

COMMONWEALTH OF KENTUCKY  
KENTUCKY DEPARTMENT OF EDUCATION  
DIVISION OF EXCEPTIONAL CHILDREN  
AGENCY CASE NO. 1718-10

[REDACTED]

PETITIONER

VS.

[REDACTED]

INDEPENDENT SCHOOLS

RESPONDENT

**FINDINGS**  
**DECISION AND ORDER**  
**OF THE DUE PROCESS HEARING OFFICER**

**Background**

The present “Request for a Due Process Hearing” was filed on or about December 4, 2017 by letter filed with the Kentucky Department of Education (KDE) by Counsel for the Petitioner pursuant to the Individuals with Disabilities Act (IDEA), (*20 U.S.C. § 1400, et. Seq.*)

This matter was heard over four and a half days, namely April 17, 18, 19, 20, 2018. Additionally, the Petitioner (June 11, 2018) and Respondent (July 16, 2018) submitted sequential briefs and the Petitioner a Reply Brief. The record consists of four volumes (one for each day). The Hearing Officer received a digital copy. One volume of Petitioner’s exhibits and two volumes of Joint Exhibits (JEX). Volume I of the JEX contains JEX 1-65 and Volume II contains JEX 66-78.

The Final Decision and Order of the ECAB in 1516-17 is part of the record for this Hearing.

In addition to the briefs, there was a motion to strike Petitioner's inclusion of a letter concerning a KDE Audit as an exhibit to Petitioner's initial brief submitted on June 11, 2018. Respondent School District submitted this motion to strike on or about July 20, 2018. The Petitioner responded to the motion to strike on August 3, 2018. The Respondent's replied on or about August 10, 2018.

This Hearing Officer will set forth his decision on that motion in his preliminary matters below.

### **BURDEN OF PROOF**

As this Due Process Hearing is an administrative proceeding in Kentucky, there is a guide for who has the burden of proof. As the party seeking relief, Student Petitioner bears the burden of proving his entitlement to relief by a preponderance of the evidence. ***Schaffer v. Weast***, 546 U.S. 49, 62 (2005). The Supreme Court in ***Schaffer*** ruled that the party seeking relief has the burden of proof and thus the burden of persuasion as the party seeking relief. see also ***City of Louisville, Div. of Fire v. Fire Serv. Managers Ass'n by & Through Kaelin***, 212 S.W.3d 89, 95 (Ky. 2006) Citing ***KRS 13B.090(7)***—"the party proposing the agency take action or grant a benefit has the burden to show the propriety of the agency action or entitlement to the benefit sought". See also- ***McManus v. Ky. Ret. Sys.***, 124 S.W.3d 454, 458 (Ky. App. 2003) (citing ***KRS 13B.090(7)***). In this situation, the Student Petitioner is the party requesting action or seeking a benefit.

### **ABBREVIATIONS OR ANACRONYMS**

Acronyms or abbreviations include ABA (Applied Behavior Analysis), ARC (Admission and Release Committee), BIP (Behavior Intervention Plan), BCA (

██████████), CFR (Code of Federal Regulations) DRO (Differential Reinforcement of Non-occurrence of Behavior) FAPE (Free and Appropriate Education) IDEA (Individuals with Disabilities in Education Act), █ CPS (██████████ County Public Schools) JEX (Joint Exhibit and Respondent's Exhibits), Kentucky Department of Education), KAR (Kentucky Administrative Regulations), LEA (Local Education Agency), MSD (Moderate to Severe, Disabilities) SCM (Safe Crisis Management Plan) T.T. (Trial or Hearing Transcript), the Student in this matter will be referenced as the Student, Petitioner and/or Student Petitioner. The School District will be referenced as the District, the Respondent and/or the Respondent School District.

### **The Order of the ECAB**

On November 14, 2016, the ECAB made the following findings.

1. The Respondent School District has no duty to consider a private placement unless it is unable to provide FAPE through a contract with a public school.
2. The ARC meetings at issue were properly constituted.
3. The Respondent School District did not have a procedural duty to give written notice regarding placement or refusal to change placement when it contracted with █ CPS to provide high school services.
4. The process of developing the IEP has not been completed; The case must be remanded to the LEA to convene an ARC Meeting.
5. If █ CPS cannot implement the IEP, BCA would be an appropriate placement for the Student.

### **Scope of the Proceedings**

In response to a ***Motion in Limine*** from the Respondent School District requesting that the issues be narrowed based upon the decision of the ECAB and the Petitioner's request for a due process hearing. The issues are the three below should cover the Petitioner's concerns as set forth in his request and subsequent pleadings.

On or about April 7, 2018 this Hearing Officer Ordered that the issues for this Hearing are as follows:

1. Was the July 24, 2017 IEP developed in accordance with the Order of the ECAB for Agency Case No. 1516-17?
2. Is Petitioner being offered FAPE for the 2017-18 school year?
3. Can the IEP be implemented by the Respondent or in this instance its contractor?

It should be noted that this matter was heard in Agency Case Number 1517-17. The decision in that Due Process Hearing was appealed to the Exceptional Children Appeals Board (ECAB). The ECAB issued a final decision and order on November 14, 2017.

The ECAB remanded to the ARC to complete the IEP development process, and consideration of private placement was considered premature until "there is a properly developed IEP and a finding that it cannot be developed by the LEA's contractor".

(ECAB p. 12)

## **RESPONDENT'S MOTION TO STRIKE**

The Respondent School District has moved to strike Exhibit “B” to Petitioner’s brief and Exhibit “C” to Petitioner’s Proposed Findings of Fact and Conclusions of Law. Specifically, the Respondent has moved to strike the documents pertaining to the Kentucky Department of Education’s (KDE) audit of the ██████ County Public Schools (CPS). This document dated April 30, 2018 is addressed to the Superintendent of CPS and its Board Chair is titled “Management Audit Findings and Recommendation of State Management”, herein after referred to as “the audit”. It was submitted to this Hearing Officer with a copy to the Respondent’s Counsel via email on June 11, 2018. This was included with Petitioner’s Brief.

Within Petitioner’s Brief at Section VIII. on page 16, the argument is made “CPS Audit and State Takeover”. In this section of Petitioner’s argument PEX #8 is cited which was admitted during the Hearing. Then it is referenced in a section of the Exhibit relating to “Implementation of IDEA”.

