

**KENTUCKY DEPARTMENT OF EDUCATION
DIVISION OF LEARNING SERVICES
AGENCY CASE NO. 1819-26**

█

PETITIONER

v.

█

INDEPENDENT SCHOOLS

RESPONDENT

FINAL DECISION AND ORDER

This appeal comes before the Exceptional Children Appeals Board (hereinafter “ECAB”) following a hearing conducted by Hearing Officer Paul L. Whalen. The ECAB panel, consisting of Kim Hunt Price, Susan Gormley Tipton and Mike Wilson, Chair, was appointed to consider the appeal of the Respondent, which was timely filed.

This case involves a high school senior with autism, scheduled to complete academic credits in four years, who the parent contends was promised transition services in the form of full-time participation in Project Search (described elsewhere hereinbelow) to take place in a 5th year in 2020-2021. However, a dispute arose midway through the student’s junior year and the school declared it would not provide a 5th year Project Search. The case went to mediation in February 2019¹ and a due process complaint was filed in April of 2019. The school’s motion to dismiss was denied by the hearing officer and that denial is one of the issues appealed by the school.

A hearing was held in August and September of 2019. The hearing officer issued a decision in December of 2019 that ordered (1) the student’s IEP to be revised to include Project Search as transition services in an IEP for a 5th year of high school, and (2) set as a goal in that IEP that the student go through Spring Commencement in 2020, at the end of his fourth year of school, but that

¹ Although Mike Wilson was the mediator, both parties affirmed they had no objection to Wilson serving on this ECAB appeal

is diploma be withheld until he completes Project Search in 2021. The school has appealed the decision to ECAB.

The parties submitted written briefs. These documents have been reviewed and carefully considered by the ECAB. Having reviewed the administrative hearing record in its entirety, together with the briefs of the parties, this ECAB issues its Final Decision and Order.

PRELIMINARY ISSUES

Jurisdiction for the Appeal. Appeals of a due process hearing decision are permitted by 707 KAR 1:340, Section 12(a), which states:

a party to a due process hearing that is aggrieved by the hearing decision may appeal the decision to the members of the Exceptional Children's Appeal Board as assigned by the Kentucky Department of Education. The appeal shall be perfected by sending by certified mail to the Kentucky Department of Education a request for appeal within thirty (30) days of the date of the Hearing Officer's decision.

The appeal of this matter was timely filed.

The Student Bears the Burden of Proof. The party seeking relief bears the burden of proving, by a preponderance of the evidence, its entitlement to relief. In this case, the Student requested the due process hearing and therefore bears the burden of persuasion on each element of the Student's claims. *See Schaffer v. Weast*, 546 U.S. 49, 57-58 (2005) and KRS 13B.090(7). Legal Standard for Provision of FAPE. *Board of Education of Fayette County v. L.M.*, 478 F.3rd 307, 314 (6th Cir. 2007) describes the obligations of a school district in providing FAPE to a student determined eligible for services under the IDEA, as follows:

Under the IDEA, the School is required to provide a basic floor of educational opportunity consisting "of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Rowley*, 458 U.S. at 201 102 S.Ct. 3034. There is no additional requirement, however, "that the services so provided be sufficient to maximize each child's

potential commensurate with the opportunity provided other children.” *Id.* At 198, 102 S.Ct. 3034.

Emphasis in L.M.

The U.S. Supreme Court recently revisited the *Rowley* decision in *Endrew F. v. Douglas City School District*, 137 S.Ct. 988 (2017). In *Endrew*, the Court considered a disagreement between the parents of a child with autism and the school district regarding development of an appropriate IEP and the provision of FAPE to a student with autism, whose behaviors impeded his ability to progress academically. In discussing the differences between *Rowley*, where a deaf student easily advanced from grade to grade despite missing information due to her deafness, and *Endrew*, where the parents alleged inadequate IEPs were a denial of FAPE, the Court expanded our understanding of *Rowley*, without increasing or decreasing the obligations of a school district.

The Court opined that in order 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.” 137 S.Ct. 999. The IEP must *aim* to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and *functional advancement*. *Id.*, Emphasis added. The Court further stated:

[E]ducational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.

137 S.Ct. 1000.

The Court reiterated its long-standing position that an IEP must have as its target substantial academic and functional progress for the student, and that the specially designed instruction and related services must be determined by what is appropriate for the student in the

student's unique circumstances. The Court further refused to "attempt to elaborate on what 'appropriate' progress will look like from case to case." 137 S.Ct. 1001.

