

**KENTUCKY DEPARTMENT OF EDUCATION  
DIVISION OF EXCEPTIONAL CHILDREN SERVICES  
EXCEPTIONAL CHILDREN APPEALS BOARD  
AGENCY CASE NO. 2223-14**

█

APPELLANT

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

█ SCHOOLS

APPELLEE

**PROCEDURAL BACKGROUND**

The Due Process Hearing was requested by letter filed with the Kentucky Department of Education (KDE) on December 9, 2021, by the student’s mother, pursuant to the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. Section 1400, et. seq. and 707 KAR 1:340. At that date the student was 13 years old and identified as a student with a disability who needs special education and related services under the category of severe autism and severe speech delay. The parent alleged a failure to provide FAPE.

An administrative hearing was conducted June 13-17, 2022, in █, KY. The Petitioner’s parent proceeded pro se, assisted by a translator. The Respondent was present in person by its representative, Director of Special Education, █. The Hon. █ represented Respondent. The Hon. D. Lyndell Pickett, Hearing Officer, by agreement of the parties, conducted the hearing remotely by ZOOM. The hearing was conducted pursuant to 34 CFR Part 300, KRS 13B and 707 KAR 1:340.

The Hearing Officer showed great liberality procedurally toward the pro se litigant, admitting records from the parent that were not tendered by the deadline set forth in the pre-trial

order but were tendered five days before the hearing. The parent's exhibits were not numbered prior to the hearing. TE 59. During the hearing, additional exhibits were introduced by the parent that had not been disclosed prior to the hearing. The parent's exhibits never were properly organized and numbered.

The issues raised by the parent were as follows:

1. **Whether Respondent failed to develop an appropriate IEP by**
  - a. failing to give adequate consideration to independent evaluations tendered to the ARC;
  - b. failing to create an IEP reasonably designed to achieve a meaningful educational benefit as evidenced by alleged failure to make reasonable progress toward goals;
  - c. by creating an IEP that was not in the Least Restrictive Environment
2. **Whether Respondent failed to implement the IEP by**
  - a. committing verbal and physical abuse against the student and not allowing student to eat lunch brought from home;
  - b. failing to reschedule ten Virtual Learning Academy (VLA) sessions that were cancelled. (The parent testified at the hearing, TE 50, that the sessions have been made up in ██████████ at Respondent's expense, so this issue is not addressed further in ECAB's Findings of Fact).
  - c. failing to collect data that Respondent agreed to collect pursuant to a mediation agreement;
  - d. failing to implement the student's Behavioral Intervention Plan (BIP);  
by improperly restraining, abusing, or secluding the student

3. **Whether Respondent committed procedural violations that amount to denial of FAPE by**

- a. failing to provide adequate notices and information about the student to the parent;
- b. failing to provide meaningful participation by the parent.

The parent sought compensatory damages as a remedy for the violations alleged.

The Hearing Officer found for Respondent on all issues, save the failure to provide the ten virtual sessions, which the parent conceded at the hearing had been made up and paid for by Respondent. The Hearing Officer found no additional compensatory services were due.

The parent appealed and the undersigned ECAB panel was appointed to hear the appeal. The parties have filed briefs herein. Being sufficiently advised, ECAB makes the following Findings of Fact, Conclusions of Law, and Final Order

**ECAB DENIES PARENT'S MOTION FOR PERMISSION  
TO SUPPLEMENT RECORD**

On appeal, the student's parent asked that the record be supplemented with two additional exhibits. The school opposed the request. 34 CFR 514 (2)iii permits ECAB to seek additional evidence if necessary. ECAB finds that the parent fails to establish that additional evidence is necessary. The record created at the hearing is sufficient to address all issues, the evidence in question was not improperly excluded, and the evidence could have been introduced at the hearing.

Additionally, were the request made at the District Court level, it would not be granted. *Egg Harbor Township Board of Education v. S.O., by his Guardian ad litem, R.O.*, Civil Action No. 90-1043, slip op. at 3 n.1 (D.N.J. Aug. 19, 1992) ("additional evidence" under 20 U.S.C. § 1415(e)(2) should not be cumulative, introduced to impeach credibility of administrative hearing witnesses, nor embellish testimony from the administrative hearing, and should not have been

available for proffer during the administrative hearing). The parent was given great leeway at the hearing and repeatedly permitted to introduce records after the deadline. The subject of additional records was explicitly addressed on the first day of the hearing:

HEARING OFFICER: I'll go ahead and admit all of [the parent's] records.... Now, [parent] you're not planning to send any additional records; is that right? We've got all of your records? **There's not going to be any more records; is that right?**

[PARENT}: No, I submitted all of the files.

HEARING OFFICER: Okay. Because, you know, the school is entitled to, you know, get the records on time so that they can prepare their response to the records.

TE 21, emphasis added. The subject of admitting additional records came up again on the third day of the hearing, after the hearing officer admitted records the parent had emailed the night before:

HEARING OFFICER: I am going to go ahead and admit the records that [parent] e-mailed today. Just by rationale, obviously, they're late, some of them; but my rationale is, I don't know how this case will come out. I do not want to get a remand because records weren't admitted or because questions go beyond the scope of direct examination, those types of things. But having said that, [parent], you know, we have these deadlines for a reason. The school, you know, they worked hard to get everything in on time, and they're allowed to rely on the deadlines I set so they'll be fully prepared. So, again, I don't know how the case will come out, but it does open up the grounds for appeal for the school, you know, if I allow you advantages that they don't get. So just -- I take it there are not going to be any additional exhibits added to the file; is that right?

[PARENT}: No. I answered that question before. I said no before and I'm saying no now. I did not add anything that was not already submitted.

MR. PICKETT: Well, I'm saying **you're not going to add anything tomorrow, next week?**

{PARENT}: I'm not adding anything, Your Honor. I did not add -- the last thing I had submitted was, again -- what was that again?

MR. PICKETT: Okay. You answered my question.

TE 408-409, emphasis added. ECAB is not a trial court *de novo*. The parent's motion to supplement the record is denied.

## FINDINGS OF FACT

**1. The student was born [REDACTED], and was enrolled in third, fourth, and fifth grade at [REDACTED] for periods during 2018-2019, 2019-2020, and 2020-2021**

Undisputed. See testimony of parent, TE 31. Matriculation at [REDACTED] was not continuous. The parent unenrolled the student from [REDACTED] on March 4, 2020 to be home-schooled. TE 306. The student was re-enrolled at [REDACTED] for 2020-2021, during COVID, and attended virtually. The student withdrew from [REDACTED] in the spring of 2021.

**2. The student has a diagnosis of severe autism and severe speech delay.**

Testimony of parent, TE 33. The parent also believes student has ADHD. The assessment of [REDACTED], Resp. Ex 255, states:

Overall, it is evident, based on the multiple sources of documentation obtained for this assessment that [the student] has severe autism and requires Level 3 supports. [The student] is largely nonverbal, exhibits delayed echolalia, will not socialize with anyone outside [student's] home, has restricted interests, maladaptive speech, and significant behavior problems with frustrated [sic]. There was no meaningful evidence of ADHD – the ASD diagnosis best explains symptoms of ADHD.

The student was able to speak well enough for teachers to understand student's needs and wants. TE [REDACTED], p. 113. The student scored at or below 1 percentile in various measures of language skills in the integrated assessment performed by [REDACTED] in 2018. Resp. Ex. 82.

**3. The student scores in the one percentile, or lower extreme, level in the non-verbal index of cognitive functioning.**

See Resp. Ex 82, p. 13.

**4. The student performs consistently and significantly below same-aged peers**

**academically; student has difficulty completing work even with individualized attention due to student's behavior issues; student has average nonverbal intelligence and the potential to function at a higher level than student does.**

See Resp. Ex. 82. Additionally, academic achievement testing was attempted three times for the integrated assessment but was unable to be completed. The first time, the student cursed and refused to work. The second time the student threw papers and screamed. The third time the student kept talking about an "officer." See Resp. Ex. 82, p. 11. There are similar reports from the psychological evaluation by [REDACTED] at the student's home:

Efforts to engage [the student] in any sort of conversation were unsuccessful. [The student] simply looked around the room and babbled incoherently or looked at the examiner when asked questions....[The student] demonstrated rather frequent scripting and echolalia.... [The student] would not engage in any tasks that required writing or providing more than a one word verbal response

Resp. Ex 255, pp 2-3. Regarding the student's potential, [REDACTED] report states:

Although [student's] functional language, academic skills, and self-help skills are profoundly limited, [student's] level of non-verbal intelligence is average. [The student] certainly has the potential to function higher in the academic and self-help areas.

Resp. Ex. 255, p. 3.

**5. The student's autism impairs student's ability to interact with other students and impels student to "tag" or touch others.**

The parent testified:

[The student] loves being around children [student's] age and younger, but will not play with them due to [student's] autism. As a result of [student's] autism, [student] has difficulty socializing with peers, and due to [student's] sensory needs, [student] tends to touch others that are too close to [student]. And [student] has difficulty when others touch [student], even if it's by accident, and [student] has the impulse to touch them back.

TE 34.

