

**KENTUCKY DEPARTMENT OF EDUCATION
DIVISION OF LEARNING SERVICES
AGENCY CASE NO. 2122-14**

[REDACTED] PETITIONER

v.

[REDACTED] PUBLIC SCHOOLS RESPONDENT

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND FINAL ORDER**

BACKGROUND

On December 9, 2021, Petitioner’s [REDACTED], filed a Request for a Due Process Hearing pursuant to the Individuals with Disabilities Education Act, (“IDEA”) and 707 KAR 1:340 with the Kentucky Department of Education (KDE) concerning [REDACTED], [REDACTED] (“Petitioner” or “Student”). An administrative hearing was conducted in [REDACTED], Kentucky, from June 13 – 17, 2022. The parties were present in [REDACTED]; the undersigned participated by Zoom as agreed by the parties. After the hearing, Petitioner filed an Initial Brief, followed by Respondent filing a Reply Brief and Petitioner filing another Brief.

Petitioner’s [REDACTED], represented Petitioner during the hearing. The Honorable [REDACTED] represented Respondent [REDACTED] Public Schools (“Respondent” or “School District”). Director of Special Education [REDACTED] was present

as Respondent's representative throughout the hearing. The undersigned was assigned as the Hearing Officer.

During the course of the proceeding, various witnesses testified and a number of exhibits were entered into the record. The hearing was conducted pursuant to 34 CFR Part 300, KRS 13B and 707 KAR 1:340.

ISSUES, FINDINGS AND CONCLUSIONS OF LAW

Petitioner alleges Respondent denied [REDACTED] a free appropriate public education ("FAPE") for the years 2018-2019, 2019-2020 and 2020-2021. The issues to be decided are as follows:

1. Whether Respondent developed appropriate Individual Education Plans ("IEP").

The undersigned finds Respondent developed appropriate IEPs.

2. Whether Respondent appropriately implemented Petitioner's IEPs. The undersigned finds Respondent appropriately implemented Petitioner's IEPs with the exception of when it cancelled and did not reschedule ten [REDACTED] sessions with Petitioner. However, following an investigation by the Kentucky Department of Education, Division of IDEA Monitoring and Results ("DIMR"), which occurred before this hearing, Respondent made up the 10 cancelled sessions by paying a tutor in [REDACTED], Petitioner's new home state. Respondent's Ex. 282; T.T. pp. 797-99. Also, Respondent provided an additional 450 minutes of compensatory education to Petitioner, and arranged for additional training of its teachers and staff for this and other violations found by DIMR. T.T. pp. 797-99.

3. Whether Respondent allowed Petitioner's parent(s) to meaningfully participate in ARC meetings. The undersigned finds Petitioner's parent(s) were allowed to meaningfully participate in all meetings.

4. Whether Respondent provided timely notices, accurate documentation, daily reports, report cards, progress reports, ARC summaries, and assessments to Petitioner's parent(s). The undersigned finds Respondent provided timely notices and documentation to Petitioner's parent(s) as required.

5. Whether Respondent considered independent evaluations when developing Petitioner's IEPs. The undersigned finds Respondent considered independent evaluations when developing Petitioner's IEPs.

6. Whether Petitioner made reasonable progress toward the goals in ■■■ IEPs. The undersigned finds Petitioner made reasonable progress toward all goals in ■■■ IEPs.

7. Whether Respondent appropriately implemented Petitioner's behavioral intervention plan ("BIP"). The undersigned finds Respondent appropriately implemented Petitioner's BIP.

8. Whether Respondent provided the least restrictive environment ("LRE"). The undersigned finds Respondent provided the LRE.

9. Whether Respondent complied with the terms of the mediation agreement. The undersigned finds Respondent complied with the terms of the mediation agreement.

10. Whether Respondent failed to provide FAPE when it did not collect behavioral data during an eight-week period in 2020. The undersigned finds Respondent did not fail to provide FAPE when it did not collect behavioral data during an eight-week period in 2020. Pursuant to the mediation agreement, Respondent agreed to collect 8 weeks of behavioral data in 2020. Respondent's Ex. 95. However, Petitioner did not return to in-person school, but instead participated in ■■■ thereby making it impossible for Respondent to collect **behavioral** data. T.T. pp. 517-19.

11. Whether Respondent verbally and physically abused Petitioner, and refused to allow [REDACTED] to eat lunch brought from home. Respondent objected to raising these issues at trial on the grounds that Petitioner did not allege them in the Request for a Due Process Hearing. The undersigned allowed Petitioner to testify about these issues so there would be a complete record, but Respondent's objection was preserved. **Respondent's objection is sustained** and Petitioner is precluded from raising these issues at trial. As an alternate ruling, the undersigned finds there was no credible evidence showing Respondent ever verbally or physically abused Petitioner.

12. Whether Respondent restrained and secluded Petitioner. Respondent objected to raising this issue at trial on the grounds that Petitioner did not allege it in the Request for a Due Process Hearing. **Respondent's objection is overruled** as further discussed. The undersigned finds there was no credible evidence showing Respondent ever restrained or secluded Petitioner.

13. Whether Petitioner was denied FAPE.

Petitioner alleges that because of Respondent's actions, and/or failures to act, [REDACTED] was denied FAPE, [REDACTED] did not make meaningful progress at school and the three years [REDACTED] attended the School District were lost. Petitioner alleges [REDACTED] suffered physically, emotionally and academically because of the harm done to [REDACTED] by Respondent. Petitioner asks that Respondent be ordered to pay for compensatory services to be provided by a tutor of [REDACTED] choice.

The undersigned finds Respondent provided FAPE to Petitioner except when it cancelled, and did not make up, ten [REDACTED] sessions. Respondent appropriately developed and implemented IEPs, and Petitioner progressed. Respondent tried to make sure [REDACTED] understood the discussions that took place during the ARC meetings. It brought in a projector so [REDACTED] could see in real time what was being written in the summaries. T.T. p.707. The ARC meetings lasted an extraordinarily long time, 3 and 1/2 hours in one instance, to ensure

██████████ understood and meaningfully participated in developing appropriate IEPs for Petitioner. Respondent's Ex. 24.

Petitioner's allegations, except the recent ones regarding abuse, were considered and dealt with by the Kentucky Department of Education, Division of IDEA Monitoring and Results ("DIMR"). After its investigation, DIMR issued a Report of Findings dated May 21, 2021. Respondent's Ex. 282. Because Respondent cancelled 10 sessions and did not reschedule them, and because of other issues discussed in the report and herein, the DIMR developed a Corrective Action Plan ("CAP") for Respondent. The CAP required Respondent to provide Petitioner with 10 sessions and 450 minutes of additional compensatory education. Also, Respondent was required to provide training to all of Petitioner's teachers from the 2020-2021 school year and all staff who attended ARC meetings for Petitioner during that year. *Id.* The training consisted of IEP and mediation agreement implementation, and meaningful parent participation, including best practices for when interpreters are disconnected from meetings. The training was required to be conducted by a KDE-approved trainer. *Id.* at 26-27. Respondent provided the 10 makeup sessions and the 450 minutes to Petitioner by paying a tutor in ██████████ as Petitioner had already moved out of Kentucky. T.T. pp. 797-99. Respondent arranged for the training of its teachers and staff by the deadlines ordered by the DIMR. *Id.*

The undersigned notes the investigation appears to have been thorough and the conclusions well-reasoned. However, additional facts were presented at the four and one-half day trial the DIMR did not have. For example, the DIMR emphasized Respondent violated FAPE when it did not permit ██████████ to record ARC meetings and this prevented ██████ from being able to meaningfully participate. Respondent's Ex. 95, pp. 22, 24. But, the DIMR did not know ██████████ secretly recorded ARC meetings despite being told that was not allowed. See

Petitioner's recordings of ARC meetings. Respondent should not be punished for not allowing [REDACTED] to record meetings when [REDACTED] actually did record them.

After hearing testimony and reviewing the exhibits, the undersigned finds the corrective action ordered by the DIMR is reasonable, except the undersigned would reduce the additional compensatory minutes from 450 to 100 minutes based on additional evidence introduced at trial. However, as Respondent has already provided 450 compensatory minutes to Petitioner, that point is moot.

The undersigned finds and hereby orders that the 10 makeup sessions and 450 compensatory minutes Respondent provided to Petitioner pursuant to the DIMR's Report of Findings fully compensate Petitioner for the violations Respondent committed. Respondent is not required to provide additional compensation to Petitioner.

LAW

PETITIONER BEARS THE BURDEN OF PROOF

The party seeking relief bears the burden of proving their entitlement to relief by a preponderance of the evidence. In this case, the student bears the ultimate burden of persuasion on the elements of the student's claims. *Schaffer v. Weast*, 546 U.S. 49, 57-58 (2005); KRS 13B.090. *See also, City of Louisville, Div. of Fire v. Fire Serv. Managers Ass'n by and Through Kaelin*, 212 S.W.3d 89, 95 (Ky. 2006) providing, "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".

IEPS

Under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. a school which receives federal funding must provide students who qualify a Free and Appropriate Public Education, or FAPE. A FAPE includes both “special education” and “related services.”

