

**COMMONWEALTH OF KENTUCKY
KENTUCKY DEPARTMENT OF EDUCATION
DIVISION OF EXCEPTIONAL CHILDREN SERVICES
AGENCY CASE NO. 1213-09**

████████████████████

PETITIONER

v.

████████████████████

RESPONDENT

DECISION AND ORDER

I

INTRODUCTION & JURISDICTION

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) by letter from the Petitioner's Counsel on or about January 31, 2013. This Hearing Officer was appointed by the Kentucky Department of Education on or about February 1, 2013 pursuant to 20 U.S.C. Section 1415 (IDEA '04), 34 CFR Part 300, KRS 13B and 707 KAR 1:340. After attempts at resolving the appeal without a hearing through Mediation, this matter was heard on four days, May 21 and 22, 2013; June 13, 2013 and July 2, 2013. The transcript of the record includes 827 pages of recorded testimony.

Both Parties submitted Post-Hearing Briefs and Reply Briefs.

It should be noted that Petitioner or Student is used to refer to the student ██████████. Respondent is used to refer to the ██████████ School District. ██████████ references the ██████████ School in Respondent's district where Petitioner was a student. "T.T." is transcript of evidence or testimony at the hearing. P # references the Student's or Petitioner's exhibits. R# references the School District's or Respondent's exhibits. "PT" is Physical Therapy. "OT" is Occupational Therapy. "ARC" is Admissions and Release Committee. "IEP" is Individual Education Plan.

II.

BACKGROUND

The situation regarding the Student in this case is unique compared to most students who are subject of a Due Process Hearing. In this case, the Student did not become eligible for services under IDEIA until [REDACTED] was age 18 and suffered traumatic brain injury (TBI) as a result of a highway accident on April 16, 2010. After a period of private rehabilitation, Student's Parents inquired and made arrangements during the fall of 2011 to enroll the Student, then age 19, in the District's Special Education Program.

There is no question that the Student was eligible for services until her 21st birthday.

III.

ISSUES TO BE DECIDED

- 1) Should the Student stay-put in current educational placement within the School District during the pendency of this action?
- 2) Should the Student be deemed eligible to receive a free appropriate public (FAPE) education until at least the Student's twenty-second birthday? Is this the correct interpretation of **20 U.S.C. §1412(a) (1) (A)** and related case law?
- 3) Is the termination of Student's educational services (at age 21) a denial of Student's right to a free appropriate public education (FAPE) pursuant to **707 KAR 1:290** and **20 U.S.C. § 1412**?
- 4) Has the School District made appropriate placement decisions for the Student in accordance with **707 KAR 1:350**?
- 5) Has the School District failed to ensure that Student had an appropriate Individual Education Plan (IEP), including extended school year services (ESY) and related services, from the 2011-2012 school year until the present time in violation of **707 KAR 1:320**?
- 6) Whether or not the School District failed to engage in meaningful and appropriate transition services, as defined in **707 KAR 1:002**, and in violation of **707 KAR 1:320**.

- 7.) Did the School District deny the Student the right to a free appropriate public education in violation of 707 KAR 1:290 for the period November 16, 2011 through January 2, 2012? Is Student entitled to Compensatory Education for this period?
- 8.) Should the Student's Parents Be Reimbursed For Transportation Services They Provided the Student While Student Was Attending School?

IV.

PROPOSED FINDINGS OF FACT

1. The Student was born on [REDACTED], making [REDACTED] 21 years of age on [REDACTED] 2013. (P#D, at KBE 0177) The Student is a twenty-one year old student residing within the boundaries of the School District. (T.T. 427, 484)
2. On April 16, 2010, the Student was involved in an automobile accident resulting in a traumatic brain injury. (TT. 429)
3. Prior to Student's automobile accident and resulting T.B.I, Student had above average academic and physical abilities. (R#1)
4. The Petitioner's Parents are Petitioner's guardians. (TT. 444-446; P.E. #D) as well as educational representatives. (T.T. 445-446; P.E. #E)
5. [REDACTED] is the District's Director of Special Education. (T.T. 6-7)
6. The District has a policy of terminating services once a student reaches age 21 or at the end of the school year in which the student turns 21. (T.T. 13-16)
7. The Petitioner attended [REDACTED] School from January 4, 2012 until May 22, 2013. (TT 506; Order denying stay put)
8. The Student's Parents inquired about placing the Student into the School District in October, 2011. (T.T. 54; R.E. #14)
9. The District's staff began making preparations for Student's ARC on November 1, 2011. Initial attendance was speculated at a few hours on Tuesdays and Thursdays. (R#10 at KBE 0700).
10. A meeting was held on November 16, 2011, at which time the Student who was age 19, enrolled in the School District. The meeting dated 11/16/2011 was "Admissions and Release Committee Meeting". (T.T. 54,531; R.E. #14)
11. At the time of the November 16, 2011 ARC meeting, the Student had been

diagnosed with a traumatic brain injury (TBI), used a feeding tube, had motor planning deficits, was non-communicative and wheelchair bound. Student was receiving speech therapy by an outside speech therapist since the time Student entered the School District. (T.T. 57,498,625; R.E. #14)

12. At the November 16, 2011 ARC, Parents' original goals for Student were increased communication skills and socialization. (T.T. 495-496; R # 14 at 0744)

13. Consent for evaluation and authorization for release of information was given by the Student's parent on November 16, 2011. (R.E. #14)

14. Student's Parents thought it would be better for [REDACTED] to begin attending school after the Christmas break rather than start in November 2011. (T.T. 584-585)