It seems clear that if an IEP has been developed and implemented taking into account the unique circumstances and needs of a student, it is not necessarily a denial of FAPE simply because a student does not achieve the goals of the IEP. Although little attention was paid to this distinction, *Andrew* does seem to acknowledge that education includes both academic and functional advancement. In evaluating allegations of denial of FAPE herein below, the ECAB considers such allegations in light of these cases.

The ECAB Reviews the Record de Novo. Kentucky has a two-tier administrative process, which requires the appellate review to be conducted in accordance with 20 U.S.C. § 1415(g). *See also* 707 KAR 1:340, Section 12.

The ECAB is required to conduct an impartial review of a hearing decision and to make its own, independent decision upon completion of such review. 20 U.S.C. § 1415(g). The ECAB must also review the entire hearing record before making its decision. 34 CFR § 300.514(b)(2). The only limitation to this required de novo review pertains to Hearing Officer findings based upon credibility determinations. Even credibility judgments may be overturned, but only if non-testimonial extrinsic evidence in the hearing record would justify a contrary conclusion or if the hearing record, read in its entirety would compel a contrary conclusion. *Carlisle Area School v. Scott P. By and Through Bess P.* 62 F.3rd 520, (C.A. Pa.) (1995). In other words, credibility determinations supported by the record require deference to the Hearing Officer's determinations. The ECAB may make fact findings contrary to those of the Hearing Officer as long as the ECAB's fact findings are supported by substantial evidence in the record and not based upon different views about credibility of witness testimony. *Id.*, p. 529. The existence of conflicting testimony does not

necessarily mean that any particular finding of fact was implicitly a credibility determination by the hearing officer. Id., p. 529.

Decision by the Hearing Officer and Issues before the ECAB. The Hearing Officer found that the student did not receive adequate transition services and thus was denied FAPE. Specifically, the Hearing Officer concluded that the school failed to provide measurable goals related to the student's post-secondary goal of gainful employment and that the school failed to assist the student in obtaining the community-based experiences needed to successfully transition to employment. The Hearing Officer also found that the student should participate with his cohort in the Spring 2020 commencement ceremonies. He remanded this matter to the student's ARC with an order to revise the student's IEP in include Project Search for 2020-2021 as part of transition services and to set an IEP goal to allow the student to participate in graduation ceremonies while withholding his diploma until his completion of Project Search.

FACTUAL BACKGROUND

Student is a nineteen-year-old senior. His primary disability is autism. He is a diploma-track student and is on schedule to complete the credits needed for a diploma in spring of 2020. Student is very routine driven, has difficulty comprehending abstract language, and needs explanation beyond the literal and concrete meaning of things. He has difficulty in maintaining peer relationships and handling anxious situations without guidance and assistance. (J.E. 2). Student is described as a very "black and white" person who does not comprehend the nuances of communication. Routines are very important to him. He also exhibits idiopathic toe walking, which is frequently seen with autistic students. (TE, pp. 11-15).

In January of 2016 and in order to facilitate student's transition from 8th grade to high school, Student's mother and behavioral support person² ██████ met with the DoSE. During that meeting, the mother and ██████ brought up the possibility of Student participating in Project Search³ during a fifth year of education. The DoSE wasn't familiar with Project Search, but said she would look into the program. After that meeting, Project Search became an ongoing subject at Student's ARC meetings. (TE pp. 19-21).

An ARC was convened on March 22, 2016 to develop Student's IEP for the 2016-2017 school year. Part of a student's IEP addresses the need for transition services. These services are considered beginning in a student's 8th grade year and thereafter and are part of the process of preparing the student for life after high school. In Student's IEP, under the category of "Transition Services Needs," it is noted that student needs a student interview, interest inventory, individual learning plan and parent interview. The IEP contains no indication for the need of a vocational assessment. (J.E. 2).

An ARC was convened on March 7, 2017 to develop Student's IEP for the 2017-2018 school year, which was Student's 9th grade year. During that meeting, Project Search was discussed as a program the ARC intended to explore as a tool for Student, including its implementation. Student's speech therapist, who was familiar with Project Search, attended the meeting and stated that it would be a great program for Student. Student's special education teacher also voiced support for Student to participate in the program. (J.E. 5, TE pp. 22-23, 100-104, 146, 157-158).

As concerning Student's transition needs, the IEP generated as a result of the meeting called for a student interview, interest inventory and another survey; again, there is no indication for the need of a vocational assessment. In a section of the IEP dedicated to Student's

² ██████ serves as Student's behavioral support person via Kentucky Medicaid's Michelle P. Waiver program.

