

COMMONWEALTH OF KENTUCKY  
KENTUCKY DEPARTMENT OF EDUCATION  
DIVISION OF EXCEPTIONAL CHILDREN SERVICES  
AGENCY CASE NO. 1516-01

RECEIVED  
FEB - 9 2016  
BY:

██████████

PETITIONER

v.

██████████

RESPONDENT

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HEARING OFFICER'S DECISION  
AND  
ORDER

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A Due Process Hearing under the Individuals with Disabilities in Education Act (IDEA), (20 U.S.C. § 1400, et seq.) in this matter was initiated with the Kentucky Department of Education (KDE) filed by Counsel for the Petitioner on July 7, 2015 with the Kentucky Department of Education Office of Exceptional Children requesting a "Due Process Hearing" for the Student Petitioner. The transcript of record includes four volumes of testimony. There are three volumes of exhibits and videos as part of P# 13 and #14 and the video ordered by this Hearing Officer's predecessor.

On or about July 8, 2015, this matter was assigned to the Hon. Jenny Jones as the Due Process Hearing Officer. Ms. Jones was appointed by the Kentucky Department of Education pursuant to 20 USC Section 1415 (IDEAIA '04), 34 CFR Part 300, KRS 13B and 707 KAR 1:340. This matter was scheduled for hearing on October 28 and 30, 2015 by the original Hearing Officer. The Hon. Jenny Jones found a conflict with her continuation as Hearing Officer and as a result, the undersigned was appointed to serve as Hearing Officer on or about October 14, 2015.

The Due Process Hearing was held on four days, October 28, October 30, November 13

and November 20, 2015. Each of the Parties submitted simultaneous briefs and reply briefs.

## I. INTRODUCTION

Throughout this decision the Petitioner will be interchangeably referred to as the Petitioner, [REDACTED] or Student. The Respondent will be interchangeably referred to as the [REDACTED] the District and/or the School. [REDACTED] Center for Autism will be referenced as HCA. Petitioner's exhibits will be referenced as P#. References to the hearing transcript are referenced by volume and page. Day one of the hearing is in Volume I which will be referenced as T.T. Vol. I and then the page number. Respondent's exhibits will be referenced as R# and Joint exhibits will be referenced as JE#. FF references the numbered Findings of Fact.

The Petitioner's original due process request was dated July 6, 2015 and filed July 7, 2015. The Parties agreed to a bifurcated hearing as noted in the Order of September 10, 2015. Within the Final Notice of Hearing entered on September 11, 2015 the issues for hearing reiterated those set forth in the Order of September 10<sup>th</sup>. These are matters all related to placement. They are as follows---

1. Whether the [REDACTED] failed to fully evaluate the student as required by **707 KAR 1:300**; and
2. Whether the [REDACTED] failed to develop, implement and revise an appropriate IEP [related to] placement for the student in violation of **707 KAR 1:320**; and
3. Whether the HCA is the appropriate educational placement for the student; and
4. Whether the [REDACTED] failed to make appropriate placement decisions or consider the continuum of educational placements for the student in violation of **707 KAR 1:350**.

## II. STANDARD OF REVIEW

### Burden of Proof

The burden of proof under **KRS 13B.090 (7)** is as follows. "The party proposing that

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, unless otherwise provided by statute or federal law". In this instance, the Petitioner is proposing that the agency take action and that she is entitled to a benefit sought. Petitioner therefore, has the burden of proof to show by the preponderance of the evidence that the IEP and the services provided by the Respondent School District were not adequate or otherwise inappropriate to satisfy the requirement of FAPE (free appropriate public education).

It is the position of the Petitioner that the Respondent failed to provide the Petitioner a "free appropriate public education" or FAPE and therefore it would be appropriate to have the Student transferred to HCA. Under IDEA, the burden of showing whether a school district provided FAPE rests with the Petitioner; who is usually the parents on behalf of the student who is challenging or otherwise disputing the effectiveness of the student's proposed independent educational program or IEP. **Board of Educ. of the Avon Lake City Sch. Dist. V. Patrick M.**, 9 F. Supp.2d 811, 820 (N.D. Ohio 1998) (citing **Doe v. Board of Educ. of Tullahoma City Schs.**, 9 F.3d.455, 458 (6<sup>th</sup> Cir. 1993)). See also **Schaeffer v. Weast**, 546 U.S. 49 (2005) in an administrative hearing, party seeking relief has burden of proof.

The Petitioner alleges the Student's current placement is inappropriate. It is the Petitioner's belief the inappropriate placement is causing great regression in the Petitioner's skill set and behaviors; and such regression is causing harm to the Petitioner. Because of this, the Petitioner seeks to have a determination that the appropriate placement for the Petitioner is the [REDACTED] Center for Autism with an order the Respondent to pay for such placement.

### **III. FINDINGS OF FACT**

1. The Petitioner is a 13 year old female student diagnosed with Autism, Tachycardia

(abnormally rapid heart rate) and Complex seizure disorder. (T.T. Vol. III p. 23-24; JE 3, p. 038) There is evidence that the student's communication disorder adversely affects her educational performance. (JE# 4, p.45. Due Process Complaint p.1) Within the [REDACTED] Center for Autism report with the date of 8/13/14, the Petitioner has a diagnosis of Autistic Disorder 299.00. (P#5; p. 1 of 10)

2. According to Center for Disease Control the Autistic Disorder 299.00 diagnostic criteria is as follows:

**Diagnostic Criteria for 299.00 Autism Spectrum Disorder**

A. Persistent deficits in social communication and social interaction across multiple contexts, as manifested by the following, currently or by history (examples are illustrative, not exhaustive; see text):

1. Deficits in social-emotional reciprocity, ranging, for example, from abnormal social approach and failure of normal back-and-forth conversation; to reduced sharing of interests, emotions, or affect; to failure to initiate or respond to social interactions.
2. Deficits in nonverbal communicative behaviors used for social interaction, ranging, for example, from poorly integrated verbal and nonverbal communication; to abnormalities in eye contact and body language or deficits in understanding and use of gestures; to a total lack of facial expressions and nonverbal communication.
3. Deficits in developing, maintaining, and understand relationships, ranging, for example, from difficulties adjusting behavior to suit various social contexts; to difficulties in sharing imaginative play or in making friends; to absence of interest in peers.

