KENTUCKY DEPARTMENT OF EDUCATION
DIVISION OF EXCEPTIONAL CHILDREN SERVICES
AGENCY CASE NO. 1213-02

[redacted] APPELLANT

Represented by:
[redacted]

v. **********

DECISION AND FINAL ORDER

****

[redacted] APPELLEE/CROSS APPELLANT

Represented by:
[redacted]

INTRODUCTION

This appeal comes before the Exceptional Children Appeals Board panel (hereinafter "ECAB," following a three day hearing conducted by Hearing Officer Mike Wilson. The panel, consisting of [redacted], and [redacted], was appointed on July 15, 2013 to consider the appeal of the student. Having reviewed the record in its entirety, this ECAB first provides some general background for the case and then issues some additional findings of fact in support of its ultimate conclusions.

JURISDICTION

This is an appeal of a decision of a due process decision issued by Hearing Officer Mike Wilson on June 11, 2013. ***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 the members of the Exceptional Children's 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) days of the date of the Hearing Officers decision."

The Hearing Officer issued his decision on June 11, 2013. Counsel for the parties submitted timely appeals to the Kentucky Department of Education. Thus the appeals were perfected within thirty (30) days of the date of the Hearing Officer's decision. Both parties have appealed the decision of the Hearing Officer, who found that the School District had denied FAPE to the Student for the 2011-2012 school year, but that the Student is not entitled to compensatory education or tuition reimbursement. On appeal, the Student has raised the following issues:

1. the Hearing Officer's decision is inconsistent and contrary to law,
2. the parents are entitled to reimbursement for tuition at the private school,
3. the placement proposed by the School District would not have been an appropriate placement,
4. the Student should be awarded one year of compensatory education, and
5. the Hearing Officer should have considered an affidavit submitted by the Student's mother subsequent to the conclusion of the due process hearing.

For its appeal, the School District objects to one or more of the Hearing Officer's findings of fact on grounds of lack of substantial evidence in the record, including those related to alleged bullying, decisions to put the Student on homebound, availability of appropriate supports in the middle school setting and sufficiency of the services provided during homebound placement. The School District also objects to the Hearing Officer's conclusion that the Student was denied FAPE during the 2011-2012 school year. The School District further argues that the aforementioned findings and conclusion are:

1. in violation of statutory provisions,
2. in excess of authority of the agency,
3. arbitrary, capricious and characterized by abuse of discretion, and

4. are deficient as otherwise provided by law.

To the extent findings of facts and conclusions of law are related to evidentiary rulings made during or after the hearing, the School District also challenges those.

BACKGROUND

The Student has been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"), Tourette Syndrome, Obsessive Compulsive Disorder ("OCD"), depression and anxiety. See TE 10, 12, 16, 37, 175, 110). Because of these conditions, the Student does not like to be touched or jostled. TE 86. The School District knew of the Student's diagnoses by the time the Student was six years old. TE 20. At a time prior to the period that was the subject of the hearing, the Student had apparently been the subject of bullying at a school of the School District, which led the parents to homeschool the Student for two years. The Student then returned to a school of the School District for the 2011-2012 school year. TE 13-14, 26, 35.

During that time, the Student had suicidal ideations. TE 25-26. The School District acknowledges that it was informed of both the past bullying and the suicidal thoughts on September 8, 2011. TE 344. At the ARC meeting held that day, it was decided that the least restrictive environment appropriate for the Student was placement in the general education classroom, with 60 minutes daily of special education in the form of someone checking to see that the Student is staying on task. A re-evaluation was also planned. TE 324-325. The Hearing Officer reported testimony that one IEP goal for the Student pertained to development of social skills, because the Student did not interact well with other students, deal appropriately with teasing or inappropriate behaviors from others or from organized groups. Decision and Order, p. 5. The IEP does not address protection from potential bullying.

The Student, unfortunately, did experience new episodes of bullying that year. TE 50-51, 112, 125. Some School District personnel were apparently not aware of the potential for bullying, despite having been informed of this at the September 8, 2011 ARC meeting. See TE 161, 395-96, 807. The School principal did not take steps to stop the problem, other than to give the Student forms to fill out when such incidents occurred. TE 51. The Student had difficulty filling out the sheets because, as a new student, the Student did not always know the names of the persons involved. TE 52. The Hearing Officer described relevant personnel as "somewhat uninformed of and indifferent to the bullying problem." Decision and Order, p. 8.

In support of the Hearing Officer's assessment, he referred to testimony of the school psychologist who had conducted a manifestation determination after the Student had made a Pokemon list of students who had bullied him and wrote out his frustrations about the bullying. The school psychologist determined that the Student was not a threat to anyone, but then testified that she knew of only one bullying incident despite the fact that the school psychologist, in her integrated report, indicated that the Student's mother had stated that the Student had been spat upon and punched. TE 374, 414. Similarly, the Student's caseworker testified that she did not remember whether the Student had attempted to report bullying to teachers, but that she had been told that sometimes it was difficult to get information when the Student tried to follow up on instances where the Student thought bullying had occurred. TE 344, 346.