## MATRICULATION AT THE DEPARTMENT OF DEFENSE

6. **Prior to attending [REDACTED], the student attended [REDACTED] schools at [REDACTED], Kentucky.**

This is undisputed.

7. **The [REDACTED] IEP provided for special education in a self-contained classroom except for lunch and special classes.**

Under a [REDACTED] IEP dated May 24, 2018, the student was placed in a full-time self-contained classroom except for lunch and special classes. Resp. Ex. 66, p. 1. Also, see testimony of student's teacher at [REDACTED], TE 56.

8. **The [REDACTED] IEP provided for speech services and Occupational Therapy.**

The [REDACTED] IEP provided for 120 minutes per month of speech and language services in a self-contained classroom and 60 minutes per month OT from the classroom teacher in the classroom. For 15 minutes each month, an occupational therapist was to consult with the teacher in the self-contained classroom for assistance with the student. Resp. Ex 66, p. 1-2.

9. **The [REDACTED] IEP reflected the student was alternate assessment.**

See Resp. Ex. 69, p. 1. Alternate assessment is a track available to students with cognitive limitations who will not receive a high school diploma. See T.E 545. This means that at [REDACTED], where the parent reports the student was doing well, the student was not being assessed as a student who could potentially earn a high school diploma.

10. **The [REDACTED] IEP did *not* require a dedicated full-time one on one assistant.**

One contention of the parent in this case is that the student needs a full-time dedicated one-on-one assistant. However, the [REDACTED] IEP, Resp. Ex 69, only listed as an accommodation

“constant adult support for safety and academics.” The [REDACTED] IEP does not require a dedicated one-on-one assistant. Regarding student’s special ed placement, the [REDACTED] IEP states, at p. 9:

Due to [the student’s] weaknesses in the areas of verbal comprehension and reasoning, and [student’s] need for one on one/small group instruction in all areas of academics, [student] needs a smaller group setting with more adult assistance than what is available in the regular education classroom.

The parent testified that at [REDACTED] the student was in self-contained classroom, but went to PE, Music, and recess with general ed accompanied by her or by another adult. TE 191-192. At [REDACTED], but not at [REDACTED], the parent worked in the same building where the student attended school.

**11. Notwithstanding provision of adult attention, [REDACTED] believed the student was capable of performing written work without an adult.**

A [REDACTED] document dated February 9, 2018 states:

[Parent] wants to make sure that when [the student] is not working with [REDACTED] SIS, another adult will be there to encourage and assist [the student] in getting started and completing [REDACTED] tasks. [REDACTED] [the student’s teacher at [REDACTED]] and [REDACTED] believe that [the student] may be seeking adult attention, but is able to perform the written work without an adult.

TE 204.

**12. The student was making progress on goals at [REDACTED] school but did not achieve them.**

The parent, in her opening statement, which was treated as testimony, testified “when [the student] was at the [REDACTED] schools, [the student] was doing good and [student] was making progress towards [student’s] individual educational plan goals.” TE 34. But then, when the parent was questioning the student’s teacher at [REDACTED], the following exchange took place:

Q. Did [the student] meet the goals of [REDACTED] IEP from the [REDACTED]?



A. Yes, ma'am.

Q. [The student] met the goals of █ IEP from the █?

A. As far as I recall; yes, ma'am, [student] did.

Q. Okay. I'll note it here that you said yes, but [student] did not.

TE 72. Taking the import of both statements together, ECAB finds the student was making progress at █, but did not achieve █ goals.

**13. The student exhibited behavioral problems at the █ school and it was anticipated student would exhibit them at student's next school.**

A behavior protocol was revised at █ on May 23, 2018, for the benefit of, the student's new school (█). The summary in the document identifies as problem behaviors tagging, aggression, and spitting. TE 200-203

#### **MATRICULATION AT █**

**14. The transfer from █ to █ had to be treated the same as an out-of-state transfer, procedurally requiring initial evaluation and referral.**

See testimony of █, DoSE, TE 777.

**15. The █ IEP provided by the parent was entered into Infinite Campus using a blank Kentucky form, pending development of a Kentucky IEP by █**

T.E. p. 65-67.

**16. The student's initial IEP at █ mostly mirrored the one at █, providing for self-contained classroom instruction except for special classes, lunch, and recess.**

The student was in an MSD classroom at █, otherwise known as a self-contained classroom, but went to general ed for special classes, such as music and art, for recess with student's grade level, and for lunch with student's grade level (but at the MSD table). TE, █

p. 86. The [REDACTED] IEP provided for less than 40% of time in general education, roughly equivalent to the time for lunch, recess, and special classes at [REDACTED]. TE, [REDACTED], p. 87. Also, see testimony of student's teacher at [REDACTED], TE 56; 62-63.

**17. The student, at [REDACTED], received one-on-one attention, but did not have a specific person assigned to [REDACTED] all the time.**

The student's teacher testified there was an adult with student, just not the same one all the time. TE 102. The teacher testified as follows:

Q. So [the student] always had essentially one-on-one supervision?

A. Yes, sir.

TE, 102.

**18. Like at [REDACTED], the student was initially on alternate assessment at [REDACTED] but that changed after the student demonstrated a possibility of greater cognitive abilities.**

Notwithstanding the limitations of the student's cognitive abilities described hereinabove, the parent object that student was still on alternative assessment, rather than on track to regular high school diploma. TE 107. It turned out, with accommodations, the student was able to answer questions in math that justified taking the student off alternate assessment in fourth grade in November of 2019. TE [REDACTED], p. 109-110.

**19. The school attempted to transition the student from MSD to resource.**

After the school took the student off alternate assessment the student was pulled out from MSD from time to time into resource, special ed classes that are a step between MSD and general ed, accompanied by a paraprofessional, for periods of 30 minutes at a time, thereby exposing the student to students functioning at a higher level than MSD. TE 110-111. The special education consultant explained.

At that time, [the student] was on a plan to transition from the MSD classroom to more resource time. It was a pretty elaborate system of adding, I believe it was 20 or 30 minutes at a time every couple of weeks. I'm generalizing here because I don't have it in front of me. But when [the student] at that time was going into the resource environment, there was an assistant from the MSD classroom going with [the student].

TE 492. When the student enrolled in [REDACTED], where MSD served kindergarten through second grade and all [REDACTED] students would be new to the student, resource was considered appropriate as a general placement except for special classes. TE 498-501.

**20. The parent failed to prove that the [REDACTED] IEPs were improperly designed or inadequate.**

[REDACTED] recommendations in the integrated assessment mirror what the school was already doing:

Given the severity and extent of [student's] functional impairments in the academic, social, communication domains, as well as [student's] tendency to abscond, the ARC needs to seriously consider a setting that involves a very low teacher to student ratio, 1:1 assistance with transitioning, intensive communication services, and a highly regimented behavior plan (following an FBA) that reinforces compliance and removes privileges for noncompliance. These services may best be provided through a self-contained classroom. [The student] is capable of developing far more age-appropriate academic skills than [the student] is currently demonstrating. Intensive academic instruction and communication interventions will be needed to address this unexpected weakness.

Resp. Ex. 255.

Parent argues that the IEPs should have provided a full-time one-on-one assistant. However, [REDACTED] psychological evaluation, quoted above, recommends 1 on 1 adult assistance only for transitions. See Resp. Ex. 255. As found elsewhere, the student did not have a full-time one-on-one assistant at [REDACTED] and was believed by [REDACTED] to be capable of completing work without assistance of an adult. [REDACTED] school personnel believe negative consequences of a one-on-one assistant outweighed any potential benefits and would interfere with relations between peers and promote prompt dependency:

So that the child is literally not doing anything for themselves because they are waiting on someone to tell them what to do or to guide them what to do.

Special education consultant [REDACTED], TE. 458. Additionally, a one-on-one assistant would not be the least restrictive environment for the child:

[P]roviding a one-on-one adult is the most restrictive option, and we are tasked with finding the least restrictive option, while still making sure we're meeting the student's needs.

Special education consultant [REDACTED], TE.460. In support of her request for a one-on-one assistant the parent offered the letter of the student's ABA therapist. See parent's unnumbered exhibit and TE 573-575. Quoting from the letter as it appears in the parent's unnumbered exhibits:

[I]t is in my professional opinion that [the student] requires the support of a 1:1 educational assistant. 1:1 support would guide [the student] to stay focused on academics by providing necessary task redirection. The aide would also be beneficial in assisting [the student] with managing [student's] behavior by implementing a behavior plan created by a behavior specialist. 1:1 support would assist with social skills training by encouraging group play or conversations in unstructured settings (playground, centers, lunchroom). [The student] requires consistent and immediate delivery of positive reinforcement. The 1:1 aide would be beneficial in that they would be able to reinforce expected behaviors such as attending to task, sitting still, and refraining from hitting others.

The letter from the therapist lists no degrees in education or other information evidencing her qualifications to give opinions on matters of education. The therapist did not appear as a witness to be cross-examined. School personnel rejected her recommendation as not in accordance with best practices educationally. The parent testified that a letter from the student's family doctor recommended a one-on-one assistant, but a review of that letter reveals the doctor recommended "one on one *monitoring* in the classroom setting not only for safety but for instruction..."