*Specify current severity:*

**Severity is based on social communication impairments and restricted, repetitive patterns of behavior.**

B. Restricted, repetitive patterns of behavior, interests, or activities, as manifested by at least two of the following, currently or by history (examples are illustrative, not exhaustive; see text):

1. Stereotyped or repetitive motor movements, use of objects, or speech (e.g., simple motor stereotypes, lining up toys or flipping objects, echolalia, idiosyncratic phrases).

2. Insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior (e.g., extreme distress at small changes, difficulties with transitions, rigid thinking patterns, greeting rituals, need to take same route or eat same food every day).
3. Highly restricted, fixated interests that are abnormal in intensity or focus (e.g., strong attachment to or preoccupation with unusual objects, excessively circumscribed or perseverative interests).
4. Hyper- or hyporeactivity to sensory input or unusual interest in sensory aspects of the environment (e.g. apparent indifference to pain/temperature, adverse response to specific sounds or textures, excessive smelling or touching of objects, visual fascination with lights or movement).

*Specify current severity:*

**Severity is based on social communication impairments and restricted, repetitive patterns of behavior.**

C. Symptoms must be present in the early developmental period (but may not become fully manifest until social demands exceed limited capacities, or may be masked by learned strategies in later life).

D. Symptoms cause clinically significant impairment in social, occupational, or other important areas of current functioning.

E. These disturbances are not better explained by intellectual disability (intellectual developmental disorder) or global developmental delay. Intellectual disability and autism spectrum disorder frequently co-occur; to make comorbid diagnoses of autism spectrum disorder and intellectual disability, social communication should be below that expected for general developmental level.

<http://www.cdc.gov/ncbddd/autism/hcp-dsm.html> (accessed 02/01/2016)

3. The Petitioner attended [REDACTED] from the beginning of her school career until February, 2010. (T.T. Vol. III p. 22-23; P.# 2)

4. The Petitioner's parents privately placed her at the [REDACTED] Center for Autism (HCA) (located at [REDACTED] from February, 2010 until December 2012. (J.E. 2; T.T. Vol. I p. 18; T.T. Vol. III p. 23; 38)

5. The HCA is a center based Applied Behavior Analytic Program which opened in 2009. It provides an intensive one on one specialized school providing education and behavioral utilizing the principals of Applied Behavior Analysis (ABA). It is a year-round program. (T.T. Vol. I p. 26)

6. The staff at the [REDACTED] Center for Autism have bachelor degrees in psychology and education. There is an ABA component. When the center first opened, the staff was trained at the Cleveland Clinic. (Vol. I; p.28-29)

7. [REDACTED] is the present Director of the [REDACTED] Center for Autism. She has been the Director of HCA since June 2015, though she came to work at HCA in November 2010. (T.T. Vol. I; p. 18) She has a Master's degree in clinical Psychology and is a Board Certified Behavior Analyst (BCBA). During the time of the Petitioner's enrollment at the [REDACTED] Center, Ms. [REDACTED] was the Petitioner's clinical behavioral therapist. (T.T. Vol. I p.20; p.34)

8. The HCA has a full time on site BCBA providing constant supervision of the staff and progress of the children. There is also a Master's level special education teacher in the program. All of the staff working at the Center are at the Bachelor's level in education and many are at the Master's level either certified in ABA or have had extensive and ongoing training in ABA. Because the BCBA is on site, any problematic behaviors of the children that staff are struggling with can be addressed immediately. (T.T. Vol. I p.28-30; 36-37; 122)

9. Applied Behavior Analysis (ABA) is an effective science based intervention for children with Autism. It involves breaking skills down into small steps and pairing the steps with effective consistent reinforcement while collecting data regarding the child's progress. Data Assessment is critical to the success of the model. It also involves a reduction of behaviors that interfere with the acquisition of skills. (T.T. Vol. I p. 22-24; p. 30-31)

10. It takes approximately one and one-half years of training to become a BCBA. (T.T. Vol. I p.21. There is both a state and national certification for BCBA. There is a requirement of a

master's degree in Applied Behavior Analysis or related field. (T.T. Vol. I p. 20)

11. Petitioner made the decision to transfer the [REDACTED] in August 2012. At that time they decided to transition her to Respondent in January 2013. (T.T. Vol. 3; p 38-39)

12. Despite observations of the Petitioner at the [REDACTED] Center for Autism, the Respondent did not replicate the Petitioner's HCA program. (T.T. Vol. I p. 227)

13. The Student's transition from [REDACTED] Autism Center to [REDACTED] was discussed at the ARC Meeting held on November 26, 2012. (J.E# 1)

14. The [REDACTED] Autism Center did not prepare an IEP for the Petitioner during the time she attended. It uses a treatment plan rather than an IEP. (Vol. I p. 82-86)

15. On 12/17/12, [REDACTED] and [REDACTED] from the Respondent's District went to the [REDACTED] Center for Autism for the purpose of observing the Petitioner. The Petitioner was beginning a one on one training session with a therapist. (P#4 p.1)

16. The HCA as a private institution, it is not required to develop individualized education plans (IEP) as required for public school districts, not required to implement core curriculum and have state required curriculum in its program. (T.T. Vol I, p. 117-118)

17. According to the evidence presented, most of the teachers at the HCA do not hold special education teaching certification from Kentucky or any other state. (T.T. Vol. p. 122)

18. Joint Exhibit 4 is a "Communication Written Report". It notes that the dates of evaluation being 7/9/12 and 12/5/12 which were prior to Petitioner re-entering the Respondent District.

