

**KENTUCKY DEPARTMENT OF EDUCATION  
DIVISION OF LEARNING SERVICES  
AGENCY CASE NO. 2122-02**

██████

**PETITIONER**

v.

██████ COUNTY SCHOOLS

**RESPONDENT**

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

This Due Process Hearing was requested by letter filed with the Kentucky Department of Education (KDE) by Counsel for the Petitioner, ██████, pursuant to the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. Section 1400, et. seq.) An administrative hearing was conducted in this matter on November 17, November 19, and December 6-10, 2021. The hearing was conducted in person at Respondent’s offices in ██████ County on November 17, 2022 in compliance with Covid protocol. The remaining dates of the hearing were conducted remotely via Zoom.

The Honorable Marianne Chevalier represented Petitioner; the Honorable Claire Parsons represented Respondent. ██████’s mother ██████ (“Mom”) was present throughout the proceeding and testified on the child’s behalf. Her father was present as well. ██████ County Director of Special Education ██████ was present as Respondent’s representative throughout the hearing and testified as well. During the course of the proceeding, twenty witnesses testified and a number of exhibits were entered into the record. The hearing was conducted pursuant to 34 CFR Part 300, KRS 13B and 707 KAR 1:340.

Petitioner argues that the IEP proposed by Respondent is inappropriate, that it cannot offer ██████ the least restrictive environment (LRE) and that it cannot offer ██████ a free appropriate public education (FAPE). Petitioner seeks to have ██████ placed in Saint Rita School for the Deaf, a private school in Ohio.

### **FINDINGS OF FACT**

1. ██████ is a six-year-old girl with complex medical conditions including a primary diagnosis of microdeletion syndrome and a secondary diagnosis of significant mixed expressive-receptive language disorder with bilateral sensorineural hearing loss. The chromosomal disorder was diagnosed when ██████ was four months old, and she began receiving early intervention services through First Steps programming and the Perlman Center, a service that provides therapy and support services to children with disabilities. ██████'s parents take her to a number of medical professionals at the Cincinnati Children's Hospital to address her complex needs. (R 590, J 269, TE Vol 5, pp. 10-16)<sup>1</sup>

2. ██████ and her family reside in the ██████ County School District. At almost age three, ██████ was referred to the District for an educational evaluation to assess her then-current level of functioning and determine her eligibility for special education programming. An Integrated Evaluation Report was completed on August 10, 2018. The report was prepared based on a number of considerations, including records review, parent input, behavioral observation, communication evaluation, and physical and occupational therapy evaluations. ██████ was noted to be a very pleasant and happy girl with an extensive medical history. Her achievement of early motor and language development milestones was delayed in relation to her peers. She could walk

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<sup>1</sup> In this opinion, references to Petitioner's exhibits are prefaced with a P before the Bates Stamp Number. Likewise, references to Respondent's exhibits are prefaced with an R and joint exhibits are prefaced with a J. The transcript of evidence is cited by volume with each of the seven days of hearing constituting a volume.

short distances only and utilized a walker for longer distances. Due to a diagnosis of sacral agenesis, [REDACTED] has bowel and bladder issues. She is noted to wear glasses and had a mild hearing loss on her left side and moderate hearing loss on her right side. [REDACTED] communicated primarily through sign language and presented with a mixed receptive and express language disorder due to developmental delay and the microdeletion syndrome. [REDACTED] was noted to have challenges in the areas of both gross and fine motor skills. Her cognitive functioning was also determined to be low. (J 269-276)

3. Due to her disabilities, [REDACTED] received special education services through IDEA beginning in the school year of 2018-2019, when she started preschool at [REDACTED] Elementary School in her home district. For IDEA purposes, [REDACTED]'s primary disability as noted in her IEP was "other health impairment." In February of 2019, Mom requested that [REDACTED] be further evaluated in light of new diagnoses of cortical visual impairment and fluctuating hearing loss. After re-evaluating [REDACTED] in regards to the new diagnoses, the ARC determined that [REDACTED] was IDEA eligible in the area of multiple disabilities. The ARC discussed the option of [REDACTED] attending [REDACTED] Elementary School where a teacher with a background in sign language taught. The parents chose to move [REDACTED] to [REDACTED] and she continued to receive services during preschool the 2019-2020 and 2020-2021 school years through that school.<sup>2</sup> (J 341-345, J 323-328, J 226-237, J 243-248).