15. No educational services were given to the Petitioner until January 4, 2012. (T.T. 55, 56, 57, 58, 59, 60, 61, 531)

16. Other students in the [REDACTED] School District receive educational services during the time in which they are being evaluated for special education and related services. (T.T. 71, 73)

17. The Student's "Integrated Assessment Report" with the date of 1/4/12 listed four examiners, both of Student's Parents and [REDACTED] and [REDACTED]. (J.E. 29 at KBE 143)

18. The Respondent conducted evaluations to determine the Petitioner's eligibility for special education and related services in January, 2012. (T.T. 71; J.E. #29, 30)

19. The Student's Integrated Assessment Report dated 1/4/12 states Student was re-admitted in March 2011 for re-evaluation of rehabilitation needs at the [REDACTED] in [REDACTED]. According to the [REDACTED]'s records, the Student was "mostly nonverbal". "Cognition skills were unable to be assessed. Speech was vocal but unintelligible. Coordination was unable to be assessed as Student was not able to follow commands". At the time of the assessment report (1/14/12), "Student was moderately verbal but not conversational". (J.E. #29 at KBE 0143)

20. The Conference Summary/Action Notice of 01/04/2012 (J.E.# 34) indicated that the Student would attend a "Regular Class less than 40% of the day (At KBE 0156) and needed further evaluation in order to determine the Student's needs (At KBE 0160).

21. Student's Parents signed the Conference Summary/Action meeting of 01/04/2012 without comment. (J.E. # 34 at KBE 0158)
22. The Petitioner's January 4, 2012 IEP with an end date of January 3, 2013 indicated that Student's limited ability to communicate wants, needs and desires to others adversely affects her ability to function independently. (J.E. #24)
23. The Petitioner's January 4, 2012 IEP indicated that her inability to maneuver in her environment independently adversely affects her ability to function independently. (J.E. #24)
24. The Petitioner's January 4, 2012 IEP indicated that the Student was able to propel forward 18-20 feet and transfer from the wheelchair to other surfaces with verbal assistance and physical contact of a familiar caregiver. (J.E. #24)
25. The Petitioner's January 4, 2012 IEP indicated a need for related services of physical therapy, occupational therapy and speech therapy. Such therapies are necessary to activate brain connections and to maximize brain function of the Petitioner. (T.T. 467; J.E. #24)
26. The Petitioner's January 4, 2012 IEP contained goals for maneuvering, communication, reading and math. This IEP called for 30 minutes twice per day of special education services and 20 minutes once per day of medical services. There were no speech, occupational therapy or physical therapy related services called for on this IEP. (J.E. #24)
27. The Petitioner's January 10, 2012 occupational therapy and physical therapy evaluations indicated that the Petitioner was able to maneuver a distance of 15 to 20 feet. The evaluation results recommended school based occupational and physical therapy. (T.T. 182, 205; J.E. #30)
28. As early as January 4, 2012, the School District determined that the Student's placement and IEP would end on February 27, 2013. (T.T. 52; 321-22; J.E., 563)
29. The Student's January 27, 2012 Communication Written Report provided a Speech Language Assessment Summary—initial evaluation. It indicated that Student's speech is primarily short phrases "that may or may not be appropriate to the conversational context". " [REDACTED] can occasionally complete rote memory tasks such as the days of the week or familiar phrases to rhymes or songs". The Peabody Picture Vocabulary Test, Fourth Edition (PPVT) and the Expressive One-Word Picture

Vocabulary Test (EOWPT) were attempted by the Student. However due to her limited attention to task, an accurate score could not be determined. (J.E. #31)

30. The Petitioner's February 7, 2012 IEP indicated that Student was able to propel forward 18-20 feet and transfer from wheelchair to other surfaces with verbal assistance and physical contact of a familiar caregiver. (J.E. #24)

31. The Petitioner's February 7, 2012 IEP indicated a need for related services of physical therapy, occupational therapy and speech therapy. (IE. #22)

32. The Petitioner's February 7, 2012 IEP contained goals for maneuvering, communication, reading and math. (J.E. #22)

33. The Petitioner's February 7, 2012 IEP contained a maneuvering benchmark that the Student be able to maneuver with verbal assistance starting with 10 feet. (J.E.#22)

34. The Petitioner's February 7, 2012 IEP called for 30 minutes twice per month of occupational therapy. (T.T. 295; J.E. #22)

35. The Petitioner's February 7, 2012 IEP called for 30 minutes twice per month of physical therapy. (T.T. 295-96; J.E. #22)

36. At the Student's ARC meeting of 03/27/2012, ██████████ reviewed the Student's current IEP goal progress. The Student continued to use the single message voice output device at home and at school for scanning on ██████ Dynavox VMax+ as well as answering/requesting simple things. "(Student) has shown great success so far." Vocational Goal Objectives were changed. Student will transfer from wheelchair to another with minimal physical and verbal assistance on 3 of 6 occasions. (J.E. # 19)

37. The IEP with the Start Date-03/27/2012 and End Date of 01/03/2013, identified Transition Needs, Communication Needs, and Assistive Technology Devices and Services, to be provided by the School District. (J.E. #16)

38. The Petitioner had mastered maneuvering ██████ wheelchair to 10 feet by April, 2012, but no increase in goal expectation was made to Student's IEP until September 2012 when the expectation was raised to 15 feet. (T.T. 348-49; J.E. #7, #12)

39. Socialization is an important component of the Petitioner's academic progress. The school environment wherein the Petitioner is with peers is assisting in the Student's recovery of brain function. (TT 468-69, 483)