On the second page of JE#3 it states "...Expressively, \_\_\_\_\_ is able to state her name, the names of others, participate in social greetings, and label reinforcers/tangible items. She protests with vocalizations, is inconsistent with yes/no answers, and initiates communication to request items and label objects and people. It has been observed that \_\_\_\_\_ is highly prompt dependent to perform these expressive language skills...."

19. Joint Exhibit 5 is an "Occupational Therapy Evaluations" with the date of 12/3/12. Under "Motor Observations" it states "...She was able to transition manipulatives in her hand and shift up and down on a pencil. \_\_\_\_ demonstrated an ability to print her first name to recognition, but did not use proper letter formation, spacing, size or letter alignment. When presented with letters not listed in her first name, \_\_\_\_ was unable print the letter. She was able to trace some lines with decreased accuracy and awareness. When asked to copy developmental shapes, \_\_\_\_ was able to imitate a circle and vertical line, but had difficulty with a square, diamond and triangle. \_\_\_\_ was unable to draw a person when asked to do so. During coloring tasks, \_\_\_\_\_ made marks on paper, but did not demonstrate any awareness to boundaries and did not color shapes in completely....."
20. On 01/03/2013 an Integrated Assessment Report was made of testing administered primarily on 12/03/2012. (JE #3)
21. The ██████████ Center for Autism would not participate in ARC meetings or transitional activities after January 2013 unless they were compensated according to the Petitioner's Parents. (Vol. III; p. 41-43)
22. The VB-MAPP is an assessment tool. (Vol.I, p. 40) It is the Verbal Behavioral Milestone Assessment and Placement Program. It is a language-based assessment tool. It looks at a number of language types of abilities. (Vol. I, p.42 )
23. The Cleveland Clinic is regarded as on the leading edge in efforts to benefit children diagnosed with autism disorder. (T.T. Vol. 1, p. 117-118)
24. Establishing functional communication is extremely important for Autistic children who lack verbal communication skills. (T.T. Vol. I p.26)
25. The staff at the ██████████ Center for Autism conducts frequent and extensive functional behavior analysis of each student's behaviors prior to creating behavior intervention plans. (T.T. Vol. I p. 24)



26. The staff at the HCA provides regular monthly parent/child training and home visits to assist parents with providing interventions into the child's behaviors that are consistent with those happening in the program. Parents are allowed to observe their child in the program.

(T.T. Vol. I p. 85; p. 86)

27. At the ARC Meeting of November 26, 2012 the Petitioner's father indicated that Petitioner had seizures which are controlled with medication. (J.E.# 1, p. 2)

28. During the ARC of November 26, 2012, Petitioner's father agreed that the Respondent could evaluate Petitioner in the areas of General Intelligence, Communication Status, Social Development History, Social and Emotional Status, Academic Performance and Motor Performance. (JE # 1 p. 9)

29. During the ARC of January 4, 2013, the evaluation of December 3, 2012 was reviewed. Petitioner's Parents requested that a Behavioral Therapist visit the Petitioner's classroom periodically. (JE # 2; p. 2)

30. Upon exit from the HCA, the Petitioner was able to independently utilize a communication device (an iPad) to display her academic skills.( P# 13; P#. 14; P#. 12; P#. 13; P.E. 14; T.T. 104-105)

31. By 2012, at the HCA, the Petitioner was able to participate in classroom group for 15-20 minutes without behavior disruptions and without one on one adult assistance. (P.# 12; P.# 13; T.T. Vol. I p. 105-106)

32. Petitioner's exhibit 13 is a video of her working at the ██████████ Center Autism. Food is not being used as a reinforcement. The date of December 2014 on the video should be December 2012. ( T.T. Vol. 1, p. 98)

33. The Petitioner returned to ██████ in January, 2013. (T.T. Vol. III p. 39)

34. Upon entry into ██████ in January 2013 ██████ was placed into the second grade. (T.T. Vol. IV, p. 113). The parents believed this was the best placement for ██████ (T.T. Vol. III, p. 95 -

96).

35. [REDACTED] is the Director of Special Education for [REDACTED] (T.T. Vol. III, p. 6). Ms. [REDACTED] testified concerning transition efforts for [REDACTED] from [REDACTED] Autism Center back into [REDACTED] and the development of a specialized classroom for [REDACTED] (T.T. Vol III at p. 10 – 19; see also JE# 1).

36. [REDACTED] was selected as [REDACTED]'s teacher due to Ms. [REDACTED] belief that she was the most qualified and had the most training in the district with autistic children. (T.T. Vol I; p. 14)

37. Ms. [REDACTED] testified that the district did not contract with the [REDACTED] Autism Center as requested by the parents because [REDACTED] contracted with the Cleveland Clinic and the educational co-op instead. (T.T. Vol. I; p. 19 – 20).

38. Ms. [REDACTED] believes that the Cleveland Clinic offered better services to the district. (T.T. Vol.I; p. 28) Ms. [REDACTED] testified that [REDACTED] is making progress in the least restrictive environment. The child is being educated and this is supported by the data. Further, [REDACTED]'s IEP goals are being achieved. (T.T. Vol. I; p.68- 70)

39. Petitioner's Parents and her Teachers have exchanged emails about training for parents, the Petitioner's behaviors at home and school recorded in 96 pages from March 2014 through February 17, 2015. (P#10; T.T. Vol. III, p. 43; 47-48)

40. Petitioner's Parents provided a response to the Conference Summary to which they did not agree to the ARC of 05/30/14. They indicated they thought the paraprofessional was not properly trained in implementing behavior strategies consistently. "They noted that CBI had not been implemented and that the previous behavior plan was not effective and the teacher acknowledged it. (P#6)