4. During a meeting conducted on April 5, 2019, the ARC decided that [REDACTED] would benefit from support from an aide proficient in American sign language (ASL) and safety concerns and that was added to her IEP as a supplementary aide and service. An aide proficient in ASL was

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<sup>2</sup> Due to COVID-19, public schools were closed by order of the governor in March of 2020. Remote learning took place thereafter, and the following school year the preschool operated in a hybrid format, with part remote and part in-person learning with smaller class sizes. (TE Vol. 6, pp. 37-38)

provided for █████ when she was in the classroom to work with her teacher, █████ and related service providers. The sign aides, though called to be “proficient” in ASL, were not certified interpreters. (J 226-233; TE Vol. 4, pp. 60-62, TE Vol. 6, pp. 217-218)

5. █████ can hear and understand spoken English in spite of her hearing loss. █████ used signs but, due to her fine motor challenges, many of her signs were approximations. According to Michelle Knab, an occupational therapist who worked with █████ for two years, █████’s fine motor challenges are likely to persist into the future, which will affect her ability to use her hands to sign proficiently. (TE Vol. 4, pp. 45, 62-63 and 262; TE Vol. 6, p. 131; TE Vol. 7, pp. 74-75 and 191-192; TE Vol. 7, pp. 174-175)

6. █████ is prescribed hearing aids, but sometimes chooses not to wear them. She is limited to two to three verbalizations, with anecdotal evidence for the words “Ma” and “Yeah.” (TE Vol. 4, p. 225; TE Vol. 7, p. 175; TE Vol. 5, p. 188)

7. In September of 2019, an ARC was conducted to discuss adjustments to █████’s IEP. Mom requested an increase in speech services. The ARC modified the scheduling of the speech services to better accommodate █████’s attention span issues. During a discussion of ASL at the meeting, staff reported that █████ was using some sign and understanding when others signed to her. Mom indicated that signing is █████’s preferred way to communicate. (J 211-219)

8. An ARC was next convened on March 27, 2020. Staff reported gains in peer interaction, speech therapy progress and in █████’s stability and ability to walk. With regard to ASL, staff reported that █████’s fine motor skills impact her ability to accurately sign. █████’s parents expressed a preference for █████ to focus on using ASL. Respondent’s speech language pathologist shared that she has been trying several modes of communication with █████, including

technology and devices, and that the ARC should keep all options open and utilize all tools available. (J 157-163)

9. The next ARC was in September of 2020, the start of ██████'s second year of preschool at ██████. During this meeting, the parents expressed concern that ASL wasn't being utilized enough at the school and that they wanted ██████ to be in an environment with more signing. They stated they wanted to consider placement at ██████. School personnel expressed the concern that voice is not encouraged at ██████ and that ██████. would best be served if she has access to both sign and spoken language. ██████, the District's Assistant Director of Education, informed the parents that they could choose to withdraw ██████ from the District, but that the District could better meet ██████'s array of needs based on her multiple disabilities. (J 178-183)

10. The ARC convened again in November of 2020. A number of District staff attending this meeting, including the speech language pathologist, occupational and physical therapists, the hearing-impaired teacher, ██████ and ██████, who serves as the school assistant principal. Also attending at least part of the meeting was ██████, a consultant with the Deaf and Hard of Hearing offices in Northern Kentucky. By this time, students, including ██████, were physically on site at school. Staff reported that ██████ was made a lot of growth since the students returned to in-person learning and was making significant progress in terms of classroom engagement and expressive communication. ██████, the speech language pathologist, reported that she is modeling using both voice and sign to teach ██████ how to better communicate. There is a communication device in the classroom and a second, lower-technology device available for ██████ to work with and staff has been trained to utilize them. Mom requested that the devices not be used and that only sign be used with ██████ Lind informed Mom studies have shown that children

who are exposed to different modules of language and communication increase their overall language skills. (J 189-198)