Only one month after the first ARC meeting, on October 6, 2011, the parents requested Home Hospital ("homebound"), because of repeated assaults of the Student. TE 50. The Student's doctor recommended homebound placement, where the Student remained for the rest of the 2011-2012 school year. TE 123-124, 129. The Hearing Officer found that the only reason

homebound instruction became necessary was because of the School District's failure to provide necessary support services. Decision and Order, pp. 10-11.

The Student received no services at all from October 6, 2011 to October 21, 2011. TE 60-62. During the Student's time on homebound, there were problems with provision of services due to an improper math book (TE 293) and failure of a program called Plato to work. TE 300. The Hearing Officer did not find these to result in a denial of FAPE, however, because the Student still received math instruction and the Student's IEP did not require the Plato program. Decision and Order, p. 13. On the other hand, Hearing officer found that the Student did not receive the social skills related services to which the Student was entitled. Decision and Order, pp. 13-14. In addition, the Hearing Officer found that the Student did not receive the minimum two hours per week of instruction while on homebound, because the time spent teaching replacement coping strategies ate into time for academic instruction. Decision and Order, p. 14. The Hearing Officer similarly found that the Student did not receive enough instruction during homebound. Decision and Order, p. 14.

Although the Hearing Officer also found that the School District failed to adequately monitor implementation of the Student's IEP, he also found insufficient evidence to determine that the Student suffered academic loss due to the School District's failure to provide needed services. Decision and Order, pp. 14-15. As grounds for this finding, the Hearing Officer noted that the Student scored in the top 50% on an MCTC test. Decision and Order, p. 15. The Student's high IQ may also have been a factor, as well as the fact that the Student may already have studied some of the materials taught at the Student's middle school while being home-schooled a couple of years earlier. *Id.*

Although the School District did prepare an IEP for the 2012-2013 school year, the parents enrolled the Student at a private school. The Student left that school in November for reasons unrelated to the Student. TE 168. After that, the Student's mother home-schooled the Student for the remainder of the school year. TE 168. The School District was notified of the parent's intent to enroll the Student at a private school. TE 163.

Although the parents sought reimbursement for the private school tuition and expenses, the private school does not provide special education or psychological services. TE228. For these reasons, the Hearing Officer concluded that the Student is not entitled to tuition reimbursement. Decision and Order, p. 23.

The Hearing Officer found the IEP offered for the 2012-2013 school year reasonable. Decision and Order, p. 17. The proposed IEP appears to have addressed many of the bad experiences of the Student at the middle school, as well as parent concerns. See TE 146, 150, 151-152, 486-487, 492, 504, 645.

The ECAB defers to the Hearing Officer on issues of credibility.

Although the Hearing Office did not explicitly state that he found the testimony of the Student and the Student's mother credible regarding the issue of bullying, he clearly did. An appeal panel is required to show deference to a Hearing Officer's assessments as to the credibility of witnesses. *In Re: Student with a Disability, 113 LRP 26979 (KY SEA 2013)* recognized that *Elliot County Schools, 103 LRP 51392 (KY SEA 2001)* further held that the deference could only be overcome if "non-testimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion."

The Student in this case was new to the School and did not always know the names of the Students involved in the incidents of the bullying the Student alleged. This made it difficult for him to fill out blank forms given to him by the school principal. The school psychologist

interviewed the Student after it was discovered that he had made the Pokemon list of incidents and known people who had bullied him. This School District employee, however, never took steps to inform the Student's IEP team of the bullying problem.

Students with disabilities are disproportionately affected by bullying compared to their peers, especially those with learning disabilities, ADD or ADHD and autism. *OSERS, Dear Colleague Letter of August 20, 2013 at page 2.* These Students may not be able to make the situation known to an adult who can help. *Id.* The evidence in this case shows that Student in this case did what he could – he reported the bullying to his parents. This ECAB cannot find non-testimonial, extrinsic evidence in the record to justify a conclusion contrary to that of the Hearing Officer, that the testimony of the parent and Student was true. The record read in its entirety, likewise, does not compel a contrary conclusion. For the foregoing reasons, this ECAB accepts the Hearing Officer's obvious conclusion that bullying did occur.

The Student was denied FAPE during the 2011-2012 school year.

This ECAB agrees with the Hearing Officer that the Student did not receive FAPE during the 2011-2012 school year. At the very first ARC meeting that year, the parent advised the School District of prior problems with bullying and suicidal ideations. The September 8, 2011 IEP, contrary to the Hearing Officer's report of testimony given, does not contain a goal related to the development of social skills. See September 8, 2011 IEP. It was noted in the Present Level of Educational Performance section that the Student

> may need instruction in social skills. While [the Student] is willing to abide by the classroom rules, [the Student] seems to be irritated by peers who do not follow the rules. [The Student] may speak without considering the effect of [the Student's] comments on others.