³ Project Search is discussed more fully below.

postsecondary goals, it is noted that Student does not desire postsecondary education and would prefer to obtain a job after graduating high school. The IEP charged the school's teacher/job coach/adult transition panel with conducting assessments regarding Student's desired employment and career interests for adult life beyond college or vocational training. The IEP does not describe what is to be done with the assessments and there are no measurable goals listed related to Student's postsecondary goal of employment. (J.E. 4).

An ARC was convened on March 1, 2018 to develop Student's IEP for his 10th grade year. The ARC identified instruction and employment as Student's areas of need and indicated its purpose at the time was to examine the IEP, to make placement decisions and to discuss postsecondary transition needs and/or services. Conference Summary notes from that meeting state that the team discussed the option of Student participating in the Project Search program. Student's mother reiterated her desire for Student to participate in Project Search in the future as a fifth-year option at the end of high school. She expressed concern about Student losing that option due to changes in administration at the school. The notes indicate that the team "assured [Student's mother] that [Student's] plan for a fifth year will remain the same." Student's mother came away from the meeting with the firm understanding that the ARC approved Student's participation for a fifth year of schooling at Project Search and delivered the news to Student. The IEP itself did not address Project Search, nor is there any indication that measurable goals were set regarding Student's transition. Although the IEP states that assessments will be conducted regarding Student's desired employment and career interests, there is no indication what would be done with the assessment results. (J.E 5 and 8; TE pp. 37-50, 145).

The ARC met again in November of 2018, which was still Student's 10th grade year. Project Search was brought up again at this meeting, but attendee assistant principal stated that Student

could attend Project Search only during his senior year, thus doing away with a fifth-year option. The assistant principal suggested that Student take a summer class and, during his senior year, attend a half day at school and a half day at Project Search. Student's mother and behavioral support therapist disapproved of this option as they understood Project Search to require a full-day participation for successful experience with Project Search. There was also concern that the school's proposed modified participation in Project Search would require a lot of changes in Student's routine and increase his anxiety. (J.E. 9; TE pp. 54-60, 73-74, 120-121, 187-188, 216).

When a notice of an ARC meeting scheduled for December 3, 2018 was issued, Student's mother notified the school that she disagreed with the plan to have Student participate in Project Search during his senior year of high school as it differed from the plan to have Student receive a deferred diploma to participate in Project Search during his fifth year. At the December, 2018 ARC meeting, the new DoSE proposed that Student work with the school's employment specialist for two periods per day while taking four other classes for credit or complete the remaining four credits in another fashion. (J.E. 11 and 13).

During the December, 2018 ARC meeting, the ARC noted Student's difficulties in independent living skills and determined that he needed additional goals in life skills and employability skills. However, the IEP adopted by the ARC in February of 2019 contains no goals with regard to those three skills. Again, the portion of the IEP dedicated to transition services required more assessments but failed to identify what the school would do with the results of the assessments. (J.E. 15; TE pp. 76-84, 664-665).

None of the progress reports completed for the 2017-2018, 2018-2019 and 2019-2020 IEPs contained goals/outcomes for Student's transition. (J.E. 23-26).

As noted earlier, the DoSE suggested that Student work with the school's employment specialist his senior year. ██████████ is the school employment specialist. ██████████ is a part-time employee, working 18 hours per week with the school. Of those 18 hours, he spends 12 hours with students on the alternative diploma track and 6 hours with students on the diploma track. ██████████ spends less than 12 hours throughout the entire school year working with diploma track students and sometimes goes an entire month without any interaction with Student. He has no certifications or degrees as a vocational counselor or consultant. (TE pp. 443-458).

██████████ attempts to "hustle up" jobs for students; he does not offer immersion into a job site or internships. Nor is ██████████ able to offer job experiences which involve a lot of repetition on the student's part, something vital to Student's need to reinforce what he has learned and how to perform a job. The school has no "existing set program" and no "coordinated set of activities." It has never supplied a written program setting forth what specific services it intends for ██████████ to provide to the Student. Rather, the school guidance counselor has indicated that she and ██████████ would set up something to enable Student to be successful, although she had no idea would that something would be, as no program has been established. (TE pp. 70-71, 144-145, 399-400, 443-458).