During the Hearing the Student Petitioner’s Father references the audit in general but without any specifics during his testimony. (See finding 89)

It has been no secret that the CPS has been undergoing a management audit since February 14, 2017. (See p. 1 of Exhibit “B”). Petitioner’s Ex. # 8 contains a copy of a letter to a previous CPCS superintendent concerning the management audit dated February 14, 2017.

A review of the Petitioner’s six page “Request For A Due Process Hearing” received by KDE on December 4, 2017, does not reference the CPS Audit by KDE.

On February 8, 2018, this Hearing Officer issued an Order that the Parties exchange witness and exhibit lists on or before March 8, 2018.

Petitioner's Exhibit #8 (PEX#8) was introduced during the testimony of █ CPS' former director of special education on day 4 of the Hearing. (T.T. Vol. IV pp.83-86) Based upon the cross examination of the special education director, it could be assumed that PEX#8 was being used to try to impeach her testimony.

At the close of Hearing on April 20, 2018, a review of the transcript fails to indicate any Party to the proceeding indicated that they needed to supplement the record. (T.T. Vol. IV, pp. 4-133)

The regulations governing "Impartial due process hearings" at **34 CFR 300.511 (d) Subject matter of due process hearings.** *"The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under § 300.508 (b), unless the other party agrees otherwise.*

Within Petitioner's argument VIII, concerning the KDE Audit, there is the implication by Petitioner that █ CPS is unable to implement IDEA within the district much less the Petitioner's IEP. If that is the concern of the Petitioner, then the original Due Process Request should have set forth that argument or Petitioner should have amended it prior to the Hearing.

Additionally, the exhibit attached to Petitioner's brief should be excluded under **Kentucky Rules of Evidence 403** as its probative value is substantially outweighed by the danger of undue prejudice or confusion of the issues.

Based upon the foregoing, the Petitioner's post hearing exhibit relating to the audit is struck from the record and will not be considered.

## **FINDINGS OF FACT**

1. The Respondent School District is an independent public-school district within the Commonwealth of Kentucky which educates students in grades kindergarten through eighth grade. Additionally, it has a contract with the █CPS to educate its high school students. The Respondent School District began contracting with █CPS in 1950. (T.T. Vol. II, pp. 138-9)
2. The Student Petitioner is presently an eighteen-year-old who was diagnosed with autism at the age of eighteen months. (T.T. Vol. I, pp. 28-29)
3. When the Student Petitioner attended the Respondent School District, he was placed in part-time general education, part-time special education. (T.T. Vol.II ; pp. 136)
4. The Student Petitioner while at the Respondent School District received some instruction in general education classes in the areas of science and social studies. These classes were modified to be appropriate for the Petitioner. (T.T. Vol. II p. 137)
5. When attending the Respondent School District, he participated in electives with regular education students one hour each day. (T.T. Vol. II, p. 136)
6. At the time the Student Petitioner graduated from the Respondent School District in 2015, he was able to transition or move from one class to another independently. (T.T. Vol. II; p. 137; T.T. Vol.III, p. 32)
7. When the Student was attending the Respondent School District, he participated in school assemblies. (T.T. Vol. II; p. 137)
8. The Student Petitioner has many educational needs. He has an IQ of 59, very severe communication issues, difficulty with reading comprehension, is prompt

dependent and had significant sensory issues. (Vol. II, pp. 106-107, Vol. I p.96-98; JEX# 63, pp.4-7.)

9. The Student Petitioner engages in physical stereotypy by flapping his hands and running his fingers across his body. (T.T. Vol. I, pp. 41-42; PEX# 12A)
10. The Student Petitioner engages in vocal stereotypy by periodically speaking a string off unrelated words (T.T. Vol. I, pp. 41-42; PEX# 12A)
11. In environments with loud or unexpected noises the Student may have outbursts or engage in maladaptive behaviors. (Vol. I, p. 40; Vol. II, pp.180-182.)
12. The Student Petitioner wears noise cancelling headphones to muffle sounds, reduce unexpected loud noises and prevent maladaptive behaviors. (T.T. Vol. II, pp.40-41)
13. The Student Petitioner is minimally verbal, cannot engage in conversation and has a behavior plan. He communicates in very short utterances, using primarily nouns and verbs (Vol. I, p. 277).
14. The Student Petitioner cannot take a shower by himself. He can brush his teeth but cannot floss. He can retrieve a vegetable from the refrigerator, but cannot cut or peel it. He can dress himself but is unaware if he puts his clothes on backwards. (T.T. Vol. II, pp.82-83)
15. The Student Petitioner's social skills are significantly delayed. He does not relate to peers or model his peers' behavior. (JEX #77, p.7)

### **The Student's Education at Respondent School District**

16. Applied Behavior Analysis (ABA) is a "systematic approach using principles of science from behavior and learning to make socially significant behavior changes that can increase or decrease behaviors." (T.T. Vol. II, p. 77)

17. The Student Petitioner has received ABA therapy since he was first diagnosed with autism, and has been part of his school and home based therapy programs. (T.T. Vol. I, pp. 31-32)
18. When the Student Petitioner was in the first grade, the [REDACTED] Principal approached the Student's Mother about working with the School's staff to design a program for students with autism. That program STRIVE, was designed as an ABA program for low-incidence students (with autism or Down syndrome). (T.T. Vol. I, pp. 36-38)
19. The Student Petitioner participated in STRIVE during his time at the District. (Vol. I, pp. 37-38)
20. The District does not have a high school, so the Student is required to transfer to another school district beginning in ninth grade. (T.T. Vol. I, p. 42)

### **The 2015 ARC Process**

21. When the Student graduated the eighth grade at Respondent District, the District had contracts with two school districts: [REDACTED] County and [REDACTED] County. (T.T. Vol. I, p. 41-46)
22. The Student's Parents toured South [REDACTED] High School, but were advised that [REDACTED] County would have to change the Student's "intensive level" of services in his IEP if he were to attend. (T.T. Vol. I, pp. 44-45)
23. [REDACTED] County reported back to the District's Special Education Director that there was no room in its entire district for the Student Petitioner. (T.T. Vol. I, p. 46)

24. The Student's Parents turned to the District's other contractor, ██████ County (CPS). The ██████ CPS placement coordinator contacted the Student's Parents. (T.T. Vol. I, pp. 46-47)
25. The Placement Coordinator informed the Student's Mother that three school sites had space available for the Student during the fall of 2015. (T.T. Vol. I, pp. 46-47)
26. The Student's Parents toured a classroom at ██████ High School. They were disappointed with the school as there were students wandering around and one student was asleep in his chair. (T.T. Vol. I, p. 47)
27. The Student's Parents requested that the District place the Student at BCA. (T.T. Vol. I, p. 48)