40. Part of the motivation for keeping Student in the District until age 22 is for her to be around people closer to her own age. (T.T. 502-503,507-509)

41. Because of [REDACTED] traumatic brain injury, the Student requires the protection of an airbag whenever Student travels in an automobile. (T.T. 340-41,416,454,534; P.E. #C)

42. The District offered to provide transportation via a district school bus, however the district's buses are not equipped with passenger airbags. The District never offered any alternative transportation to the Student until March 26, 2013. (TT. 416-417, 539-540)

43. The Petitioner's parents provided all of her transportation to and from school. (T.T. 340, 537, 588)

44. The Petitioner must arrive late and leave early from school each day in order to be transported by parents as to comply with the school's traffic policies. (T.T. 537-538)

45. The Petitioner does not respond well to unfamiliar persons. (T.T. 290,695)

46. The District has a policy of terminating services for disabled students upon turning age twenty-one, however, the student's ARC can override this policy and allow students to attend school past age twenty-one until the end of the school year. (T.T. 14, 15, 563)

47. Other Kentucky public school districts allow students to attend school past the age of twenty-one until a natural break in the school year. (T.T. 332-32, 380; Petitioner's Brief on Stay Put Exhibit C)

48. Neither the Student, nor Student's ARC were aware that they had the authority to override the age twenty-one policy. (T.T. 26, 27, 321-22,380)

49. The decision to end the Petitioner's placement and IEP was based solely on [REDACTED] age. (T.T. 49, 52, 53)

50. Vocational Rehabilitation is a referral service for disabled persons seeking supported employment opportunities. (T.T. 83)

51. The District begins to provide transition services as early as middle school. (T.T. 747-749) As the Student did not begin attending the District until after age 18, the conversation began at the first meeting and 01/04/2012 ARC. (T.T. 749; J.E.#34 at 0161)

52. The ARC with the date of 10/10/12 indicated that the IEP was revised to include "Community Based Instruction" 1 time a month with parent providing transportation. (J.E. #5 @ KBE 0034)
53. Transition planning for disabled individuals into post-secondary training or employment typically takes several months. (T.T. 85-87, 93, 102)
54. ██████████ provides different levels of services for disabled adults including a sheltered work setting. (T.T. 81-83)
55. ██████████, Director of adult services at ██████████ met with members of Student's family and with the Student at the school regarding transition. (T.T. 95-97)
56. Members of Student's family visited ██████████ but did not make an application on behalf of the Student. (T.T. 110-111)
57. There are no post-secondary training or employment options in Northern Kentucky "that has as its primary mission or certified for individuals with traumatic brain injury". (T.T. 99,104; R#3 at KBE 0205)
58. The Petitioner is in need of an educational-type post-secondary program that will also meet Student's medical, speech, occupational therapy and physical therapy needs. (T.T. 100, 104)
59. The Petitioner's maneuvering goal and benchmarks are measured by both subjective and objective measures. The occupational therapist and physical therapist do not take data as to the Petitioner's progress on ████ IEP maneuvering goal. This is done solely by the classroom teacher. (T.T. 179, 180,193,206,207,356)
60. The Petitioner's February 7, 2012 IEP called for consultative speech services (T.T. 281; J.E. #22)
61. It was determined on February 7, 2012 that the Petitioner qualified for and was offered 10 days of extended school year services in the Summer of 2012 to work on communication, math and maneuvering goals. Occupational Therapy and Physical Therapy were not offered during extended school year services but Speech Therapy was. The Petitioner was to have a different teacher for extended school year services. (J.E. #13,#23; T.T. 205, 290, 377-378,622)
62. The Petitioner's parents declined to have the Petitioner participate in

extended school year services and instead opted to have the Petitioner attend outside occupational and physical therapies. (T.T. 622,814)

63. The Petitioner's March 2, 2012 IEP indicated the same present levels of performance and the same goals as were described in Student's January and February 2012 IEP's. The present levels of performance were not an entirely accurate portrayal of the Petitioner's daily performance. (T.T. 414-15; J.E. #22, #23, #16)

64. The Petitioner's March 27, 2012 IEP called for 30 minutes once per month of direct speech therapy. (J.E. #16)

65. Changes were made to the Petitioner's IEP on March 27, 2012 in the areas of assistive technology, speech and physical therapy without input of an assistive technology expert, a speech therapist or a physical therapist. (T.T. 706-08; J.E. #19)

66. The Petitioner's September 13, 2012 IEP indicated that Student's limited ability to communicate wants, needs and desires to others adversely affects Student's ability to function independently. (J.E. #7)

67. The Petitioner's September 13, 2012 IEP indicated that an inability to maneuver in Student's environment independently adversely affects Student's ability to function independently. (J.E. #7)

68. The Petitioner's September 13, 2012 IEP indicated that Student was able to propel forward 10-15 feet and transfer from her wheelchair to other surfaces with verbal assistance and physical contact of a familiar caregiver, however Student was resistant to transferring in the school setting. (J.E. #24)

69. The Petitioner's September 13, 2012 IEP indicated a continued need for related services of physical therapy, occupational therapy and speech therapy. (J.E. #7)

70. The Petitioner's September 13, 2012 IEP contained goals for maneuvering and reading. It contained no separate speech goal. (J.E. #7)

71. The Petitioner's September 13, 2012 IEP contained a maneuvering benchmark of propelling 15 feet within a set amount of time. (J.E. #7; T.T. 192,193)