41. The Petitioner's parents requested that the Respondent work with the [REDACTED] Center for Autism to help address the Petitioner's behaviors. (T.T. Vol. III p. 20)

42. The Petitioner's parents requested that the Respondent provide a BCBA on site at the Petitioner's school to work with the Petitioner on a daily or weekly basis. (T.T. Vol. III p. 20)
43. The Respondent had the assistance of a BCBA consultant from the Kentucky Educational Development Corporation (KEDC) located in Ashland, Kentucky. ( T.T. Vol. III p. 54)
44. The BCBA consultant from KEDC has been in the school nine (9) times to observe the Petitioner and consult with the Respondent. (T.T. Vol. III p. 244; 256)
45. Parents requested an ARC Meeting to be held on 04/01/2014. They were concerned with the Student's negative behaviors (ex. Pinching, biting, yelling/screaming/chanting, waiting) and social skills at home. (JE# 15, p. 153 & 167)
46. A Behavior Intervention Plan (BIP) was developed on 04/01/2014 in response to the concerns of Petitioner's Parents. (JE #17)
47. Petitioner's Parents requested an ARC Meeting on 05/29/2014. Parents were concerned with the Student's regressing behaviors and the need for home support. Parents expressed the belief that factors that contributed to the Student's behaviors have not been included in the Conference Summary. P. 182 (JE # 18)
48. During the August 19, 2014 conference (JE #23) it was requested by the Student's Parents that a VB-MAPP be completed by an outside professional and not by the school district or Cleveland Clinic. The ARC then reconvened on Sept 12, 2014 all parties agreed that independent evaluation would be performed by the University of Louisville, Kentucky Autism Center. Dr. Robert Pennington, PhD, BCBA-D conducted the independent assessment on September 25-26th, 2014. (JE# 26 and 28).
49. The Cleveland Clinic consultants have been in the Petitioner's school to observe the Petitioner and other children at least six (6) times. (T.T. Vol. IV p. 9 & 37)
50. The Respondent relies on input from the KEDC and Cleveland Clinic consultants when

the Petitioner exhibits concerning behaviors. (T.T. Vol. V p. 38-39)

51. Respondent has recommended antecedent strategies for Petitioner. It refers to the eighty/twenty rule for positive feedback to directive, redirection or corrective statements.

(Ex. 50; T.T. Vol. IV, p. 11)

52. Despite the Petitioner's parents' objection, the Respondent has relied on food to manage the Petitioner's behaviors. (T.T. Vol. IV p. 40)

53. When the Petitioner was attending the HCA, food as a reinforcement had nearly been faded completely. (T.T. Vol. I p. 105)

54. When the Petitioner was attending the HCA, she was able to write her name independently. (T.T. Vol. I p. 109; P# 14; J.E.# 38; J.E.# 39)

55. On 8/13/14, Petitioner's Parents had Behavior Analyst Sara Gilbert, M.S., BCBA provide an update of the Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP) assessment. (P#5)

56. On page 8 of 10 of the VB-MAPP assessment (8/13/14), it noted "During the assessment \_\_\_\_\_ was able to write her own name. (P#5 p. 8 of 10)

57. The Petitioner's behaviors have become increasingly a concern both at school and at home since her re-enrollment at [REDACTED] (T.T. Vol. III p. 49)

58. A functional behavior assessment is vitally important to determine why behavior is occurring and how to reduce the behavior. Without knowing the function of the behavior, a behavior plan cannot be effective nor can behavior be treated appropriately. (T.T. Vol. I p.68; R.# 10; T.T. Vol. I p 161; J.E.# 32)

59. Petitioner contends Respondent has often offered opportunities for trainings given by the Cleveland Clinic for the Petitioner's parents, however many of , these have been offered with very little or no notice and/or at times when the parents cannot attend. These trainings often do not involve the child, but are only for the parents. (R.#. 32. T.T. Vol. IV p.225-226)

60. The Petitioner's IEP calls for monthly community based instruction, however, this does not occur on a monthly basis. From January, 2013 until May, 2015, the Petitioner had only attended seven (7) community based instruction trips. (R #)4-i)

61. It took four adults to manage the Petitioner's behavior on a community based instruction outing on September 25, 2015. (J.E. #39)

62. The Respondent has opined that many of the Petitioner's aggressive behaviors revolve around her menstrual cycle, her medication changes and her diet. On page 2 of the Functional Behavior Assessment with the date of 12/8/14, there is a reference to a 45 day Data Analysis which notes the Petitioner's aggressive behavior occurred "immediate days prior to and days on her menstrual cycle". (JE.# 32)

63. [REDACTED], [REDACTED]'s consultant from the Cleveland Clinic is a bachelors level Certified Assistant Behavior Analyst. (BCaBA). (T.T. Vol. IV p. 45-47)

64. The Petitioner is unable to independently tie her shoes although she can independently complete some of the steps to tie her shoes. (T.T. Vol. IV p.223; T.T. IV p. 76-77)

65. The Petitioner has been physically restrained in school for the first time on or about October 12, 2015. (P#15 p. 4 & T.T. Vol. II p. 76-77) According to the "Behavior Incident" report "Once at the visual schedule, \_\_\_\_\_ behavior began to escalate and she began chanting, kicking/pinching staff and biting herself. \_\_\_\_\_ continued to bite self and attempted to bite others. [REDACTED] (staff) employed Emergency Safety Physical Intervention (Standing Cradle Assist) for 2 minutes. \_\_\_\_\_ appeared calm and was given the option to sit in a chair. \_\_\_\_\_ sad down in the chair. Once in the chair, she began to chant and resumed biting self; therefore ESPI (Standing Cradle Assist) was employed once again for 1 minute. \_\_\_\_\_ appeared calm and was redirected to her visual schedule. No further emergency interventions were needed. (P#15; p. 4)

66. The Petitioner's parents have never been given the opportunity for a debriefing regarding the Petitioner's physical restraint due to the litigation. ( T.T. Vol. III p.77 & P #15; p. 5)