See parent's unnumbered exhibit, letter from [REDACTED], September 14, 2009, emphasis added.

As described elsewhere in these findings, though the student did not have a one-on-one assistant

assigned to student exclusively throughout the day, student did have adult monitoring at all times.

**21. The IEPs were implemented, and the student made modest progress on student's goals, but was still enrolled in first grade and second grade classes in fifth grade.**

The parent testified she observed classroom on January 9, 2020, and, in her opinion, the teacher was not using a reward system for the student's work. TE 156-157. However, the student's teacher at [REDACTED], testified that she implemented the IEP and that student made progress on the IEP that replaced the [REDACTED] IEP. TE. 74, 80. At [REDACTED], the student made progress on some goals, but not others. See TE 357-399. One of student's goals at [REDACTED] was to speak in complete sentences (Resp. Ex 180) and student was able to communicate in sentences at [REDACTED] (TE 364). During 2020-2021, when student was attending virtually, student met student's writing objective, made progress on reading comprehension goal, and scored 100 on the math goal. TE 734-737. Once the student became comfortable with the virtual setting, the student "made progress being able to do things independently, doing things when asked with fewer and fewer prompts each time" and made steady progress on the behavior goal of "given two nonpreferred educational tasks before getting reinforcement, that [student will] be able to work." TE 739; 743-744.

However, overall, the progress was not great. Entering third grade, in 2018-2019, the student's math level was kindergarten to first grade (TE 444, Resp. Ex 28), reading level was first to second grade level (TE. 445, Ex 28), and the student was on alternate assessment (TE 447). The student was still enrolled in first and second grade classes in fifth grade. (TE 752).

**22. Parent failed to prove speech and OT services provided for on IEPs in [REDACTED] [REDACTED] were not appropriate; the student made progress in speech.**

The [REDACTED] IEPs provided for less speech minutes than the [REDACTED] IEPs, but there was not proof whether [REDACTED] utilizes a transdisciplinary approach under which language goals are worked on across the classroom and all providers to promote generalization, as is the case in [REDACTED]. TE 607-608 The student's progress on following directions was up and down, but for the other speech goals student was making progress in [REDACTED] TE 399; Resp. Ex. 38.

The student did not have impairment of fine motor skills that would interfere with participation in school. The student had some sensory processing issues and the OT in [REDACTED] [REDACTED] recommended certain types of supports be used in the classroom for OT issues and she remained in a consultive role with teachers. While it appears the student received 60 minutes direct OT three times a month on the [REDACTED] IEP, examination of the language of the [REDACTED] IEP established that these services were delivered by the teachers, not an OT, as was the case in [REDACTED]. TE 671. Behavior issues of the student were behaviors used to avoid non-preferred activities and were not caused by lack of sensory support. TE 672.

**23. The student exhibited serious behavior issues at school that often endangered the student or others.**

During the first weeks of attending [REDACTED] the student's teacher asked a special education consultant for help because the student was using bad language with [REDACTED] word and throwing furniture. TE 422-423. The parent also was informed:

I was told that [the student] was using inappropriate language and throwing things in the classroom. I was told [the student] did not want to work on [student's] assignments. .... [The student's] behavior in the classroom setting continued to escalate .... I began getting phone calls and emails from [student's] teachers regularly stating that [the student] was very inattentive, refused to participate, did not complete activities, was climbing on the windows in the classroom, running outside the classroom, in the hallways, and outside the building.

TE 34-35. The parent further testified

[the student] was having difficulty with following directions and remaining seated, difficulty focusing, getting easily distracted, tagging others who came too close to [the student] or touch [student]. And I know this because I made school observations also.

TE 41. The parent opined that the student was learning these bad behaviors from the “Think-it” sheets which were supposed to help the student control such behaviors. TE 178. ECAB does not find that argument persuasive.

The incidents continued in 2019-2020. [REDACTED], Assistant Principal at [REDACTED], testified that on January 8, 2020

[the student] was told it was time to work; however, [the student] got up and went to the door and tried to tag [REDACTED], who had already left the room. The student then returned to the area and punched very hard an instructional assistant in the back. The other instructional assistant intervened because she was afraid the student would hit again. [Student] then hit her repeatedly.

TE. 678-679. On January 21, 2020, another incident occurred.

9:00, student was removed from gym because [student] was climbing on the bleachers and rolling on the floor. 9:05, student refused to get on iRead. [REDACTED] was working with the student while [REDACTED] was working with the other four students in the classroom. The student started yelling no and went to run out the door. [REDACTED] was standing by the door when the student started to kick, punch, and slap her. The student then punched [REDACTED] in the face. [REDACTED] then moved away from the student, and the student stated, 'I will punch your face.' [REDACTED] then stepped in and stood in the doorway until school administration arrived. The student ripped posters off the wall as well.

TE 680-681. The principal believes the two incidents were intentional:

[The student] had targeted this particular aide. This was the second time. The 1/8 incident and the 1/21 incident was the same aide. ... The last time, [the student] punched this aide in the back; this time, [the student] punched her in the face. And [student] stated in the behavioral referral that "I will punch you in the face."

TE. 687-688. The critical incident log, Respondent Ex. 189, documents numerous instances of the student’s bad behaviors, many of which endangered the student and others.

## **ALLEGATIONS OF ABUSE AND IMPROPER RESTRAINT**

The parent alleged inappropriate restraint in the due process hearing request (at p 3). At the hearing, the parent testified the student was not allowed to eat lunches student had brought to school from home and that at times student was locked in the bathroom. The school objected on grounds that such allegations had not been raised in the due process complaint. The Hearing Officer allowed the parent to testify about these allegations “so there would be a complete record” (See: Final Order, p 4) but sustained the objections in the Final Order, also ruling alternatively, “there was no credible evidence showing Respondent ever verbally or physically abused the student.” (Final Order, p 4). The Hearing Officer also found there was no credible evidence to support the allegation that the student had ever been improperly restrained or secluded by the school. (Finding of Fact No. 11). ECAB finds the Hearing Officer ruled correctly.

### **24. Parent did not prove that the school withheld food from the student.**

The parent testified the student lost weight (TE 42) and that the student told her student was not allowed to eat lunch. TE 143.

I asked [student’s] teacher why [the student] did not eat the food I packed for [the student]. The teacher’s response was that [student] ate the food at school or that [student] was not hungry. This has never been an issue in the past. I knew by the teacher’s response that she was lying.

TE 38. However, there is not evidence to corroborate that the school prevented the student from eating the lunch packed by the parent.

### **25. Petitioner did not prove that school personnel “retaliated” against, abused, or improperly restrained the student.**

Part of the “retaliation” evidently consisted of the school reporting to the parent that the



student was behaving badly. “ [REDACTED] Schools purposely refused to provide [the student] free and appropriate public education. They retaliated against [student] and accused [student] of horrible things.” TE 45. The parent further testified:

The teachers, the aides in the classroom, and other staff members began retaliating against [the student]. [the student] not only began coming home very sad and not wanting to go back to school the next day, but [the student] also was coming home with bruises and scratches on [student’s] body.

TE 38. The parent did not witness any of the alleged abuse, but offered the alleged hearsay statement of her student as evidence:

[the student] was waking up throughout the night crying saying "No school, Mommy, no school. No more restraining [the student]. No more locking [the student] in the bathroom. No more taking [the student]'s food away. No more hitting [the student]. No more school."

TE 41.

The parent testified “when I questioned them about all the bruises and scratches [the student] was getting at school, they either denied it or said they didn't know how it happened.”

TE 40. The parent had the opportunity to cross-examine the student’s teacher at [REDACTED], who was with the student all the time in the self-contained classroom;

Q. Have you denied [the student] access to the food I packed for [the student] for lunch?

A. No, ma'am, never.

Q. Never. Okay. Have you told [the student] that [student] will be restrained?

A. There was a time where [REDACTED] said after one hit, that we should make the statement, "Please do not hit me or you will be restrained."

Q. So you did tell [student]?

A. Yes, ma'am. There were those times, and I communicated that with you.

Q. Was [the student] restrained?

A. No, ma'am.

Q. Have you ever used inappropriate tone of voice towards [the student]?

A. No, ma'am.

Q. Have the aides in the classroom used inappropriate tone of voice towards [the student]?

A. No, ma'am.

Q. Have you ever used inappropriate language towards [the student]?

A. No, ma'am.

Q. Have the aides in the classroom used inappropriate language towards [the student]?

A. No, ma'am.

Q. Were you verbally abusing [the student]?

A. No, ma'am.

Q. Were the aides in the classroom verbally abusing [the student]?

A. No, ma'am.

Q. Have you physically abused [the student]?

A. No, ma'am.

Q. Have the aides in the classroom physically abused [the student]?

A. No, ma'am.

TE 79-80. Later, the parent questioned the witness about another alleged incident.