The goal that was actually developed, however, pertained to development of skills to complete in-class and homework assignments in Language Arts. The co-teaching provided for one-hour per day was apparently to make sure the Student was staying on task. No assistance related to the development of social skills. No safety plan to prevent bullying or to address in any way parental concerns about the Student's suicidal ideations was included in the IEP. A re-evaluation was planned as the most recent evaluation was more than three years old. The Notes of the meeting indicate that the IEP was to be temporary, with a new IEP to be in place by November 28, 2011. This temporary IEP was inadequate to address the Student's needs.

The Student, as stated elsewhere herein, and as acknowledged in the November 28, 2011 IEP, received no services from the School District from October 4, 2011 through October 20, 2011. Nov. 28, 2011 IEP, p. 1. Some of the information on page 1 of this IEP is confusing, because it refers to events that have not yet occurred in the past tense, making one wonder when some parts of the IEP were actually developed. See, for example, the Social and Emotional Status section on page 1, which, in part, states:

> [The Student] participated in the [School District's] Homebound program with Special Educations services from October 21, 2011 through 12-16-2011. The parent submitted an updated homebound application on 12-21-2011 and [the Student] will be provided instruction in the home setting for the remainder of the school year.

The November 28, 2011 IEP replaces the goal for skills to complete assignments with a social skills goal. The goal required the Student to use calming and/or coping strategies "to appropriately interact with others in order to recognize and control [the Student's] individual stressors with 80% accuracy over 3 consecutive weeks as monitored by the teacher/staff." IEP at page 3. The Student was to receive social skills training to help the Student understand nonverbal cues and social language, and also training in strategies to help deal with stress in the

classroom, such as modeling, role playing, and direct social skill instruction. The Student was also to have the opportunity for a period of calming in a designated place, to have social stories and power cards. Teachers were to be trained in how to help the Student use the replacement and/or coping strategies within the classroom.

The Student was to have been in accelerated classes and was to receive all instruction in the general education classroom setting, except for two 25 minute sessions per week of special education and one sixty minute session per month with the school psychologist. IEP at pages 4-5. The Student was also to receive temporary homebound services from November 28, 2011 through January 2, 2012, at two 60 minute sessions per week. *Id.* Overall, the IEP seems to reflect consideration of the November 21, 2011 Integrated Report.

The November 28, 2011 IEP also appears to assume that the social interaction difficulties are primarily the result of the Student's faulty perceptions of the words and actions of others and a result of the Student's inappropriate responses to the words and actions of others. Part of this may be related to teacher interviews completed as part of the re-evaluation process, in which teachers indicated that the Student feels compelled to correct others in the classroom, that he answers questions for others and then brags that it is easy for the Student. See Integrated Report, Interviews, p. 7. While these concerns are certainly valid and did reflect deficits in the Student's social skills, it did not address everything the Student needed in order to be able to participate in, and benefit from, education in the public school setting and in the least restrictive environment appropriate for him.

Nothing in the November 2011 IEP addresses strategies for the Student's safety inside or outside the classroom, such as in the halls or other areas. It, like the September IEP, failed to address bullying. As early as October, 2011, the School District had been notified by the parent

that the Student had been spat upon, shoved into lockers, hit, threatened with violence, verbally assaulted, charged with creating a "hit list," and illegally held by law enforcement. Parent Addendum to IEP meeting dated October 21, 2011. It is these failures, coupled with the Student's social skills deficits that caused the Student to remain on homebound for the balance of the 2011-2012 school year.

The homebound instructor attempted to teach calming and/or replacement strategies to the Student during the twice weekly sessions. TE 313. The Student's mother testified that these were helpful. TE 77-78. This resulted, for at least a portion of the time, in less time for academic instruction, as was noted in testimony. According to IEP Meeting Notes for the March 23, 2012 ARC meeting, at page 7, however, someone else was providing this training, so that the Student did receive a full two hours of homebound instruction, at least by that time. Despite teaching coping and replacement skills, however, the Student required homebound instruction. The Student did not have the opportunity to practice with peers the skills being taught while on homebound. The Student would not have been on homebound had the School District not ignored the problem of bullying. This ECAB does not find a reduction of time for academics to have resulted in a denial of FAPE. Rather, it is the lack of opportunity to practice social skills and the lack of appropriate supports that caused the Student to be placed in a more restrictive environment than he should have needed that we find a problem.