**The ██████ Center for Autism**

28. The Student Petitioner has attended BCA since leaving ██████ in 2015. (T.T. Vol. I, pp. 57-59)
29. The ██████ Campus ██████ where the Student Petitioner attends has about 20 students between the ages of 12 and 23. (T.T. Vol. II, p. 13)
30. The Student Petitioner's present classroom at BCA has four students where he receives almost entirely via direct one-on one instructor support. (JEX#77, p. 9)
31. BCA has two full-time BCBAs on-site, lead instructors who are certified registered behavior technicians, and a team of instructors who are trained on both BCA's instructional system as well as each learner's behavior plan. (T.T. Vol. II, pp. 16-17)
32. At BCA, the Student is situated in a cubicle for most of the day and works there with a technician. (T.T. Vol. III, pp. 31-33.)

33. The Behavior Services Assessment sent to █ CPS by BCA in the spring of 2017 indicated that BCA had been using the same behavior goals with the Student Petitioner since he enrolled there in 2015. (T.T. Vol. p. 69)
34. Progress monitoring data from the March 30, 2015 ARC meeting was reviewed at the January 20, 2017 ARC. (JEX#56, p. 5; T.T. Vol. II, p. 147)

### **Historical Background On The Issues**

35. This is the second due process hearing in this matter. A hearing was held before this Hearing Officer on March 29-31, 2016.
36. The Hearing Officer entered an Order dated July 5, 2016. In that Order, this Hearing Officer concluded that the Respondent School District had offered that Student Petitioner FAPE.
37. The Student Petitioner timely appealed that decision to the ECAB.
38. The ECAB found that this IEP process was not complete and this Hearing Officer erred regarding concerning the Respondent School District providing an IEP, which would reasonably be calculated to provide FAPE to the Student Petitioner. One of the major problems was the latest IEP's failed to consider the March 2015 IEP when creating the July 2015 IEP. (Additional conclusions are set forth by the ECAB on page 3 of this decision.)
39. The Student Petitioner appealed the findings in the ECAB Order believed to be averse to him to the U.S. District Court for the Western District of Kentucky on or about December 14, 2016.
40. The Respondent School District moved to dismiss the appeal to the District Court on the grounds the Student Petitioner had failed to fully exhaust the

available state remedies. On October 11, 2017, the Court granted the School District's Motion and remanded the case back to the ARC to complete the process of crafting an IEP.

41. After the ECAB Decision, there were at least six ARC meetings held in 2017 to develop the Student Petitioner's IEP. (T.T. Vol. I, p. 183; JEX# 56,58, 65,69, 75,77,78)
42. The Respondent's Special Education Director offered to hold an ARC meeting in December 2016 to update the Student Petitioner's IEP and begin developing program and placement options for him. (T.T. Vol. I p. 142)
43. The Parties ultimately agreed to hold the first ARC meeting on January 20, 2017. (T.T. Vol. II, p. 13)
44. The 2017 ARC discussed transition planning for the Student Petitioner at a █ CPS school. (T.T. Vol. IV p. 182)
45. In January 2017, the Student's Parents participated with the School District and █ CPS where the Parents, █ (BCA's Program Director at the time), █ gave updates on the Student's present levels. (T.T. Vol. I, p. 73; Vol. 2, p. 102; JEX# 57)
46. It was decided that because the Student Petitioner had not been in public school for over a year, he would need to be evaluated prior to an IEP being developed. (T.T. Vol. I, p. 73; Vol. II, p. 102)
47. The Parties participated in a second ARC meeting on January 26, 2017. Notwithstanding the fact that only a week earlier the parties agreed that the Student Petitioner needed evaluations. █ CPS presented the Student's Parents

with an IEP and an offer for the Student to start at █ CPS immediately. (JEX # 58; T.T, Vol. I, pp. 90-91; Vol. II, p. 105)

48. The Student's Parents did not agree with the draft IEP offered in January 2017. (T.T. Vol. I, p.92)

49. For at least three months during the 2017 spring semester the Student Petitioner was evaluated and █ CPS personnel observed him at BCA. (JEX #55, T.T. Vol. I, pp. 74-76, and T.T. Vol. II, p. 106)

50. During the process for developing what would become the July 21, 2017, IEP, the draft IEPs would include "March 30, 2015 █ INDEPENDENT IEP PRESENT LEVEL INFORMATION; JANUARY 2017 UPDATES FROM █ SLP (2014-15 Year END DATA); UPDATES █ CENTER FOR AUTISM SLP; PARENT INFORMATION PROVIDED JANUARY 2017"; plus, subject specific information for each area. The areas are: Communication Status; Academic Performance; Health, Vision, Hearing, Motor Abilities; Social and Emotional Status; General Intelligence; Functional Hearing, Listening & Communication Assessment. (JEX #70, #73)

51. The Respondent's Special Education Director with the Occupational Therapist went to BCA to observe the Student Petitioner as part of the observation process. The Respondent's Special Education Director was concerned that BCA was more of a clinic than a school. She believed the Student in 2017 was working on some of the same skills he was working on in 2015. She believed there was more emphasis on behavior than academics. (T.T. Vol. II, pp. 158-161; JEX #38)

52. On April 20, 2017, there was an ARC meeting which commenced at 9:01 a.m. and ended at 1:06 p.m. Petitioner's Parents brought a court reporter who recorded the entire proceedings. (JEX #65, pp. 1-167)
53. Within the Petitioner's March 6, 2017 Occupational Therapy Assessment Summary, it says "he received an OT evaluation through TheraPLACE in August 2016 using the Bruininks-Oseretsky Test of Motor Proficiency, Second Edition (BOT-2). His performance on this assessment was consistent with previous assessments for motor skills. These assessments yielded well below average fine and visual motor abilities at the 4 1/2 to 5 1/2 year level. For this reason, standardized testing was not completed, however, he was observed during his individual daily routine at BCA, which included behavioral sessions, vocational routine, and meal time routine. (JEX #61, p. 1)
54. The Occupational Therapy Assessment Summary (JEX#61, p. 2) in the last two sentences in the first paragraph state: "He (referring to the Student Petitioner) would benefit from occupational therapy in the educational setting to address his motor and bilateral coordination activities to participate in vocational and self-care routines. He would also benefit from a variety of sensory modulation strategies that are developed and monitored by a licensed occupational therapist embedded into his daily routines to increase his level of engagement and participation.
55. . Within the Supplementary Aids and Services of the July 21, 2017 IEP, the third sentence "The occupational therapist will provide individual support to the student to address sensory modulation strategies such as movement breaks, heavy work, and motor planning/coordination strategies. (JEX #77 p.21)

Unfortunately, there is nothing in this section (JEX # 77 p. 21; Supplementary Aids and Services) that states that the Student Petition will be provided opportunity for movement breaks throughout the day basis at intervals of “A” etc. On the most recent evaluations (JEX #77, pp. 6-7) the Student requires movement breaks. On page 7, “During observation at BCA, he utilized movement breaks during his daily routine while engaged in behavioral therapy, vocational skills and independent living skills”.