Q. Was [the student] ever locked in the restroom because of [student's] behaviors?

A. No, ma'am. I have no way of locking anybody in my bathroom. It is locked from the inside, not the outside.

Q. Did the aides lock [the student] in the bathroom?

A. No, ma'am.

TE 84. Uniformly, school personnel testified there was no retaliation, abuse, or improper restraint of the student. The only time student was restrained was during a fire drill when the student ran across the parking lot and they had to catch and bring the student back to school, but this did not involve use of the CPI restraint. TE 705. There was not evidence from medical or other witnesses supporting Petitioner's theories of improper restraint. The parent testified

[t]he school staff not only restrained [the student] and failed to notify me, but they were inappropriately restraining [the student].

TE 39. However, there could be no notice to the parent of improper restraint if no such restraint occurred.

The parent's evidence for the alleged improper restraint are photos of bruises and scratches. Some school personnel, accepting the parent's assumption that they were received at school, speculated about how they might have occurred, but no one at school had actual knowledge of the student being injured at school. For example, on 10/29/19, the parent contacted the student's teacher about bruises on the student. The teacher testified:

And that day, [student] had a great day. No one had touched [student] for any reason, [student] kind of stayed to [student's self] that day, if I recall correctly. So I was unsure of why [student] would have had bruises that day. But the day before was bus evacuations, and [student] had run around the bus, and some adults had tried to grab [student] for [student's] safety, and those bruises could have been caused from that.

TE [REDACTED] p. 102-103; (See also, TE 119 where [REDACTED] speculates in a communication with parent that another student might have pinched her student.) The parent complains that no incident report was filed, but there was not evidence the school is aware of any incident causing injury to the student at school.

There are a couple of instances where the school observed a scratch on the student. A scratch was noticed at the end of school one day that hadn't been observed at the beginning of school – see TE 101-112. The second instance is January 8, 2020, when, according to the parent's testimony summarizing the incident report, the assistant principal reported to the parent observing, and sent a picture of, a scratch that the student reported to school personnel was self-inflicted. TE 135-136.

The school investigated internally parent's claim that student was restrained and reported to the student's parent

I spoke to [student's] teacher and the instructional assistant, as well as the ISS monitor this morning in regards to your question on whether [the student] was restrained yesterday or not. The teacher and the instructional assistant stated that [student] was not restrained. The ISS monitor stated [student] was not restrained either. However, [the student] did keep getting up and hitting other students in ISS and did have to be redirected to [student's] seat.

TE. 684.

The parent filed a complaint with Child Protective Services, who investigated, interviewed the parent and the child, and found the complaints of abuse unsubstantiated. TE 201-209.

Nonetheless, the parent contends school personnel have conspired against her student.

I accuse the teachers, the aides in the classroom, and all the staff involved of not only purposely denying FAPE to [the student] as well as the other students in the classroom, but also for abusing [the student] as well as the other students, both verbally and physically. These people should be behind bars and should not be allowed to work with children in general, and most definitely not with children who have special needs.

TE p. 47.

Weighing all the evidence, ECAB finds the Petitioner failed to prove that the school “retaliated” against, abused, or improperly restrained the student.

**26. The parent failed to prove that the student’s Behavioral Intervention Plan (BIP) was inadequate or improperly designed.**

At the ARC meeting in May of 2019, the parent requested and the ARC approved a Functional Behavioral Assessment. The resulting BIP appears well-considered and thoughtful. See Resp. Ex.52, 11/19/19 BIP, and TE 465-467. However, after the BIP was put in place

behaviors were escalating to more frequent. And, in particular, there were a couple of incidents where I’d classify it as opportunistic, where the teacher -- the minute the teacher turned her back, beeline away from the para working for [student] and was hitting and had to be pulled off of the teacher. So they were becoming more intense and more frequent.

TE 477. Consequently, the BIP was added to and made more specific by the ARC on 2/14/20.

TE. 479. The special education consultant’s testimony about the changes illustrates the sort of behaviors the school was attempting to address.

Q. It looks like there's just quite a bit added.

A. Uh-huh.

Q. All right. Anything in the targeted behaviors that you recall being changes of significance?

A. Physical aggression, we called it physical – I think in the other one, it just said hitting, biting. I think spitting is probably in there, added. We noted that aggression was directed at adults, that it was not directed at students, but that students had been injured when objects were thrown. We also added in there, "Can be accompanied by shouted obscenities and loud laughter," because that was kind of part of the whole display. And then self-injury, I believe it mentions that in the conference summary, but we didn't specify what that was in the behavior plan.

Q. All right. Anything else -- it looks like --

A. I think we added in the part about triggered by specific phrases and tone of voice. We added information about the most recent physical aggression episodes.

Q. Okay.

A. And noted that that particular incident was without an observable antecedent, which means that there wasn't an observable trigger for that. It occurred very quickly.

...

A. And the frequency there on the obscenities and profanity.

p. 479-481. See further testimony concerning additions to the BIP, TE 481-486. In addition to making the BIP more specific, behavior monitoring data collection was increased from 5 to 30 times a week. TE 486-487.

The student's BIPs at [REDACTED] are detailed and well-considered. See TE 100.

The plan was added to and made more detailed in response to the student's escalating behaviors.

The parent did not identify flaws in the plans that made them inadequate or improperly designed.

The fact that the student had behavior problems, notwithstanding the BIP, does not prove the plan itself was improperly designed.

**27. The student was prescribed medication for ADHD, but parent stopped giving it to the student.**

The IEP at [REDACTED] indicated the student had been prescribed Risperdal. TE 440-441; Resp. Ex. 28. Risperdal is a medication to treat behavior and mood disorders. The evidence is conflicting regarding when or why student stopped taking the medication. The parent testified she took student off it because it made student sick or was causing student to lose weight. TE 281-282. There was *not* evidence that the student at any point no longer needed medication to help regulate behaviors and moods.

**28. The parent failed to prove that the student was removed from the classroom in violation of the BIP.**

The BIP in its various incarnations provided for removing the student to the "SAFE"

room to cool off for 10 or 15 minutes in order to prevent developing behaviors from escalating.

The parent believes this provision was violated:

I don't know if it necessarily affected [student] negatively, but the thing is that those instructions were there in the document and it proves that they were not following what they were supposed to be following.

TE 297. However, sometimes behaviors escalated quickly, so there also was a crisis plan as well.

Once the student had become a danger to self or others, the student was removed to the SAFE room for longer periods of time or, if the student had violated applicable conduct rules, as a disciplinary suspension to which all students engaging in such conduct were subject. See TE 90; 704. For example, the parent testified that a voicemail left by the assistant principal on January 21, 2020, stated as follows:

I am letting you know that [student] will be suspended from school tomorrow. [The student is] serving time in the SAFE room today. What happened is that [student] had hit [student's] teacher in the face. [Student] punched her, so [student] is in the SAFE room today, and [student] will be out of school. {Student} will be suspended from school tomorrow.

TE 137. Similarly, the parent testified that on March 3, 2020 "[redacted] had sent me an email at 10:11. He said, "[the student] was taken to the SAFE room because [student] kicked and hit [redacted] in her leg." TE 144. Assistant principal [redacted] testified:

The behavior plan was put in place so that if we could intervene on [student's] behalf prior to an event like this occurring, then we could limit [redacted] time in the SAFE room for a chance to cool down, redirect, and return to class. Another student who did not have disabilities who was exhibiting the same behavior had a different consequence that would have been longer than what [student] received in this instance...at this point in time, the aggressive behavior had already happened, and [the student] is still accountable to consequences according to the matrix that was provided in the Acceptable Code of Behavior, so even students with disabilities can received the consequences that are outlined in that matrix, and because the event had already happened, then a consequence needed to be assigned to that. However, what [redacted] received was not commensurate with what a student without disabilities would have received for the same behavior."

██████████, TE 704-705. Petitioner argues that such removals due to a crisis of danger to self or others or as discipline for conduct violations were barred by the BIP, but ECAB finds they are not.

Petitioner also takes issue with some of the decisions to remove the student, arguing, for example, that the school's failure to take photographs documenting bruises to a teacher aide, or aide's failure to seek medical care, proves that the student's attack on the aide was not dangerous and the student was not a danger to self or others. See TE 146. ECAB does not find this reasoning persuasive. Without hashing through each incident, ECAB finds there were a number of instances in which the student's behavior endangered self or others and/or violated conduct codes and student was properly removed from the classroom in those instances for longer than the "cooling off" period of 10 or 15 minutes.

**29. The school was unable to collect eight weeks of data observing the student's behavior in a school setting, per a mediation agreement, because the student was attending school virtually.**

The Hearing Officer correctly found that the school did not default on its promise, given in a mediation agreement, to collect eight weeks of data on the student's behaviors because, from that point until the student withdrew from school, the student only attended virtually except for some tutoring and special services delivered one-on-one. It was literally impossible to collect the data. TE 220-226.

## **PARENTAL PARTICIPATION**

**30. The parent failed to prove that either parent was denied meaningful participation or that the school committed procedural violations that amounted to a denial of FAPE; the school kept the parent informed, provided required notices, and worked to**

**facilitate the parent's meaningful participation.**

The parent claimed she did not receive quarterly report cards. TE 229. However, it is clear that the school provided daily reports on the student to the parent. A daily report is

a sheet that had [student's] schedule, everything [student] did, how many adults were with [student], at one point, how many students with [student], whether [student] did it the first time [student] was asked or not, and what happened during that block of time.