72. The Petitioner's September 13, 2012 IEP called for 20 minutes twice per

day of special education services, 30 minutes per month of speech therapy, 30 minutes per month of occupational therapy, and 30 minutes per month of physical therapy. The physical therapist and the classroom teacher were not sure whether the occupational therapy and physical therapy was consultative or direct. (J.E. #7; T.T. 194, 195, 196,351)

73. The Petitioner received 30 minutes of co-treatment in occupational and physical therapy in September 2012, October 2012, January 2013 and February, 2013. The Petitioner received no occupational or physical therapy in November 2012 or December 2012. (T.T. 196; P.R. #Q)

74. ██████████ was the speech pathologist assigned to the Student from September 2012 until December, 2012. She was hired to replace ██████████ ██████████. As of September 2012, the Petitioner was receiving consultative speech therapy services rather than direct speech therapy services. (T.T. 132, 134, 140,145, 337,790)

75. The Petitioner's October 10, 2012 IEP indicated the same present levels of performance and the same goals as were described in her September 13,2012 IEP. (J.E. #4, #7)

76. The Petitioner's October 10, 2012 IEP called for an increase in speech therapy to 30 minutes twice per month. (J.E. #4)

77. ██████████ kept progress data regarding the Petitioner in a computer program, as well as giving hand written notes to the Petitioner's teacher. ██████████'s progress data was not reflected in the Petitioner's progress data sheets. (T.T. 152,153, 154, 155,355-56; IE. #3)

78. ██████████ became the Petitioner's speech therapist starting in January, 2013. ██████████ indicated that because of the Petitioner's severe communication deficit, it is impossible to know what the Petitioner knows. (T.T. 217)

79. The Petitioner's Parents wanted the School District to focus more on communication. (T.T. 241,496; J.E. #14; R.E. #3)

80. Community based instruction involves taking the students into the community to practice skills they work on in the classroom. Students are taken to stores such as Krogers and WalMart. Once a trimester, students are taken into the community for recreation and eating out. (T.T. 340)

81. Community Based Instruction was added to the Petitioner's IEP at the ARC Meeting of October 10, 2012. (J.E.# 5 at 0034; T.T. 338-342)
82. The School District offered the Student transportation for Community Based Instruction. School District furnished transportation was declined without explanation. The Petitioner's Parents provided the transportation for the Student to attend Community Based Instruction. (J.E. # 5 at 0034)
83. All other students are provided transportation via a district school bus. The Petitioner would not participate in Community Based Instruction unless the parents were available to transport [REDACTED]. The Petitioner often did not attend community based instruction because of this. (T.T. 339, 341, 458, 537, 539;)
84. The Petitioner's math, speech and reading goals were no longer monitored in September 2012 as a result of a desire of Student's Parents for the Student to focus on communication and socialization. (T.T. 344-46)
85. The Student's Parents indicated by their testimony that the Student was making progress and generally pleased with the educational services provided the Student. (T.T. 442; 467-470; 545-546; 597; R#10 at KBE 0704)
86. The District was not informed that Student had transportation needs until March of 2013. (T.T. 774-775)
87. Regarding the Student's transportation needs, within the ARC Summary Notes of 03/26/2013 at R#3, KBE 0211-0213—

District transportation was offered for CBI. The parent stated that they would transport (Student) at their own expense because they did not want (Student) to be transported in a vehicle that does not have an airbag. The parents have not provided a doctor's recommendation to say that (Student) is unable to ride in any vehicle that does not have an air bag, so up to this point they have chosen to transport (Student) themselves. [REDACTED] asked if they would be willing to allow (Student) to be transported in a van, if the vehicle has an airbag. The parents stated that they would first want to have information regarding who would be driving (Student) and what their certification and licensing is. (Student) sits on the regular car seat without modification when riding in the parents car.

[REDACTED] stated that she wants the notes to reflect that the parents were not asked for a doctor's statement to indicate that (Student) could not participate in district transportation. It was clarified that it was the understanding of the school staff that it was the parents preference to provide transportation for (Student) because they wanted Student to ride in a vehicle with an airbag. School staff was not informed that this (transportation

restriction) was mandated by a doctor, so there would have been no need to request a doctor's statement. Previous conference summary notes were examined and there is not indication that this was discussed at previous conference.

88. The Respondent determined that the Petitioner was not eligible for extended school year services during the summer of 2013 due to [REDACTED] age.

89. Student's IEP with the start date of 10/10/2012 has an end date of 02/29/2013 which is set forth on the first page of the IEP. It is not until Page 6 of the IEP that it states "The student turns 21 on [REDACTED]. ESY services are not provided after a student is no longer eligible for services (i.e. aging out)". (J.E. #4)

90. The Petitioner receives outside speech therapy twice per week in her home. (T.T. 781)

91. Beginning in November 2012, the Student's Parents began inquiring about whether the Student could continue to receive services through age 21, until the Student turned age 22. (J.E. 40; p. KBE 0809)

92. According to Student's 3-4-2013, "Summary of Skills", Student's communication skills are as follows:

- a. Reaches out and grabs yes/no cards in response to questions;
- b. Needs hand over hand assistance for touch screen devices;
- c. Is able to match cards regarding personal information;
- d. Is able to identify the next task of daily schedule most of the time.