§1401(9). “Special education” is “specially designed instruction . . . to meet the unique needs of a child with a disability”; “related services” are the support services “required to assist a child . . . to benefit from” that instruction. §§1401(26), (29). See also *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386 at 391 ; 137 S. Ct. 988 at 994; 197 L. Ed. 2d 335 at 344 (2017). A school district covered by the IDEA must provide a disabled child with special education and related services “in conformity with the [child’s] individualized education program,” or IEP. §1401(9)(D).

“The IEP is “the centerpiece of the statute’s education delivery system for disabled children.” *Andrew F.*, quoting *Honig v. Doe*, 484 U. S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988). An IEP must include “a statement of the child’s present levels of academic achievement and functional performance,” describe “how the child’s disability affects the child’s involvement and progress in the general education curriculum,” and set out “measurable annual goals, including academic and functional goals,” along with a “description of how the child’s progress toward meeting” those goals will be gauged. §§1414(d)(1)(A)(i)(I)-(III). The IEP must also describe the “special education and related services . . . that will be provided” so that the child may “advance appropriately toward attaining the annual goals” and, when possible, “be involved in and make progress in the general education curriculum.” §1414(d)(1)(A)(i)(IV).

School districts have a duty to provide FAPE to all children with disabilities in their districts. 20 U.S.C. section 1412, 707 KAR 1:290. “FAPE” is defined to mean special education and related services that:

- (a) are provided at public expense, under public supervision and direction, and without charge;
- (b) meet the standards of the Kentucky Department of Education included in 707 KAR Chapter 1 and the Program of Studies, 704 KAR 3:303, as appropriate;
- (c) include preschool, elementary school or secondary school education in the state; and
- (d) are provided in conformity with an individual education program (IEP) that meets the requirements of 707 KAR 1:320.

707 KAR 1:002(27).

In implementing IEPs, Kentucky school districts are required to make “a good faith effort to assist the child in achieving the goals, objectives, or benchmarks listed in the IEP.” 707 KAR 1:320, Section 9(1). A party challenging the implementation of an IEP must show more than a de minimis failure to implement the IEP; it must demonstrate that the district failed to implement substantial or significant provisions of the IEP. *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

Endrew F ex rel Joseph F v. Douglas Cty. Sch. Dist., 137 S. Ct. 988 (2017) concluded that an IEP has to be “reasonably calculated to enable a student to make some progress. *Id.* at 1,342. The *Endrew* case further focused on the district’s inability to address Endrews’ behavioral needs as evidenced by “the district’s lack of success in providing a program that would address the Petitioner’s maladaptive behaviors.” *Id.* at 1,184. The court correctly noted that when a district is unable to appropriately address a student’s behavior, their behavior “. . . in

turn, negatively impacts his ability to make progress on his educational and functional goals, [that] also cuts against the reasonableness of the ... IEP.” *Id.* (citing *Paris School District v. A.H. by and through Harter*, 217 WL 1234151 (WD Ark, April 3, 2017), an unpublished opinion.

School officials are not required to “maximize” the potential of the disabled student. *Board of Educ. v. Rowley*, 458 U.S. 176 (1982). “To provide FAPE, schools must develop, review, and be prepared to revise an IEP for each student...’The IEP must (1) comply with the procedures set forth in the IDEA and (2) be ‘reasonable calculated to enable the [student] to receive educational benefits.’” *Somber v. Utica Comm. Schs.*, 908 F.3d 162 (6th Cir. 2018) (internal citations omitted). To be reasonably calculated to enable the student to receive education benefits, the IEP must include, among other things, measurable annual goals and a description of how the progress will be measured. *Id.*

20 U.S.C. 1414(c)(1) provides that when determining eligibility an IEP team must (A) review existing evaluation data on the child, including—

- (i) evaluations and information provided by the parents of the child;
- (ii) current classroom-based, local, or State assessments, and classroom-based observations; and
- (iii) observations by teachers and related services providers

LEAST RESTRICTIVE ENVIRONMENT

The IDEA requires that, “to the maximum extent appropriate,” children with disabilities be educated with children who are nondisabled and that children are removed from the regular educational environment only if the nature and severity of the disability is such that education in

regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR 300.114(a)(2). The pertinent Kentucky regulation, 707 KAR 1:350, essentially mirrors the federal regulation. This least restrictive environment (LRE) mandate balances the goal of mainstreaming with nondisabled peers with the equally important objective of providing an education appropriately tailored to each student's particular needs. *P. v. Newington Board of Education*, 546 F.3d 111 (2d Cir. 2008).

DISCIPLINE OF STUDENTS WITH A DISABILITY

School district may discipline disabled students for misconduct, including violation of student codes of conduct. 34 CFR 300.17; 34 CFR 104.33(a); and 34 CFR 300.530(b). School districts may suspend students for misconduct related to the student's disability up to 10 days for misconduct related to the student's disability. 34 CFR 300.530(b); 34 CFR 300.536. Students with disabilities who are suspended 10 days or less are not entitled to any additional due process rights under the IDEA. OSEP Memorandum 95-16, 22 IDELR 541 (OSEP 1995).

PROCEDURAL DEFICITS

To find FAPE was not provided because of Respondent's procedural deficits, Petitioner must show there was substantial harm to ■■■ or ■■■ parents. Substantial harm has been interpreted to mean procedural violations which "seriously infringe" on the parent's opportunity to participate in the development of a child's IEP. *N.L. v. Knox County Schs*, 315 F.3d 688 (6th Cir. 2003). See also *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 764 (6th Cir. 2001).

In determining if procedural violation substantially infringes on a parent's opportunity to participate, courts have considered whether a parent fully participates in the IEP team meetings, whether they are an active participant in the determination of a child's eligibility, whether they

had the opportunity to express their views to school staff outside of meetings via letter, telephone calls or other means. *N.L. v. Knox County Schs*, 315 F.3d 688 (6th Cir. 2003); *Burilovich v. Board of Educ.*, 208 F.3d 560 (6th Cir. 2000); *Kings Local Sch. Dist. v. Zelazny*, 325 F.3d 724 , (6th Cir. 2003).

ISSUES ARE LIMITED TO THE DUE PROCESS COMPLAINT

The issues in due process hearings are limited to the issues raised in the complaint. 34 CFR 300.511 provides, in relevant part, as follows:

(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.

KENTUCKY REGULATIONS

707 KAR 1:340, Section 2 (8). If the parent obtains an independent educational evaluation at public or private expense and it meets the agency criteria, results of the evaluation shall be considered by the LEA in any decision made with respect to the provision of a free, appropriate public education (FAPE) to the child.

707 KAR 1:320, Section 1 (1), An LEA shall ensure an IEP is developed and implemented for each child with a disability served by that LEA, and for each child with a disability placed in or referred to a private school or facility by the LEA.

707 KAR 1:320, Section 5 (13) (b), An IEP shall include a statement of: When periodic reports on the progress the child is making toward meeting the annual goals, (which may include the use of quarterly or other periodic reports concurrent with the issuance of report cards) will be provided.

707 KAR 1:320, Section 4 (1), An LEA shall ensure that one (1) or both of the parents of a child with a disability are present at each ARC meeting or are afforded the opportunity to participate. Except for meetings concerning a disciplinary change in placement or a safety issue, an LEA shall provide written notice to the parents of a child with a disability at least seven (7) days before an ARC meeting.

ADDITIONAL FACTS, DISCUSSION AND CONCLUSIONS OF LAW

Petitioner was born [REDACTED], and is currently age [REDACTED]. T.T. p. 33. Respondent found Petitioner eligible for special education services because of autism and a speech language impairment. Respondent's Ex. 28. Petitioner attended the School District during the [REDACTED], [REDACTED] and [REDACTED] grades (2018-2019, 2019-2020 and 2020-2021 - the years at issue). *Id.* Before attending Respondent, Petitioner attended the [REDACTED], Kentucky. *Id.*

On March 3, 2020, [REDACTED] withdrew Petitioner for the remainder of the 2019-2020 school year to home school [REDACTED]. T.T. p. 778; Respondent's Ex. 95 p. 2. On September 7, 2020, Petitioner enrolled in Respondent's [REDACTED]. T.T. p. 785. Petitioner withdrew from the School District in April 2021.

There are various allegations concerning 2018-2019, 2019-2020 and 2020-2021. Some of the allegations are addressed during different meetings and at different times. The following sections will reference which issues are discussed therein.

ISSUE 1 - DEVELOP IEP'S (Prior IEP)

Petitioner attended [REDACTED] prior to enrolling at Respondent; the [REDACTED] IEP is dated May 24, 2018. Pursuant to this IEP, [REDACTED] was placed in a full-time self-contained classroom except for lunch and special activities. Respondent's Ex. 66, p. 1. [REDACTED] also received 120 minutes per month of speech and language services in the self-contained classroom and 60 minutes per month of occupational therapy from [REDACTED] teacher in the classroom. *Id.* at 1-2. For 15 minutes each month, an occupational therapist and a teacher worked with Petitioner in the self-contained classroom. *Id.* at 1. Petitioner was placed in alternate assessment pursuant to [REDACTED] IEP. *Id.* at 3. Under said IEP, [REDACTED] was determined to be ineligible for extended year services. *Id.* at 4. While [REDACTED] was a student at [REDACTED], the educators documented problematic behaviors of tagging and aggression/spitting. T.T. p. 200.