TE p. 77. The student's teacher at [REDACTED], [REDACTED], never failed to provide daily reports at the end of each day, except when [REDACTED] was absent due to illness. TE 77-78; 105.

Daily reports are not required to be provided to a parent by either IDEA or Kentucky state regulations. [REDACTED], the student's teacher at [REDACTED], also sent progress notes to the parent. TE 351.

Conference Summary notes support the school's contention that they carefully considered the parent's suggestions and adopted same where appropriate. For example, the parent requested an ARC meeting to suggest the student be removed from alternate assessment. The ARC considered her comments at the 5/3/19 ARC meeting and removed the student from alternate assessment (Respondent's Exhibits 23, 24, 25, 27). The Conference Summary notes for the 9/11/2020 ARC meeting show the ARC answered the mother's questions (Respondent's Exhibit 184). Most of the ARC meetings were lengthy to allow full discussion and the opportunity for full understanding by the parent. On two occasions [REDACTED] set up a projector to show the Conference Summary notes on the wall as they were being typed. (TE 107).

The parent took issue with the wording of some ARC conference summaries and failure to quote verbatim the words of the parent (see TE 270) for meetings lasting three or four hours, and the parent often refused to sign the conference summaries, but ECAB does not find the conference summaries misleading. Generally, the parents' issues with the school in this due



process proceeding are the same ones that appear in conference summaries and in correspondence between the parent and school that were introduced at the hearing. Conference summaries were sent to the parent the day of the meeting. TE 351.

The parent complained that she was not notified quickly enough about a behavior incident at school because the school called on her personal phone instead of her work phone, but the resulting delay was minimal and inconsequential. Similarly, the parent says that on one occasion an incident report was not logged the day it occurred and, only after she requested it was provided the next day. TE 145.

Notice of an ARC meeting is required only to be provided to a parent “early enough that they will have an opportunity to attend.” 34 CFR 300.322(a)(1). The mother signed two (2) notices for the 9/11/2018 ARC meeting. She signed a notice for the 12/3/2018 ARC meeting. She participated in both meetings (Respondent’s Exhibits 29, 30, 34). There was no evidence to show harm from receiving notices on the day of and prior to the meetings. The parties later agreed in Provision 9 of their Mediation Agreement to set deadlines for notices of meetings. (Respondent’s Exhibit 95). The school complied with that agreement.

The mother’s complaint that the father of the student was not given separate notice of the 12/3/2018 ARC meeting is without merit. The mother admitted in the post-hearing brief the school had telephoned him before the meeting and gave him the opportunity to participate. Subsequently, the father did not ever personally complain about the notice issue. The father did not participate in the administrative hearing.

The parent alleged a failure to provide an interpreter or the provision of information to student’s parents in their native language (Spanish) prior to a meeting, but did not show it resulted in harm. See: *Deal v. Hamilton County Bd. Of Educ.*, 392 F. 3d 840, 854 (6<sup>th</sup> Cir. 2004).

The student's mother, who speaks some English, signed two (2) notices for the 9/11/2018 ARC meeting and did not check the box indicating a request for an interpreter, nor did she make such request at that meeting. She also signed a notice for the 12/3/2018 ARC meeting and did not check the box indicating a request for an interpreter, nor did she make such request at that meeting. (Respondent's Exhibit 30).

There is no requirement that documents to be discussed at a meeting be provided to ARC members prior to meeting. 20 USC 1414(b)(4); 34 CFR 300.306(a)(2). However, if requested by a parent, the school district is to provide such documents. 34 CFR 300.613. Upon the mother's request, [REDACTED] sent her an agenda for the 9/11/2018 meeting showing topics for discussion (CCF\_000080.pdf page 15).

**31. The school did not alter or falsify records to hide injuries or improperly modify IEPs or BIPs.**

Non-programmatic changes to the IEP, such as correcting inadvertently omitted dates, were made that did not require an ARC and made no substantive changes in services.

TE [REDACTED], p. 89.

Regarding incident logs, parent alleges the logs record the student's bad behaviors, but not injuries the parent alleges the student suffered at the hands of the school. For example, a critical incident log entry on the day of the fire drill describes how the student spit and hit the teacher, yelled and attempted to run away, ran around the buses and ran towards the road. See TE 100. The parent called that day regarding a scratch on the student's arm. TE 104.

[T]hey were taking [the student] to see the school nurse for just little simple things, but when incidents like this occurred where [student] had like big scratches, where [student's] -- nobody took [student]. So I did not get an incident report from the nurse regarding this scratch.

TE 131. The student's teacher testified she observed a scratch that day after it was called to her attention by an aide. TE 112. The parent complains no incident report was filed concerning this, but there was no evidence that the scratch resulted from some incident, only that the student had a scratch. ██████ testified that the student did not complain about it and there was no evidence the student reported to any school personnel how student came to have a scratch. Similarly, there are other instances where the parent complained to the school that the student was bruised or scratched, but the school was unaware of any incident causing injury to the student. A scratch observed is not, in itself, an "incident." Absent awareness of an incident, there is no reason to prepare an incident report.

**32. The parent did not prove the school violated a mediation agreement with the parent.**

The parties engaged in mediation in the summer of 2020 and a mediation agreement resulted. When a resolution is reached in a mediation session a legally binding written agreement is executed by the authorized participating parties, which sets out resolution and its timeline for implementation. 707 KAR 1:340, Section 10 (5)(a). "The agreement shall be enforceable in any state court of competent jurisdiction or in a district court of the United States." 707 KAR 1:340, Section 10(6). The parent testified, "Sadly, the school failed the mediation agreement." TE 43:1.

ECAB does not have authority to enforce a mediation agreement. The Hearing Officer, however, gave consideration to the matter of the Mediation Agreement, Respondent's Ex. 95, and found it was not violated, mooted the question of determining whether failure to comply with the agreement was failure to provide FAPE. On appeal, ECAB affirms the Hearing Officer's findings. The agreement consists of 21 provisions, addressed below:

**Provisions 1 and 2:** The parent obtained an independent evaluation of the student by 8/7/20 (T.T. p 215). This is undisputed.

**Provision 3:** The student had a revised behavior plan dated 2/14/20; student withdrew from public school for home schooling on 3/5/20. The parties had agreed the school would collect data for the next 8 weeks while school was in session; that the student's therapist would observe the student at school and collaborate with the school as it assessed the effectiveness of the revised BIP (Respondent's Exhibit 95). The student did not return to school but enrolled in the school's VLA (TE pp 517-519). The Hearing Officer was correct in determining this provision had been agreed to in contemplation by both parties that student would be attending a new school; that as the student was not in school it was impossible for the therapist to make an in-school observation and for the school to collect data for 8 weeks. As found in Finding of Fact #29 hereinabove, the school did not breach this provision.

**Provision 4:** The student was to be re-evaluated for OT. ██████████ contacted several individuals to perform the OTE, but no one would commit to do so due to the pandemic (TE p 782). One individual later agreed to perform the OTE and this individual contacted the student's mother. An OTE was never scheduled (T.T. p 783).

The school provided the parent an updated list of evaluators. ██████████ testified the school would have paid the fees for an OTE had the parent arranged the evaluation, even if conducted by an evaluator not on the school's list, so long as that person satisfied Kentucky criteria (TE p 785). However, an OTE was never performed. Hence, the school did not breach this provision.

**Provision 5:** The facts show the school complied with this provision by presenting the

clinical speech evaluation performed by [REDACTED] (provided by the parent), which was accepted by the school and considered (as agreed by the parties under the mediation agreement) when the student's IEP was developed.

**Provisions 6, 7 and 8:** Compliance was not disputed.

**Provision 9:** It had been agreed that student's teacher would provide the parent a daily report addressing certain topics. [REDACTED], the teacher, provided daily reports except when she was out ill, or had to take her child to a doctor's appointment, or on the occasional "house day". During [REDACTED] absence staff usually provided such reports (TE 77, 98-102, Respondent's Exhibit 110, 149 pp 18-19). Evidence showed there were only a few days that school year when such reports were not sent. [REDACTED] supplemented the daily reports with information she provided through an on-line platform known as Class Dojo (TE p 104).

The school substantially complied with this provision. The parent did not prove any harm due to the few instances a daily report was not given.

**Provision 10:** The Hearing Officer correctly determined the evidence does not show the school breached this provision.

**Provisions 11 and 12:** The Hearing Officer correctly determined there were no allegations in the Request for a Due Process Hearing alleging violations of these provisions.

**Provision 13:** The parties agreed an evaluation would take place 8 weeks after the behavioral plan had been put in place to influence the decision about the amount and kind of one-on-one assistance required by the student. [REDACTED] performed an independent education evaluation that indicated student had autism and needed significant support; that verbal functioning, social functioning, and behavior difficulties were significant; and that nonverbal intelligence was average. The findings were consistent with observations made by [REDACTED]

and other of school's evaluators (Respondent's Exhibit 255). The school complied with this provision.