56. An additional assistant was offered to the Student by the School District and █CPS to provide further assistance to him. (T.T. Vol. II. p.58) His classroom at █CPS would have one certified teacher and three instructional assistants. (T.T. Vol. III, p. 30)
57. Evaluations for the 2017 IEP indicated that the Student Petitioner has significant communication issues, significant cognitive issues and an IQ of 59. (T.T. Vol. II, pp. 106-107; JEX #63)
58. Evaluations indicated that the Student Petitioner’s nonverbal index score was 59—in the 0.3 percentile, meaning that 99.7% of the students who took the test scored higher. (T.T. Vol. I, p. 96; JEX #63, p. 4)
59. The Student’s math and reading scores were well below average. (T.T. Vol. I, p. 96; JEX # 63, p. 5)
60. For the spring 2017 speech evaluation, the Student was observed at least three times. The Student’s speech enunciation has improved. He is easier to understand now than at the time he graduated from the Respondent School District. (JEX # 63, pp. 6-7)

61. There was no evidence presented at the Hearing that academic data was provided by BCA to the Respondent School District or JCPS during the spring of 2017 to determine the Student's gains or regression since he had graduated from the Respondent School District in 2015. (T.T. Vol. III, p. 81)
62. The Student Petitioner had a BIP developed by BCA and a separate BIP for home developed by his private therapist. (JEX #62, p. 8)
63. In June 2017, the Student's Parents, BCA's Director, the Student's private therapist, a special education teacher for the Respondent District, the █CPS special education director, the █CPS Autism Specialist, █CPS Low Incidence Specialists and the Respondent School District Special Education Director met in an informal meeting to develop a Behavior Intervention Plan (BIP) for the Student. The group reviewed the behavior plan from his private therapist, the BIP from BCA and the BIP from the Respondent School District in developing a new BIP. (T.T. Vol. I, p. 172)
64. Much of the final BIP was taken from the BIP that was being used for the Student at BCA as the Respondent School District and █CPS did not have any recent behavior data. (T.T. Vol. III, p. 120) The BIP was finalized and offered to the Student's Parents at the June 27, 2018 ARC meeting. (JEX# 72 and 74)
65. The ARC decided to reduce the DROs on the BIP from sixty-minute intervals to thirty-minute intervals to assist the Student in making the transition from BCA to a █CPS school. Everyone was in agreement with this decision. (T.T. Vol. II, pp.119-121)
66. Safe Crisis Management (SCM) was not part of the Student's BIP as his behaviors never demonstrated that he needed SCM. (T.T. Vol. II, p. 172)

67. Information from the March 2015 IEP was incorporated into the July 21, 2017 IEP offered to the Student Petitioner. (T.T. Vol. I. p. 154), JEX 77, pp. 1-12)
68. From the IEP with the date of 07/21/2017, under Communication Status—fourth paragraph below the heading, it says: “(The Student) needs speech services in a one-on-one setting because (the Student) does not model from his peers. A group setting has been tried in the past, but has not been successful. This had also been noted in his March 30, 2015 evaluation. (These deficits will affect how (the Student) communicates his wants, needs, and knowledge to teachers and peers in his classroom and special education setting”. (JEX#77, p. 1)
69. After the July 21, 2017 IEP and placement was offered to the Student Petitioner, his Parents emailed the School District’s Special Education Director on July 24, 2017, and stated, “...and I decline the services at the █ CPS.” (J.E. #54)
70. The Student’s Parents declined services/placement at █ CPS because they are concerned about the Student’s safety at █ High School (JEX # 54), the Student was not being offered vocational services similar to those being offered at BCA (JEX #77, p. 14) and concerns about Speech Language Services (JEX # 77, p. 1 and 23)

### **The July 21, 2017 IEP**

71. Pages 1-14 of the Student Petitioner’s IEP contains present levels of his performance during the spring of 2017. The 2017 levels of performance are set forth after his spring 2015 levels of performance just prior to the Student graduating from the Respondent School District. (JEX #77)
72. Goal #1 on the IEP states: “Given a real-world math task and asked to solve, (the Student) will demonstrate basic money handling skills (i.e. staying within a set

budget, choosing the better buy, making a purchase) by completing the task with at least 80% accuracy across 3 consecutive instructional sessions, as measured by teacher data probes”. (JEX# 77, pp. 15-16) This goal was based on goals that the Student had worked on at the Respondent School District and BCA. (T.T. Vol. II, p. 165; Vol. III p. 12)

73. Goal #2 on the IEP states: “Given an analogue or digital clock and a schedule, (the Student) will demonstrate basic time telling concepts (i.e. tell time from an analogue or digital clock to the minute, tell time to the quarter hour/half hour and independently follow a schedule), with at least 80% accuracy across 3 consecutive instructional sessions, as measured by teacher data probes”. (JEX #77, pp. 16-17)

74. Goal #3 on the IEP states: “(the Student) will demonstrate functional reading skills by increasing his sight word vocabulary and basic reading vocabulary with at least 90% accuracy across 3 consecutive instructional sessions, as measured by teacher data probes”. (JEX# 77, p. 17)

75. Goal # 4 on the IEP states: “Given a functional writing task (i.e., write personal information from a model, type 3 to 5 sentences on a topic of interest, and compose a shopping list) and asked to complete, (the Student) will produce the writing tasks with at least 80% accuracy (fewer than 20% errors), across 3 consecutive instructional opportunities, as measured by student work samples”. (JEX #77, pp.17-18)

76. Goal # 5 on the IEP states: “Given the opportunity to advocate for himself, (the student) will independently request help or state his needs to a peer or adult for 4

out of 5 opportunities across 3 consecutive sessions, as measured by teacher data probes”. (JEX #77, p. 18)

77. Goal # 6 on the IEP states: (the Student) “will follow a task analysis to complete a variety of functional tasks to increase independence with at least 80% accuracy across 3 consecutive instructional sessions, as measured by teacher data probes”. (JEX # 77, p 19)

78. Goal #7 on the IEP states: “During structured language tasks and conversational exchange, (the Student) will use intelligible speech (appropriate volume and correct speech production) to request help as needed, initiate conversation with a partner, and use high level sentence structures to describe familiar objects by stating their feature, function and/or class with 80% accuracy across three consecutive sessions as measured by service log data and teacher reports”. (JEX #77, p. 19) However, there is a notation on page 23 regarding discussing changing one-on-one speech therapy after the first 9 weeks.