At the beginning of the 2018-2019 school year, Petitioner was enrolled in Respondent's [REDACTED] Elementary School in [REDACTED], Kentucky. Because Petitioner was transferring from another school, [REDACTED] was re-evaluated to determine if [REDACTED] was eligible for special education services under the standards applicable in Kentucky. T.T. pp. 770-72.

ISSUE 1 - DEVELOP IEP'S (Alleged Use Of Another Student's Information)

Petitioner alleges Respondent used the information of a different student to develop Petitioner's December 3, 2018, IEP. This allegation is not supported by the record. Respondent typed the wrong name (" [REDACTED] ") at the bottom of the first page of the

October 31, 2018, report. Respondent's Ex. 135. However, the rest of the report relates to Petitioner and contains the same information discussed at the December 3, 2018, meeting. The report clearly pertains to Petitioner and not to another student. The IEP developed at the December 3, 2018, meeting was based solely on Petitioner's evaluations.

ISSUE 1 - DEVELOP IEP'S (Clear Goals)

Petitioner alleged the December 3, 2018, IEP did not have clear annual goals. This allegation is not supported by the record. The IEP lists six annual goals, each of which contains sub goals or objectives. Respondent's Ex. 63, pp. 3-6. Petitioner alleged the present levels were vague and inaccurate. The present levels were not vague as they detailed ten areas of Petitioner's communication/speech levels. Also, the present levels were accurate. At this time, Petitioner referred to everyone as "he". Petitioner argued the goals were not effectively written, but did not present evidence to support this allegation.

ISSUE 1 - DEVELOP IEP'S (Alternate Assessment)

Petitioner alleges Respondent did not provide information about alternative assessment to [REDACTED] for the 2018-2019 school year. The record does not support this allegation. The conference summary notes of the December 13, 2018, meeting state the parent guide for alternate assessment was provided to the parents before the ARC meeting. Also, Respondent explained alternative assessment to the parents during the meeting. Respondent's Ex. 28, p. 7. At the request of [REDACTED], Petitioner was taken off alternative assessment for the 2019-2020 school year.

ISSUE 1 - DEVELOP IEP'S (One-On-One Assistant)

Petitioner alleges Respondent should have provided a dedicated one-on-one assistant for [REDACTED]. Respondent agrees Petitioner needed individual attention to help stay on task, but relying on its teachers' and professionals' opinions, disagrees as how best to accomplish that.

Special education teacher [REDACTED] and district special education teacher consultant [REDACTED] stated Petitioner's setting was a low adult-student ratio of 3 adults with 7 students, and during much of the day [REDACTED] received one-on-one instruction. Respondent's Ex. 24.

[REDACTED] explained research generally opposes the use of a dedicated one-on-one assistant because it creates dependence and issues associated with that. *Id.* [REDACTED] said, "We want to make sure that the students with the highest need for support are not the responsibility of staff members with the least degree of professional training." *Id.*

[REDACTED] testified a one-on-one assistant would be needed if special skills are required to keep a student safe, including feeding and monitoring the student for health issues.

T.T. p. 455. Continuing, [REDACTED] said, ". . . literature says that having a one-on-one assistant is putting the student with the most intensive needs with the person who has the least amount of education. And, I don't mean that in any way to devalue a paraprofessional's role. But, it often interferes with peer relationships because there is an adult velcroed to the child. It can create prompt dependency." *Id.* at 458. [REDACTED] testified there are different levels of support Respondent can give. Providing a one-on-one adult is the most restrictive option. Respondent must use the least restrictive option that meets the student's needs. *Id.* at 460. Someone was always with Petitioner to help [REDACTED], but it was not always the same person. T.T. p. 102.

[REDACTED] stated the one-on-one assistance to Petitioner should be provided by an entire team, not by just one person. That was the best practice for Petitioner. T.T. pp. 574-75.

██████████ professional opinion is based on █████ education, training and experience as a teacher and administrator. *Id.* at 455. Petitioner did not receive one-on-one assistance at the █████ school district █████ transferred to for almost a year. Petitioner’s Ex. 10 21 2021 – 10 20-2022 at 34-35.

██████████ testified that placing the student with one person creates a dependency on that person. It places the student with the most intensive needs with someone with the least education, and it interferes with the development of peer relationships. T.T. pp. 458-59.

██████████, Petitioner’s special education teacher at Respondent testified Petitioner always had someone with █████; it just was not always the same person. T.T. p. 102. █████

██████████ testified, “My recommendation has never been that Petitioner did or didn't need one-on-one assistance in particular areas. My recommendation was that it being provided by one person and not implemented by an entire team, that that was contrary to best practice. And, I cannot in good conscience agree with a recommendation that is contrary to best practice.”

T.T. pp. 574-75.

ISSUE 1 - DEVELOP IEP’S (Interpreter)

██████████ alleges █████ was denied an interpreter at the December 3, 2018, ARC meeting. This allegation is not supported by the record. █████ signed a notice for the December 3, 2018, meeting which contained a box to check if █████ needed an interpreter. Respondent’s Ex. 30. █████ did not check the box to indicate █████ wanted an interpreter. Respondent was not required to furnish an interpreter as Petitioner did not request one.

██████████ also signed two notices for the September 9, 2019, ARC meeting, and did not check the box requesting an interpreter. █████ speaks very good English as demonstrated

by [REDACTED] testimony at trial. Nevertheless, the undersigned is convinced that if [REDACTED] had requested an interpreter, Respondent would have furnished one.

ISSUE 1 - DEVELOP IEP'S (11 Month IEP)

Petitioner states Respondent formulated an IEP for only eleven months. However, the record does not show Petitioner was harmed by this. ARC meetings were held on May 3, 2019, and November 18, 2019, during which new IEPs were developed for Petitioner. Respondent's Exs. 24, 27, 50. Consequently, there was no time during which Petitioner did not have an IEP. "Only if a procedural violation has resulted in substantive harm, and thus constitutes a denial of a FAPE, may relief be granted." *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 854 (6th Cir. 2004). Petitioner was not harmed by the 11 month IEP.

ISSUE 1 - DEVELOP IEP'S (September 11, 2020, ARC Meeting)

On September 11, 2020, an ARC meeting was held at [REDACTED] Elementary School with virtual participation by [REDACTED] and other attendees. Respondent's Ex. 8. During this ARC meeting, the ARC reviewed the Independent Educational Evaluation Dr. [REDACTED] prepared. Respondent's Ex. 8, p. 3. [REDACTED] asked about independent speech and OT evaluations. *Id.* [REDACTED] stated the pandemic made it difficult to find willing evaluators, but Respondent was still looking. *Id.* [REDACTED] offered to explain the procedural rights, but [REDACTED] requested that wait until the end of the meeting. *Id.*

[REDACTED] asked questions about the [REDACTED]. [REDACTED] expressed concerns about whether Respondent's administrators, faculty and staff had been trained regarding Petitioner's BIP.

██████████ stated they were trained and ██████ reminded ██████ about an email from ██████ ██████, a Special Education Teacher for Respondent, regarding training. *Id.* ██████ trained the faculty and staff about Petitioner's BIP and IEP at Respondent during the summer of 2020. T.T. pp. 496-97. ██████ also trained bus personnel regarding proper procedures. *Id.* at 504-05.

During the meeting, ██████ reported Petitioner's progress before ██████ withdrew from in-person school on March 3, 2020, for home schooling. Respondent's Ex. 8, p. 4. The ARC reviewed the speech language evaluation prepared by ██████ Therapy Services dated December 9, 2019. *Id.* at 5.

The ARC amended Petitioner's IEP to reflect ██████ was receiving ██████ instruction. ██████ informed ██████ that if Petitioner returned to school in-person, ██████ IEP would be amended again. *Id.* at 6. The ARC decided special education minutes would be provided through one-on-one virtual instruction from a teacher, instead of in the resource classroom environment. The ARC decided Petitioner would receive 225 minutes per week of one-on-one services from a special education teacher. T.T. p. 787.

After reviewing the speech language data, ██████ recommended Petitioner receive 30 minutes of one-on-one virtual speech services each week. ██████ requested more speech minutes for Petitioner. Respondent's Ex. 8, p. 7. The ARC decided to provide two one-on-one thirty-minute speech language sessions each week, which increased Petitioner's speech minutes an additional 40 minutes a month. This was twice the number of speech minutes Petitioner received while attending ██████, ██████ previous school. *Id.* The ARC determined these sessions would be provided one-on-one in-person in its resource room by a SLP. T.T. pp. 789-90. The ARC decided Petitioner would receive 225 minutes one-on-one

special services from a special education teacher each week. Respondent's Ex. 8, p. 8. The conference summary was read aloud at the end of the meeting. *Id.* at 9.