Project Search is a program designed to help students with disabilities transition from high school to competitive employment. It is a nationwide program that was developed by the Cincinnati Children's Hospital. ██████████ County partnered locally with Northern Kentucky University approximately four years ago to offer Project Search to its public-school population. In order to sustain the program, ██████████ County accepts other students from ██████████ County (SCHOOL is in ██████████ County) and other school districts. For the ██████████ County/NKU program, known as "Norse Project Search," the ██████████ County school district provides a special

education teacher to serve participating students and NKU provides departmental internships. Students are still served by an IEP as they cycle through 10-week internships at NKU. These internships can include jobs at the recreation center, library, sports arena, and agricultural and janitorial work. Students meet each morning for workplace instruction and vocational training before proceeding to their assigned work place. (TE pp. 298-305; 474-476).

While the majority of students participating in Norse Project Search are on an alternative diploma track, the program does include students on a diploma track as well. The program will accept a student for a fifth year of education, even if the student has earned enough credits to graduate. An IEP team or ARC must refer a prospective student to Project Search. Thus far, ██████ County's Project Search has accepted every student referred to it by an ARC. (TE pp. 298-305, 325, 327, 17).

The ██████ County school district provides Project Search as well. ██████ County has partnered with a company called Cengage to provide internship opportunities for students. Student's parents know several autistic students who successfully participated in the ██████ County and ██████ County programs and transitioned from school to competitive employment. (TE p. 17-18).

Student's behavioral support person describes Project Search as a program specifically designed for students like Student who are not necessarily going to access college but rather seek to be competitively employed. (TE p. 204). A special education teacher who worked with Student over a five-year period testified that Student would benefit from Project Search, noting that because he was in the regular education track, he didn't get the full value of the transition skills that students on the alternative assessment track receive. (TE p. 158). Although Student did participate in a class called Pathway to Careers, he was unable to participate fully in activities such

as community-based outings and job shadowing because he could not miss his core classes to attend such activities. (TE p. 16). Student's long-time Cincinnati Children's Hospital psychiatrist has indicated that he would "greatly benefit from deferring his diploma and taking time to enter into a life skills or vocational training program like Project Search." (P.E. C; TE pp. 28, 108).

By letter dated March 13, 2020⁴, Student and his family were notified that he has been recommended to the Norse Project Search, assuming the successful completion of his 2019-2020 school year. It is noted that Student's IEP approval would be required to finalize his participation.

There is nothing in the record to suggest that Student was not on track to graduate this spring. Likewise, the briefs recently filed by the parties indicate Student will soon meet the necessary academic requirements for graduation.

Student's mother and behavioral support person feel strongly that Student be able to "socially graduate" with his class, and thus be able to take part in whatever graduation ceremonies are planned while still being considered a student eligible for IDEA services. They contend that Student would then be able to graduate with the peer group he has been with for 11 years and that graduating after Project Search would take him away from his peer group and actually place him in the same graduating class as his younger brother. Other local school districts, including Boone, Kenton and Campbell Counties, have allowed students to socially graduate. However, the school's Site Based Decision Making Council decided that Student could not participate in graduation ceremonies at the end of the 2019-2020 school year if he deferred his diploma and attended Project Search as a fifth year. (R.E. 11; TE pp. 46-47, 201-213, 221).

I. THE HEARING OFFICER CORRECTLY OVERRULED RESPONDENT'S MOTION TO DISMISS

⁴ Attached to "Brief of Petitioner/Appellee, [REDACTED]," filed on March 26, 2020

The Due Process Complaint was filed herein on or about April 30, 2019 and alleged that IDEA entitled the child to transition services based upon his particular needs. Further, it alleged that decisions regarding the child's education should be made by the ARC, not school board policy. The resolution sought was for a social graduation and then a fifth year at Project Search. In reply to the Motion to Dismiss, Petitioner made it clear that he was alleging that IDEA had been violated due to inadequate transition services. He further raised the specific issue that compensatory education was an appropriate remedy if violation of IDEA was found in this circumstance. Petitioner also raised the fact that the law allowed a child to raise the issue to be able to challenge graduation if they do not believe they have received appropriate services. The Hearing Officer entered an Order overruling the Motion to Dismiss on August 12, 2019.