67. Aggressive behavior by the Petitioner typically follows her vocal stimulations.( JE# 32)

68. At the ARC Meeting date of 02/13/2015, Petitioner's father attended. The Parents had requested the meeting. Concerns were discussed about the FBA. Petitioner's Parents voiced disagreement with the inclusion of the Petitioner's menstrual cycle in the behavior assessment report. (JE# 35 p. 407)

69. Within the IEP discussed during the ARC of 5/21/2015, on page 4 of the IEP under "Consideration of Special Factors for IEP Development" in respect to the question "Does the child's behavior impede his/her learning of that of others?" the answer is "Yes". (JE #37, p. 425)

70. On the last page of the IEP with the ARC date of 5/21/2015, Extended School Year services were discussed. The last sentence states the student "will receive six 90 minute sessions during the summer break. (30 minutes-special education teacher, 30 minutes speech therapy, 30 minutes occupational therapy). (JE# 37 p. 432)

71. Petitioner's Parents provided a response to the Conference Summary to which they did not agree to the ARC of 05/30/14. They indicated they thought the paraprofessional was not properly trained in implementing behavior strategies consistently. "They noted that CBI had not been implemented and that the previous behavior plan was not effective and the teacher acknowledged it. (P#6)

72. ██████████ the Student's teacher testified that ██████████ is progressing and meeting goals. (T.T. Vol. IV, p. 172). Based upon her experience with this child, ██████████ is being educated and meeting her educational goals as supported by the data. (T.T. Vol. IV; p. 173 - 174)

73. Ms. [REDACTED] the Student's occupational therapist testified that based upon her work with [REDACTED] and her knowledge, background and education that [REDACTED] is learning, meeting educational goals, achieving or meeting IEP goals and that she is in her least restrictive environment. Ms. [REDACTED] believes that [REDACTED]'s placement is proper. (T.T. Vol. IV, p. 73-75)

74. Ms. [REDACTED] the Student's speech therapist, testified that the Petitioner is being educated in an appropriate setting and that she is making progress and she's meeting goals, educational goals and IEP goals. Ms. [REDACTED] testified that she has observed improvement in [REDACTED]'s functional communication and has mastered some of her speech goals. (T.T. Vol IV; p. 86-88)

75. From November 2012 to May 2015 there have been fourteen (14) ARC meetings convened concerning [REDACTED] (See R# 34).

76. Since the Petitioner resumed attending the Respondent School District, IEPs have been adopted on 01/04/2013 for the time period 01/04/2013 to 01/03/2014 (JE# 6); 10/17/2013 to 10/16/2014 (JE 11); 04/01/2014 (JE 16) 10/14/2014 to 10/13/2015 (JE 29)

#### **IV. REVIEW OF THE ARGUMENTS**

Petitioner has set forth the following arguments in support of its position.

- A. The Petitioner's current placement is inappropriate.**
- B. The inappropriate placement is causing great regression in the Petitioner's skill set.**
- C. The appropriate placement for the Petitioner is the [REDACTED] Center for Autism**

Respondent's Arguments are as follows.

- A. THE RECORD IS DEVOID OF ANY PROOF TO SUPPORT ANY CLAIMS THAT THE CHILD HAS BEEN DENIED FAPE. MORE IMPORTANTLY, THERE HAS BEEN NO DOCUMENTATION, OPINIONS, NOR OTHER MATERIAL**

**PRESENTED AT ANY OF THE ARC MEETING OR AT THE HEARING  
DEMONSTRATING THAT THIS CHILD'S PLACEMENT IS NOT PROPER**

- B. RESPONDENT MADE APPROPRIATE PLACEMENT DECISIONS**
- C. THERE IS NO ERROR IN ALLOWING CONTRACTORS OR OTHERS WITH KNOWLEDGE OR SPECIAL EXPERTISE TO PARTICIPATE AS AN ARC MEMBER OR TO REVIEW THE CHILDS RECORDS**
- D. THERE IS NO ERROR IN PREPARING MULTIPLE VB-MAPPS WITHOUT PARENTAL PERMISSION.**

**V. DECISION**

This is an appeal that could have many dimensions based upon the issues raised by the Parties during the litigation. The focus of this decision is on the proper placement for the Student. After due consideration of the evidence presented during the four days of hearing, the video ordered by the previous Hearing Officer, Exhibits, the arguments of the Parties this Hearing Officer issues the following decision based on the issues contained Order of the previous Hearing Officer of September 10, 2015.

**1. Whether the [REDACTED] failed to fully evaluate the student as required by 707 KAR 1:300;**

During the Petitioner's transition from the [REDACTED] Center for Autism (HCA), the Respondent did not request the Petitioner's records from HCA. Regulations indicate that the receiving school district must request the student's records from the school district the student is leaving.

**300.323 (f)** sets forth----

(e) IEPs for children who transfer public agencies in the same State. If a child with a disability (who had an IEP that was in effect in a previous public agency in the same State) transfers to a new public agency in the same State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide FAPE to the child (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency either--



(1) Adopts the child's IEP from the previous public agency; or

(2) Develops, adopts, and implements a new IEP that meets the applicable requirements in Sec. Sec. 300.320 through 300.324.

(f) IEPs for children who transfer from another State. If a child with a disability (who had an IEP that was in effect in a previous public agency in another State) transfers to a public agency in a new State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency--

(1) Conducts an evaluation pursuant to Sec. Sec. 300.304 through 300.306 (if determined to be necessary by the new public agency); and

(2) Develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in Sec. Sec. 300.320 through 300.324.

(g) Transmittal of records. To facilitate the transition for a child described in paragraphs (e) and (f) of this section--

(1) The new public agency in which the child enrolls must take reasonable steps to promptly obtain the child's records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous public agency in which the child was enrolled, pursuant to 34 CFR 99.31(a) (2); and

(2) The previous public agency in which the child was enrolled must take reasonable steps to promptly respond to the request from the new public agency.