ISSUE 1 - DEVELOP IEP'S (One-On-One Services, Math Goal)

On September 30, 2020, the ARC amended Petitioner's IEP. The amended IEP added one-on-one in-person special education services and transportation services twice a week. Respondent's Exs. 131, 160.

Between fall break and Thanksgiving 2020, Petitioner attended twelve 45-minute in-person sessions with Special Education Teacher [REDACTED] to work on specific IEP goals. T.T. pp. 340-42. The math goal was challenging for Petitioner, but [REDACTED] could do it if it was broken down. *Id.* at 341. In November 2020, [REDACTED] math goal was changed because multiplication was too difficult. *Id.* at 343-44.

ISSUE 1 - DEVELOP IEP'S (Observations); ISSUE 2 – IMPLEMENT IEP'S (Occupational Therapy Services)

Petitioner alleges [REDACTED] method of evaluation regarding occupational therapy services for the 2018-2019 school year was inappropriate. This allegation is not supported by the record. The evaluation was done as part of determining Petitioner's eligibility for special education. Respondent's Exs. 80, 82, 223.

20 U.S.C. 1414(c)(1) provides that when determining eligibility an IEP team must (A) review existing evaluation data on the child, including—

- (i) evaluations and information provided by the parents of the child;

(ii) current classroom-based, local, or State assessments, and classroom-based observations; and

(iii) observations by teachers and related services providers

The ARC is required to consider “classroom-based observations” and “observations by teachers and related services providers”. Therefore, it was appropriate for [REDACTED] to observe Petitioner in the classroom and report [REDACTED] observations to the ARC for its consideration when determining Petitioner’s eligibility for services.

Petitioner alleges [REDACTED] did not receive individual attention. This allegation is not supported by the record. Respondent’s employees in the MSD room worked individually with Petitioner. T.T. p. 102.

Petitioner alleges the IEPs did not give [REDACTED] any occupational therapy for the 2018-2019 and 2019-2020 school years. This allegation is not supported by the record. The ARC determined Petitioner did not need direct occupational therapy. Instead, Respondent’s teachers provided occupational therapy services indirectly to Petitioner. This was the same approach used by [REDACTED] in its IEP for Petitioner. [REDACTED] advised the teacher about Petitioner’s occupational needs and the teacher implemented them. Respondent’s Ex. 28, p. 8. Respondent provided specialized instruction best designed for Petitioner.

ISSUE 1 - DEVELOP IEP’S; ISSUE 3 - MEANINGFULL PARTICIPATION;

ISSUE 8 – LEAST RESTRICTIVE ENVIRONMENT

An ARC meeting was held December 13, 2019, to decide how best to transition Petitioner into special education resource time (a lesser restrictive setting than the self-contained MSD classroom) with supervision. Respondent’s Ex. 17. Respondent provided a Spanish

translator for [REDACTED]. *Id.* at 3. [REDACTED] speaks excellent English, but Spanish is [REDACTED] native language. Procedural safeguards were explained to [REDACTED] and provided to [REDACTED] in Spanish and English. *Id.* [REDACTED] reported Petitioner could read fourth grade passages but struggled with wh- questions, and [REDACTED] had difficulty answering main idea questions. *Id.* at 4.

After discussing Petitioner's speech progress, Assistant Principal [REDACTED] suggested the ARC consider increasing Petitioner's speech minutes with part of [REDACTED] time spent in the MSD self-contained special education classroom and part of the time in a one-on-one resource setting. After a discussion with significant input from [REDACTED], the ARC increased Petitioner's speech to 30 minutes four times a month one-on-one in the resource room and 20 minutes in the MSD classroom 4 times a month, which was 80 more minutes than the [REDACTED] IEP provided. [REDACTED] agreed to this schedule. *Id.* at 9-10; Respondent's Ex. 41, p. 11.

On November 18, 2019, the ARC decided to gradually increase the amount of Petitioner's resource classroom (not general education) time with regular education students accompanied by an instructional aid. *Id.* at 4. Although the amount of resource room time was scheduled to incrementally increase, Petitioner would still be in full time special education. This plan gave Petitioner more exposure to higher functioning peers than [REDACTED] had in the MSD classroom. T.T. p. 110; T.T. pp. 774-76.

The ARC discussed Petitioner's reading and social levels. The ARC made amendments to address concerns [REDACTED] raised during the meeting. Respondent's Ex. 17, pp. 6-7. The ARC, [REDACTED] and [REDACTED] (private retained ABA therapist) engaged in an in-depth discussion about Petitioner's current speech level and speech goals. *Id.* at 7-8.

The ARC discussed gradually reducing the instructional aid in the resource setting with the goal of eliminating the need for an aid. *Id.* at 10. The transition plan would incrementally

change the location of [REDACTED] special education service minutes from MSD to the resource setting, but it would not reduce Petitioner's special education service minutes. *Id.* [REDACTED] agreed with this transition plan. *Id.* The ARC decided to review the transition plan in March 2020 to see how it was working. *Id.* The ARC added a social goal to the IEP at [REDACTED] request. *Id.*

On December 13, 2019, the ARC adopted an amended IEP. Respondent's Ex. 185. It provided a transition schedule to incrementally transition the location of the special education minutes from the MSD to the special education resource setting. The transition schedule did not reduce the special education minutes; it simply changed the location. *Id.* at 11.

Petitioner alleges the December 13, 2019, IEP did not address annual measurable goals. However, the IEP lists 6 annual measurable goals and their benchmarks beginning at page 4. The undersigned finds the IEP contained all the required information. Respondent's Ex. 41, p. 4.

ISSUE 1 – DEVELOP IEP'S; ISSUE 2 – IMPLEMENT IEP'S; ISSUE 6 - PROGRESS

After Petitioner was tested and evaluated, [REDACTED] wrote goals for the new IEP at [REDACTED] with annual goals in December 2018 and 2019. T.T. pp. 74-75. [REDACTED] testified Petitioner generally met [REDACTED] goals under the [REDACTED] IEP. *Id.* at 72. [REDACTED] said Petitioner progressed on all [REDACTED] IEP goals for the two years [REDACTED] was [REDACTED] student, although not always to mastery. *Id.* at 80.

At the November 18, 2019, ARC meeting, [REDACTED] updated the committee regarding Petitioner's progress on [REDACTED] IEP goals. Respondent's Ex. 20. [REDACTED] reported Petitioner made progress on [REDACTED] behavior goal and progress telling time to the minute. Petitioner mastered [REDACTED] reading goal and made steady, consistent progress in writing. [REDACTED] reported Petitioner is

good at math, but [REDACTED] behavior interferes with [REDACTED] progress. Respondent's Ex. 61. [REDACTED], SLP, stated Petitioner progressed on [REDACTED] speech and language goals, but [REDACTED] behavior issues caused the progress to appear inconsistent. *Id.* at 4; Respondent's Ex. 62.

The IEP dated December 3, 2018, provided six annual goals with each annual goal having multiple short-term benchmarks. Respondent's Ex. 53, pp. 3-6. The IEP provided Petitioner would be on alternate assessment which was similar to the [REDACTED] IEP. *Id.* at 7. As in the latest [REDACTED] IEP, Petitioner's primary classroom setting was "Regular school, self-contained special education classroom, some special inclusion (art, music, PE) but return to their special education class for most of the day." *Id.* at 11, 12. Similar to the latest [REDACTED] IEP, the occupational therapist would provide the special education teacher with monthly consultation for supports as needed. *Id.* at 12. The IEP provided for special education service minutes of 335 per day or 1,675 per week, which was an increase of 325 special education service minutes per week over the latest [REDACTED] IEP. *Id.* The IEP provided for monthly speech language service minutes of 80 per month (20 minutes per week) in a special classroom, which was a reduction of 40 minutes per month from the latest [REDACTED] IEP. *Id.* at 13; T.T. p.195.

From November 2019 until [REDACTED] withdrawal from Respondent for home schooling on March 3, 2020, Petitioner progressed on [REDACTED] annual speech goal. Ex. 13; T.T. pp. 793-94. Special Education Teacher [REDACTED] testified Petitioner progressed after [REDACTED] enrolled in [REDACTED] from September 2020 through [REDACTED] withdrawal from Respondent in April 2021. T.T. pp. 733-42; Respondent's Ex. 37. [REDACTED] stated [REDACTED] made good progress on [REDACTED] writing goals, meeting objectives toward [REDACTED] annual goal. T.T. pp. 733-34. [REDACTED] also stated Petitioner made good progress on [REDACTED] reading comprehension goals, but noted [REDACTED] behavior sometimes

interfered with progress. *Id.* at 734-35. ■ testified they generally worked on one objective at a time and that some graphs show no data in the objectives not started. *Id.* at 736. ■ also testified Petitioner mastered the first objective of ■ math calculation goal. *Id.* at 736-37. ■ said Petitioner progressed on ■ adaptive goals, but ■ behavior could be an impediment at times. *Id.* at 739-40, 742. ■ further testified Petitioner's behavior improved. *Id.* at 743. ■ stated Petitioner steadily progressed toward ■ behavior goals. *Id.* at 744. Also, ■ testified Petitioner progressed in ■ math goals since the December 2019 IEP. *Id.* at 745-46. The new IEP modified Petitioner's goals to align better with online instruction. *Id.* at 746-50. ■ further testified Petitioner progressed with ■ writing goals with both the 2019 and 2020 IEPs. *Id.* at 751.