The Student also did not begin receiving the required psychological services until March 25, 2012. TE 140. The School District claims that it satisfied this requirement by giving sessions spaced more closely together, between March 25th and the end of the school year in May. See TE 656. Assuming that the ARC, in establishing the requirement for these services monthly, did not make such a decision arbitrarily, but instead took into account what was

appropriate for the Student, the psychological services should have been spaced out approximately monthly. This would have given the Student opportunity to reflect on things discussed during the sessions and perhaps to practice skills being taught. It is clear that this was intended. See Petitioner's Exhibit 13, Counseling Plan dated April 9, 2012, where the plan includes such notations as "plan when to try it and how to do it." Between March 20 or 25, 2012 and April 24, 2012, the Student had received only 150 minutes of counseling services the IEP required. Realizing that the Student was to receive another 210 minutes in the final month of school, the School District began to provide services over very short intervals and for longer durations of time. Not only does the School District's approach to curing the problem by cramming the missed sessions into essentially two months deprive the Student of substantial opportunity to reflect and practice, but it also left him without the added support of a counselor that may have allayed his fears about returning to school in January of that year.

Had the Student's fears been addressed by the ARC and through the provision of the counseling sessions required by the Student's IEP, in the schedule the IEP required, the Student may have been able to return to school, rather than remaining on homebound. We will never know because the School District failed to appropriately implement the Student's November IEP.

This ECAB must consider the impact of the deprivations on the Student's educational performance. The IDEIA does not define "educational performance," nor does it define "adversely affects." 707 KAR 1:002(2), however, provides that "[a]dverse effect means that the progress of the child is impeded by the disability to the extent that the educational performance is significantly and consistently below that of similar age peers."

Except in cases where a student has poor social skills or where a student has exhibited behavioral difficulties, most courts seem to focus on academic performance in determining whether or not adverse effect on educational performance exists. In *Corvallis Sch. Dist. 509J*, 28 IDELR 1026 (SEA Or. 1998), for example, a student with Asperger's syndrome was found ineligible for special education and related services because she had earned high-average grades, demonstrated satisfactory progress in social skills, work habits, study habits and had achievement test scores showing she was at least at grade level in all areas. The court also found that the student was also satisfactorily served by a Rehabilitation Act of 1973 Section 504 plan.

Corvallis is easily distinguishable from the matter before this ECAB. Although the *Corvallis* court found an Asperger's student not eligible for services under the IDEA, the ARC here found the Student eligible. The Student in *Corvallis* had demonstrated satisfactory progress in social skills and was also served by a Rehabilitation Act of 1973 Section 504 plan that met her needs. The Student here has not been served by any Section 504 plan and has not made satisfactory progress in social skills. Considering that the only goal on the November IEP pertained to the development of social skills that required the Student to have opportunity to learn and practice such skills in social interaction with peers, this ECAB finds the combined failures during the 2011-2012 school year to amount to a substantive denial of FAPE.

The IEP offered for the 2012-2013 was appropriate for the Student and was reasonably calculated to provide FAPE.

The request for a due process hearing in this matter did not allege any failure of violation of FAPE for the 2012 -2013 year because it was filed prior to said school year beginning. However, testimony was presented at the hearing, without objection, concerning the proposed IEP for said year and its possible implementation at the Student's home high school. Neither party made specific arguments at the Hearing about whether FAPE would be

provided with implementation of the proposed IEP. The School District presented the testimony as to the proposed IEP's implementation at Dunbar. It appears the testimony concerning the 2012-2013 IEP and Dunbar was really directed at any possible remedy if FAPE was found not to have occurred in the 2011-2012 year and in order to controvert that the placement at the private school was appropriate. The student asked for reimbursement for the private school expenses in 2012-2013 as a remedy due to the failure of the school to provide FAPE the previous year. The School District alleged it provided FAPE in 2011-12 and that it could have continued to do so the next school year. The Hearing Officer appropriately considered the private school evidence for the limited purposes of determining remedies and whether the proposed 2012-2013 IEP was appropriate. The ECAB's findings for such issues are reflected elsewhere herein.

The essence of KRS 13 B is to ensure that a person or entity's due process rights are protected. This requires that there be notice of all issues being considered to each party. KRS 13B.050 (3) (d) requires that the Notice of hearing include the statement of issues involved. The Request for Due Process Hearing lists all issues and the Order Assigning the case to a Hearing Officer incorporates such issues as those to be heard.

The Student has argued on appeal that the proposed placement was not appropriate. Because the potential for reimbursement for tuition at the private school depends, in part, upon whether FAPE was offered, this ECAB considers, the proposed placement for purposes of determining whether an offer of FAPE was made for the 2012-2013 school year. The proposed IEP would have been implemented at the Student's home high school. The special education teacher there had six students on her caseload that had been the subject of bullying. TE 458, 462. Administrators at the Student's home high school try to place Asperger

students in the most advanced classes they can handle, because the students are bright and other students tend to be more mature in those classes, more focused on learning. TE 486. The proposed IEP provided for a one-on-one para-educator to be with the Student initially, and then to fade that person out so that the Student would have opportunity to interact with other Students. TE 504. The Student would have been allowed to use earphones or ear plugs to reduce the Student's perception of the noise level in the halls. TE 494. The Student would have been allowed to leave class early or arrive in the next class late in order to minimize jostling in the halls. TE 150. The school had plans to address the Student's response to rule-breaking by other students. TE 496. This IEP, unlike its predecessors appears to have better addressed Student needs and parent concerns. This ECAB finds that, based on the evidence in the record, it appears that an offer of FAPE was made; the proposed IEP was reasonably calculated to confer educational benefit to the Student.