**(Authority: 20 U.S.C. 1414(d) (2) (A)-(C))**

This is based upon the language of the IDEA 2004----

(c) Program For Children Who Transfer School Districts--

(i) In General--

(I) **Transfer Within The Same State**--In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school district within the same academic year, who enrolls in a new school, and who had an IEP that who had an IEP that was in effect in the same State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such a time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with the Federal and State law.

(ii) Transmittal of Records--To facilitate the transition for the child described

In the transition for a child described in clause (i)---

- (I) The new school in which the child enrolls shall take reasonable steps to promptly obtain the child's records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child from the previous school in which the child was enrolled, pursuant to section 99.31(a)(2) of title 34, Code of Federal Regulations; and
- (II) The previous school in which the child was enrolled shall take reasonable steps to promptly respond to such request from the new school.

The Petitioner transferred from the [REDACTED] Autism center there was not IEP.

However, there was a "Treatment Plan". (FF 8) Therefore, Respondent would have been unable to have adopted the Petitioner's IEP from HCA.

However, the Respondent did not request any of Petitioner's records from the [REDACTED] Center for Autism.

In respect to whether the Petitioner was adequately evaluated at the time of transition from HCA to [REDACTED], the record indicates there was at least one observation (FF9), a Communication evaluation (FF 10) and an Occupational Therapy Evaluation (FF 11). These reports were combined in the Integrated Assessment Report. (FF 12) At the time of the Student's transition from HCA to [REDACTED], the District complied with its duty to obtain the necessary information to formulate an appropriate IEP.

Quoting from *N.B v. Hellgate Elementary School District; Ex. Rel. Board of Directors* 541 F3d. 1202 (2008) at 1209-10. :

A child must be tested in all areas of suspected disability. 20 U.S.C. § 1414(b). The evaluation includes gathering information "that may assist in determining ...

the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general curriculum, or, for preschool children, to participate in appropriate activities." 20 U.S.C. § 1414(b)(2)(A) (1998). The "local educational agency shall administer such tests and other evaluation materials as may be needed to produce the data identified by the IEP Team" in order to determine the needs of the child. *Id.* § 1414(c) (2). "Each local educational agency shall ensure that--(B) any standardized tests that are given to the child-- ... (ii) are administered by trained and knowledgeable personnel." *Id.* § 1414(b) (3) (B) (ii) (1998). In conducting or obtaining an evaluation, the school district "shall ensure that the child is

assessed in all areas of suspected disability." *Id.* § 1414(b) (3) (C) (1997); 34 C.F.R. § 300.532(g) (1999).

The Student has continued to be evaluated since arriving at [REDACTED]. A BCBA from KEDC has observed the Student at least nine (9) times and made recommendations. (FF 44) An independent evaluation was performed during September 2014. ((FF 48) Student's IEP has been amended at least four times. (FF 76)

Based upon the evidence presented, the [REDACTED] evaluated the Student in accordance with IDEA regulations as set forth above. Therefore, Petitioner's contention that the Respondent failed to fully evaluate the Student when she transitioned to [REDACTED] in January 2013 through August 2014 is overruled.

However, this Hearing Officer found that Parties have not discussed whether the Petitioner's specific diagnosis of "Autistic Disorder 299.00" would make a difference in formulating her IEP.—See Hearing Officer's Topic 5 below--

**2. Whether the [REDACTED] failed to develop, implement and revise an appropriate IEP [related to] placement for the student in violation of 707 KAR 1:320.**

Since the Petitioner resumed attending the Respondent School District, IEPs have been adopted on 01/04/2013 for the time period 01/04/2013 to 01/03/2014; 10/17/2013 to 10/16/2014; 04/01/2014 10/14/2014 to 10/13/2015 (FF 76)

The appropriate portion of 707 KAR 1:320 which governs the development, implementation and revision of an appropriate IEP is set forth as follow.

Section 1. Individual Education Programs. (1) An LEA shall ensure an IEP is developed and implemented for each child with a disability served by that LEA, and for each child with a disability placed in or referred to a private school or facility by the LEA.

(2) Kentucky School for the Deaf and Kentucky School for the Blind, in conjunction with the child's resident LEA, shall ensure that an IEP is developed and implemented for each child with a disability placed in its school by an ARC.

(3) At the beginning of the school year, an LEA shall have an IEP in effect for each child with a disability within its jurisdiction.

(4) An LEA shall ensure the IEP:

(a) Is in effect before specially designed instruction and related services are provided to a child with a disability; and

(b) Is implemented as soon as possible following an ARC meeting.

(5) An LEA (or state agency responsible for developing the child's IEP) shall ensure that there is no delay in implementing a child's IEP, including any case in which the payment source for providing or paying the special education and related services to the child is being determined.

(6) An LEA shall ensure that:

- (a) The child's IEP is accessible to each regular education teacher, special education teacher, related services provider, and other service providers who are responsible for its implementation;
  - (b) Prior to the implementation of the IEP, each implementer is informed of his specific responsibilities related to implementing the child's IEP; and
  - (c) The specific accommodations, modifications, and supports are provided for the child in accordance with the IEP.
- (7) An IEP shall be in place for all eligible children aged three (3) through five (5).