79. Goal #8 on the IEP states: “Given vocabulary tasks, (the Student) will demonstrate knowledge of receptive and expressive components with 80% accuracy over 3 consecutive sessions as measured by data collected during drill and practice sessions”. (JEX# 77, p. 20)

80. At [REDACTED], the Student was offered additional space where he could move to in the event there were noises that bothered him. The Student would have been supervised by an adult in a smaller and quieter room if he had chosen to use it. (T.T. Vol. II, p. 185) Supplementary Aids and Services on the IEP listed “Accommodations for high noise level” and “noise cancelling headphones”. (JEX # 77, p. 21)

81. The IEP stated that the Student would be provided OT for thirty minutes four times per month in a resource room. (JEX # 77, pp. 23-24; T.T. Vol. II, p. 171)
82. The section for Supplemental Aids and Services on the IEP states that OT would provide individual support to the Student to address sensory modulation strategies such as movement breaks, heavy work and motor planning/coordination strategies. Under Program Modifications/Supports, the IEP provides that the OT would educate classroom staff (classroom teachers, instructional assistants, outside teachers) on sensory modulation strategy and activities to promote motor coordination. (JEX # 77, pp. 21,23; T.T. Vol. II, p. 171)
83. The █ CPS OT was involved in developing the IEP goals (T.T. Vol. II, p. 261) Goal #4 on the IEP involved a functional writing task. The Specially Designed Instruction for that goal indicates that an OT would be available to assist with any fine motor strategies, classroom adaptation and adaptive materials that the Student might need in order to type or write those sentences and produce that work product. (JEX # 77, pp. 17-19; T.T. Vol. II pp. 263-265) Sensory strategies were embedded into the Student's program with the goal of keeping him calm and regulated in the classroom. (T.T. Vol. II, p. 272)
84. █ CPS' █ High School was recommended for the Student Petitioner's Placement (T.T. Vol. III, p. 26) The teacher in the MSD classroom was Christy Boston who is a certified moderate and severe disabilities (MSD) teacher. Ms. Boston has experience teaching students with autism and providing home therapy to autistic students. She has some training in ABA strategies and behavior plans. (T.T. Vol. III, pp. 28, 70-71, & 100-101)

85. In respect to the July 2017, JEX #77, the Student Petitioner's Father testified: "I think this document, what I am holding in my hand I think is a really good document. I think the goals in there are relevant goals to (Student Petitioner). I think the process of turning this document into a living breathing document that outlines what kind of services and how (the Student Petitioner) is going to receive those services that is where I have major misgivings about this IEP. (T.T. Vol. II p. 117)

86. According to the transcript of the July 21, 2017 ARC meeting, the Student's Father near the close of the meeting after expressing the need for more time to decide whether to accept services from JCPS said:

"We need time based on the [REDACTED] thing and just, okay, now it's [REDACTED]. Here's all the stuff you talked about, the training, the supplemental stuff, the peer tutor, the pullout, special—the home base, I mean, what we've agreed to is the IEP goals and the behavior plan if those are—I mean, we've agreed upon those.

We do not agree upon the – we did not agree yet with the provision of the services at [REDACTED]. Whether it's [REDACTED] it's how [REDACTED] CPS would bring this to life. That's what we need time to discuss." (JEX # 78, p. 204)

87. The Student Petitioner's Mother agreed with the goals set forth in the July 21, 2017 IEP. (T.T. Vol I, pp. 175-177)

88. The Student Petitioner's Parents were concerned about making sure the Student always had adult supervision for safety concerns. The ARC incorporated having an adult always present for the Student for safety concerns. (T.T. Vol. I pp. 186-189; JEX #77, p. 12)

89. After declining the services from [REDACTED] CPS in July 2017, the Student Petitioner continued to attend BCA. (T.T. Vol. I, pp. 58-59, Vol. II, p. 49)

90. It is the position of the Student Petitioner that his IQ has increased by 17 points since attending BCA. However, there is no written record regarding an IQ that is not 59 except in the ECAB Decision. Though there is testimony it went from 42 to 59. (JEX# 55; T.T. Vol. II, pp. 106-107; Ex. 63)
91. Dr. [REDACTED] was the [REDACTED] CPS Director of Special Education during the 2016-17 school year. She participated in the development of the Student Petitioner's July 2017 IEP. (T.T. Vol. IV pp. 4-12)
92. If the Student Petitioner had attended [REDACTED] CPS in the fall of 2017, he would have a teacher and two instructional assistants. At least one of those assistants would have been full-time. (T.T. Vol. IV p. 58)
93. [REDACTED] has a peer tutor program where normally developing high school students assist students and teachers in the MSD classrooms. In testifying about the peer tutor program, the Student Petitioner's Mother indicated concerns about the training the peer tutors received at [REDACTED]. (T.T. Vol. I, pp. 122 and pp. 318-322)
94. The behavior technicians assisting the Student Petitioner at BCA are not licensed ABAs. (T.T. Vol. III, p. 63)
95. MSD teachers in [REDACTED] CPS must complete twenty-four hours of professional development each school year. Additionally, training is provided by MSD and autism groups at [REDACTED] CPS who go into the classrooms and identify target areas of growth. These individuals provide modeling, assist with data collection and analysis and perform fidelity data checks to ensure the programs are being implemented with fidelity. (T.T. Vol.III, pp. 34-36 & 39)