**Provision 14:** The evidence showed the school complied with the agreement to provide advance notice of meetings and a draft agenda.

**Provision 15:** The parties agreed ARC meetings would allow the full participation of the parent. The ARC, as indicated by notes, at various times adopted the parent's suggestions, such as increasing the student's speech minutes and removing student from alternate assessment. Notes indicate the parent fully participated in all meetings. The school complied with this provision.

**Provisions 16, 17, 18, 19, 20, and 21:** The Hearing Officer correctly determined there were no allegations in the Request for a Due Process Hearing alleging violations of these provisions.

### CONCLUSIONS OF LAW

Petitioner bears the burden of proof by a preponderance of evidence. *Schaffer v Weast*, 546 SW2d 49, 57-58 (2005) and KRS 13B.090. Accordingly, Petitioner has to prove each element of the case by a preponderance of evidence See also: *City of Louisville, Div. Of Fire v. Fire Serv. Managers Ass'n by and Through Kaelin*, 212 S.W. 3d 89, 95 (Ky. 2006): "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."

FAPE includes both "special education" and "related services" 20 U.S.C. Sec. 1401(9). "Special education" is "specially designed instruction...to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child...to benefit from"

that instruction. 20 U.S.C. Sec. 1401(26)(29). *Andrew F. V. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386 at 391; 137 S. Ct. 988 at 994; 197 L. Ed. 2d 335 at 344 (2017). A school district subject to IDEA must provide a “disabled child” with special education and related services “in conformity with the [child’s] individualized education program.” (“IEP”). 20 U.S.C. Sec. 1401(9)(D).

“FAPE” is defined as special education and related services that: (a) are provided at public expense, under public supervision and direction, and without charge; (b) meet the standards of the Kentucky Department of Education included in 707 KAR Chapter 1 and the Program of Studies, 704 KAR 3:303, as appropriate; (c) include preschool, elementary school or secondary school education in the state; and (d) are provided in conformity with an individual education program (IEP) that meets the requirements of 707 KAR 1:320. 707 KAR 1:002(27).

FAPE shall be provided to each child with a disability even though the child has not failed or been retained in a course and is advancing from grade to grade based on the child’s unique needs and not on the child’s disability. 707 KAR 1:002, Section 1(1). The school district has an obligation to locate children who may need special education services who reside within the district who are in private school or home-schooled. 707 KAR 1:300, Section 1, (1)(b). To qualify for special education services a student must be a “child with a disability”; a child evaluated in accordance with 707 KAR 1:300 who meets the criteria listed in the definitions section for certain conditions or impairments, which have an *adverse effect* on the child’s educational performance and who, as a result, needs special education and related services. 707 KAR 1:280, Section 1(9). *Adverse effect* means the progress of the child is impeded by the disability to the extent that the educational performance is significantly below the level of similar aged peers. 707 KAR 1:002, Section 1(2).

A school district must, then “...meet its substantive obligation under IDEA [by offering] an IEP reasonable calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F. v. Douglas City School District*, 137 S. Ct. 988 at 999 (2017).

## **I. RESPONDENT DEVELOPED AN APPROPRIATE IEP**

20 USC Section 1400 et seq. requires that schools which receive federal funding must provide students who qualify with a free and appropriate public education (hereinafter FAPE). FAPE includes both “Special Education which is specially designed instruction ... to meet the unique needs of a child with a disability” and “related services which are support services required to assist a child ... to benefit from that instruction.” 20 USC Section 1401(26)(29).

The IEP is the “centerpiece of the statute’s education delivery system for disabled children.” *Endrew F v Douglass Cnty. Sch. Dist.* RE-1 58 US 386 (2017), 20 USC Section 1414(d)(1)(A)(i)(I)-(3) requires that an IEP include a) “a statement of the child’s present levels of academic achievement and functional performance”; b) a description of “how the child’s disability affects the child’s involvement and progress in the general education curriculum”; c) “measurable annual goals, including academic and functional goals”; d) a “description of how the child’s progress toward meeting” those goals will be evaluated; and e) describe “special education and related services... that will be provided” so that the child may “advance appropriately toward the annual goals” and “be involved and make progress in the general education curriculum” when possible.

707 KAR 1:320 Section 9(1) requires that schools make “a good faith effort to assist the child in achieving the goals, objectives or benchmarks listed in the IEP”. However, case law notes that the party challenging implementation of an IEP has to show more than de minimis



failure to implement the IEP. The burden to be proved is that the district failed to implement substantial or significant provisions of the IEP. *Houston Independent School District v Bobby R*, 200 F3rd 341(5<sup>th</sup> Cir. 2000).

Further, *Andrew F* defines that an IEP must be “reasonably calculated to enable a student to make some progress.” *Andrew* further held that if a child has behavioral needs, the district must provide a program that addresses the child’s maladaptive behaviors, *Id.*, at 1184, noting that when a district cannot properly address a child’s behavior, their behavior negatively impacts on their ability to make progress on their educational and functional goals and cuts against the reasonableness of an IEP.

However, schools are not required to maximize a disabled student’s potential. *Board of Educ. v Rowley*, 458 US 176 (1982) specifically noted that an IEP must be reasonably calculated to enable the student to receive educational benefits. To be reasonably calculated, the IEP must include measurable annual goals and a description on how progress is measured.

20 USC 1414 (c)(1) states that when an ARC is determining eligibility, it must review existing evaluation data on the child including “(i) evaluations and information provided by the parents of the child; (ii) current classroom based, local, or state assessments, and classroom-based observations; and (iii) observations by teachers and related service providers.”

34 CFR 300.114 (a)(2) and 707 KAR 1:350 require that children with disabilities be educated with non-disabled children to the maximum extent appropriate and that children can only be removed from regular educational environment if the nature and severity of their disability is such that education and regular classes, with the use of supplementary aids and services, cannot be achieved satisfactorily.

**A. The ARC considered the independent evaluations provided to the ARC.**

An independent psychological evaluation was conducted by [REDACTED], from [REDACTED] (Respondent's Exhibit 255) at the student's home. This report was provided to the ARC on September 11, 2020 and was discussed extensively during ARC meetings. [REDACTED] report stated that "although [student's] functional language, academic skills, and self-help skills are profoundly limited, [student's] level of non-verbal intelligence is average. [Student] certainly has the potential to function higher in the academic and self-help areas." [REDACTED] also noted that he was unsuccessful in having a conversation with the student as the student babbled incoherently and looked around or at the examiner when asked questions. The student would not engage in any tasks that required writing or more than a one-word verbal response while [REDACTED] was administering the testing.

The recommendations of [REDACTED] are nearly identical to what the school was already doing and what was placed in the IEP. Specifically, he stated

given the severity and extent of [student's] functional impairments in the academic, social, communications domain as well as [student's] tendency to abscond, the ARC needs to seriously consider a setting that involves a very low teacher to student ratio, 1:1 assistance with transitioning, intensive communications and a highly regimented behavioral plan (following an FBA) that reinforces compliances and removes privileges for non-compliance. These services might be best provided through a self-contained classroom. [Student] is capable of developing far more age-appropriate academic skills than [student] is currently demonstrating. Intensive academic instruction and communication interventions will be needed to address this unexpected weakness.

Resp. Ex. 255. Further, the [REDACTED] independent evaluation that the mother supplied, was ultimately accepted by the school as an independent evaluation due to the difficulties with the pandemic and getting other independent evaluations completed. This evaluation was presented at the September 11, 2020 ARC meeting. (Resp. Ex. 97). Said evaluation underreported the number of speech services minutes that the child was receiving

from the school. Further, it was a clinical evaluation, and it was recommended that three to four sessions each week of an unspecified length be provided in a clinical setting. Speech minutes in a clinical and educational setting are different things.

The ARC also considered the report of Petitioner's ABA therapist, [REDACTED], via a letter she wrote recommending one-on-one aid if the student returned to in-person school. (Respondent's Exhibit 7, p. 7). [REDACTED] was also personally present during several ARC meetings and provided input that was considered.

The mother raised issues that the school did not consider the recommendations of [REDACTED], the student's developmental behavioral pediatrician. However, that allegation is not supported by the record. In fact, the school was already using some of [REDACTED] recommendations and considered those and implemented them at such times as the ARC believed it was in the best interest of the student. They also relied on the extensive training and experience of the educators on the ARC to formulate the IEPs. (Respondent's Exhibit 7, TE. p. 573-574)

**B. The ARC created IEPs designed to achieve meaningful educational benefits.**

Prior to coming to [REDACTED], the child attended the [REDACTED] Schools at [REDACTED] and was receiving special education in a self-contained classroom, other than during lunch and special classes. The mother was very supportive of the IEP developed at [REDACTED] school.