The Student is not entitled to reimbursement for expenses at the private school.

The Student argues that the Hearing Officer erred in denying an award of tuition reimbursement for expenses at the private school. The applicable Federal regulation is ***34 C.F.R. §300.533*** which is set forth below.

> **(a)** Except as provided in § 300.533, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under § 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

The applicable Kentucky Administrative Regulation governing this matter is 707 KAR 1:370.

> **Section 1. Children with Disabilities Enrolled in Private Schools by Their Parents when FAPE is at Issue.** (1) An LEA shall make FAPE available to each child with a disability. If a parent decides to place his child with a disability in a private school after the offer of FAPE, the LEA shall not be required to pay for the cost of the private

education. Disagreements between a parent and the LEA regarding the availability of a program appropriate for the student and financial responsibility shall be subject to the due process procedures in 707 KAR 1:340.

(2) If a parent of a child with a disability, who previously received special education and related services under the authority of the LEA, enrolls the child in a private school without the consent of or referral by the LEA, a hearing officer or a court may award financial reimbursement to the parent if it is determined that the LEA did not offer FAPE to the child in a timely manner and the private placement is appropriate. This may be awarded even if the parents did not receive consent from the LEA for the private placement and the LEA did not make a referral to the private school. A hearing officer or a court may determine a private school placement to be appropriate even though it does not meet state standards that apply to an LEA.

(3) The amount of the financial reimbursement described in subsection (2) of this section may be reduced or denied if:

(a) At the most recent ARC meeting prior to the removal by the parents of their child with a disability to the private school, the parents did not inform the LEA that they were rejecting the proposed LEA placement, including stating their concerns and their intent to enroll the child in a private school at public expense;
(b) The parents did not give written notice to the LEA of the information described in paragraph (a) of this subsection at least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child.

Emphasis added.

The U.S Supreme Court ruled in ***School Committee of Burlington v. Dept. of Education of Massachusetts,*** 471 U.S. 359 (1985) that a school district would have to reimburse the costs of an unilateral private placement for their disabled child if the following findings were made:

1. The school district's IEP is found to be inappropriate (i.e. not reasonably calculated to confer meaningful educational benefit to the student), and
2. The private program is found to be appropriate under IDEA.

In the present case, the parents sought reimbursement for private school expenses primarily as a remedy for denial of FAPE in the 2011-2012 year, although the parent made clear in the May, 2012 ARC meetings that they did not believe that the proposed plan would keep the Student safe. The parents requested, in writing, which the School District acknowledged that it

received, placement at the private school about which testimony was provided. See May 23, 2012 ARC Conference Summary Meeting Notes, p. 8 and Addendum submitted by parents. The School District, believing it could provide FAPE and that it had offered a plan reasonably calculated to provide FAPE for the 2012-2013 school year, did not accept the parents' proposed placement.

The parents then placed the Student at the private school. In support of Student's placement at [redacted] Military Academy, Dr. [redacted] (TE 231 to 262) who described his position as "head of school. (TE 233) Student's Parents removed him from that institution in November 2012 due to an employee who was accused of sexual abuse and another accused of embezzlement. (T.E. 166-168) Petitioner's mother believed that the ongoing situation for the Student at [redacted] was potentially unsafe. (T.E. 168)

At the time of the Student's enrollment at the private school, it was licensed by the Commonwealth of Kentucky. It was not accredited by the Commonwealth or the Southern Association. At the time of the Headmaster's testimony, accreditation was pending with the National Association of Private Schools. (TE 239) Though the faculty members have at least a master's degree, none of the five faculty members has a teaching certificate.(TE 241; 253)

The private school did not provide any special education services and did not provide any psychological services. TE 228. The Student therefore had no IEP. TE 254. Failure of the private school to provide a necessary related service derailed a reimbursement action in the case of ***Hunt v. Bureau of Special Educ. Appeals*, 53 IDELR 83 (D.Mass. 2009)**. One of the findings in *Hunt* was the private program failed to provide the very services that the parents argued were needed in the public school program. The court agreed, finding that the private program failed to provide OT services, which were a primary bone of contention with respect to

the public program. The services provided at the private school did not meet the recommendations of the student's own evaluators.

In the case of ***K.S. and S.S. ex. Rel. LS v. New York City Dept. of Educ. 59 IDELR 159 (S.D. N.Y. 2012)*** the Court ruled that even if a school district has denied FAPE, the private placement must be appropriate. The Court ruled that the parents must establish the appropriateness of the private placement in order to receive tuition reimbursement. If the private placement offers reduced services then the parents are not entitled to reimbursement.

