The hearing officer finds that the teaching assistant's actions were appropriate consistent with his training in crisis management.

**33. After gaining control of the situation, the teaching assistant escorted the student to an administrative office and student went willingly.**

The video so reflects.

**34. The parent was promptly informed of the incident and provided relevant information as the facts were being determined.**

The parent testified that the assistant principal phoned the parent and asked her to come to the school "as fast as she could" (TE 28) but that, generally "no one would tell me what was going on." (TE 28). The hearing officer finds to the contrary.

The assistant principal described the first phone call to the parent as follows:

Q. Were you the one that called The Parent?

A. I did. I was the first person that called her.

Q. Okay.

A. That is correct.

Q. Okay. And then -- and so you told her there was a situation. What did you tell her?

A. All I knew about it at the time when I called her is that something was wrong with [the student]. I had just stepped out of my office. [The student] came in [after the incident with the teacher] very distraught. I heard a crashing sound on the floor. It was like a little

plastic type of vase or something like that. And I just thought that [the student] was having a bad day and so I knew that, you know, he would have some - have to have some help in getting him calmed down. So I just called her and told her, "You might want to come up here and let's see if we can get [the student] settled in." That's all the knowledge I had of it, that time. That first encounter.

Q. So you heard something hit the floor break or whatever, was [the teaching assistant] bringing [the student] into the office?

A. Yes.

Q. And so that's when you knew there was something had gone wrong?

A. Yeah.

(TE 170). The vice-principal described successive phone calls where information was shared as it became known:

I talked to her, I want to say, maybe three times on the phone, different times that morning. I didn't want [see?] the video incident until later. What I was going on was what [the teaching assistant] had told me. By that time Officer Barry had come onto the scene and as had Rick Culross. And so I was kind of getting my information in progress. And so when I was talking to her first, I really didn't know what I was dealing with at that time. So it was only after I found out, you know, that the allegation was that he had struck [the teacher], that I was able to say, you know, "You need to get down her right now. I'm not sure what's going to happen from this point." Not being the resource officer, being the school administrator, I couldn't speak to charges or anything at that time.

Q. So you spoke to her several times about the incident trying to keep her informed that day?

A. I want to say maybe twice on my office phone. And I want to say that we used Mr. [REDACTED] phone at one point to call her when maybe she didn't answer my office phone. We were trying to get her there as quick as we could.

(TE 171-172).

The hearing officer finds that the parent was promptly informed of the incident and provided relevant information as the facts were being determined.

**35. The videotapes of the student on the day of the incident were trustworthy.**

Prior to the hearing, the parent requested videotape of the incident in the possession of the school. An administrative subpoena was issued requiring the school to bring videotape to the hearing. Several times during the hearing the tape was played and viewed by hearing officer, counsel, and relevant witnesses.

Although the tape was the student's primary evidence in support of student's claim that the IEP or BIP was not properly implemented on the day in question, the parent expressed skepticism that the tape was trustworthy. The Superintendent for Support Operations explained (TE 142-145) how the cameras work and how the tapes were edited to obscure the faces of other students for privacy purposes. The hearing officer viewed the tapes several times as well. There was not evidence that the tapes were tampered with or not trustworthy.

**36. The student's personal assistant did not strike the student during a previous incident.**

The parent alleged that the student had told her that the teacher assistant "put his hands on [the student]" during some previous incident where the student had spit on another student (TE 24), although later the parent seemed to characterize this as hitting the student. This prior incident was unrelated to the incident that is the subject of this hearing, but was relevant, the parent contended, to whether the teaching assistant was not qualified to implement the IEP. This prior incident was the only other time the parent was unhappy with how the teacher assistant performed his duties. (TE 25). The allegation was fully investigated and found to be untrue. (TE 25; 141-142; 145-146).

**37. The personal assistant should have watched the student more closely but did not fail to properly implement the IEP at the time of the incident that is the subject matter of the complaint.**

The parent believes that the teaching assistant should have monitored the student more closely in the hall that morning. The hearing officer agrees. However, the evidence does not support a finding that failure to "talk the student down" or to remove the student to a different location prior to the encounter with the teacher was a failure to implement the IEP or BIP. The

cooling off managed in this incident as it had been managed in the past. An attempt to “talk down” the student might have worked, not worked, or worsened the situation. Allowing the student to cool down in hallways while class was in session did not violate the BIP as written or as it had customarily been implemented prior to this incident. The hearing officer further finds that the teaching assistant promptly intervened in the quickly-developing situation and the manner in which he separated the student from the teacher was appropriate.

### 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 (6<sup>th</sup> 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.*)

*Honing v Doe*, 484 US 305 (1988) held that an IEP is the centerpiece of the special education delivery system for disabled children. Implementation of the IEP is essential to obtaining FAPE. Implementation of the IEP is crucial to a child receiving FAPE as recognized in 707 KAR 1:320, Section 1(1). Section 1(6)(b) requires that “prior to implementation of the IEP, each implementer is informed of his specific responsibilities related to implementing the child’s IEP.”

- 1. School personnel were properly trained to implement the IEP and BIP.**
- 2. School personnel did not fail to implement the IEP and BIP.**
- 3. The student was not denied FAPE.**

### **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., 5<sup>th</sup> 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 May 22, 2018.

/s/ Mike Wilson

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MIKE WILSON, HEARING OFFICER

### **CERTIFICATION:**

The foregoing was mailed to Hon. Todd Allen, KDE, 300 Sower Blvd., Frankfort KY 40601, with copies to [REDACTED], and to Teresa T. Combs, Mazanec, Raskin & Ryder, 230 Lexington Green Circle, Suite 605, Lexington KY 40503, on May 23, 2018.

/s/ Mike Wilson

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MIKE WILSON, HEARING OFFICER