The first IEP developed in [REDACTED] in December 2019 was very similar to that of the [REDACTED] IEP. Student was placed in an MSD classroom at [REDACTED], otherwise known as a self-contained classroom, and went to general education for special classes such as music, art, recess, and lunch. (TE [REDACTED] p. 86). The [REDACTED] IEP provided for 120 minutes per

month of speech and language services in a self-contained classroom and 60 minutes per month of occupational therapy from the classroom teacher and for 15 minutes an occupational therapist consulted with student's teacher in the self-contained classroom. The [REDACTED] IEPs did provide for less speech minutes than that of the [REDACTED]. However, there was not proof of what approach the [REDACTED] utilized in providing speech minutes. A transdisciplinary approach, under which language goals are worked on across the classroom and all providers to promote generalization, is used in [REDACTED]. (TE 607-608). Therefore, even though the actual minutes with a speech therapist were less, the student was still receiving speech services additional minutes a day in other classroom settings. It is unknown whether [REDACTED] implemented in this matter or simply provided direct services.

The student did not have fine motor skill problems that interfered with student's participation in school, but did have some sensory processing issues. The OT at [REDACTED] [REDACTED] recommended various supports for the classroom for these issues and consulted with teachers. It would appear on the [REDACTED] IEP, the student received 60 minutes of direct OT three times per month, but upon closer examination of the language of the [REDACTED] IEP, these services were in fact delivered by teachers, not an OT, as was the case in [REDACTED]. (TE p. 671).

The [REDACTED] IEP had the child on alternate assessment, which means that the student would not receive a regular high school diploma. The mother changed her position initially not wanting student on the alternate assessment and then questioning why student was taken off alternate assessment. Nonetheless, [REDACTED] started the student on an alternate assessment program and as student was exhibiting progress, particularly in the area of math, student was taken off other alternate assessment in the fourth grade of November 2019. (TE [REDACTED] p. 10-11).

At the September 11, 2020 meeting, the mother inquired about an independent speech and OT evaluation. [REDACTED], the Special Education Director, explained that the pandemic had made it difficult to find people willing to conduct evaluations, but stated that the district was inquiring into that request.

The 2018-19 IEP developed and presented in evidence as Respondent's Exhibit 63 illustrates that each of the areas required were included within the December 3, 2018 IEP. There were six total annual goals and each of those contained subgoals or objectives. Although the mother claims that IEPs did not contain annual goals, she did not provide any evidence or make any argument as to how the goals were written ineffectively.

The mother also questioned the accuracy and specificity of the student's present level of performance. Said levels are specific and accurate. They detail approximately ten areas of the student's communication and speech levels. One such example is the Speech Language Pathologist testified to exactly what the description of the present levels said, namely that between the time student enrolled and the ARC meeting on December 3, 2018, the student referred to everyone as "he." Mother alleged another student's data was used to form the IEP. The name "[REDACTED]" was at the bottom of the first page on October 31, 2018 report. Respondent's Exhibit 135) However, the report clearly relates to Petitioner and the other name was merely a typographical error from carrying over the IEP forms word processing elements. The mother disputes some of the school personnel's observations that were made, and conclusions drawn therefrom regarding the student during the observation period prior to this ARC meeting. The school personnel are trained to conduct such observations and did so, and further did standardized testing during the time student was enrolled in 2018 up until the ARC meeting. No independent testing was presented to controvert the school's conclusions.

On September 11, 2020, an ARC meeting was held at [REDACTED] with virtual participation by the mother and other attendees. (Respondent's Exhibit 8). During the meeting, [REDACTED] reported Petitioner's progress before student withdrew from in-person school on March 3, 2020, for home schooling. (Respondent's Exhibit 8, p. 4).

The ARC amended student's IEP to reflect student was receiving VLA instruction. [REDACTED] informed the mother that if the student returned to school in-person, student's IEP would be amended again. (*Id.* at 6) The ARC decided special education minutes would be provided through one-on-one virtual instruction from a teacher, instead of in the resource classroom environment. The ARC decided Petitioner would receive 225 minutes per week of one-on-one services from a Special Education teacher. (TT p. 787).

After reviewing the speech language data, [REDACTED] recommended Petitioner receive 30 minutes of one-on-one virtual speech services each week. The mother requested more speech minutes for the Petitioner. (Respondent's Exhibit 8, p. 7). The ARC decided to provide two one-on-one thirty minute speech language sessions each week, which increased Petitioner's speech minutes an additional 40 minutes a month. This was twice the number of speech minutes the Petitioner received while attending [REDACTED]. *Id.* The ARC determined these sessions would be provided one-on-one in person in its resource room by a SLP. (TT p. 789-790). The ARC decided Petitioner would receive 225 minutes one-on-one special services from a Special Education teacher each week. (Respondent's Exhibit 8, p. 8).

On September 30, 2020, the ARC amended Petitioner's IEP. The amended IEP added one-on-one in-person special education services and transportation services twice a week. (Respondent's Exhibits 131, 160). In November 2020, the student's math goal was changed because multiplication was too difficult. (*Id.* at 343-344). Petitioner alleges the December 13,

2019 IEP did not address annual measurable goals. However, the IEP lists six annual measurable goals and their benchmarks beginning at page 4. The IEP contained all the required information. (Respondent's Exhibit 41, p. 4).

One of the mother's main concerns was that the school did not put one full-time one-on-one assistant with the student. Although the mother had stated that the student had one person who worked with student all day long and never left student's side at the [REDACTED], the IEP there did not reflect this. Respondent Exhibit 69 only listed an accommodation of "constant adult support for safety and academics." The student had adults available to help student at all times in [REDACTED]. (TE p. 102). The ARC found that it was not appropriate to have one person dedicated entirely to student as they felt it could create dependency issues. [REDACTED] psychological evaluation referred to previously, only recommended one-on-one adult assistance for transitions. (Respondent's Exhibit 255). The ARC members from the school believed that the negative consequences from one-on-one assistance outweighed any potential benefits and would also interfere with relations between peers and promote prompt dependency. ([REDACTED] [REDACTED] TE 458) Further, there were concerns that having one-on-one assistance would not create the least restrictive environment for the child. ([REDACTED] TE 460)

**C. [REDACTED] IEPs placed the child in the least restrictive environment.**

The student came from the [REDACTED] having been in a self-contained classroom, other than for special classes and lunch. This placement continued when student came to [REDACTED] by placement in a self-contained classroom for instruction other than special classes, lunch and recess. Further, after the student was taken off alternate assessment, the school began to transition student from MSD to the next level of support, resource classroom. Student was pulled from the MSD fulltime to the special education resource classes accompanied by

paraprofessional for periods of thirty minutes at a time allowing student to be exposed to student's who functioned at higher levels. (TE 110-111) As explained by the special education consultant, this student was on a plan to transition from the MSD classroom to more resource time. They were adding 20-30 minutes more every couple of weeks to the resource time. (TE p. 492)

Also, as mentioned above, the ARC refused to place a dedicated one-on-one person with the child as doing so would place student in a more restrictive environment and further limit student's contact with peers.

## **II. RESPONDENT DID NOT FAIL TO IMPLEMENT THE IEPS**

While 707 KAR 1:320 Section 9(1) requires schools make "a good faith effort to assist the child in achieving the goals, objectives or benchmarks listed in the IEP", a party who challenges the implementation of an IEP has to show more than de minimus failure to implement the IEP. One must prove the district failed to implement substantial or significant provisions of the IEP. *Houston Independent School District v. Bobby R*, 200 F. 3<sup>rd</sup> 341 (5<sup>th</sup> Cir. 2000).

### **A. There was no failure to implement by reason of verbal or physical abuse or withholding lunch.**

Issues in a due process hearing are limited to those raised in the complaint. 34 CFR 300.511 states in relevant part:

(d) *Subject matter of due process hearings.* The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under [Sec] 300.508(b) unless the other party agrees otherwise.

At the beginning of the first day of the due process hearing the school's attorney objected to testimony and evidence of issues that were not mentioned in the due process complaint (the



Request for Due Process Hearing having been submitted on December 7, 2021 (T.T. pp 10-17)) including alleged abuse of the student, locking █████ in the bathroom, and not allowing █████ to eat lunch brought from home. While the Hearing Officer allowed the parent to present testimony regarding alleged abuse, the Hearing Officer in his Final Order sustained the school's objection and, alternatively, found there was no credible evidence showing the school verbally or physically abused the student.

ECAB agrees these issues were barred by failure to raise them prior to the hearing. Alternatively, per Findings of Fact hereinabove, ECAB finds parent failed to prove the school locked the student in a bathroom, withheld lunch, or otherwise physically or verbally abused the student.

**B. There is no remediable violation due to missed Virtual Learning Academy (VLA) Sessions due under the 20-21 IEP; the sessions were subsequently provided**

The mother claimed she was not provided with accurate information to access the VLA and that the student lost instruction time because the instructor was late or canceled class. The VLA teacher, █████, explained if a link did not work, she emailed it again and then it worked. (TT p. 755). █████ further stated that when she was late for a class it would only be a minute or two, and if she started late a minute or two, she would end the session a minute or two late. (TT p. 755-758).

The parent filed a state complaint concerning these missed VLA sessions and █████ █████ was ordered, and as acknowledged by the mother did provide, ten sessions plus 450 minutes of compensatory education to address those issues. Therefore, any failure to provide VLA time has already been remedied. This corrective action plan was completed and

accepted by the Kentucky Department of Education and the mother acknowledged that it was completed.