A Motion to Dismiss for failure to state a claim for relief is controlled by Kentucky Rule of Civil Procedure 12.02(f). Said rule specifically states,

“If, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Case law has interpreted these rules to prohibit a Hearing Officer from weighing the evidence or attempting to resolve any factual differences. And determining only whether the Plaintiff could be entitled to relief under any state of facts which could be proved as set forth in his allegations. *Ewell v Central City*, 304 SW2d 479 (Ky. 1960) The trial court is required to liberally construe all Plaintiffs allegations as true when ruling on a Motion to Dismiss for failure to state a claim for relief. *Fox v Grayson*, 317 SW3rd 1,7 (Ky 2010) holds that a Motion to Dismiss for failure to state a claim on which relief maybe granted “admits as true the material facts of the Complaint” so a Court should not grant such a Motion “unless it appears the pleading party would not be entitled

to relief under any set of facts which could be proved...”. Accordingly, “the pleadings should be liberally construed in the light most favorable to the Plaintiff, all allegations being taken as true.” This exacting standard of a review eliminates any need by the trial court to make findings of fact; Rather, the questions is purely a matter of law. Stated another way, the court must ask if the facts alleged in the Complaint can be proved, would the Plaintiff be entitled to relief?” Clearly the Complaint alleged and the Response thereto alleged that the parties had differences of opinions as to whether the ARC had agreed to allow social graduation and a fifth year of study specifically at Project Search. Clearly, Respondent was on notice that the issue of the adequacy of the transition services and thus the IEP and whether FAPE had been provided thereunder where at issue from the beginning of this case. If the facts as alleged by the student had been more proved at a hearing, relief could have been properly granted in the form of compensatory education or other relief. With regard to the issue of social graduation, there is no guiding law and thus an issue was appropriately submitted to hearing. With regard to the issue of graduation in four years, the case law is clear that students can contest said graduation. *TS v Independent School District Number 4*, 265 F3rd 1099 (Tenth Circuit 2001) specifically recognized that a child could contest graduation. Further, the argument propounded by the student that graduation is a change in placement under 34 CFR 300.102(a)(3)(iii) procedure protections are afforded to the student allowing them to contest the proposed graduation during a due process hearing. *DC v Mount Olive Township Board of Education*, unreported case number 12-5592 (KSH)(DNG March 31, 2014), page 56, citing *Mosely v Board of Education*, 483 F3rd 689, 693, note 6 (10th Circuit 2007).

The Constitution of both the United States and Kentucky envisioned that parties shall have full rights to due process of law with a full hearing allowing them to present their factual issues. It would be in the rarest of circumstances that a Motion to Dismiss would be granted. It is clear that

the parties disagreed upon the interpretation of any law as to graduation and in the case of special education because each child is entitled to an individual education plan based upon their own needs, it cannot be said that a fifth year of school is never appropriate. Accordingly, the Hearing Officer was correct in overruling the Motion to Dismiss and allowing the parties to proceed forward with a full hearing.

II. THE SCHOOL PROMISED THE STUDENT WOULD PARTICIPATE IN PROJECT SEARCH DURING A FIFTH YEAR BUT CHANGED ITS POSITION MIDWAY THROUGH THE STUDENT'S JUNIOR YEAR

Everyone agrees the student would benefit from attending Project Search full-time in 2020-2021, including his special education teacher [REDACTED] and the student's psychiatrist (TE 108). [REDACTED], counselor with Kentucky Office of Vocational Rehabilitation, who testified concerning the Vocational Assessment performed by the school, stated that the student would be an ideal candidate for Project Search (TE 516).

The student's position is that the school promised to give the student a 5th year of full-time Project Search. She testified that it was agreed at March 1, 2018 ARC meeting (TE 42) that student, scheduled to complete academic credits by the end of his senior year, would return for a 5th year to participate in Project Search (TE 42). The ARC summary for that meeting includes the notation "plan for 5th year will remain the same." (TE 53). However, the ARC March 1, 2018 IEP does not mention Project Search. It only indicates assessments will be performed of desired employment and career interests (TE 51). None of the IEPs ever included Project Search as a goal. The hearing officer found that there was no written plan for the student to attend Project Search and all ARC members other than the mother testified that Project Search had never been voted on by the ARC.

ECAB finds that as of March 2018, the ARC expected the student to participate in Project Search full-time during 2020-2021 in fulfillment of individualized transition services due him. The phrase "plan for 5th year will remain the same," which appears in the March 2018 ARC meeting

summary, was written by school personnel, not the mom, and implies that a plan for a 5th year of services exists, it had existed prior to March 2018 (because it “remains the same”) and that the members of the ARC knew what the plan was. Full-time participation in Project Search during 2020-2021 was the only 5th year plan discussed by any witness. It is implausible that the phrase could refer to anything else.