From December 4, 2020, through April 16, 2021, Petitioner made significant progress in ■ annual reading comprehension IEP goal from the November 2020 IEP. The goal was to be met by November 2021. Respondent's Ex. 37, p. 9. Petitioner met the first objective. T.T. p. 791. The second reading objective had not started. *Id.* at 25; Ex. 37, p. 10. During the same period, Petitioner progressed on ■ annual math goal, showing significant progress on the first two objectives. The goal was to be met by November 2021. Ex. 37, p. 11; T.T. p. 791. The progress data shows ■ made reasonable progress in all areas during the time ■ attended Respondent. T.T. pp. 794-96.

ISSUE 1 - DEVELOP IEP'S (September 11, 2018, ARC Meeting);

ISSUE 3 – MEANINGFULLY PARTICIPATE

On September 11, 2018, before Petitioner's evaluation was completed, the ARC met to create an IEP that would comply with Kentucky forms. T.T. p. 66; Respondent's Ex. 33.

Procedural safeguards (parental rights) were reviewed verbally at the meeting. [REDACTED] refused to sign the first page of the procedural safeguards the ARC gave [REDACTED]. Respondent's Ex. 33, p. 4. During the meeting, the ARC reviewed records from [REDACTED]. *Id.* [REDACTED], special education teacher, reviewed Petitioner's progress toward the [REDACTED] IEP goals. *Id.* [REDACTED], speech language pathologist, discussed [REDACTED] work with Petitioner regarding the [REDACTED] IEP. *Id.* [REDACTED], Occupational Therapist, presented [REDACTED] observations of Petitioner in the classroom. *Id.* During the meeting, the ARC discussed the plan to evaluate Petitioner. [REDACTED] consented to the evaluation. *Id.* at 5. At [REDACTED] request, the ARC amended the IEP to allow Petitioner to spend recess with [REDACTED] general education peers. *Id.* [REDACTED] and Petitioner's [REDACTED], [REDACTED], signed the conference summary indicating they received a copy and explanation of their procedural safeguards. *Id.* at 6. The [REDACTED] IEP was implemented until the evaluations were completed and a new IEP developed. T.T. p. 65.

ISSUE 1 - DEVELOP IEP'S (December 3, 2018, ARC Meeting);

ISSUE 3 – MEANINGFULLY PARTICIPATE

An ARC meeting was held December 3, 2018, after Petitioner's evaluations were completed. Respondent's Ex. 28. [REDACTED], speech language pathologist ("SLP"), reviewed [REDACTED] evaluation of Petitioner's speech and language needs. Respondent's Ex. 72. [REDACTED] reported that Petitioner had a language disorder with respect to receptive and expressive language skills. [REDACTED] determined Petitioner's fluency and articulation skills were average. *Id.* at 2-3.

██████████, occupational therapist (“OT”), discussed ██████ evaluation of Petitioner. Respondent’s Ex. 223. ██████ concluded Petitioner had difficulty with transitions and classroom expectations, and occasionally required verbal cues and adult initiation. ██████ had difficulty participating in non-preferred tasks. ██████ also determined Petitioner could use technology, could perform most fine motor work tasks and could use the bathroom independently. *Id.* at 1.

At the December 3, 2018, meeting, ██████████, school psychologist, presented ██████ evaluation of Petitioner as part of the Integrated Assessment Report. Respondent’s Ex. 82. ██████████ performed a battery of cognitive function tests and tests to determine autism. Petitioner’s nonverbal intelligence score of 67 and adaptive functioning score of 78 were in the lower extreme and below average range, respectively. The scores were not more than two standard deviations below the average range of 85 - 115. Respondent’s Ex. 82, pp. 7, 8. The ratings indicated a likelihood of autism. *Id.* at 10. ██████████ stated Petitioner was taking ██████████ (a drug used to treat mental mood disorders) in the morning and afternoon. *Id.* at 6.

After the results of the evaluations were presented, the ARC determined Petitioner was eligible for special education services for autism and speech/language impairment. It then discussed a new IEP for Petitioner based on the evaluations and observations. At the request of ██████████, a language annual measurable goal using wh- questions, an annual measurable goal regarding non-preferred tasks and an annual measurable goal for math regarding the value of coins and addition/subtraction were added to the IEP. *Id.* at pp. 6, 7. The ARC approved the IEP, including the goals ██████████ requested to be added. Respondent’s Ex. 53. The ARC determined Petitioner would be placed on alternate assessment which was consistent with the most recent ██████████ IEP. Ex. 28, p. 7. ██████████ signed a statement acknowledging

█ received proper notice, and an explanation and copy of █ procedural safeguards (parental rights). Respondent's Ex. 28, p. 9.

ISSUE 1 - DEVELOP IEP'S (May 3, 2019, ARC Meeting); ISSUE 3 – MEANINGFULLY PARTICIPATE

At █ request, an ARC meeting was held May 3, 2019, which lasted over three and one-half hours. Respondent's Ex. 24. Procedural safeguards were provided and explained.

█ signed the first page of the procedural safeguards. *Id.* at 3. █ inquired about: (1) obtaining a functional behavioral assessment ("FBA") to address behavior difficulties, (2) receiving more detailed daily reports, (3) obtaining a dedicated assistant for Petitioner and (4) removing Petitioner from alternate assessment so █ would be eligible to receive a regular high school diploma. *Id.* at 3-4.

ISSUE 1 - DEVELOP IEP'S (Regular Assessment); ISSUE 3 – MEANINGFULLY PARTICIPATE

Petitioner alleges Respondent violated FAPE because it placed █ on track for a high school diploma. Petitioner's Initial Brief 2019-2020 1.c. The record does not show Respondent violated FAPE in this regard. At the request of █, Respondent scheduled a meeting on May 3, 2019, to address this issue. Respondent's Ex. 25. The ARC decided to consider Petitioner's eligibility for alternative assessment at a later date. Respondent's Ex. 24, pp. 6-7. Petitioner was placed on regular assessment at the ARC meeting on November 18, 2019. Respondent's Ex. 20, p. 9. Respondent considered █ request for regular assessment.

Respondent developed and amended Petitioner's IEP as appropriate based on Petitioner's progress.

ISSUE 1 - DEVELOP IEP'S (February 14, 2020, ARC meeting);

ISSUE 3 – MEANINGFULLY PARTICIPATE; ISSUE 7 – BEHAVIOR IMPROVEMENT PLAN

On January 24, 2020, [REDACTED] met with Superintendent [REDACTED], Director of Special Education [REDACTED] and District Special Education Consultant [REDACTED] to discuss concerns [REDACTED] had with the administration at [REDACTED] Elementary.

Superintendent [REDACTED] offered [REDACTED] the chance to transfer Petitioner to [REDACTED] Elementary School, but [REDACTED] declined the offer and kept Petitioner enrolled at [REDACTED].

On February 14, 2020, an ARC meeting was held at [REDACTED] Elementary at [REDACTED] request to discuss revisions suggested to the BIP by [REDACTED] and others. Respondent's Ex. 10; T.T. pp. 277-81.

Respondent arranged for a translator to be available through the Language Line.

[REDACTED] was upset because the translator was not at the meeting in-person. [REDACTED] was given the option to reschedule the meeting to allow for an in-person translator, but [REDACTED] decided to proceed with the meeting. Respondent's Ex. 10, p. 3. The procedural safeguards were explained to [REDACTED]. [REDACTED] read them and signed the first page of the document. [REDACTED] was accompanied by [REDACTED], Petitioner's ABA therapist. *Id.*

At the February 14, 2020, meeting, [REDACTED] and [REDACTED] stated Petitioner's behavior interfered with [REDACTED] academic and speech progress, and they had been working with Occupational Therapist, [REDACTED], to address this. Respondent's Ex. 10. [REDACTED] discussed

techniques [REDACTED] uses to address behavioral issues. *Id.* [REDACTED] said the [REDACTED] [REDACTED] recently observed Petitioner and provided information to Respondent. *Id.* Petitioner's medical provider attributed the decline of Petitioner's behavior to weaning [REDACTED] off [REDACTED], which was done to address Petitioner's weight loss. [REDACTED] had not previously informed Respondent that Petitioner's medication was being changed. [REDACTED] and [REDACTED] drafted a revised BIP to address Petitioner's issues. T.T. pp. 91-98.

[REDACTED] led the ARC through a discussion of the draft BIP. Respondent's Ex. 10. The ARC discussed in detail Petitioner's likes, dislikes, reinforcers, preferred activities and non-preferred activities. *Id.* There was a lot of discussion about the behaviors the BIP was aimed at improving, including physical aggression and inappropriate language. *Id.* at 6. [REDACTED] noted the correction of other students can be an antecedent to Petitioner's behavioral issues.