11. ██████████ the hearing-impaired teacher, reported on progress made with signing and using communication boards with ██████████. The occupational therapist and physical therapist also shared their progress with ██████████. Mom expressed concern about the sign language interpreters who had been assigned to ██████████, and also requested a safety aid for ██████████ as Mom was driving by the school one day and observed ██████████ on a piece of playground equipment. She also expressed concerns with ██████████'s ability to communicate with bus drivers if needed while en route to and from school. In response, staff informed Mom who the sign language interpreter would be for the remainder of the school year and assured her they would provide training to bus drivers in case a communication issue should arise. ██████████ volunteered to review ██████████'s daily schedule to ensure that no safety issues existed. Following the meeting, ██████████, the deaf and hard of hearing consultant, conducted a training for bus staff. In addition, ██████████ scheduled an observation of ██████████ to ensure her safety needs were met. (J 189-198, J 195, J 232, J 245-247, J 307, J 325-326; TE Vol. 2, pp. 65-66, 130-131; TE Vol. 4, pp. 182-187)

12. An array of options is available to modify assistive technology devices to help students like ██████████ communicate even if they have fine motor challenges. According to ██████████, the speech language pathologist, ██████████ did not sufficiently trial assistive technology in the educational setting and further exploration of this technology could continue ██████████'s language development. (TE Vol. 4, pp. 73-84, 87; R 560-563)

13. ██████████'s attendance during the 2020-2021 school year was poor due to a variety of health issues, a family vacation, and the parents' decision to pull ██████████ from the public school in March of 2021. (R 115, 520-528)

14. In January of 2021 District staff met with Mom and the school nurse to ensure no safety concerns existed for [REDACTED] after the implantation of a feeding tube. (TE Vol. 2, pp. 73, 131, TE Vol. 6, pp. 138-139)

15. At about this time, parents hired [REDACTED], a parent advocate. [REDACTED] contacted [REDACTED] to arrange for testing for [REDACTED] so that she could be admitted to [REDACTED]. [REDACTED] is a psychologist with experience both with the deaf community and with [REDACTED]. On February 3, 2021, [REDACTED] performed an in-person assessment with [REDACTED]. At that time Mom told him she wanted [REDACTED] to get into [REDACTED]. (R 223, R 194)

16. In March of 2021, Mom submitted information to [REDACTED] and the school completed an assessment of [REDACTED]. By letter dated March 24, 2021, [REDACTED], the President of [REDACTED] informed [REDACTED]'s parents that the assessment had been completed and that [REDACTED] could enroll in the Fall of 2021. The letter states the following: "However, because of the variety of services listed in [REDACTED]'s] IEP, her attending [REDACTED] will be contingent upon the school district agreeing to place her at [REDACTED]." It is noted that [REDACTED] is a private tuition-based school and that the parents should work with its school district regarding placement so tuition can be covered by the district. Mom filled out an enrollment application the day the letter was issued. (R 251-256, 228-229)

17. Four separate and lengthy ARC meetings were conducted on March 24, 2021, April 7, 2021, April 26, 2021 and May 17, 2021. In total, the meetings lasted over 11 hours. The meetings were video recorded at Mom's request, and the videos submitted into the evidence and reviewed by the undersigned. [REDACTED] attended each of the meetings and attempted to take complete control of the discussions to steer the ARC towards a [REDACTED] enrollment for [REDACTED]. (R 531)

18. [REDACTED], who used to work at [REDACTED], attended some of the March 24, 2021 meeting to advocate for a [REDACTED] placement. During the meeting, [REDACTED] and the parents expressed

dissatisfaction with the District and spoke extensively about [REDACTED]. [REDACTED], the District Director of Special Education attended the meeting and proposed that the school investigate contracting with an interpreter to work with [REDACTED]. to address the parents' concerns about [REDACTED]'s communication needs. Staff was not able to complete the goals and services portions of [REDACTED]'s IEP so another meeting was scheduled for April 7, 2021. Mom later confirmed with [REDACTED] that she wanted to start an interpreter trial on April 19, 2021. However, the interpreter trial never occurred as scheduled because [REDACTED] stopped attending school after April 5, 2021. (J 518-529; TE Vol. 6, pp. 124-126; TE Vol. 6, p. 89; R 115-116)

19. The meeting on April 7, 2021 was similar to the prior meeting, with the parents and [REDACTED] doing much of the talking and insisting on a [REDACTED] placement. Staff were unable to fully provide updates on [REDACTED]'s progress. With the IEP not yet fully developed, another meeting was scheduled for April 26, 2021. (J 86-99)