(J.E. 39; at KBE 0250)

93. According to the 3-4-2013 "Summary of Skills" Student's academic performance, retention, acquisition and recall are impaired across all academic settings. (J.E. 39 at KBE 0250)

94. There was an ARC dated 03/26/2013. The following items were considered - "Student Progress in Achieving IEP Goals", Individual Learning Plan (ILP) Parental Input and Multi-Year Course of Study. (R#3 KBE 0204)

95. At the ARC dated 03/26/2013, Parents indicated they would rather Student work on more communication and problem solving than mobility. One of the Parents

said that "the Student has made better progress on this at school than at home". R#3, KBE 0205)

96. At the time of the filing of the Request for Due Process Hearing, the Student was twenty years of age. (Due Process Hearing Request)

97. The Kentucky State rate for mileage reimbursement was 47¢ per mile in April and May 2013.

<http://finance.ky.gov/services/statewideacct/Documents/Mileage%20rate%20for%20website%2006%202013.pdf>

V.

ANALYSIS OF THE EVIDENCE AND THE LAW

A.

Burden of Proof

The burden of proof under *KRS 13B.090 (7)* is as follows. "The party proposing that the agency take 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 Student is proposing that the agency take action and that Student is entitled to a benefit sought.

Student 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). The Student also has to show that the School District failed to correctly interpret the law in regards to whether it has to provide services until the Student turns 22.

It is the position of the Student that the School District failed to provide the Student a "free appropriate public education" or FAPE when it terminated services at age 21, failed to provide transition services as well as an appropriate IEP in the months leading up to the Student's aging out. Under IDEA, the burden of showing whether a school district provided FAPE rests with the Student 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 (6th Cir. 1993)). See also *Schaeffer v. Weast*, 546 U.S. 49 (2005) in an administrative hearing, party seeking relief has burden of proof).

1. Should Student stay-put in current educational placement with the District during the pendency of this action?

A decision on the issue of "Stay-Put" was made twice by this Hearing Officer. An Order was issued March 13, 2013 for Student to continue in current placement until March 29, 2013 in order to give the Parties time to brief the issue and the Hearing Officer to issue a decision. An Order was issued on March 29, 2013, continuing the Student's placement until the end of the District's 2012-2013 school year which was on May 23, 2013. The primary reason for the extension was due to the Student's 21st birthday being in the middle of the school year. The end of the school year would provide a natural break for the Student and her teachers.

Student, by Counsel, moved to extend the "Stay Put" beyond the 2012 academic school year while this matter was pending a decision. After due consideration, this Hearing Officer issued an Order on June 12, 2013 denying "Stay Put" or continued services during the pendency of this action.

This Hearing Officer's Order of June 12, 2013 was appealed to the U.S. District Court for the Eastern District of Kentucky at Covington. In Civil Action No. 13-13-109-DLB-JGW, the Court upheld the Hearing Officer's Order of June 12, 2013.

As this issue will be moot with the issuance of this Decision and Order, this will be discussed in more detail below.

2). Should the Student be deemed eligible to receive a free appropriate public education (FAPE) until at least the Student's twenty-second birthday? Is this a correct interpretation of 20 U.S.C. §1412(a)(1)(A) and related case law?

This presents a unique look at the dynamics of the interpretation of special education law which was mandated by Federal law and is implemented by State law and regulation. In order to determine that answer to that question statutes and regulations set forth below will be examined.

Going to **20 U.S.C. § 1412 (a)(1)(A)**, set forth below---

(a) In general

A State is eligible for assistance under this subchapter for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:

(1) Free appropriate public education

(A) In general

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school. Emphasis Added

(B) Limitation

The obligation to make a free appropriate public education available to all children with disabilities does not apply with respect to children--

- (i) aged 3 through 5 and 18 through 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children in those age ranges; and*

However, the next paragraph **20 U.S.C. § 1412 (a)(1)(B)** is titled "Limitation".

Under the Code of Federal Regulations defining FAPE (relevant portion) are set forth below.

34 C.F. R. §300.101 Free appropriate public education (FAPE).

(a) General. A free appropriate public education must be available to all children residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school, as provided for in §300.530(d). (Emphasis added).

(b) FAPE for children beginning at age 3. (1) Each State must ensure that--

(i) The obligation to make FAPE available to each eligible child residing in the State begins no later than the child's third birthday; and

(ii) An IEP or an IFSP is in effect for the child by that date, in accordance with **§300.323(b)**.

(2) If a child's third birthday occurs during the summer, the child's IEP Team shall determine the date when services under the IEP or IFSP will begin.

(c) *Children advancing from grade to grade.* (1) Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.

(2) The determination that a child described in paragraph (a) of this section is eligible under this part, must be made on an individual basis by the group responsible within the child's LEA for making eligibility determinations.

In respect to Kentucky law regarding services to special education students, **KRS 157.200** set the range for the age perimeters for which services are to be provided.

157.200b Definitions for KRS 157.200 to 157.290.b

(1) "*Exceptional children and youth*" means persons under twenty-one (21) years of age who differ in one (1) or more respects from same-age peers in physical, mental, learning, emotional, or social characteristics and abilities to such a degree that they need special educational programs or services for them to benefit from the regular or usual facilities or educational programs of the public schools in the districts in which they reside. The Department of Education, through administrative regulations promulgated by the Kentucky Board of Education, shall interpret the statutory definitions of exceptionality. An exceptionality is any trait so defined in this section or by administrative regulations promulgated by the Kentucky Board of Education. Requirements of average daily attendance for exceptional classes shall be regulated by statute, or in the absence of direction by administrative regulations promulgated by the Kentucky Board of Education. (Emphasis added)

Counsel cites the recent case of *E.R.K. v. State of Hawaii Dep't of Educ.*, No. 12-16063 (9th Cir. Aug. 28, 2013) In that case, Hawaii allowed non-disabled students over the age of 20 to pursue a diploma while not allowing disabled students the same option. As a result, the 9th Circuit ruled that Hawaii could not discriminate against disabled students. Therefore, Hawaii must allow disabled students to pursue a diploma through age 21 until their 22nd birthday due to the fact Hawaii did not set an equivalent upper age limit for providing educational services to both disabled and non-disabled students.