However, testimony at the hearing indicates that subsequent to the March 2018 meeting which noted “plan for 5th year will remain the same,” there were changes in school administrators, and at the November 1, 2018 ARC meeting, midway through the student’s junior year, Assistant Principal ██████ explained that the student would only be able to do Project Search if he did it in his senior (4th) year. (TE 54). The reason given, later stated in the December 3, 2018 ARC meeting conference summary, was that state law and district policies require that once a student meets requirements for diploma that he receive it and anyone graduated from high school cannot enroll. (TE 64). The school’s Director of Special Education, ██████, testified at the hearing that the cost of Project Search for this student to participate full-time in 2020-2021 would be approximately \$19,360.00, but denied that budgetary considerations played a role in the school’s determination that the student would be unable to participate full-time in Project Search during a 5th year in 2020-2021. (TE 634).

III. ORDINARILY A DIPLOMA THAT HAS BEEN EARNED MUST BE GRANTED, BUT NOT WHERE IT IS A DEVICE TO AVOID PROVIDING SPECIAL EDUCATION SERVICES

It is assumed by all that the student will successfully complete requirements for a diploma by the end of the current school year. KRS 158.140(2)(a) states that “[u]pon successful completion of all state and local board requirements, the student shall receive...[a] diploma indicating graduation from high school.” The school contends that this statute ties their hands – that it requires

them to issue a diploma immediately and that issuance of a diploma terminates the obligation to provide FAPE.

There is no Kentucky case on point, but ECAB has reviewed numerous out-of-state cases, including those cited by the parties. The case law falls into two camps. One line of cases, such as *Stock v. Massachusetts Hosp. School*, 392 Mass. 205, 213 (1985) revoke diplomas where graduation is used to evade providing FAPE. The other line of cases, such as *Puffer v. Reynolds*, 761 F. Supp. 838 (D. Mass. 1990), do not revoke the diploma if all requirements were properly met, but orders the services that were not provided prior to issuing the diploma as compensatory education for denial of FAPE. Under either approach, a student is entitled to transitional services he or she should have received.

Elsewhere hereinbelow, ECAB finds that the student is entitled to compensatory education in the form of full-time Project Search during 2020-2021. The school must defer the diploma and continue the student in a fifth year if doing so is necessary to meet Project Search's eligibility requirements. Otherwise, the school will be using the diploma as a device to avoid providing required compensatory services.

IV. APPROPRIATE TRANSITION SERVICES WERE NOT OFFERED OR PROVIDED

The IDEA requires that IEPs for older students include a plan for a coordinated set of services designed to move special education students successfully from school to post-school settings. "Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. Section 1400(c)(1). The

purpose of the IDEA is to ensure that all children with disabilities have available to them a FAPE designed to meet their unique needs and prepare them for further education, employment and independent living. 20 U.S.C. Section 1400(d)(1)(A). In Kentucky law, the requirements for transition services are set forth in 707 KAR 1:320, Section 7(2) which requires that by a student's 16th birthday, the IEP contain:

- (a) appropriate, measurable, postsecondary goals based upon age-appropriate transition assessments, related to training, education, employment, and, where appropriate, independent living skills; and
- (b) The transition services (including the course of study) needed to assist the child in reaching these goals.

Transition services are addressed at 34 CFR 300.43, which defines "transition services" as:

a coordinated set of activities for a child with a disability that—

(1) 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 education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

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

(i) Instruction;

(ii) Related services;

(iii) Community experiences;

(iv) The development of employment and other post-school adult living objectives; and

(v) If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.

Despite Student having expressed the desire to obtain employment and bypass postsecondary education, neither the 2016-2017 or the 2017-2018 IEP identified the need for a vocational assessment under transition services. While the 2017-2018 IEP references assessments regarding Student's career interests, it fails to describe what is to be done with any assessment results and lists no measurable goals related to Student's desire for employment. Student's 2018-

2019 IEP, established following a discussion of Project Search as a fifth year for Student, makes no mention of Project Search. Again, it indicates that assessments would be conducted but there is no indication of what would be done with the results, nor are there measurable goals regarding Student's transition from high school to employment. The IEPs are inadequate in that they required assessments but failed to identify the assessments or provide their results. *Somberg v. Utica Community Schools*, 67 IDERL 139 (E.D. March 30, 2016).

Student did participate in a "Pathways to Careers" class and had access to the employment specialist, but these experiences did not provide adequate preparation for Student to successfully transition in accord with the required services. As Student was on a diploma track (as opposed to an alternate diploma track), he was required to attend core classes and was thus unable to participate fully in the Pathways to Careers activities that involved community outings and job shadowing. His contact with the employment specialist, while surely beneficial, was limited.