20. A third ARC was conducted on April 26, 2021. Early that morning, Mom e-mailed a listing of her parent concerns and input, and that e-mail was included in the conference summary report. Mom requested that [REDACTED] be placed at [REDACTED] where students are immersed in ASL. She also expressed concerns about [REDACTED]'s safety due to her deficits in gross motor skills and the need of a safety aide. As the meeting convened, parents and [REDACTED] continued to demand placement at [REDACTED] and express dissatisfaction with the District. [REDACTED] explained to them that an IEP has to be established before a placement decision is made. A fourth meeting was scheduled for May 17, 2021. (J 69-82)

21. On May 13, 2021, Mom and [REDACTED] informed the school that [REDACTED]. would not be attending school the rest of the year because of an incident that apparently occurred on April 5, 2021, causing [REDACTED] to have a psychological reaction. The incident was not mentioned in prior



communications with staff between April 5 and May 13, 2021, nor was it mentioned at the fourth ARC meeting on May 17, 2021 and it is unclear what exactly happened. Physical therapists ██████████ and ██████████ recall ██████████ being upset on April 5, but no significant incident or injury occurred. Schleuter indicated that ██████████ reacted badly when the sign aide told her to get up from sitting on her lap and to go play with other students. (R 157, 528, 523-527; TE Vol 6, p. 126; TE Vol. 7, pp. 81-85)

22. The fourth ARC meeting took place on May 17, 2021. That morning, Mom submitted her own draft of goals for ██████████ and those goals were considered by the ARC and made a part of the conference summary. ██████████ again tried to commandeer the meeting and did much of the talking but the ARC was able to discuss the remaining goals and objectives and supports and moved forward to a discussion about placement. The ARC ultimately concluded that ██████████'s IEP could be implemented within the District and ██████████ explained that she believed the District could provide FAPE to ██████████ ██████████ explained the process for a parent who disagrees with an ARC decision. Mom then read a prepared letter addressed to the District superintendent and director of special education indicating their decision to enroll ██████████ at ██████████ (J 24-56)

23. The draft IEP lists six measurable annual goals and benchmarks involving ██████████'s use of sign language or voice, social responses and improvement of her fine motor skills, among other things. Specially designed instruction is accompanied for each goal. A number of supplementary aids and services are to be provided to ██████████, including access to sign language and picture cues to facilitate language expansion, access to a speech-generating communication device *if* requested by parents, adapted materials, gross motor activities to promote development and safety, vision recommendation and materials to assist visual access, an interpreter, use of hearing

aids, adult support throughout the day as needed for safety and assistance, and physical and occupational therapy. (J 1-12)

24. The IEP calls for the specific involvement of the teacher of the visually impaired, a speech language pathologist, occupational therapist, physical therapist, teacher of the deaf and hard of hearing and the school nurse. Special education services are to be provided daily both in the resource setting and in a collaborative setting. In addition, occupational therapy, speech/language therapy and physical therapy are to be provided four times per month, with an additional two times a month of speech/language therapy in a collaborative setting. ■■■■ is to be provided with interpreter services. (J 1-12)

25. ■■■■ started kindergarten at ■■■■ at the start of the 2021-2022 school year. ■■■■ is a 106-year-old private school owned by the Archdiocese of Cincinnati. There are approximately 110 students in the school. ■■■■ provides a preschool program for disabled and non-disabled children, but the other grades have only students who are deaf or hard of hearing. Anyone with contact with the students knows some level of sign. The cost of tuition at ■■■■ is about \$42,000 and the school contracts at times with public school systems in Ohio to cover those tuition costs. There are additional costs for the provision of physical and occupational therapy. The school agreed to a reduced tuition cost to ■■■■'s parents of \$19,000 per year until the current dispute is resolved. The parents have made no payments to ■■■■ as of yet. (TE Vol. 1, pp. 128-131, 144-145 and 154-157).

26. Upon starting at ■■■■, ■■■■ expressed excitement about being in an environment where so many people were using sign language. (TE Vol. 1, pp. 214-215).