96. Within the district, █ CPS has an Autism Program Specialist, twenty-five consulting teachers, school psychologists and resource teachers support the classroom staff working with autistic students. (T.T. Vol. II, pp. 76-76 & 106)
97. The Kentucky and National Certification Board of BCBA's do not require teachers to hold a BCBA certification in order to use ABA strategies in a classroom. (T.T. Vol. III pp. 69, 111, 142-143)
98. The Respondent School District did not have a certified BCBA on staff when it implemented ABA strategies for the Student Petitioner. (Vol. II, pp. 173-174)
99. On the Student Petitioner's IEP at page 23, "Program Modifications/Supports for school personnel that will be provided; Supports for school personnel included: "Staff trained in the principles of ABA to support implementation of the IEP" and "The occupational therapist will educate classroom staff in all relevant school environments on the use of sensory modulation strategies and activities to promote motor coordination. (JEX #77, p. 23)
100. MSD teachers are trained to take data like that required for the Student Petitioner's BIP. (T.T. Vol. IV, p. 56) They are familiar with taking data on IEP goals and behavior plans as they do so daily. (T.T. Vol. III, p. 122)
101. The Student Petitioner's Father testified that he was concerned with the fact that █ CPS was undergoing an audit from KDE. (T.T. Vol. II p. 123)
102. A review of the July 2017 IEP indicates an absence of vocational goals or programs. (JEX #77 check goal 6). A review of the court reporter's transcript of the final ARC meeting, indicates that neither of the Petitioner's Parents brought up the subject of vocational training as he had at BCA. (JEX # 78)

103. As IEPs are written for a period of one year, the July 2017 expired in July 2018. Therefore, a new one needs to be created. (T.T. Vol. II; pp. 46-47)

104. The last sentence on page 19 of the ECAB Final Decision and Order states: “ECAB finds that the provisions of the student’s March IEP discussed in this decision are necessary to provide FAPE and if [REDACTED] were unable to implement with such provisions that BCA would be an appropriate placement capable of implementing such an IEP.

### **POSITIONS OF THE PARTIES**

The Arguments of the Parties as set forth in their respective briefs are outlined below.

The Student Petitioner has outlined the following in support of his position.

- I. The Supreme Court Raises the Bar with ***Andrew***.
- II. The Respondent School District Failed to Offer the Petitioner FAPE in 2015 and 2016.
- III. The Respondent School District has failed to Offer the Student FAPE in 2017 because [REDACTED] CPS could not provide the Student Petitioner the services he needs to succeed.
- IV. BCA has provided and continues to provide the Student Petitioner with an appropriate education.
- V. The Student’s Parents are entitled to reimbursement for the costs of sending the Student Petitioner to BCA.

The outline of the argument of the Respondent School District is as follows.

- I. The Respondent School District has provided FAPE for the Student Petitioner.
- II. BCA is an inappropriate placement for the Student Petitioner
- III. The Student's Parents are not entitled to reimbursement as a matter of law.

## **DISCUSSION**

### **Introduction**

The Hearing Officer will use the Introduction to respond some of the Student Petitioner's initial arguments.

The Student Petitioner opens his Argument in support of his position with "The Supreme Court has raised the bar with the *Andrew*, referencing the U.S. Supreme Court decision in *Andrew F. v. Douglas County School District RE-1 137*, S.Ct. 988; 580 U.S. \_\_\_ (2017). As set forth on page 11 of the slip opinion the Court in

*Andrew* states:

While *Rowley (Board of Educ. v. Rowley*, 458 U.S. 176 (1982)) declined to articulate an overarching standard to evaluate the adequacy of the education provided under the Act, the decision and the statutory language point to a general approach: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.

The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. (*Id.*, at 207) The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but by the input of the child's parents or guardians. *Id.*, at 208-209. Any review of an IEP must appreciate that the question is whether

the IEP is reasonable, not whether the court regards it as ideal. *Id.*, at 206-207.

The IEP must aim to enable the child to make progress.

Then further on the Court says---

**That the progress contemplated by the IEP must be appropriate in light of the child's circumstances** should come as no surprise. (Emphasis added)

I.

**Was the July 24, 2017 Developed In Accordance  
With the ECAB ORDER?  
For Agency Case No. 1516-17?**

Within Section V. of the ECAB decision, it was decided “The Process of Developing the IEP Has Not Been Completed; The Case Must Be Remanded to the LEA to Convene an ARC Meeting”. The ARC overlooked the Student’s most recent IEP and related evaluations, prepared on March 30, 2015. The March 30, 2015 IEP and related evaluations was not utilized at the July 28, 2015 ARC meeting and the resulting IEP. Instead the July 2015 IEP relied upon the January 16, 2015 IEP which did not contain the most recent evaluation information concerning the Student Petitioner. (F.F. 38)

As set forth in the ECAB decision at pages 8-11, there were significant differences between the January and March 2015 IEPs in the following areas.

1. Delivery of speech therapy services.
2. Health, Vision, Hearing, Motor Abilities.
3. The General Intelligence Section.
4. Supplementary Aids and Services Section.
5. The Least Restrictive Environment (LRE) and General Education.
6. Related Services—Occupational Services.

The ECAB remanded this matter back to the Respondent School District “to convene an ARC meeting that will utilize the March 30, 2015 IEP, and the evaluations upon which it is based, in developing an appropriate IEP for the student.”

It is the position of the Respondent School District that the July 24, 2017 was developed in accordance with the ECAB Order. In order to make a determination, the record will be reviewed.

The Parties did reconvene the ARC on January 20, 2017 to begin the process of crafting an IEP in accordance with the ECAB Order. (F.F. 43) As it had been over a year since the Student Petitioner had been evaluated, in addition to reviewing March 2015 the Parties agreed to have the Student evaluated prior to developing the IEP. (F.F. 46, 47) This is in accordance with ***Bd. of Educ. v. Rowley***, 458 U.S. 176, 181, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), "the IEP must be 'tailored to the unique needs' of each child, it must be regularly revised in response to new information regarding the child's performance, behavior, and disabilities." ***Id.*** at 234 (citing 20 U.S.C. §§ 1414(b)-(c).) The IDEA regulations, ***34 CFR § 300.324***, require that the District ensure that IEP teams carefully consider all available information in developing an IEP, including information from the child's parents. The IEP team must be provided data sufficient to inform its consideration of the individualized academic, developmental, and functional needs of Student. See ***34 CFR § 300.324(a)***, ***707 KAR 1:320, Section 2 (6)(a) &(b)***.

In respect to the first area, related to the delivery of speech therapy services, recent evaluations indicate that the Student Petitioner continues to need "speech services in a one-on-one setting" because he does not model from his peers. (F.F. 68) With the Student-Petitioner's history, the ARC should not have limited the related on-on one speech therapy to 9 weeks. As noted the Student's capabilities have not changed since March 2015 and it is not very likely that that will change within the first 9 weeks of school.