Respondent had an IEP in place in January 2013 when the Petitioner returned to [REDACTED] (PFF 33) There was an ARC Meeting on November 25, 2012 (FF 13) Assessments were made during the month of December 2012 to insure that Petitioner had access to educational services designed to meet her educational needs. (FF 15, 18, 19, 20)

Two questions must be asked in evaluating any IEP. *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 853-54 (6th Cir. 2004). First, the finder of fact must determine whether the school system has complied with the procedures set forth in the IDEA. *Id.*, citing *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982); *McLaughlin v. Holt Pub. Sch. Bd. of Educ.*, 320 F.3d 663, 669 (6th Cir. 2003). Second, the finder of fact must assess whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefits. *Rowley*, 458 U.S. at 206-07, 102 S. Ct. 3034. In reviewing the record herein, the answer to both questions is yes. (F.F. 10)

To be valid, an IEP, as stated herein above, must be *reasonably calculated* to enable the child to receive educational benefit. The IEP generated by the ARC which was comprised of Respondent's personnel and Petitioner's parents was reasonably calculated to provide educational benefit to the Petitioner. From reading the record in this appeal the Hearing Officer, finds the Respondent made educational progress under her IEPs (F.F. 72,73,74 )

Petitioner's issue is with transition services. Petitioner was to transition from HCA to [REDACTED] This was transition services from a clinical or hospital setting to Respondent's public school setting. Transition activities were initiated by Respondent beginning with the November 26, 2012 ARC Meeting. There were no concerns voiced by the Petitioner's parents

to these activities. However, Petitioner has failed to provide evidence telling this Hearing Officer why Respondent's proposed "transition or placement activities" was inadequate or violated FAPE other than the lack of an onsite BCBA. The record as presented does not show modifications proposed by the Petitioner's parents other than the onsite BCBA.

There is an underlying argument by Petitioner that because the present IEP does not have a plan to transition Petitioner to Respondent's school, then the current IEP is a denial of FAPE. This is not necessarily the case as seen in the decision by the court in *Park Hill School Dist. v. Dass*, 655 F.3d 762 (8<sup>th</sup> Cir. 2011) According to the court, the lack of a transition plan is a procedural error. In the case which is the subject of this hearing, Petitioner is continues to receive services which result in educational benefit. (F.F. 20)

Therefore, Petitioner's claim that she was denied FAPE is denied due to the lack of evidence showing such.

When Petitioner's Parents had concerns ARC Meetings were scheduled. (FF 68, 75) In response to the needs of the student the IEPs were changed or amended. (FF 76)

**3. Whether the HCA is the appropriate educational placement for the student; and whether the [REDACTED] failed to make appropriate placement decisions or consider the continuum of educational placements for the student in violation of 707 KAR 1:350.**

The Petitioner alleges that the HCA is the appropriate educational placement for the Student. Law and regulation requires that the Student be placed in the Least Restrictive Environment (LRE) possible.

**707 KAR 1:350. Placement decisions**, is as follows.

Section 1. Placement Decisions. (1) An LEA shall ensure that to the maximum extent appropriate, children with disabilities, including children placed by the LEA in public or private institutions or other care facilities, **are educated with children who are nondisabled.** The LEA shall ensure that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if education in the regular education environment with the use of supplementary aids and services cannot be satisfactorily achieved due to the nature or severity of the disability.

(2) An LEA shall ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

(3) The continuum shall include the alternative placements of:

- (a) Instruction in regular classes;
- (b) **Special classes;**
- (c) Special schools;
- (d) Home instruction; and

(e) Instruction in hospitals and institutions.

(4) *The LEA shall make provision for supplementary services to be provided in conjunction with regular class placement.*

(5) *In determining the educational placement of a child with a disability, the LEA shall ensure that the placement decision is made by the ARC in conformity with the least restrictive environment provisions. (Emphasis added)*

(6) A child's placement shall be:

(a) Determined at least annually;

(b) Based on the child's IEP; and

(c) As close as possible to the child's home.

(7) Unless the IEP of a child with a disability requires some other arrangement, the child shall be educated in the school that he would attend if nondisabled.

(8) In selecting the least restrictive environment, consideration shall be given to any potential harmful effects on the child or on the quality of services that he needs.

(9) A child with a disability shall not be removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum.

(10) In providing or arranging for the provision of nonacademic and extracurricular services and activities, an LEA shall ensure that a child with a disability participates with nondisabled children in those services and activities to the maximum extent appropriate to the needs of the child.

However the evidence presented does not indicate that the Student would receive any specific services that she is could receive from the HCA that the Respondent could not provide. In fact there are indications that [REDACTED] is able to provide services that HCA is unable to provide.

One of the primary issues is the allegation by the Petitioner that she was denial of Free Appropriate Public Education (FAPE). This is interwoven with Petitioner's claim that Respondent did not make appropriate placement decisions.

Pursuant to 707 KAR 1.290, Section 1, FAPE must 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. The education provided must be based upon an appropriate IEP, developed after a thorough assessment of the student's unique special education needs.

The Supreme Court has explicitly rejected the argument that school districts are required to provide services "sufficient to maximize each child's potential commensurate with the opportunity provided other children." *Rowley*, at 198, 102 S.Ct. 3034 (internal citation omitted (finding no congressional intent to achieve strict equality of opportunity or services); see *Renner v. Bd. of Educ. of the Pub. Sch.*, 185 F.3d 635, 644 (6th Cir. 1999). At the same time, however, the services provided must be reasonably calculated to confer a meaningful educational benefit. See *Deal* at 862; *Cypress-Fairbanks Indep. Sch. Dist.*

*V. Michael F.*, 118 F.3d 245, 247 (5<sup>th</sup> Cir. 1997). This means that the student will receive a basic floor of opportunity, specifically designed to meet the child's unique needs, *supported by services that will permit him to benefit from the instruction. Id.*, at 247-248, emphasis added. That basic floor of opportunity must be reasonably likely to produce more than trivial progress. See *Michael F.* 118 F.3d at 248.

At [REDACTED], the Student is receiving occupational therapy, speech therapy as well as direct instruction from a special education teacher. (FF 18, 19, 35, 36) The Student is also receiving community based instruction at [REDACTED] (FF 60)

As there was no evidence presented by the Petitioner regarding HCA's ability to provide occupational therapy, speech therapy, community based instruction as well as direct instruction from a special education teacher, HCA is not the "least restrictive environment" under IDEA. [REDACTED] is the proper placement for the Student.