27. As of the date of the hearing, no written plan for academic goals had been finalized by ■■■■ or introduced. Thus, there is little evidence of ■■■■'s progress at the school aside from

a report card showing “satisfactory” grades for math, language arts, science and social studies and “outstanding” grades for physical education, art and religion. (TE Vol. 1, pp. 64-65, 251-257; P 259)

28. A Services Plan detailing goals and services tailored to [REDACTED] was put in place for [REDACTED], but it was not drafted until November, nearly three months after [REDACTED] began receiving services at [REDACTED]. The plan does not include for the provision of physical therapy or the services of a certified teacher of visual impairments, nor does it provide for specially designed instruction from a certified special education teacher. (P 263-276; TE Vol. 1, pp. 91-92, 163, 166, 252-253, 271-272).

29. Aside from the preschool, [REDACTED] has no nondisabled students in the school. [REDACTED] is in a classroom with only two other students, neither of whom speak verbally. During some parts of the day, she has access to at most only 12-14 peers. (TE Vol. 1, pp. 113-114, 169-171, 220).

30. [REDACTED] is [REDACTED]’s teacher. She is not a certified special education teacher. While [REDACTED] had some support from a certified intervention specialist (a degree equivalent to a special education teacher under Kentucky law) until September, that teacher went on maternity leave and wasn’t available to serve [REDACTED] until at least the time of the hearing. When the certified intervention specialist was on leave, [REDACTED] received support from [REDACTED], who is the principal of [REDACTED] and a certified intervention specialist. However, [REDACTED] did not see [REDACTED] on a daily basis and it is clear that she never provided direct instruction to [REDACTED] and was not able to testify regarding [REDACTED]’s progress. (TE Vol. 1, pp. 54-55, 178-179, 252, 199, 25-257)

31. The [REDACTED] president, principal and speech language pathologist did not provide testimony that the District could not meet [REDACTED]’s needs. Expert witnesses called by Petitioner were

also unfamiliar with the District and did not present evidence that the District cannot meet ██████'s needs. (TE Vol. 1, pp. 100, 200, 285-286; TE Vol. 3, pp. 51-52, 62-64, 282; TE Vol. 5, pp. 81-82).

32. ██████ and ██████, expert witnesses call by Petitioner, could also not say that ██████ was appropriate for ██████. They did express concerns about a placement where ██████ would not receive supports from a special education teacher and necessary related services, including the support of a teacher for the visually impaired. (TE Vol. 3, pp. 51-53, 263-264, 281-282).

33. Petitioner filed a request for a due process hearing on July 15, 2021.

### **CONCLUSIONS OF LAW**

1. 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, 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. In addition, KRS 13B.090(7) provides that the “party proposing the agency take action or grant a benefit has the burden to show the propriety of the agency action or entitlement to the benefit sought.” Here, Petitioner is the party requesting action or seeking a benefit. Thus, Petitioner has the burden of proof and must establish, by a preponderance of the evidence, that Respondent violated IDEA.

2. Petitioner specifically has the burden of proof to establish that the IEP proposed by Respondent is inappropriate, that it cannot offer ██████ a least restrictive environment (LRE) and that it cannot offer ██████ a free appropriate public education (FAPE). To get the relief it seeks, it must also prove that placement at ██████ is appropriate.

3. Petitioner’s overarching argument is that Respondent has failed to provide Student with a free appropriate public education (FAPE). School districts have a duty to provide FAPE to all children with disabilities in their districts. 20 U.S.C. Section 1412, 707 KAR 1:290. “FAPE” is defined to mean special education and related services that:

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the Kentucky Department of Education included in 707 KAR Chapter 1 and the Program of Studies, 704 KAR 3:303, as appropriate;
- (c) include preschool, elementary school or secondary school education in the state; and
- (d) are provided in conformity with an individual education program (IEP) that meets the requirements of 707 KAR 1:320.

707 KAR 1:002(27).

4. *Board of Education of ██████ County v. ██████*, 478 F.3rd 307, 314 (6th Cir. 2007) describes the obligations of a school district in providing FAPE to a student determined eligible for services under the IDEA, as follows:

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.” ██████, 458 U.S. at 201 102 S.Ct. 3034. There is no additional requirement, however, “that the services so provided be sufficient to maximize each child’s potential commensurate with the opportunity provided other children.” Id. At 198, 102 S.Ct. 3034.