[REDACTED] stated Petitioner does not like the word "no." *Id.* [REDACTED] said there had been a recent increase of events where Petitioner threw items or used profanity. *Id.* [REDACTED] stated there had been 5 incidents where Petitioner had been physical with staff since December 2019. *Id.* at 7. The ARC discussed replacement behaviors, the use of breaks and methods to instruct Petitioner. *Id.* at 7-8. The ARC discussed positive behavior strategies such as first-then and zones of regulation. *Id.* at 8-9. [REDACTED] was satisfied with the revised BIP. T.T. p. 278. The ARC approved the amended BIP. Respondent's Ex. 11.

ISSUE 2 – IMPLEMENT IEP'S; ISSUE 3 – MEANINGFULLY PARTICIPATE

Petitioner alleges Respondent failed to implement the IEP and BIP that [REDACTED] schools formulated on May 3, 2018. This allegation is not supported by the record. Respondent was required to evaluate Petitioner to determine eligibility and then formulate an IEP if

appropriate. 707 KAR 1:300 etc.; 20 U.S.C.1414. There was no BIP in place when Petitioner transferred to Respondent. T.T. p. 770. After evaluating Petitioner, Respondent formulated a new IEP to address [REDACTED] behavioral issues. Respondent's Ex. 63. The IEP Respondent formulated, with significant input from [REDACTED], was similar to [REDACTED] IEP. Respondent's Ex. 68.

[REDACTED] alleges when [REDACTED] observed Petitioner at school [REDACTED] did not misbehave, and the teachers were not implementing [REDACTED] IEP. Petitioner argues this shows Respondent denied [REDACTED] FAPE. Petitioner behaving at school when [REDACTED] mother is watching does not prove [REDACTED] behaved when [REDACTED] was not watching [REDACTED]. [REDACTED] testimony that the teachers were not implementing Petitioner's IEP is given little weight considering all the evidence showing the teachers did implement the IEPs.

Petitioner alleges Respondent did not address [REDACTED] parent(s)' concerns at the December 3, 2018, ARC meeting. This allegation is not supported by the record. This was the first meeting to review Petitioner's eligibility for services in Kentucky and to develop a Kentucky IEP. The ARC discussed in great depth the data collected since the September 11, 2018, meeting and determined Petitioner was eligible for services for autism, and for expressive and receptive communication issues. Respondent's Ex. 28. The ARC then discussed annual goals. [REDACTED] inquired about Petitioner's communication goals. After a discussion with [REDACTED], the ARC added a goal regarding comprehension of "wh questions".
Id.

[REDACTED] also asked about a math goal, which was discussed. The ARC added a math goal for learning to tell time. Respondent's Exs. 28 p. 6, 53 p. 4. Respondent carefully

considered [REDACTED] concerns and drafted IEPs incorporating [REDACTED] requests, when feasible, to develop appropriate IEPs for Petitioner.

Petitioner alleges Respondent amended an IEP for the 2018-2019 year without involving the parents or holding an ARC. However, the record does not contain any credible evidence to support this allegation.

Petitioner alleges Respondent did not answer [REDACTED] question regarding whether Petitioner's goals from [REDACTED] IEP were being met. Kentucky law requires Respondent to first determine eligibility and then prepare a new IEP. "If they come from out of state with an IEP, they're considered an initial evaluation, so they have to go through the referral. The ARC meets, they look at the IEP, we set IEPs in place until we have the referral, we reevaluate that student and see if they qualify under Kentucky Department of Education guidelines, under one of the 13 eligibility categories that Kentucky had." T.T. p. 770. Respondent could not adopt the previous IEP without complying with the requirement to evaluate Petitioner. 707 KAR 1:300 etc.; 20 U.S.C. 1414. Respondent followed the [REDACTED] IEP until Respondent developed a new one. Respondent was required to develop its own IEP, which was the reason for the December 3, 2019 meeting.

ISSUE 4 – ACCURATE AND TIMELY REPORTS

[REDACTED] alleges the conference summary notes of various meetings were not accurate. This allegation is not supported by the evidence. The conference notes are detailed and contain references to [REDACTED] questions, suggestions and comments. Respondent's Exs. 24, 27, 28. Petitioner states in [REDACTED] initial brief that during at least one meeting, the parties spent two hours revising the conference notes. Petitioner's statement indicates Respondent went

to great efforts to make accurate notes of their meetings and to allow [REDACTED] to participate in them. There is nothing in the file to indicate the conference summary notes are inaccurate.

ISSUE 1 - DEVELOP IEP'S (September 30, 2022, ARC meeting);

ISSUE 2 – IMPLEMENT IEP'S; ISSUE 5 – CONSIDER INDEPENDENT

EVALUATIONS; ISSUE 10 – COLLECT BEHAVIORAL DATA

On September 30, 2022, the ARC met again at the request of [REDACTED]. [REDACTED] explained the procedural safeguards to [REDACTED]. Respondent provided a Language Line interpreter during the meeting. Respondent's Ex. 7. The ARC agreed to add [REDACTED] written comments at the end of the conference summary. Respondent's Ex. 268. During the meeting, [REDACTED] stated the progress graphs [REDACTED] received before the September 11, 2020, IEP were from February 2020. This occurred because [REDACTED] withdrew Petitioner from school on March 3, 2020, to home school [REDACTED]. Respondent's Ex. 7.

[REDACTED] stated [REDACTED] was unable to send progress graphs to [REDACTED] until a couple of hours before the meeting because of technical issues. *Id.* [REDACTED] stated Respondent would accept the [REDACTED] evaluation as an independent evaluation to be considered by the ARC. [REDACTED] previously presented the evaluation at the September 11, 2020, ARC meeting. *Id.*; Respondent's Ex. 97. The [REDACTED] speech evaluation underreported the number of speech services minutes Petitioner was receiving from Respondent. The evaluation was a clinical one and recommended three to four sessions each week of unspecified length to be provided by the clinic. Speech minutes recommended for a clinical setting are different than speech minutes for education purposes. Respondent's Ex. 92, pp. 30-21; T.T. p. 513.

Petitioner's ABA therapist, ██████████ presented a letter ██████ wrote containing recommendations including a one-on-one aide if Petitioner returned to in-person school. Respondent's Ex. 7, p. 7. ██████████ stated much of what ██████████ recommended was already included in Petitioner's BIP. ██████████ shared research on the disadvantages of assigning one paraprofessional to a student and the problems it creates with peer relationships, prompt dependency and dependency on the paraprofessional. *Id.* ██████████ stated Respondent agreed to collect 8 weeks of behavior data to determine whether the BIP should be modified, including whether to provide a one-on-one assistant, but collection of data had been impossible because ██████████ decided to enroll Petitioner in ██████████ as opposed to in-person learning. *Id.* When Petitioner attended school in-person, ██████ received one-on-one services at least 75% of the time. *Id.* at 8.

Because Petitioner was attending school in-person for speech therapy two times each week, Respondent suggested Petitioner receive the 45 minutes of one-on-one special education services in person on those days. *Id.* The IEP was modified to reflect this change. *Id.* at 9. Petitioner's teachers were in favor of Petitioner returning to in-person school. *Id.* at 8. Respondent informed ██████████ that if Petitioner returned to in-person school that ██████ would be in a class of 4 - 6 other students and would receive paraprofessional support. *Id.* at 9. ██████████ questioned why Petitioner was no longer on alternate assessment and said ██████ was not part of that process. However, the record shows Respondent removed Petitioner from alternate assessment per ██████████ suggestion at the May 3, 2019, ARC meeting. *Id.*

ISSUE 2 – IMPLEMENT IEP’S; ISSUE 5 - CONSIDERATION OF EXPERT’S REPORTS

Petitioner alleges Respondent did not consider the recommendations of Dr. [REDACTED] (Petitioner’s developmental behavioral pediatrician) and [REDACTED] (Petitioner’s therapist) for a one-on-one assistant. This allegation is not supported by the record. The record shows Respondent was already using some of their recommendations. Respondent considered their recommendations and implemented them when it was in the best interest of Petitioner. But, Respondent also relied on its extensive training and experience to formulate IEPs. Respondent’s Ex. 7; T.T. pp. 573-74.

The ARC discussed the issue of a one-on-one assistant for Petitioner with [REDACTED] numerous times. The ARC determined a one-on-one, full-time assistant for Petitioner was not appropriate. T.T. pp. 573-74. Although Petitioner did not have a dedicated one-on-one assistant, [REDACTED] received one-on-one assistance through the work of a team of teachers, paraprofessionals and administrators. *Id.*

Petitioner alleges speech services should not have been provided in a separate room. This allegation is not supported by the record. Providing speech services in a separate room was appropriate because of Petitioner’s behavioral issues, and because the speech room was busy and would have distracted Petitioner. Respondent’s Ex. 24, pp. 4-5.

ISSUE 1 - DEVELOP IEP’S (November 12, 2020, ARC meeting); ISSUE 2 –IMPLEMENT IEP’S; ISSUE 6 – PROGRESS

An ARC meeting was held November 12, 2020, at [REDACTED] Elementary School. Respondent’s Ex. 137. Respondent provided a Spanish interpreter via the Language Line.