**4. Whether the [REDACTED] failed to make appropriate placement decisions or consider a continuum of educational placements for the Student in violation of 707 KAR 1:350.**

As set forth above [REDACTED] is the least restrictive on the continuum as set forth under 707 KAR 1:350 (3). A special education class at [REDACTED] is less restrictive than HCA which is part of a hospital or medical center.

As set forth above, [REDACTED] is the most appropriate placement for the Student.

**5. The Parties Failed To Consider the Student's Diagnosis Under Autism Spectrum 299.0**

Within Petitioner's Exhibit 5 (with the date of 8/13/14) within on the first page under Medical Diagnosis: Autism Disorder 299.00. (FF 2) Throughout the presentation of evidence there was no discussion by any of the parties about the Petitioner being diagnosed with Autism Disorder 299.00. This Hearing Officer is taking up this issue in

accordance with point 5 of the Remedies set forth on page 5 of the Order of September 11, 2015.

A review of the definition set forth under (FF 2) and the evidence presented by the parties indicates that the Student has most of the symptoms of Autism Disorder 299.00.

The wording of **707 KAR 1:340 § 2(8)** is as follows.

8) If the parent obtains an independent educational evaluation at public or private expense and it meets the agency criteria, results of the evaluation shall be considered by the LEA in any decision made with respect to the provision of a free, appropriate public education (FAPE) to the child.

One goal of Congress in passing the 1997 Amendments to the IDEA was to strengthen the role of parents in the educational decision-making process. A privately obtain evaluation provides parents added authority at the IEP meeting. One court held:

"[T]he failure to receive and consider parental information, including evaluations they may obtain, directly denies parents the pivotal role they should enjoy in the development of their child's placement. This role includes not only providing evaluations or other information, but discussing such information. Consideration of such outside information also ensures that a program is individualized and provides a check on the judgments being made by school officials regarding the child." ***Community Consolidated Sch. Dist. No. 180, 27 IDELR 1004, 1005-06.***

Federal regulations require that parents and school personnel act as equal participants in the development of a child's IEP and that the parents' participation in the IEP process must be meaningful. In many cases, independent evaluations provide support for the parents' opinions and requests. When a school district refuses to consider an independent evaluation, it not only denies equal and meaningful input from the parents, but ***it also prevents important information from the evaluation from being considered by the ARC team that develops the IEP.*** (Emphasis added)

Consideration of parentally obtained evaluations by the IEP team is not discretionary, it is mandatory. **34 C.F.R. 300.502(c)** ("*If the parent obtains an independent educational evaluation at private expense, the results of the evaluation (1) **Must be considered** by the public agency in any decision made with respect to the provision of a [free appropriate*



*public education] to the child.").* (Emphasis added).

When a parent presents an independent evaluation to the school district, the ARC team is **required** to consider the evaluation. This does not mean that the school district must accept the findings or recommendations in the parental funded evaluation. It does mean that the ARC must review the evaluation, and discuss it as appropriate. In this regard, the requirements placed on school districts are fairly minimal.

In the present situation, neither Party presented direct evidence of the Student being educated in a manner considering the Autistic Disorder 299.00 disorder which is noted in the August 2014 report. Although this report with this diagnosis is contained within the record herein.

Therefore, it is hereby Ordered that the Respondent-School District perform an evaluation considering and/or confirming the Autistic Disorder 299.00. In doing so, an IEP shall be developed taking in consideration this diagnosis when providing the Petitioner services.

#### **ATTORNEY FEES**

Under IDEA, 20 U.S.C. § 1415 the award of attorney fees is under the jurisdiction of the district courts of the United States. Specifically **20 U.S.C. § 1415 (i)(3) (A) and (B)** is set forth below.

#### **(3) Jurisdiction of district courts; attorneys' fees**

##### **(A) In general**

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

##### **(B) Award of attorneys' fees**

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

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

The Hearing Officer is without the ability to award attorney fees to a prevailing party in a Due Process Hearing.

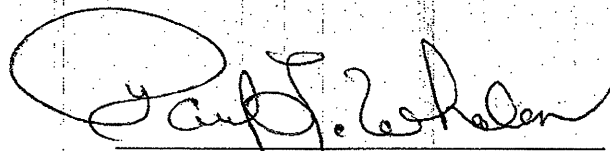
#### **VI. CONCLUSION**

Wherefore, based upon the foregoing this Hearing Officer enters the following

Order:

1. The Respondent erred in failing to request the Petitioner's records from the HCA, however this was overcome with Respondent's evaluation of the Student; and
2. The Petitioner failed to prove by a preponderance of the evidence that Respondent is not a proper placement for the Student; and
3. Educational services as provided by the Respondent school district, are appropriate at least through August 2014 and the appropriate placement is the [REDACTED]; and
4. HCA is not the LRE placement for the Student; and
5. Since August 2014, the Parties should have been aware of the Student's diagnosis of Autism 299.00. It is hereby Ordered that the Respondent evaluate the Student considering that diagnosis and reflect that diagnosis when implementing Student's IEP.

Entered this 8th day of February 2016.



PAUL L. WHALEN  
Due Process Hearing Officer

#### **APPEAL RIGHTS**

Pursuant to **707 KAR 1:340 Section 12**. Appeal of Decision. (1) A party to a due process hearing that is aggrieved by the hearing decision may appeal the decision to members of the Exceptional Children Appeals Board as assigned by the Kentucky Department of Education. The appeal shall be perfected by sending, by **certified mail**, to the Kentucky Department of Education, a request for appeal, within thirty (30) calendar days

of the date of the hearing officer's decision.

The address is: Kentucky Department of Education

Office of Legal Services

500 Mero Street; 1<sup>st</sup> Floor

Frankfort, Kentucky 40601

cc: Via E-mail and USPO



KDE