In this case, evidence shows that the private school did not have a special education program. Additionally, the evidence proves that the private school placement actually provides less accommodation for the Student than the 2011-2012 placement and the 2012-2013 proposed placement within the District. Based upon the evidence contained in the record and presented at the hearing, the private school in which the parents placed the Student would not have been appropriate for the Student. Regardless of whether the claim for reimbursement for tuition paid to the private school was intended as a remedy for denial of FAPE for 2011-2012 or whether it was because the parents believed that FAPE was not offered for 2012-2013, the Hearing Officer did not err in denying tuition reimbursement for the Student's placement there.

An award of compensatory education in the form of psychological services is appropriate and it was Hearing Officer error not to award it.

To the extent that the Hearing Officer found a denial of FAPE but awarded no remedy, this ECAB agrees with the Student that the Hearing Officer's decision is inconsistent and contrary to law. On appeal the Student has alleged that the Hearing Officer erred in denying one year of compensatory education, after finding that the Student did not receive a FAPE during the 2011-2012 school year. This ECAB considers an earlier decision of the Court of Appeals for the Sixth Circuit in finding that a year of compensatory education is not an appropriate remedy in this case. In *Board of Educ. Of Fayette County, Ky. V. L.M.*, 478 F.3d 307 (6th Cir. 2007), a hearing officer had determined that a student had been denied FAPE for two years and awarded 125 hours of compensatory education, consisting of one-on-one instruction in reading and language arts skills plus an "additional number of hours equal to the number of hours that the student would have been eligible for ESY, had the [Committee] considered and determined the need for ESY services in the Summer of 2003." *Id.*, at 312. The School District appealed and

the ECAB upheld the hearing officer's finding, but altered the remedy, ordering "the [Committee] to prepare and carry out a plan for providing T.D. with compensatory education services and to meet as required to review and modify the plan, not less than once every twelve months, until the Committee determines that the award is fulfilled." *Id.* The school district appealed the ECAB decision to the District Court, which affirmed the ECAB decision in its entirety. The Student then appealed through his guardian.

The student argued that the ECAB decision was vague, unenforceable and allows the school district to determine the remedy for its own wrongdoing. *Id.*, at 315-16. Although the student in *L.M.* sought hour for hour compensatory education, the Sixth Circuit opined that an award of compensatory education is an equitable remedy that a court can grant as it sees fit, there being no obligation to provide a day-for-day compensation for time missed. *Id.*, at 316, citing *Park ex rel. Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1034 (9th Cir. 2006). The Sixth Circuit upheld the denial of a specific number of hours of compensatory education, accepting the ECAB's reasoning that the number of hours is less important than the amount of extra services the Student will receive over a period of time and the form of those services. *Id.*, at 316. The Court said, "An appropriate award of compensatory education is 'relief designed to ensure that the student is appropriately educated within the meaning of the IDEA'" quoting *parents of Student W. v. Puyallup Sch. Dist., No. 3*, 31 F.3d 1489, 1497 (9th Cir. 1994). *Id.* Ideally, an award of compensatory education should aim to place a disabled child in the same position he or she would have occupied, but for a school district's violation of IDEA. *Id*, at 317, quoting *Reid ex rel. Reid v. Dist. Of Columbia*, 401 F.3d 516, 518. The *L.M.* Court thus adopted the more flexible approach of *Reid*, and then considered whether or not it was appropriate for an IEP team to decide if and when a student no longer requires services. *Id.*

In deciding the latter question, the Sixth Circuit again turned to *Reid*, which first examined the authorizing statute, and noted that "IDEA due process hearings 'may not be conducted by an employee of the State educational agency or the local educational agency involved in the care or education of the child.'" *Id.*, See *Reid*, citing 20 U.S.C. 1415(f)(3). The Sixth Circuit agreed with *Reid* that a delegation, to an IEP team, of power to reduce or terminate a compensatory education award would, in effect, mean that the IEP team could exercise a hearing officer's powers. *Id.*, at 317-18. In *L.M.*, the Sixth Circuit held that neither a hearing officer nor an appeals board, such as this ECAB may delegate to a student's IEP team the power

to reduce or terminate a compensatory education award. *Id.*, at 218. This places the responsibility for determining an appropriate equitable remedy squarely on the shoulders of the Hearing Officer.

In the case before this ECAB, although the Hearing Officer found a denial of FAPE for the 2011-2012 school year, he awarded no remedy at all to the Student. It flies in the face of reason to say that a Student has been substantively denied FAPE for a year but that the Student is in the same position he would have been had he been provided needed services. It appears that the Hearing Officer focused on the academic progress of the Student during the time in question. *See*, for example, pages 14-15 of the Hearing Officer's decision in which he stated the record contains insufficient evidence to determine whether the Student suffered academic loss due to the School District's failure to provide needed services; *see also* the Hearing Officer's finding that the Student scored in the top 50% on an MCTC test.