In respect to the second area, Health, Vision, Hearing, Motor Abilities, the July 21, 2017, IEP relies on updates from the █CPS and Respondent District Occupational Therapists (OT) for the year ending 2014-15; January 2017 updates from BCA; █CPS integrated assessment of April 10, 2017. (F.F. 53, 83)

As to the third area, General Intelligence, the IEP contains evaluation updates from March 30, 2015, Respondent School District for 2014-14 Year End Data, January 2017 Updates Updates From Parents, BCA and Private Service Providers. Additionally there was the Parent Inventory of 2/21/17. Within the Supplementary Aids and Services, the third sentence “The occupational therapist will provide individual support to the student to address sensory modulation strategies such as movement breaks, heavy work, and motor planning/coordination strategies. (F.F. 82) Unfortunately, there is nothing in this section that states that the Student Petitioner needs movement breaks and they are going to be address on a daily basis at intervals of “A” etc. On the most recent evaluations (FF 54) the Student requires movement breaks. On page 7, “During observation at BCA, he utilized movement breaks during his daily routine while engaged in behavioral therapy, vocational skills and independent living skills”. (F.F. 55)

In the ECBA’s fifth and six directives regarding Least Restrictive (LRE) and General Education a reading of evaluations indicates that the Student’s Petitioner’s needs have not changed in those areas since July 2015. The Student will participate in Occupational Therapy for 30 minutes 4 times a month in a resource room. (F.F. 81) This is what the most recent evaluations indicate are best. The Speech Language Therapy for 30 minutes for 4 times a week in the Resource Room is fine as long as it one on one with the Student Petitioner. The notation on page 23 of the IEP regarding discussing

changing one-on-one speech therapy after the first 9 weeks should be deleted as noted above.

As set forth above, the Respondent School District and the ARC implemented the ECAB Order as Ordered with two exceptions. The ARC did not properly consider the Student Petitioner's needs for movement breaks within the school day in light of the ECAB and realistically consider his need of ongoing one-on-one speech language therapy. (JEX 68)

Therefore, it is Ordered that for those matters this is remanded to the ARC for correction and clarification.

## **II.**

### **Did the Respondent School District Offer The Student Petitioner FAPE For 2017-18 School Year**

As set forth in Part I, the Respondent School District properly responded to the ECAB's decision with a couple of exceptions.

Within this section review is made beyond the specifics of the ECAB Order and an examination of the remainder of the July 21, 2017 IEP.

IDEA directs that, in general, a hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE **(20 U.S.C. § 1415(f)(3)(E)(i))**. A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (**Rowley**, 458 U.S.176 (1982) at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" Since the first hearing in this matter, the Supreme Court

has ruled: "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (**Andrew F.**, 137 S. Ct. at 1001). Additionally, school districts are not required to "maximize" the potential of students with disabilities (**Rowley**, 458 U.S. at 189, 199). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (**Cerra v. Pawling Central Sch. Dist.**, 427 F.3d 186 (2<sup>nd</sup> Cir. 2005) The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (**Mrs. B. v. Milford Bd. of Educ.**, 103 F.3d 1114 (2<sup>nd</sup> Cir 1997) at 1120. See **Andrew F.**, 137 S. Ct. at 1001, holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances".

In this instance within Benchmark/Short-Term Instructional Objectives under Annual Measurable Goal #8, there is a question of about what is expected under several Short-Term Goals 1 and 2. Is the Student Petitioner suppose to be able to communicate what a preposition is or what a pronoun is?

Under the standard set forth in **Andrew**, the Student's ability to point out prepositions and pronouns are not reasonable calculated to help him make progress. Therefore, this matter is remanded to the ARC to re-consider or re-write short-term goals which are more reasonably calculated to help him make progress.

The Student was born in July 2000. At the time of the creation of the July 2017 IEP, he was 16 years old. As a 16-year-old with an IEP, vocational education must consider vocational education. See **Letter to Cernosia**, 19 IDELR 933 (OSEP 1993) and **Yankton Sch. Dist. v. Schramm**, 900 F.Supp. 1182 (195) Transition services are defined as a coordinated set of activities in the areas of instruction, community

experiences, development of employment and post-school adult living objectives, and, if appropriate, acquisition of daily living skills and functional vocational evaluation. If the IEP team determines that services are not needed in one or more of those areas, the IEP must include a statement to that effect and the basis upon which the determination is made. (See **707 KAR 1:320(7)(2)(a)(b)**)

Without the consideration of transition services or vocational education, the Student has been denied FAPE in the 2017-18 IEP.

**III.**  
**Is JCPS Able to Implement the IEP**  
**Offered to the Student Petitioner?**

The location of a placement is an administrative decision which may be made by a school district. **White v. Ascension Parish Sch.**, 343 F.3d 373 (5<sup>th</sup> Cir. 2003); **Letter to Wessels**, 16 IDELR 735 (OSEP 1990)

The Petitioner in his initial brief sets forth several arguments as to why the Respondent's contractor █CPS cannot implement the Petitioner's BIP and IEP. Petitioner lists the following reasons as to why █CPS is unable to implement the BIP and IEP. They are as follows.

- A. Lack of Trained On-site Staff and BCBAs
- B. Lack of Organizational Competencies as Recognized by the State Takeover
- C. The Physical Environment at █ is Inappropriate
- D. The Curriculum That Has Been Proposed for (the Student) is Not Appropriate
  - a. Social Studies and Science are Not Appropriate for (the Student)
  - b. █CPS Will Not Guarantee, nor Could they Provide, the One-on-One Speech (the Student) Requires

- c. Vocational Opportunities are Not Available for (the Student) for at Least a Year
- E. █ CPS' Practices with Safety and Restraints Are Particularly Dangerous to the Student

The Student Petitioner's Parents primary objection is the belief that the Respondent School District's contractor, █ CPS cannot implement the IEP with the date of July 21, 2017. The reasons the Student Petitioner believe that the IEP cannot be implemented are listed in a-e above.

A.

In respect to the issue of "Lack of Trained On-Site Staff and BCBAs, the record indicates that it is not necessary to be ABA certified to provide FAPE  
In respect to the Petitioner's argument of "Lack of Organizational Competencies as Recognized by State Takeover, there has been no specific evidence presented on this issue.