The options the school provided for Student's senior year after it denied Student a fifth year at Project Search were not a coordinated set of activities based on his individual needs as required by regulation. It is unclear from the evidence whether part-time participation in Project Search is possible or would provide meaningful results and, in Student's case, the changes in schedule would create anxiety-inducing situations. As to the option of Student working with the employment specialist, no plan was ever created or presented, and it is clear that the employment specialist, a part-time employee serving mostly students on the alternate diploma track, would have limited time with Student.

Finally, although the December, 2018 ARC concluded that Student needed additional assistance with independent living skills, life skills and employability skills, the February, 2019 IEP was deficient as it contained no goals for those skills. There was no roadmap, or coordinated

set of activities, that was focused on facilitating Student's improvement in these important transition areas.

The transition services provided to Student were not adequate as they lacked measurable goals and referenced assessments with no indication of how to use the data from the assessments. In addition, especially in Student's latest IEPs, there is no indication that the services were a results-oriented process based on Student's individual needs and focused on improving Student's movement from school to employment. As a result of the inadequate transition services, Student was denied FAPE.

V. THE STUDENT IS ENTITLED TO COMPENSATORY EDUCATION IN THE FORM OF A 5TH YEAR PARTICIPATION IN PROJECT SEARCH

As found above the ECAB agrees with the Hearing Officer that the lack of a transition plan, the lack of measurable goals for transition, and the overall lack of transition services provided to Student deprived the student of FAPE. Once such determination is made the Hearing Officer has the right to grant compensatory education in a wide variety of forms and fashions. Although Petitioner did not specifically frame his Due Process Request to request compensatory education, he clearly wanted the Project Search program from the beginning.

Testimony was clear that this student needed repetition and had weaknesses in dealing with the public and in communication. Specifically, the student had difficulty generalizing his classroom work to real life situations; was very routine driven and showed a great deal of anxiety in situations that were overwhelming to him or in situations of change; has difficulty in comprehending abstract language and may need further explanations beyond literal, concrete meaning of things; and has difficulty generalizing his pragmatic language skills which adversely affects his ability to maintain peer relationships and handle anxious situations without guidance

and assistance. It had always been the goal for him to engage in competitive employment after graduation. Based upon his achievement testing and performance in school, as well as his psychiatrist opinion and special education teachers' opinions, he had the ability to engage in fulltime competitive employment with appropriate transition services. Nobody questioned that Project Search has all of the components that the student needs to gain transition skills necessary to be competitively employed and thus a productive member of society.

Dracut School Committee v Bureau of Special Education, 737 F.Supp. 2d 35 (D.Mass. 2010) and *Pihl v Massachusetts Dept of Education*, 9 F 3d 184, 189 (1st Cir. 1993) recognized that compensatory education is appropriate for a student who has been deprived of FAPE even when the child has graduated or has become otherwise ineligible for IDEA services. Further, the case of *Stock v Massachusetts Hospital School*, 392 Mass 205, 210, n. 8, 467 NE 2d 448, 453, n 8(1994) recognized that it would be “insidious if graduation proceedings were employed as a device to circumvent federal mandate by prematurely terminating special education services.”

Compensatory education is an equitable remedy that must be fashioned to fit each student's individual needs. *CG v Five Town Community School District*, 513 F 3d 279, 290 (1st Cir. 2008) Essentially, compensatory education is a surrogate for the education that a child should have received during the periods in which FAPE was denied. Compensatory services must be “equal in time and scope” with what the student should have received while eligible under IDEA. *Puffer v Reynolds*, 761 F Supp. 838, 853 (D. Mass. 1988).

This is one of the rare cases where the Hearing Officer was provided actual evidence of a program that would be successful for this child as a form of compensatory education. Often that burden is hard to meet. Project Search is a program which all parties acknowledge has been successful in helping student's with similar disabilities as the student at hand to successfully