5. The U.S. Supreme Court revisited the ██████ decision in ██████ v. ██████ *City School District*, 137 S.Ct. 988 (2017). In ██████, the Court considered a disagreement between the parents of a child with autism and the school district regarding development of an appropriate IEP and the provision of FAPE to a student with autism, whose behaviors impeded his ability to progress academically. In discussing the differences between ██████, where a deaf student easily advanced from grade to grade despite missing information due to her deafness, and

██████, where the parents alleged inadequate IEPs were a denial of FAPE, the Court expanded our understanding of ██████, without increasing or decreasing the obligations of a school district.

6. The Court opined that in order to “meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.” 137 S.Ct. 999. The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement.

7. The Court reiterated its long-standing position that an IEP must have as its target substantial academic and functional progress for the student, and that the specially designed instruction and related services must be determined by what is appropriate for the student in the student’s unique circumstances. The Court further refused to “attempt to elaborate on what ‘appropriate’ progress will look like from case to case.” 137 S.Ct. 1001. In evaluating allegations of denial of FAPE herein below, the undersigned considers such allegations in light of these cases.

8. Petitioner first argues that the proposed IEP is inappropriate for four reasons. It contends:

- 1) Respondent failed to include ██████’s parents in the IEP process
- 2) Respondent failed to consider the communication needs of ██████
- 3) Respondent failed to appropriately address ██████’s safety at school; and
- 4) Respondent failed to create an IEP that was reasonably calculated for ██████ to make progress in light of her circumstances

9. The IDEA requires that the public agency ensures that the IEP team for each child with a disability includes the parents of the child. 34 C.F.R. Section 300.321(a)(1). The record is clear that ██████’s parents were heavily involved in the ARC meetings and IEP processes, and the ARC made several changes over ██████’s three years of preschool in response to Mom’s and her advocate’s requests. The undersigned agrees with Respondent that, in order to provide R.M.’s

parents the right to meaningful participation in the IEP process, the District was not required to do whatever they wanted. The ultimate responsibility for developing the IEP and offering a FAPE is on the District. OSEP addressed this issue in *Letter to ██████*, 55 IDELR 107 (OSEP 1.7.10):

If the team cannot reach agreement, the public agency must determine the appropriate services and provide the parents with prior written notice of the agency's determinations regarding the child's educational program and of the parent's right to seek resolution of any disagreements by initiating an impartial due process hearing or filing a State complaint.

10. ██████'s parents were provided all rights of meaningful participation. The record is replete with their heavy involvement in the IEP process. Absolutely, it is admirable for parents to be active participants in the process, but after they have that involvement, they cannot credibly claim they were denied meaningful participation.

11. Petitioner next argues that ██████'s communication needs were not considered as the draft IEP did not allow for direct instruction in ASL, failed to give her the opportunity to directly interact with peers in her language, failed to give her access to professionals with whom she could communicate in her language, and failed to give her access to sign language interpreters.

12. The IEP sought to address ██████'s communication in a variety of ways. Petitioner argues that it focuses on a total communication approach rather than the direct instruction in ASL as Mom preferred. However, with a child as young as ██████, especially in light of her deficiencies in fine motor skills and tendency to approximate, it is entirely reasonable to do as ██████ suggested and keep all possible tools at ██████'s disposal. It is noted that the IEP provides for the use of assistive technology only if the parents are on board. Although differing with the parents on the child only using ASL, Respondent has respected the parents' wishes in this regard.

13. The evidence established that ██████ did enjoy peer interaction, especially when in-person class resumed at the ease of the pandemic. Although there were few people in the school

who could sign, the aides assisted [REDACTED] with her communication with peers. While the ARC initially decided to have aides who are proficient in signing to accompany [REDACTED], it did later modify the IEP to call for an interpreter when it became apparent that the aides needed more expertise. [REDACTED]'s situation at [REDACTED] doesn't appear to afford her a great more deal of peer interaction as there are only two other peers in her classroom.