During the course of the Hearing, testimony concerning implementing ABA strategies with a student could be done with a teacher and teaching assistants who were trained in ABA but not ABA certified. (F.F. # 17, 31, 84, 94, 97, 99)

Based upon what has been presented the Student Petitioner is being provided ABA therapy in his education. It may not be "intensive" ABA therapy. It should be noted that the evidence provided by the Student Petitioner did not reach the level to prove ABA therapy is crucial for the Student to receive a FAPE.

In ***Ks Ex Rel. Ps v Fremont Unified School District***, 679 F. Supp. 2d 1046 (N.D. Cal. 2009), the court found that the expert testimony regarding "ABA was rather general in nature" and did not focus on the particular educational needs for the specific

student at issue did not meet the standard that ABA was crucial for the Student to receive FAPE.

In this situation, the Student Petitioner has been educated with ABA strategies without always having ABA certified personnel on site at the Respondent School District. (F.F. 99) Though many including the personnel the Student works with at BCA are not ABA certified.

As part of the IEP, “Staff trained in the principles of ABA to support implementation of the IEP”. The argument regarding the need for ABA therapy with ABA certified personnel has not shown to be crucial for the Student to receive FAPE. It has been shown that █ CPS personnel assigned to the Student will be trained in ABA strategies. (F.F. 99) Kentucky and National Certification Boards of BCBA do not require teachers to hold BCBA certification in order to use ABA strategies in a classroom. (F.F. 96)

. Moreover, the record indicates that the Student Petitioner’s teachers at █ High School were qualified. Ms. Christy Boston who would be in the MSD room where the Student would have been assigned, is a certified MSD teacher. Ms. Boston is experienced in teaching students with autism and providing home therapy for autistic students. She also has received training in ABA strategies and behavior plans. (F.F. 84)

In respect to special education teacher in █ CPS, MSD teachers must complete twenty-four hours of professional development each school year. (F.F. 95) Within █ CPS, the district has an Autism Program Specialist, twenty-five consulting teachers, school psychologists and resource teachers who can support the classroom staff working with autistics student. (F.F. 96)

B.

In respect to Petitioner's Argument concerning "Lack of Organizational Competencies as Recognized by the State Takeover", it should be noted that on August 29, 2018, █ CPS entered into a written agreement with KDE which avoided "State Takeover".

C.

It seems that the Petitioner's Parents are concerned about the Student Petitioner's safety at █ High School as reflected in their message declining services/placement. (F.F. 70) █ is a large high school with over 1,000 students. If the Student Petitioner gone to █, he would have been provided an additional instructional assistant at █ CPS. This would mean he could have one certified teacher and three instructional assistants. (F.F. 56)

At █ the Student was offered additional space where he could move to in the event there were noises that bothered him. The Student would have been supervised by an adult in a smaller and quieter room if he had chosen to use it. (F.F. 88)

D.

Petitioner's concerns about curriculum are addressed above in Part II.

e.

Petitioner's concerns that █ CPS' practices with safety and restraints are dangerous were not proven during the course of the Hearing. SCM was not part of the

Student's BIP because his behaviors never demonstrated he would need a SCM. (F.F. 66)

### **Conclusion**

█CPS can implement the IEP for the Student Petitioner once the corrections are made to the Student's IEP. The Petitioner has not provided a preponderance of evidence to show that █CPS' █ High School cannot provide FAPE.

### **ORDER**

1. The July 21, 2017 IEP is remanded to the ARC for updates to make corrections for the ECAB's Order regarding movement breaks and one-on-one speech; and
2. The IEP is further remanded to the ARC to make corrections or clarifications to the IEP regarding the short-term instructional objectives set forth under IEP Measurable Goal #8 as set forth above regarding labeling parts of speech; and
3. As the Student Petitioner is over age 16, and his postsecondary goals are probably employment and independent living, the ARC needs to add a goal of vocational education or training similar to what is receiving at BCA; and
4. It is found that the Respondent School District's contractor █CPS could implement the IEP once the ARC corrects it as set forth above.
5. The ECAB as set forth above decided that the July 2015 IEP did not provide FAPE. The Student's Parents decided to send the Student Petitioner to BCA

for the 2015-16 and 2016-17 school years. As the July 2015 IEP had not been corrected or otherwise finalized until July 2017, the Respondent School District shall reimburse the Parents of the Student Petitioner for his tuition for the 2015-16 and 2016-17 school years. ***Alfonso v. District of Columbia***, 45 IDELR 118, 422 F. Supp. 2d 1 (D.D.C. 2006)

Within ***Alfonso***, tuition for private school for student with visual impaired for part of the 2004-05 school year because the District did not have the IEP completed prior to the beginning of the school year. In this situation, the IEP was not completed until July 21, 2017.

6. As with the shortcomings set forth above in the 2017-18 IEP, the IEP was not fully completed in compliance with the ECAB Order and the IEP would not have provided FAPE for that school year. Therefore, the Respondent shall re-imburse the Petitioner of the 2017-18 school year.

7. With this matter being remanded back to the ARC for correction and clarification, it is hoped that the IEP will be ready for the 2018-19 school within a few weeks after this decision. Therefore, it is further Ordered that the Respondents reimburse the Petitioner for the first 2 months of the 2018-19 school year.

8. Once the IEP has been corrected as directed, █ CPS should be able to implement the Student Petitioner's IEP.

9. This Hearing Officer is unable to award attorney fees in this matter.

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. § (i) (3) (A) and (B)** is set forth 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 party of a child with a disability;

As this Hearing Officer is not with the district courts of the United States, he without the jurisdiction or the ability to award attorney fees to a prevailing party in a Due Process Hearing.

This Order and Decision is entered 3<sup>rd</sup> day of September 2018.

/s/ Paul L. Whalen

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PAUL L. WHALEN  
Due Process Hearing Officer

CC:  
Counsel of Record Via email and U.S. Postage Pre-paid  
Kent Wicker, Counsel for Petitioner  
Dana Collins, Counsel for Respondent School District  
KDE: Todd Allen, Esq. & Tina Drury

## **APPEAL RIGHTS**

Pursuant to **707 KAR 1:340 Section 12**. Appeal of Decision. (1) A party to a due process hearing that is aggrieved by the hearing decision may appeal the decision to members of the Exceptional Children Appeals Board (ECAB) assigned by the Kentucky Department of Education. The appeal shall be perfected by sending it, 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  
300 Sower Blvd.; 5<sup>th</sup> Floor  
Frankfort, Kentucky 40601