We believe the Hearing Officer erred in failing to award any remedy for a denial of FAPE. In cases where student behaviors form the basis for eligibility for services, we must consider not only the academic performance of the Student but also the development of the Student's social skills. This Student with Asperger's Syndrome and a high composite IQ score may not have academic deficits, but he does have social skills deficits. The Student's eligibility classification for services under the IDEIA is autism. The Student has great difficulty with various aspects of social interaction with peers, with the result that he has experienced bullying. The Student's only IEP goal as of the November 28, 2011 ARC meeting was development of social skills that would enable the Student to better function in our society.

The various failures of the School District during the 2011-2012 school year led to placement of the Student in one of the more restrictive settings – homebound - and deprived the Student of the opportunity to have regular interaction with peers in a safe environment where he could learn about social cues and his perception of them. The Student's IEP required monthly psychological services at 60 minutes per month. The IEP was silent as to whether the 60 minutes per month was to be provided in just one session or whether it could be split into two or more sessions totaling 60 minutes. In considering how to place this Student in the position he would have been in but for the failures of the School District, it seems to this ECAB that the appropriate award is one that will provide opportunities for the Student to learn the social skills he lacks as well as for the Student to practice such skills.

Had the November 28, 2011 IEP been properly implemented, the Student would have received such counseling services during the school year, until November 27, 2012, unless the IEP was earlier revised. This would have been a total of 9 months at sixty minutes per month. For the reasons stated herein, the ECAB requires that the Student shall receive the equivalent of no fewer than nine 60 minute sessions, in addition to all other special education and related services required by the Student's proposed IEP for the 2012-2013 school year.

This ECAB accepts that under normal circumstances, the hour-for-hour approach is not appropriate. In this case, however, the Student will be entering high school for the first time with a significant lack of social skills. High school can be a challenging time for any student, but even more so for a student without the social survival skills necessary. Because the ECAB, as stated elsewhere herein, does not accept the School District's attempt to cure the lack of psychological services by cramming them all into a very short period of time at the end of the school year, the ECAB does not give credit for minutes already provided to the Student. Based upon the evidence in the record regarding this Asperger's Student, we believe it will take at least the nine 60 minute sessions to bring the Student to the position the Student would have had, if the counseling had been received in regular, monthly or more frequent but relatively evenly spaced intervals. The ECAB does not require that the total of 540 minutes must be provided in 60 minute increments. If the ARC decides that it will be better for the Student to divide the sessions into 30 minutes each, that will be acceptable, so long as the total number of 540 minutes is received and so long as the sessions are spaced as evenly apart as possible, taking into account Student absences, school breaks, etc. This ECAB has no doubt that the School District, as it reviews and revises subsequent IEPs will consider whether the Student requires additional psychological services. We only state here the minimum this ECAB finds acceptable. We do not believe that this award constitutes an improper delegation of authority to the ARC, in violation of the holding in *L.M.*, because the ARC has no power to reduce or terminate the award.

The Hearing Officer properly struck the mother's affidavit from the record.

There were approximately 814 pages of testimony during three day the due process hearing. Pages 814 through 816 concerned the briefing schedule.

The Student's Witness and Exhibit List (P.E. #1) submitted February 1, 2012 contains the name of Student's mother as a witness. Student's mother was the Student's first witness during the hearing on February 7, 2013. Her direct testimony is contained at T.E. 8-106. After the testimony of the Student's doctor (T.E. 106-136), the Student's mother testified from T.E. 136 to 263 on cross examination and redirect examination. Furthermore, Counsel for the Student called Student's mother as a rebuttal witness on the last day of the hearing. TE. 814-813. In addition, Student's sister testified. TE. 263-269.

Attached to the Student Petitioner's Post-Hearing Brief was an Affidavit by the Student's mother. In response, the School District file a Motion to Strike the Affidavit and Portions of the Petitioner's Post-Hearing Brief. See Motion to Strike. The School District objected to the Affidavit on the grounds of hearsay, double hearsay and the fact the affidavit was proffered in a manner that denied the School District the opportunity to cross-examine the affiant or the affiant's daughter. The School District also objected to references in the Petitioner's post-hearing brief pertaining to scholarly articles. *Kentucky Retirement Systems v. Brown*, 336 S.W.3d 8, 13 (Ky. 2011) was cited for the proposition that scholarly articles are by definition hearsay. Hearsay would only be admissible over objection in a civil action if it complied with KRE 803(18), which limits the introduction of learned treatises into evidence by a qualified expert, when the expert relies on them or is cross-examined regarding them. The referenced scholarly articles were not proffered for admission in this manner and, although some of the articles were quoted in a published court decisions, the School District argued that that the quote from such articles must still be the subject of testimony by an expert witness in the case before the Hearing Officer. The School District opined that all such references should be stricken from the record and should not be considered by the Hearing Officer.