Id. at 3. Respondent provided and explained procedural safeguards to [REDACTED]. *Id.*

[REDACTED], Petitioner's [REDACTED] special education teacher, stated Petitioner scored 84% in English Language Arts in [REDACTED] and 94% in Math in Odysseyware at the first grade level. [REDACTED] and [REDACTED] reported [REDACTED] struggled with the main ideal goal and made slow progress in math. Petitioner could calculate the area of a rectangle while using a multiplication chart. Petitioner mastered [REDACTED] writing goal and was consistent with [REDACTED] behavior goal. [REDACTED] and [REDACTED] recommended adjusting [REDACTED] math and reading goals to fit better with [REDACTED] current levels and [REDACTED] instruction. *Id.* at 3-5.

[REDACTED] worked with Petitioner during two 30-minute sessions each week. [REDACTED] reported Petitioner could answer five comprehension questions after reading a passage. T.T. pp. 388-89.

[REDACTED] worked with Petitioner on [REDACTED] IEP goals relating to speech and language issues while [REDACTED] was enrolled in [REDACTED]. Petitioner's severe speech delays were not in fluency or articulation, but were in receptive and expressive language. T.T. pp. 405-06. [REDACTED] provided those services in-person and online during the 2020-2021 school year. [REDACTED] kept detailed notes of Petitioner's progress. Respondent's Exs. 266, 267. Because progress notes were kept for both years, [REDACTED] and the other SLPs were able to record whether there was no progress, limited progress or clear progress during each session. The progress notes indicate Petitioner made some progress in most of [REDACTED] speech sessions. T.T. p. 396. [REDACTED] also entered [REDACTED] data into progress monitoring graphs. Respondent's Ex. 246. The data fluctuates, in part, because [REDACTED] increased the difficulty of the tasks as Petitioner progressed. T.T. pp. 298-99. Petitioner generally made progress while working with [REDACTED]. T.T. pp. 399, 403-06.

From December 2018 through May 3, 2019, Petitioner made 31% progress in [REDACTED] annual reading comprehension goal of December 2021, meeting the first benchmark. Ex. 24, p. 4; T.T. pp. 791-92. During this time, Petitioner made progress on [REDACTED] math goal by doing one math task at 80%. Petitioner scored 100% at telling time to the hour, 83 % to the half hour and 79% to the quarter hour thereby mastering this goal. Respondent's Ex. 24, p. 4; T.T. p. 792. Regarding writing, Petitioner achieved a range of 66% to 100% of the goal of typing a four to five word sentence on a computer. Petitioner sometimes refused to perform this task. *Id.*

ISSUE 1 - DEVELOP IEP'S (November 18, 2019, Develop BIP);

ISSUE 3 – MEANINGFULLY PARTICIPATE; ISSUE 8 – LEAST RESTRICTIVE ENVIRONMENT

An ARC meeting was held November 18, 2019, after the FBA was completed.

[REDACTED] was given the procedural safeguards in Spanish and an interpreter was available via the Language Line. [REDACTED] explained the process of the FBA and development of the BIP, which was adopted. T.T. pp. 464- 75; Respondent's Exs. 20, 52. The FBA contained an analysis of antecedent behaviors, such as non-preferred tasks and correction of others, as well as a review of Petitioner's likes and dislikes and successful past strategies. Respondent's Ex. 51.

A new IEP was approved at the November 18, 2019, ARC meeting that included annual goals and short-term benchmarks. A math area goal was developed because Petitioner independently completed some math work that was difficult to distinguish from the work of general education students. T.T. p. 108-09. The ARC provided 20 minutes of speech per week in a one-on-one setting. Respondent's Ex. 20, pp. 8-9; Exs. 50, 181.

The ARC members noted Petitioner's adaptive and cognitive abilities were low, but not exceedingly low. To place Petitioner in the least restrictive environment, the ARC developed a plan that would gradually expose Petitioner to academic subjects in a special education environment in a resource classroom instead of a self-contained classroom. *Id.* at 10. The ARC determined an adult assistant would accompany and supervise Petitioner in the resource setting. *Id.*; T.T. pp. 110-11.

██████████ said ██████████ did not want Petitioner on alternate assessment because ██████████ wanted ██████████ to receive a regular high school diploma and go to college. Respondent's Ex. 20; T.T. p. 107. So, the ARC also considered whether alternate assessment was appropriate at the November 18, 2019, meeting. *Id.* at 9-10. The ARC agreed to meet again to look at the alternate assessment guidelines. Respondent's Ex. 20.

ISSUE 2 – IMPLEMENT IEP'S

Petitioner alleged ██████████ IEP was not properly implemented for the 2020-2021 school year. Petitioner's Initial Brief 2020-2021 3(a), 3(b), 3(c), 4(8). ██████████ claims Respondent did not provide information needed to access the ██████████, and that ██████████ lost time because the instructor was late or cancelled class. ██████████ explained that if a link did not work, ██████████ emailed the link to ██████████ again, and then it worked. T.T. p. 755. ██████████ said when ██████████ was late for a class, it was only for a minute or two. ██████████ stated if a class started one or two minutes late, ██████████ would end it one or two minutes late. T.T. pp. 755-58. ██████████ testimony seemed credible.

When the 2020-21 school year began, Respondent operated under a nontraditional model with instruction provided online. Respondent began in-person instruction September 8, 2020. However, ██████████ decided not to send Petitioner back to school in-person. Instead, on

September 7, 2020, [REDACTED] enrolled [REDACTED] in Respondent's [REDACTED]. The general education curriculum in [REDACTED] was delivered through Odysseyware. Respondent's Exs. 88, 109. Because of Petitioner's [REDACTED] enrollment, the ARC met to determine how Petitioner's IEP services would be delivered. T.T. p. 785.

ISSUE 3 – MEANINGFULLY PARTICIPATE; ISSUE 4 – TIMELY NOTICE, DOCUMENTATION

Petitioner alleges [REDACTED] parents were denied the opportunity to meaningfully participate in the development of [REDACTED] IEPs. Petitioner states [REDACTED] was not provided timely notice before the September 11, 2018, ARC meeting, and Respondent did not provide Petitioner with documentation prior to the meeting. Petitioner alleges this deprived [REDACTED] parents of the ability to meaningfully participate in the meeting. This was the first meeting to discuss Petitioner's IEP and to develop a new IEP, if appropriate. [REDACTED] emailed [REDACTED] notice of the meeting on the same day it was to occur. Petitioner's Ex., CCF 000080.pdf, p. 16. Petitioner makes a similar complaint about the meeting that occurred December 3, 2018.

Respondent is required to notify parents "early enough that they will have an opportunity to attend." 34 C.F.R. 300.322(a)(1) **This regulation does not require Respondent to furnish documentation to parents before an ARC meeting.** Respondent's notices to Petitioner's parents complied with the regulation. Respondent did not violate any statute or regulation regarding providing documentation to [REDACTED], and did not fail to timely notify [REDACTED] as [REDACTED] attended and participated in both meetings. Respondent's Exs. 29, 30, 34. The record does not show Petitioner was harmed from receiving notice the day of the meeting. Later, the

parties entered into a mediation agreement that set deadlines for Respondent to send notices. Thereafter, Respondent complied with the provisions in the mediation agreement.

Petitioner alleges notice was not given to [REDACTED] father, [REDACTED], for the December 3, 2018, ARC meeting. However, Petitioner admits in [REDACTED] brief that Respondent called [REDACTED] father before the meeting began and gave [REDACTED] the opportunity to participate. [REDACTED] did not testify at the hearing and did not personally complain about the notice [REDACTED] received.

Petitioner writes the parental rights disclosure for the December 3, 2018, meeting was not signed by [REDACTED]. Petitioner does not allege parental rights were not given to [REDACTED], just that [REDACTED] did not sign the disclosure. [REDACTED] wanted [REDACTED] name removed from the document because someone signed [REDACTED] name for [REDACTED].

Petitioner alleges Respondent did not allow [REDACTED] to meaningfully participate during the meetings. This allegation is not supported by the record. The audio recordings [REDACTED] secretly made show [REDACTED] talked a great deal during the meetings and fully participated. The conference summary notes indicate Respondent carefully considered [REDACTED] suggestions for Petitioner's education and adopted them where appropriate. One example of Respondent considering and adopting [REDACTED] suggestions occurred during an ARC meeting on May 3, 2019. This meeting was scheduled at the request of [REDACTED]. During the meeting, [REDACTED] requested Petitioner be removed from alternate assessment. Respondent considered [REDACTED] comments and removed Petitioner from alternative assessment. Respondent's Exs. 23, 24, 25, 27.