14. [REDACTED] did have opportunities for instruction in sign via her deaf and hard of hearing teacher and her speech language pathologist. Had she returned to the District, she could well have been placed in the classroom of a special education teacher who had received training in sign language and has used it for a number of years. However, while signing may be [REDACTED]'s preferred mode of communication currently, it need not be [REDACTED]'s only mode of communication as she is a hearing child and not completely deaf, which is why the District attempted to serve her through a variety of modes of communication at her tender age. ARC teams are required to provide opportunities for direct instruction in the child's language and communication mode. 34 CFR 300.342(2)(iv). The District did that.

15. Petitioner argues that Respondent forced her to communicate through unqualified adults and denied her an interpreter in violation of KRS 309.300. Kentucky's statute concerning interpreters states that "[N]o person shall represent himself or herself as an interpreter or engage in the practice of interpreting" as defined as "the translating or transliterating of English concepts to any necessary specialized vocabulary used by a consumer or the translating of a consumer's specialized vocabulary to English concepts." The statute requires a qualified "interpreter" to hold a nationally recognized certification. In this case, the initial IEPs called for an aide proficient in ASL to serve [REDACTED]. There were three aides that did this over the course of time, but there is no evidence that they held themselves out as interpreters or nationally certified. The ARC determined,



however, that for the 2021-2122 school year, the District would contract with an interpreter to serve ██████. That didn't happen because ██████ didn't return to the school.

16. Petitioner alleges that Respondent failed to address ██████'s safety needs during her time at the preschool and in the draft IEP. The undersigned is aware of no specific authority for this argument and none was offered. ██████ has a history of struggling with stability and balance but has made progress in this area according to both the Respondent's staff and the ██████ staff. ██████ initially had an aide who served as both a safety aide and a communication aide. After Mom raised issues regarding safety, the Respondent indicated it would observe ██████'s safety needs more closely. When Mom expressed concern about ██████'s safety on the bus, Respondent provided training to bus drivers on how better to communicate with ██████. The draft IEP offered physical supports and tools to support ██████ during the day as needed as well as adult support throughout the day as needed for safety and assistance.

17. Petitioner contends that the proposed IEP was not reasonably calculated to enable ██████ to make progress in light of her circumstances and that the IEP was not tailored to her needs as required by ██████, supra. This argument is based in large part on the contention that the goals in ██████'s IEPs were not tailored to her as the District did not acknowledge that ASL is her mode of communication. As indicated earlier, signing was always incorporated into ██████'s IEPs, even though the Respondent urged the parents to use other tools in combination with signing. The IDEA requires that in constructing an IEP, an ARC should consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of evaluations, and the academic, development, and functional needs of the child. 34 CFR 300.324(a)(1). The evidence of record showed that the ARC considered all of these factors and crafted an IEP to address all of

■■■■'s needs, including cognitive deficits and physical impairments. Petitioner failed to meet its burden of proof on this issue.

18. Finally, Petitioner argues that ■■■■ County Schools cannot offer ■■■■ an LRE because they cannot consider her communication needs when there are so few ASL-proficient staff members and no other students who communicate through ASL. It argues instead that ■■■■ offers ■■■■ an LRE because they are able to meet her needs, including direct instruction in ASL and opportunities for interaction with signing peers and staff.

19. The IDEA requires that, “to the maximum extent appropriate,” children with disabilities be educated with children who are nondisabled and that children be removed from the regular educational environment only if the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR 300.114(a)(2). The pertinent Kentucky regulation, 707 KAR 1:350, essentially mirrors the federal regulation. This LRE mandate balances the goal of mainstreaming with nondisabled peers with the equally important objective of providing an education appropriately tailored to each student’s particular needs. ■■■■ v. ■■■■ *Board of Education*, 546 F.3d 111 (2d Cir. 2008).

20. In the case of a child who is deaf or hard of hearing, the ARC committee must “consider the child’s language and communication needs, opportunities for direct communication with peers and professional personnel in the child’s language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child’s language and communication mode.” 34 CFR 300.324.