The Hearing Officer subsequently considered KRS 13B.090(2) which allows evidence to be received in written form if it will expedite the hearing and if it will not work a substantial prejudice to the interests of any party. See Order Partly Granting and Partly Denying Respondent's Motion to Strike. He found that the Affidavit of the mother was not for the purpose of expediting the hearing and was an attempt to introduce new evidence, despite the fact that the administrative record had not been held open for purposes of receiving additional

evidence. The Hearing Officer found that the proffered affidavit, if relevant, would work a substantial prejudice to the Respondent unless another hearing was convened, and also found the document irrelevant to the matter before the Hearing Officer and inadmissible under KRS 13B.090. He also considered the affidavit an attempt to impermissibly enter into evidence of other alleged bad acts or wrongdoings, in violation of KRE 404(b). He struck the affidavit from the record.

Regarding the quotes from scholarly articles which were not introduced into evidence at the hearing and are not part of a published court decision, the Hearing Office reviewed KRS 13B.090(2) and the relevant portions of the Kentucky Rules of Evidence to determine that these quotes must be stricken from the Petitioner's Post-Hearing Brief. The Hearing Officer did not strike from the brief the court case that Petitioner quoted, on grounds that the quoted text showed the Court's rationale for its holding, thus transforming it into law. The Hearing Officer distinguished this situation from one where the petitioner might have tried to introduce the scholarly articles into evidence. Like the Hearing Officer, this ECAB knows of no evidentiary or other rule that would permit redaction of a relevant court opinion or any part thereof.

The Hearing Officer did not err in striking the affidavit from the Petitioner's Post Hearing Brief, nor did he err regarding the quotations from scholarly articles that were stricken, or the court opinion quotation that was not stricken.

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 authority to award attorney fees to a prevailing party in a Due Process Hearing.

FINAL ORDER

1. To the extent that the Hearing Officer found a denial of FAPE but awarded no remedy for the 2011-2012 school year, this ECAB finds that the Hearing Officer's decision is inconsistent and contrary to law.
2. The Student is entitled to nine 60 minute sessions of psychological services, which may be divided into smaller segments, but which must occur relatively evenly spaced one from the next, taking into account school holidays and vacations, and Student absences.
3. The parents are not entitled to reimbursement for tuition at the private school because the placement was not appropriate for the Student.
4. The placement proposed by the School District for 2012-2013 was appropriate and if implemented as written in the IEP would have provided FAPE.
5. The award of compensatory education is limited to that identified in paragraph 2p of this Final Order.
6. The Hearing Officer properly struck from the Student's post-hearing brief, the Affidavit of the Student's mother.
7. Academic services (as distinguished from overall educational services) provided to the Student during the Student's homebound period of 2011-2012 were sufficient.
8. Except as provided in paragraph 1 of this Final Order, this ECAB does not find that the Hearing Officer's findings and conclusions violate statutory provisions, exceed authority of the agency, or that they are arbitrary, capricious or deficient.

NOTICE OF APPEAL

707 KAR 1:340, Section 8, Subsection (2) states that a decision made by the Exceptional Children Appeals Board (ECAB) is final unless a party appeals the decision to a Kentucky Circuit Court or Federal District Court. This decision and order, therefore, is a final and 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 a 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 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.

Kentucky Administrative Regulations do not specify a time for initiating an appeal from an ECAB.

KRS 13B.140 governs administrative hearings in Kentucky, generally, and not to civil actions brought under Part B of the IDEIA. It provides:

(1) All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes; a party may appeal to the Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of the record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

(2) A party may file a petition for judicial review only after the party has exhausted all administrative remedies available within the agency whose action is being challenged and within any other agency authorized to to exercise administrative review.

(3) Within twenty (20) days after the service of the petition, or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the official record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. The court may require or permit subsequent correction or additions to the official record. If the court request a transcript of proceedings that have not been transcribed, the cost of the transcription shall be paid by the party initiating the appeal, unless otherwise agreed to by all parties.

(4) A petition for judicial review shall not automatically stay a final order pending the outcome of the review, unless:

(a) An automatic stay is provided by statute upon appeal or at any point in the administrative proceedings;
(b) A stay is permitted by the agency and granted upon request; or
(c) A stay is ordered by the Circuit Court of jurisdiction upon petition.

BY Exceptional Children Appeals Board Panel, consisting of Karen L. Perch, Chair; Paul L. Whalen and Kim Hunt Price this 17th day of October, 2013.

Karen L Perch

KAREN L. PERCH, CHAIR
EXCEPTIONAL CHILDREN APPEALS BOARD

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Order was served to the above-named representatives, by placing in the United States mail, postage prepaid and first class, to the persons shown below, on this the 3rd day of October, 2013.

[redacted]

[redacted]

[redacted]

Mike Wilson, Hearing Officer
1148 Four Wynds Trail
Lexington, KY 40515

[redacted]

[redacted]

Karen L Perch
KAREN L. PERCH