navigate the transition from work to school. This is accomplished through a fulltime program which runs the entire school day and the entire length of the school year. The program consists of morning classes in general job seeking and retaining services and then the afternoon is spent in three different jobs throughout the school year for a period of ten weeks on each job to give the student actual immersion into a job to determine their abilities to carry that job out and whether they like that job. The program is repetitive in nature with constant input from job coaches on a daily basis helping students stay focused, stay on task, and apply what they have learned in a job setting. Miss ██████ the student's Special Education teacher, acknowledged that because he had been on the regular diploma tract, he did not receive the full value of some of the transition services that are offered to alternative diploma tract students, specifically in the area of community based outings and job shadowing. Everyone agreed that that would be a major benefit to Project Search. As acknowledged by Respondent, the case of *Parents of Student W v Puyallup School District #3*, 31 F 3d 1489, 1497 (9th Cir. 1994) acknowledged "an appropriate award of compensatory education is 'relief designed to ensure that the student is appropriately educated within the meaning of IDEA'". *Board of Educ. of Fayette Cty., Ky. v L.M.*, 478 F 3d 307, 316-17 (6th Cir. 2007) acknowledged that the law favors a flexible approach to fashioning appropriate relief rather than a rote or mechanical approach. Project Search is such a unique experience with a proven history of success locally, nationally and internationally. Based upon the Hearing Officer's and ECAB's findings that appropriate transition services were not provided by the District in this case and finding that Project Search serves all of those needs, it is appropriate to order compensatory education and the ECAB orders that the District offer a fifth year of services to the student as compensatory education with attendance at Project Search during said year. The ECAB believes that the Hearing Officer's recommendation that the matter go back to ARC for referral to this

program is unnecessary given the findings herein, and particularly pertinent to the timing of this Order in relationship to the student's pending graduation in 2020. It would be disingenuous, as suggested by the District, to refer the matter back to the ARC for the ARC to craft a transition service when they had failed to do so previously.

VI. THE STUDENT SHOULD WALK IN GRADUATION WITH HIS PEERS REGARDLESS OF WHEN THE DIPLOMA IS ISSUED

██████████, DoSE of ██████████ County, testified that “[a]ll of our kids walk during the 12th grade, so they can walk with their same age peers, and then if they come back to school, they may do different kinds of jobs, whether it’s Project Search or not.” (TE 305-306). ECAB believes this reflects a norm – students walk in ceremonies with their peers, even if they return for transitional service. In the present case, the student will have earned credits by the end of his 4th year sufficient to entitle him to a diploma but will continue to receive transitional services in 2020-2021. However, it is clear from the record that, until the school changed its position on the issue, the plan always had been for the student to walk with his peer with the diploma deferred to facilitate participation in Project Search during a fifth year.

The student should be allowed to participate in graduation ceremonies with his peers, regardless of when he receives his diploma, or the school is, in effect, forcing the student to choose between Project Search or participating in graduation ceremonies. At a minimum, the school’s position penalizes the student for receiving the individualized transitional services to which he is legally entitled and which the school failed to provide prior to attaining the academic credits necessary for a diploma.

ORDER

The ECAB orders the following relief:

1. The school shall take all necessary steps to ensure that the student is able to participate full-time in Project Search during the 2020-2021 school year.
2. The student shall be permitted to participate in graduation services for the class of 2020, whether or not a diploma has issued at that time.
3. The diploma may be deferred to the extent necessary the relief ordered above.

NOTICE OF APPEAL RIGHTS

This decision is a final, appealable decision. Appeal rights of the parties under 34 CFR 300.516 state: (a) General. Any party aggrieved by the findings and decision made under Sec. 300.507 through 300.513 or Sec. 300.530 through 300.534 who does not have the right to appeal under Sec 300.514(b), and any party aggrieved by the findings and decision under Sec. 300.514(b), has the right to bring a civil action with respect to the due process complaint notice requesting a due process hearing under Sec. 300.507 or Sec. 300.530 through 300.532. The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

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

In addition, 707 KAR 1:340, Section 8. Appeal of Decision provides the following information to aggrieved parties, in subsection (2):

A decision made by the Exceptional Children Appeals Board shall be final unless a party appeals the decision to state circuit court or federal district court.

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

(1) All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not in the enabling statutes, a party may appeal to Franklin Circuit Court of the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the student upon the agency and all parties of the record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

Although Kentucky Administrative Regulations require the taking of an appeal from a due process decision within thirty days of the Hearing Officer's decision, the regulations are silent as to the time for taking an appeal from a state level review.

SO ORDERED this 29th day of April, 2020, by the Exceptional Children's Appeals Board, the panel consisting of Kim Hunt Price, Susan Gormley Tipton and Mike Wilson, Chair.

EXCEPTIONAL CHILDREN APPEALS BOARD

BY: /s/ Mike Wilson
Mike Wilson, Chair

CERTIFICATION:

The original of the foregoing was served on KDE and the parties by email this 29th day
of April, 2020 to:

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