21. In arguing that the LRE for ■■■■ is at ■■■■, Petitioner also relies on a letter published by the Department of Education to ■■■■ in 2010. The letter reiterates

that placement decisions are to be made on a case-to-case basis depending on each child's unique needs and circumstances, and that the setting chosen must meet the communication and related needs of a deaf child. The letter also advises that the vast majority of students with disabilities attend a neighborhood school, and a student should not be sent to a separate school solely because of a disability. While a specialized school placement may be appropriate for some students with hearing impairments, for other students it is more appropriate to attend their home school with appropriate supports. (P 283-285)

22. The undersigned concludes that neither placement is absolutely ideal for ■■■■■, but the most appropriate placement under these circumstances is within the ■■■■■ County School District. ■■■■■ will be given ample opportunity to be educated with nondisabled peers when she is in the general education setting. Importantly, the IEP proposed by the District addresses all of ■■■■■'s needs, including the provision of a certified special education teacher and a teacher for the visually impaired. ■■■■■ could continue with speech, occupational and physical therapy at the District and her communication would be benefitted with the support of a certified interpreter. It is also a public school closer to home.

23. The benefit of ■■■■■ is that it would allow ■■■■■ to communicate with more people via ASL, a mode of communication she currently prefers and the mode her parents are most interested in. However, ■■■■■ would be restricted to a classroom with only two other students, neither of whom are verbal. All of the students above the preschool grade are disabled so ■■■■■ would have no interaction at all with nondisabled peers. ■■■■■ lacks the qualified staff and supports to meet all of ■■■■■'s complex needs.

24. To the maximum extent appropriate, the LRE is a placement that allows a child to be with nondisabled peers, in a location close to her home, and in the school she would attend if

nondisabled. 707 KAR 1:350, Section 1(1), (6), and (7). In addition, 707 KAR 1:350, Section 1(3) states the following as the continuum of alternative placements: regular classes, special classes, special schools, home instruction and hospitals or institutions.

25. In light of all of the above, the undersigned concludes that the placement offered by the District is the LRE for ██████<sup>3</sup>

26. Petitioner has not demonstrated that the District denied FAPE or offered an IEP that was not reasonably calculated to lead to educational benefit. Nor has it shown ██████ to be the appropriate placement for ██████ For these reasons, it is not necessary to address the tuition reimbursement issues.

### **FINAL ORDER**

The undersigned concludes that Petitioner failed to prove by a preponderance of evidence that Student was denied FAPE. Specifically, Petitioner did not demonstrate that the IEP proposed by Respondent is inappropriate, that it cannot offer ██████ an LRE, and that it cannot offer ██████ a free appropriate public education (FAPE). It likewise failed to prove that ██████ is the LRE for ██████

### **APPEAL RIGHTS**

In accord with that regulation and pursuant to 707 KAR 1:340, Section 12, 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, via certified mail, a request for appeal within

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<sup>3</sup> Interestingly, Respondent has cited to two Ohio cases involving St. Rita where the hearing officers ruled in a similar fashion regarding placement after parents argued that St. Rita is the LRE because it offers students the ability to communicate with peers and staff in sign language. See *Mason City Sch.*, 108 LRP 53430 (OH SEA 3.21.08) and *Bd. of Educ. of the City Sch. Dist. Of the City of Cincinnati*, 110 LRP 63486 (OH SEA 1.6.10) (quoting *Renner v. Bd. of Educ. of the Pub. Sch. of the City of Ann Arbor*, 185 F.3<sup>rd</sup> 635 (6<sup>th</sup> Cir. 1999) and noting that the Sixth Circuit has repeatedly stated that the parents of a disabled child have no right to dictate educational methodology or compel a specific program.

thirty (30) calendar days of the date of the Hearing Officer's decision. The appeal shall be submitted to the Kentucky Department of Education at the following address:

Kentucky Department of Education  
Office of Legal Services  
300 Sower Blvd; 5<sup>th</sup> Floor  
Frankfort, KY 40601

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

Issued this 30th day of June, 2022.

/s/ Susan Gormley Tipton  
SUSAN GORMLEY TIPTON  
Hearing Officer  
[susantipton@roadrunner.com](mailto:susantipton@roadrunner.com)

#### CERTIFICATION

I hereby certify that a true copy of the foregoing Order has been served by mailing same to the following, via **e-mail**, on this the 30th day of June, 2022:

Hon. Marianne Chevalier  
[mchevalier@lawcg.com](mailto:mchevalier@lawcg.com)

Hon. Claire E. Parsons  
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Tina Drury  
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/s/ Susan Gormley Tipton  
Susan Gormley Tipton  
Hearing Officer