Several states, including South Dakota and New York, indicate that age 21 as the cut off date for public school districts to offer special education services. The Eighth

Circuit U.S. Court of Appeals in *Yankton School District v. Harold and Angie Schramm* 93 F.3d 1369 (1996) that a disabled child remains eligible for services until the student graduates from high or reaches age of 21 without having graduated. New York regulations allow disabled students to receive FAPE until the end of the school year in which they turn age 21.

<http://www.p12.nysed.gov/specialed/idea/2012regsanalysis.htm>

OSEP 04-07 dated March 1, 2004 sums it up as follows.

At this point, all States are providing FAPE to all children with disabilities aged 3 through 17. State practice varies for children aged 18 through 21. For example, some States ensure FAPE for all children with disabilities through age 21 (and in some cases, even beyond that age). Some States ensure FAPE for all children who have not reached 21 by a date certain, such as September 1, and continue to ensure FAPE for children who turn 21 after that date for the remainder of the school year. Other States ensure FAPE for all children with disabilities through age 18, but allow local education agencies to serve children with disabilities beyond that age.

In any case, under **34 CFR §300.102(a)**, the obligation to make a FAPE available to a student does not end until the student obtains a regular high school diploma or exceeds the State's maximum age of eligibility for FAPE, whichever comes first. **OSEP Letter to Cort, May 14, 2010.**

707 KAR 1:290. Free appropriate public education.

KRS 157.200 to 157.290 establish the statutory framework for special education programs in local school districts. KRS 157.220 requires the Kentucky Board of Education to adopt rules and administrative regulations for proper administration of these programs. KRS 156.035 authorizes the Kentucky Board of Education to implement any act of Congress appropriating funds to the state and to provide for the proper apportionment and disbursement of these funds in accordance with state and federal laws. 20 U.S.C. 1407 and 1412, and 34 C.F.R. 300.100 require that policies and procedures be adopted to assure the apportionment and disbursement of federal funds for exceptional children programs in accordance with applicable laws. This administrative regulation establishes requirements for providing a free, appropriate, public education for children identified as eligible for special education services.

Section 1. Free Appropriate Public Education. (1) AN LEA shall make a free appropriate public education (FAPE) available to all children with disabilities aged three (3) to twenty-one (21) residing within its district's boundaries who have not received a high school diploma, including children with disabilities who have been suspended or expelled for more than ten (10) school days in a school year. FAPE shall be provided to each child with a disability even though the child has not failed or been

retained in a course and is advancing from grade to grade based on the child's unique needs and not on the child's disability.

Therefore, based upon the law and regulations, both Federal and Kentucky, the Student is not eligible for services beyond the 21st birthday. Therefore, the Student was not denied the right to FAPE by the School District due to termination of services.

3). Was the School District's termination of the Student's educational services a denial of the Student's right to a free appropriate public education pursuant to 707 KAR 1:290 and 20 U.S.C. § 1412?

It is the position of the Student that termination of Student's educational services from the School District on the 21st birthday, was denial of Student's right to FAPE.

As set forth above, the fact the Commonwealth of Kentucky ends opportunities for disabled and non-disabled students alike at age 21, does not violate the Student's right to FAPE.

4) Did the School District make appropriate placement decisions for the Student in accordance with 707 KAR 1:350?

The Student argues, through Counsel, that the District made inappropriate placement decisions. It is the Student's contention that placement decisions were predetermined by Student's date of birth.

This case involves a student who began receiving services under IDEA at an older age and under significantly different circumstances than most students receiving such services. The Student's disabilities came into existence at age 18 as a result of an automobile accident causing traumatic brain injury. (F.F. 2) Up to that time in the Student's life, Student was of above average academic and physical abilities. (F.F. 3)

The first ARC Meeting held for the Student was on November 16, 2011. (F.F. 10) At that ARC Meeting, the parties were aware that Student had been diagnosed with traumatic brain injury (TBI). (F.F. 11) The Parents' goals for the Student were increased communication and socialization skills. (F.F. 12) At the same time, Student was enrolled in the School District at age 19. (F.F. 10)

The Student's "Integrated Assessment Report" of January 4, 2012, included Student's Parents as examiners. (F.F. 17)

It was noted by a check on the box of the IEP of January 4, 2012, that services to Student would end on [REDACTED], the day before Student's 21st birthday.

Student cites *Speilburg v. Henrico County Schools*, 441 IDELR 178, 853 F.2d 256 (4th Cir. 1988) in support. One of the issues in *Speilburg* was placement determined prior to the development of the IEP.

The elements of predetermination may be found in *Zachary Deal v. Hamilton County TN Board of Education*. 259 F.Supp.2d 687 (2003)

Elements of Predetermination can be seen by:

1. *School District making few and no substantial changes reflecting parent input from the draft ones they provide.*
2. *School District having a pattern of doing the same IEP categorically or maybe just at a specific school.*
3. *School District failing to identify any substantive reason or data in the prior written notice given the parent for refusing parent requests.*
4. *Recorded admissions that this is the way it is going to be whether the parent likes it or not.*

In this case, the Student's Parents or at least one Parent was present at all ARC meetings. Due to the Student's disability, Parents continued to insist that the School District focus on "increased communication skills and socialization". (F.F.12) At the January 4, 2012 ARC meeting, the Student's Parents signed the Conference Summary without comment. (F.F. 21) Parents were indicated present and participating at most if not all of the ARC meetings.