**C. The Respondent collected appropriate data to determine whether progress was being made on IEP goals; any failure to collect data of student interaction for an eight-week period per the mediation agreement is mooted by the impossibility of doing so as the student was attending school virtually at that time.**

The data collected and the graphs prepared therefrom were described in detail at each ARC meeting in order to evaluate progress under the IEP. There was discussion about up and down variants on one of the graphs and ██████████ explained this was because she would not implement a subsection of a goal until the subsection prior to that had been completed. Thus, there would be high graphing and then a dip as the new subsection of the goal was started. (TE p. 734-736).

From November 2019 until the student's withdrawal from ██████████ for home schooling on March 3, 2020, the student progressed on annual speech goals. (Exhibit 13; TT p. 793-794). Special Education teacher, ██████████, testified the student progressed after student enrolled in VLA from September 2020 through student's withdrawal from ██████████ ██████████ in April 2021. (TT p. 733-742, Respondent's Exhibit 37) She stated the student made good progress on writing goals, meeting objectives toward annual goals. (TT p. 733-734). ██████████ ██████████ also stated the student made good progress on reading comprehension goals, but noted student's behavior sometimes interfered with progress. (*Id at 734-735*)

██████████ also testified that the student mastered the first object of the math calculation goal. (*Id. at 736-737*) She said the student progressed on adaptive goals, but student's behavior

could be an impediment at times. (*Id.* at 739-740, 742) ██████████ further testified student's behavior improved. (*Id.* at 743) She stated the student steadily progressed toward behavior goals. (*Id.* at 744) Also, ██████████ testified student progressed in math goals since the December 2019 IEP. (*Id.* at 745-746) The new IEP modified student's goals to align better with online instruction. (*Id.* at 746-750) ██████████ further testified the student progressed with writing goals with both the 2019 and 2020 IEPs. (*Id.* at 751).

From December 4, 2020, through April 16, 2021, the student made significant progress in annual reading comprehension IEP goal from the November 2020 IEP. The goal was to be met by November 2021. (Respondent's Exhibit 37, p. 9). The student met the first objective. (TT p. 791) The second reading objective had not started. (*Id.* at 25; Exhibit 37, p. 10). During the same period, the student progressed on the annual math goal, showing significant progress on the first two objectives. The goal was to be met by November 2021. (Exhibit 37, p. 11; TT p. 791). The progress data shows the student made reasonable progress in all areas during the time student attended ██████████. (TT p. 794-796).

The mother also stated that the school did not complete the mediation agreement due to not collecting weeks of data on the student's behaviors. However, the student was withdrawn from school and began attending virtually, other than some special services that were delivered one-on-one. Thus, for this eight-week period it was impossible to collect data on student's behavior as the student was never in a classroom with other students or teachers. (TE p. 220-226, and Findings of Fact hereinabove).

**D. The school did not fail to implement the student's behavioral intervention by improperly restraining or secluding the student.**

The school objected that this issue was barred because it had not been raised prior to the hearing. The Hearing Officer correctly overruled the school's objection. The December 7, 2021 Request for a Due Process Hearing includes in the request for relief "[f]or ██████ to not allow inappropriate restraining on [student] by unauthorized staff members and to not place [student] in an isolated room but to offer a calming area with training staff monitoring [student]" (at p 3). However, per fact-findings hereinabove, there was no improper restraint or seclusion.

The initial BIP was adopted by the ARC after a Functional Behavior Assessment was completed. (Respondent's Exhibit 52, November 19, 2019 BIP & TE p. 465-467). Student did not have a BIP at ██████. (TE p 770) After the initial BIP was put into place, the student's behaviors escalated and were more frequent.

At the February 14, 2020 meeting, ██████ and ██████ stated the student's behavior interfered with academic and speech progress, and they had been working with Occupational Therapist, ██████, to address this. (Respondent's Exhibit 10). ██████ discussed techniques she uses to address behavioral issues. (*Id.*) ██████ said the ██████ recently observed Petitioner and provided information to Respondent. (*Id.*) ██████ drafted a revised BIP to address the Petitioner's issues. (TT p. 91-98).

██████ led the ARC through a discussion of the draft BIP. (Respondent's Exhibit 10). The ARC discussed in detail Petitioner's likes, dislikes, reinforcers, preferred activities and non-preferred activities. (*Id.*) There was a lot of discussion about the behaviors the BIP was aimed at improving, including physical aggression and inappropriate language. (*Id.* at 6). ██████ noted the correction of other students can be an antecedent to the student's behavioral issues.

The ARC discussed replacement behaviors, the use of breaks and methods to instruct the student. (*Id. at 7-8*) The ARC discussed positive behavior strategies such as first-then and zones of regulation. (*Id. at 8-9*) The student's mother was satisfied with the revised BIP. (TT p. 278) The ARC approved the amended BIP. (Respondent's Exhibit 11).

Thus, the school made continuing efforts to modify and intensify the BIP based upon the student's escalating behaviors. In addition to making the BIP more specific, behavior monitoring data collection was increased from five to thirty times per week. The mother did not present any evidence or testify to any specific problems with the BIP. The fact that the student continued to have behavior difficulties does not prove that the plan was not properly designed.

It should also be noted that during this period of time, the student had been prescribed Risperdal. (TE p. 440-441, Respondent's Exhibit 28) This medication treats mood and behavior disorders. There is conflicting evidence as to why the student quit taking the medication. The mother testified that she took the student off it because it was making the student sick or causing the student to lose weight. (TE 281-282) However, there was no evidence that the student had been told by a doctor that the student no longer needed the medication to regulate student's moods or behavior and could have easily been the cause of the increase in behaviors.

The mother was inaccurate in her allegations that the student was removed from the classroom in violation of the BIP. The BIP provided for the student to go to the safe room to cool off for periods of no more than ten or fifteen minutes to stop developing behaviors from escalating. The mother testified and presented evidence as to several times when the student was removed from the classroom and taken to the safe room after the student had violent outbursts. The purpose of the BIP's provision for removal to the safe room is to prevent escalating behavior.

At times the student was placed in the safe room for greater than 10-15 minutes as a disciplinary action due to a violation of school rules. The BIP did not prohibit removal to the safe room for disciplinary conduct code violations. A school district may discipline disabled students for misconduct, including violation of student codes of conduct. 34 CFR 300.530(b). School districts may suspend a student up to 10 days in any school for misconduct related to the student's disability. 34 CFR 300.530(b); 34 CFR 300.536. Students with disabilities who are suspended 10 days or less are not entitled to any additional due process rights under IDEA. *OSEP Memorandum 95-16*, 22 IDELR 541 (OSEP 1995).

### **III. THERE ARE NOT PROCEDURAL VIOLATIONS AMOUNTING TO A DENIAL OF FAPE**

Per the fact-findings hereinabove, notices and information provided satisfied, and sometimes exceeded legal requirements. Additionally, per fact-findings hereinabove, the parent's participation in lengthy ARC meetings and in all aspects of the student's matriculation was extensive. There are numerous instances of changes being made at the instance or suggestion of the parent.

"Only if a procedural violation has resulted in substantive harm, and thus constitutes a denial of FAPE, may relief be granted." *Deal v. Hamilton County Bd. Of Educ.*, 392 F #d 840,854 (6<sup>th</sup> Cir. 2004). The evidence in this case failed show any procedural violations that rise to the level of a showing of substantive harm to the student.

### **FINAL DECISION AND ORDER**

The Exceptional Children Appeals Board affirms the decision of the Hearing Officer and finds no relief is due Appellant.

**SO ORDERED** on January 19, 2024, by the Exceptional Children's Appeals Board, the panel consisting of Kim H. Price, Roland Merkel and Mike Wilson, Chair.

### **NOTICE OF APPEAL RIGHTS**

This decision is a final, appealable decision. Appeal rights of the parties under 34 CFR 300.516 state:

(a) General. Any party aggrieved by the findings and decision made under Sec. 300.507 through 300.513 or Sec. 300.530 through 300.534 who does not have the right to appeal under Sec 300.514(b), and any party aggrieved by the findings and decision under Sec. 300.514(b), has the right to bring a civil action with respect to the due process complaint notice requesting a due process hearing under Sec. 300.507 or Sec. 300.530 through 300.532. The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(b) Time limitation: The party bringing the action shall have 90 days from the date of the decision of the hearing officer or, if applicable, the decision of the State review official, to file a civil action, or, if the State has an explicit time limitation for bringing civil actions under Part B of the Act, in the time allowed by that State law.

707 KAR 1:340 § 8. Appeal of Decision provides the following information to aggrieved parties, in subsection (2): A decision made by the Exceptional Children Appeals Board shall be final unless a party appeals the decision to state circuit court or federal district court.

KRS 13B.140, which pertains to appeals to administrative hearings in general, in Kentucky, and not to civil actions under Part B of the Act (the IDEA), provides: (1) All final





With copies emailed to:

[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]

Kim H. Price  
khplaw@windstream.net

Roland Merkel  
rolandmerkel@gmail.com

KDE Legal Services  
kdelegal@education.ky.gov

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MIKE WILSON, CHAIR  
EXCEPTIONAL CHILDREN APPEALS BOARD