In support of placement predetermination, Student argues that because the District had a policy of terminating services for disabled students at age 21 that this was predetermination. Student also argued that predetermination was made because neither the Student nor the ARC knew the ARC had the authority to extend school attendance beyond age 21 unto age 22. (F.F.48) It is this Hearing Officer's view that ending services at age 21 is a legal issue and not one of predetermination. It did not adversely impact the FAPE given the Student during the time of the Student's attendance.

5.) Did the School District fail to ensure that Student had an appropriate Individual Education Plan ("IEP"), including extended school year services and related services, from the 2011-2012 school year until the present time in violation of 707 KAR 1:320?

The Student moved this Hearing Officer to extend the "Stay- Put" Order beyond May 23, 2013. As noted above, that motion was denied as well as the appeal to the U.S. District Court for the Eastern District Court. Therefore, the issue regarding extended year services (ESY) is moot. The Student's Parents declined the offer of ESY for the summer of 2012. (F.F. 62)

The sufficiency and propriety of an IEP is to be judged based on the information available to a school district at the time the IEP was developed. See *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990) (An IEP does not have to be prescient, but instead it should be viewed as "a snapshot" and its appropriateness must be judged based on "what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated").

The documentation reflects School District personnel preparing for the Student's IEP as early as November 1, 2011. (FF 9) With the November 16, 2011 ARC, it was realized that the Student was diagnosed with TBI and used a feeding tube, had motor planning deficits, was wheel chair bound, and non-communicative. (FF 11)

According to the Student's 3-4-2013 "Summary of Skills", the Student's academic performance, retention, and acquisition and recall are impaired across all academic settings. (F.F. 93) Due to the Student's disability, the services reflected in the Student's IEP were amended frequently due to the Student's unique needs and the Parents' concerns. This meets the standard that a student's unique needs must be addressed, not just her or his academic needs. e.g., *Russell v. Jefferson Sch. Dist.*, 609 F. Supp. 605, (N.D. CA 1985); *Abrahamson v. Hershman*, 701 F.2d 223, (1st Cir. 1983).

This is a situation where the Student has a Traumatic Brain Injury (T.B.I) (F.F. 11) and one of the results of TBI is that Student does not respond well to unfamiliar persons. (F.F. 45) The impact of T.B.I. on the Student's communication abilities, it is very difficult to determine what the Student knows. (F.F. 78) The [REDACTED]

where the Student had spent weeks in rehabilitation records that the Student was "mostly nonverbal." "Cognition skills were unable to be assessed. Speech was vocal but unintelligible. Coordination was unable to be assessed as Student was unable to follow commands." (F.F. 19)

Due to the nature of the Student's disabilities, the ARC and the School District were constantly amending the Student's IEP. The Student's IEP with the start date of January 4, 2012 and end date of January 3, 2013 (F.F. 22) was amended many times to accommodate the Student. (F.F. 31, 36, 37, 52, 60, 65, 66, 75, 81, 89, 95)

The Student's Parents were generally pleased with the progress was making at school. (F.F. 95)

A review of the record indicates a team was assembled, the Student evaluated and the IEP was assembled and amended in accordance with **20 USC § 1414**.

6.) Whether or not the ██████████ County School District failed to engage in meaningful and appropriate transition services, as defined in 707 KAR 1:002, and in violation of 707 KAR 1:320.

According to **Section 62 of 707 KAR 1:002—**

(62) "Transition services" means a coordinated set of activities for a child with a disability that:

(a) Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

(b) Is based on the individual student's needs, taking into account the child's strengths, preferences, and interests; and

(c) Includes:

- 1. Instruction;*
- 2. Related services;*
- 3. Community experiences;*
- 4. The development of employment and other post-school adult living objectives; and*
- 5. If appropriate, acquisition of daily living skills and functional vocational evaluation.*

Generally, the District begins to provide transition services as early as middle school. (F.F. 51) As the Student did not begin attending the District until after age 18, the conversation began at the first meeting and 01/04/2012 ARC. (T.T. 749; J.E.#34 at 0161) (F.F. 51)

The IDEIA provides that each special education student is entitled to receive transition services designed to enable the student to "facilitate the child's movement from school to post-school activities, including post-secondary education, vocational education, integrated employment,...continuing adult education, adult services, independent living, or community participation." 20 U.S.C.A § 1401(34)(A). A transition plan should take into account the student's strengths, preferences and interests. 20 USCA § 1401(34)(B).

In this case, the Parties at the outset knew the Student had the possibility of services from the School District for 13 months. It ended up being about 16 months with the "Stay-Put" until the last day of the 2012-2013 school year.

This is an unique situation with a Student only beginning to receive service less than two years after suffering TBI in an automobile accident. Due to the Student's age at entrance into the program (19), the School District has a limited time to provide those services pursuant to the law.

An examination of Student's IEPs and ARC Meeting will be made to determine what was offered and discussed regarding transition for the Student. The IEP of March 27, 2012 identified "Transition Needs" (F.F. 37) Due to the nature of the Student's disability, "Vocational Goal Objectives" were changed. Student will transfer from wheelchair to another with minimal physical and verbal assistance on 3 of 6 occasions". (F.F. 36)

Community Based Instruction is taking the students out into the community to practice skills they work on in the classroom. Students are taken to stores such as Krogers and WalMart. Once a trimester, students are taken into the community for recreation and eating out. (F.F. 80) Community Based Instruction was added to the Student's IEP at the ARC meeting of October 10, 2012. At the same meeting the School District offered the Student transportation to the community based instruction. However, the Parents said they would transport the Student to community based instruction. (F.F. 82)

In addition to the information regarding transition related goals, ██████████, Director of adult services at ██████████, met with the Student's Parents at a group meeting. (F.F. 55) ██████████ provides different levels of services for disabled adults including a sheltered work setting. (F.F. 54) Later, members of the Student's family visited ██████████ but did not make an application on behalf of the Student after the visit. (F.F. 56)

Within the limited time and the confines of the Student's disability, the School District provided meaningful and appropriate transition services. The evidence indicates that the School District provided instruction and related services as well as community services for the Student.

Therefore, the Student's claim that the School District violated *707 KAR and 707 KAR 1:320* is denied.

7) Did the School District deny the Student the right to a free appropriate public education (FAPE) in violation of 707 KAR 1:290 for the period November 16, 2011 through January 2, 2012? Is Student entitled to Compensatory Education for this period?

Student argues that the District denied FAPE. Student believes that FAPE was denied when services were not provided from November, 2011 to January 2, 2012.

The Student was enrolled in the Respondent School District on November 16, 2011. (F.F. 10) While an IEP was not in place, the School District knew that the Student had been diagnosed with traumatic brain injury and thus was disabled. (F.F. 11)

An award of compensatory education is an equitable remedy that attempts to place disabled children in the same position they would have occupied but for the school district's violation of the FAPE. It is not a contractual remedy. Compensatory education involves discretionary, prospective, injunctive relief crafted by a hearing officer to remedy what might be termed an educational deficit created by a school district's failure over a given period of time to provide a FAPE to a student.

Both "OSEP" in *Letter to Riffel*, 34 IDELR 292 (OSEP 2000), *Letter to Anonymous*, 21 IDELR 1061 (OSEP 1994) and the courts in *Reid v. District of Columbia*, 401 F.3d 516, 522, 43 IDELR 32 (D.C. Cir.2005); *D.W. v. District of*

Columbia, 561 F. Supp. 2d 56, 50 IDELR 193 (D.D.C. 2008); *Diatta v. District of Columbia*, 319 F. Supp. 2d 57, 41 IDELR 124 (D.D.C. 2004) have established that hearing officers do have the authority to award compensatory education.

The School District often provides services during the time a student is being evaluated for an IEP. (F.F. 16) However, testimony and notes from the ARC held on November 16, 2011, state that the Parents by the Student's Father, they would prefer the Student to begin to attend school and thus receive services from the School District after the Christmas break. (F.F. 14) However, a review of the record indicates that the School District did not discuss with the Parents the possibility of "home-hospital" services.

As the School District failed to discuss the possibility of "home-hospital" services, the Student is entitled to 9 days of compensatory services. This is based upon what was considered during the ARC of November 16, 2011. (F.F. 9) This would have been 2 days a week from November 16, 2011 through January 4, 2012, taking into account the Thanksgiving and Christmas holiday breaks.

8. Should the Student's Parents Be Reimbursed For Transportation Services They Provided the Student While Student Was Attending School?

Student has requested reimbursement for transportation services while Student was receiving services from the School District. However, the issue of transportation services for the Student did not appear in the record until the discussion concerning Community Based Instruction (CBI). At that time on October 10, 2012 Student's Parents' declined the School District's offer of transportation. (F.F. 82) All of the other students in the Community Based Instruction were furnished transportation to the site of the CBI in a school bus. (F.F. 83)

It is unquestioned that the Student's Parents provided Student transportation to school and from school back home. (F.F. 43)

Evidence of the specific reason for the Student's refusal to ride a school is due to the lack of air bags came on or about March 26, 2013. (F.F. 95) The physician's note did was not provided to the School District until April 4, 2013. (F.F. 41)

Transportation is included under **34 CFR § 300.34** Related Services. The fact the Student needed a vehicle with an airbag was presented to the School District in March and documented on April 4, 2013.

Therefore, this Hearing Officer will award the Student's Parent mileage for no more than the 34 days between April 4, 2013 and May 22, 2013. The amount of mileage will be based upon the Student's attendance during that time period. The mileage shall be calculated from the Student's home and the school and return. Mileage may be calculated for transportation of the Student to CBI. The mileage rate shall be at the State of Kentucky rate of 47¢. (F.F. 107)

VI.

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.

VII.

CONCLUSION AND ORDER

Based upon the foregoing, this Hearing Officer concludes with the following Order:

1. The Order denying Student's "Stay-Put" request beyond the 2012-2013 school year is denied.
2. Kentucky law provides only for FAPE until a student turns age 21. Therefore, Student is unable to receive FAPE or continued services until age 22.
3. The School District has made appropriate placement decisions for the Student from January 2012 until the end of the 2012-2013 school year.
4. The School District was correct in denying Student ESY for the summer of 2013 as Student is over age 21.
5. The School District engaged in meaningful and appropriate transition services as anticipated by 707 KAR 1:002.
6. The School District failed to provide services for the Student between November 11, 2011 and the end of the fall 2011 semester. It is hereby ordered that the School District provide the Student 9 days of compensatory education for the services that were not provided during the fall semester 2011 as set forth above.
7. The Student's Parents are to be reimbursement of mileage for no more than 34 days between April 4th and May 22, 2013 as set forth in the discussion above.
8. This Hearing Officer is without the authority to award attorney fees as set forth above.

Entered this 6th day of November 2013.


PAUL L. WHALEN, Esq.
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 the 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; 1st Floor
Frankfort, Kentucky 40601

cc:

[REDACTED]