An ARC meeting was held September 11, 2020. Respondent's Ex. 184. Petitioner alleges parental rights were not discussed at this meeting. However, the conference summary report states, "[REDACTED] offered to explain parental rights and [REDACTED] asked [REDACTED] to go over

them at the end of the meeting.” Petitioner alleges the conference summary notes were not emailed to [REDACTED] before the end of the meeting for [REDACTED] review, the notes do not accurately reflect [REDACTED] input and they were amended outside ARC meetings. Petitioner’s Initial Brief 2020-2021 1(e),1(l), 1(o), 3(f). 3(g)(III),3(g)(V), 3(g)(VII),4,12, 13,15. Petitioner’s allegations are not supported by the record. At the September 11, 2020, meeting, [REDACTED] stated the minutes would be read aloud at the end of the meeting because everyone’s memories would still be fresh, as opposed to reading them at a later meeting. Respondent’s Ex. 8. The conference summary notes show the ARC answered [REDACTED] questions. Respondent’s Ex. 184.

ARC meetings were lengthy to ensure [REDACTED] fully understood the discussions. [REDACTED] wanted to see the conference summary as it was being typed. On at least two occasions, [REDACTED] got a projector to show the conference summary on the wall as it was being typed to allow [REDACTED] to read. T.T. p.707. Respondent listened to [REDACTED] questions and considered [REDACTED] input. Although all of [REDACTED] suggestions were not implemented, all of them were considered and addressed. Respondent’s Ex. s 17, 20, 10.

The undersigned finds Respondent allowed [REDACTED] to fully participate at all meetings.

ISSUE 7 - BIP

On January 8, 2020, a serious behavior incident occurred in the MSD classroom. Respondent’s Ex. 90. The report states:

Student was told it was time to work. However, [REDACTED] got up and went to the door to try and tag [REDACTED] who had already left the room. The student returned to the area and punched (very hard) the instructional assistant in the back. The other instructional assistant intervened because [REDACTED] was afraid the student would hit again. [REDACTED] then hit [REDACTED] repeatedly.

Respondent notified [REDACTED] about the incident by a telephone message, an email and a parent conference. Respondent gave [REDACTED] a photograph of the employee's injury. Petitioner was placed in time-out in the Safe Room for three hours because of this incident. T.T. pp. 679-80. [REDACTED] testified all students are subject to the Code of Acceptable Behavior including special education students. [REDACTED] said they may be removed from class for as many as 10 days for violations, including violations relating to their disability. *Id.*

On January 21, 2020, Petitioner committed another serious behavior offense.

Respondent's Ex. 90. The incident report states:

9:00 Student was removed from gym because [REDACTED] was climbing on the bleachers and rolling on the floor. 9:05 Student refused to get on iRead. [REDACTED] was working with the student while [REDACTED] was working with the other 4 students in the classroom. The student started yelling no and went to run out the door. [REDACTED] was standing by the door when the student started to kick, punch, and slap her. The student then punched [REDACTED] in the face. [REDACTED] then moved away from the student and the stated, "I will punch your face." [REDACTED] then stepped in and stood in the doorway until school administration arrived. The student ripped posters off the wall as well.

The assistant principal attempted to contact [REDACTED] two times by telephone. Because [REDACTED] was not able to reach [REDACTED], Petitioner was placed in the SAFE room for the rest of the day as a day of in-school suspension and was suspended from school the next day. [REDACTED] stated Petitioner was suspended because [REDACTED] punched the aide twice leaving a red mark on [REDACTED] face. T.T. pp. 687-89.

Petitioner alleges the March 3, 2020, incident report was not given to [REDACTED] until the next day and there are discrepancies between school personnel about the incident. The record does not show a discrepancy. [REDACTED] relied on [REDACTED] memory of a conversation with [REDACTED], a former School District employee, to dispute a written report prepared at the time

of the incident by [REDACTED]. [REDACTED] did not testify at the hearing; therefore, it is unknown whether [REDACTED] would have agreed with the written report.

[REDACTED] explained the difference between conduct which is a violation of the code of acceptable behavior and the cool down periods in Petitioner's BIP. T.T. p. 704. Concerning the March 3, 2020, incident, [REDACTED] said, "In this case, I took Petitioner to the SAFE room because a violent act had occurred, which made [REDACTED] eligible to receive consequences under the Code of Acceptable Behavior. It was reduced from what it would have been for a student without disabilities. And then I merely came to my office and I sent you the email based on what had been described to me from [REDACTED]." T.T. p. 716.

Petitioner alleges for the 2019-2020 school year that Petitioner's removal from the classroom for more than 15 minutes was a denial of FAPE. Respondent states Petitioner was removed from the classroom because [REDACTED] assaulted a teacher. T.T. p. 704.

[REDACTED] said, "The behavior plan was put in place so that if we could intervene on Petitioner's behalf prior to an event like this occurring, then we could limit [REDACTED] time in the SAFE room for a chance to cool down, redirect, and return to class. Another student who did not have disabilities who was exhibiting the same behavior had a different consequence that would have been longer than what Petitioner received in this instance. The difference in my mind is that at this point in time, the aggressive behavior had already happened, and Petitioner is still accountable to consequences according to the matrix that was provided in the Acceptable Code of Behavior, so even students with disabilities can receive the consequences that are outlined in that matrix, and because the event had already happened, then a consequence needed to be assigned to that. However, what [REDACTED] received was not commensurate with what a student without disabilities would have received for the same behavior." *Id.*

The undersigned finds Petitioner's removal from the classroom in these exigent circumstances to prevent a teacher from further injury was not a violation of FAPE. When testifying about special education, ██████████ said, "But MSD teachers go into this profession knowing that we're going to get hurt. I'm not saying it is something that we don't intervene on, but I'm saying that the longer a behavior has worked for a student, the more difficult it is to teach replacement behaviors and the longer it will take to do that." T.T. p. 568. Continuing ██████████ said "... that is every other MSD teacher in the world. It is how often are they getting hit." *Id.* at 569.

**ISSUE 3 – MEANINGFULLY PARTICIPATE; ISSUE 4 – DAILY REPORTS;
ISSUE 5 – CONSIDER INDEPENDENT EVALUATIONS; ISSUE 9 - MEDIATION
AGREEMENT; ISSUE 10 – COLLECT BEHAVIORLA DATA**

During the summer of 2020, ██████████ and Respondent participated in mediation regarding Petitioner (and ██████████, ██████████, who is involved in a separate case against Respondent, No. ██████████). On or about June 1, 2020, the parties entered into a mediation agreement. Respondent's Ex. 95. The issue is whether Respondent complied with all the provisions in the mediation agreement. The agreement contains 21 provisions, but only a few are in dispute.

Provisions 1 and 2 provide ██████████ will obtain an independent evaluation of Petitioner by August 7, 2020, which ██████████ did. T.T. p. 215.

Petitioner alleges Respondent violated provision 3 of the mediation agreement. This provision states Petitioner had a revised behavior plan dated February 14, 2020, and that ██████████ withdrew from public school for home schooling on March 5, 2020. Continuing, the mediation

agreement states because Petitioner will be attending a new school, Respondent will collect data for the next eight weeks school is in session. It further states **Petitioner's therapist will observe [REDACTED] at school** and collaborate with Respondent as it assesses the effectiveness of the revised BIP. Respondent's Ex. 95. The agreement contemplates Petitioner will return to school in person. However, instead of returning to in-person school, Petitioner enrolled in Respondent's VLA. T.T. pp. 517-19. Consequently, it was impossible for Petitioner's therapist to observe [REDACTED] at school. Similarly, Respondent could not collect **behavior data** on Petitioner as [REDACTED] was not at school in person. If it were a different type of data (test scores, etc.), then Respondent could have collected it. But here, Petitioner needed to be physically at school for Respondent to collect data regarding how [REDACTED] interacted with teachers and other students. Therefore, the undersigned finds Respondent did not breach this provision of the mediation agreement.

Provision 4 states Petitioner will be reevaluated for occupational therapy. [REDACTED] contacted several individuals about performing the occupational therapy evaluation, but could not get a commitment because of the pandemic. One OT who was agreeable to the parties canceled the evaluation shortly before the appointment due to pandemic concerns. T.T. p. 782. [REDACTED] found an OT from [REDACTED] County who was willing to perform the evaluation. The evaluator contacted [REDACTED], but an evaluation was not scheduled. T.T. p. 783. Respondent provided an updated list of evaluators including psychologists, speech language pathologists and OTs to [REDACTED]. *Id.* at 784. [REDACTED] testified Respondent would have paid the fees of an occupational therapy evaluation if [REDACTED] had arranged one, or the fees of a professional evaluator who was not on Respondent's list, if the evaluator [REDACTED] chose satisfied the Kentucky criteria. *Id.* at 785.

The occupational therapy evaluation was not completed; however, Respondent was not at fault. Respondent provided [REDACTED] with a list of providers, but [REDACTED] never scheduled an appointment for Petitioner with any of them. Therefore, Respondent did not breach this provision of the mediation agreement.

Provision 5 of the mediation agreement states [REDACTED] provided a speech evaluation conducted in late 2019 to Respondent. The agreement provides, “If the independent evaluator meets the system’s standards, the evaluation will be accepted by the school district and **considered** (emphasis added) by the ARC.” The agreement does not state the ARC will adopt all the recommendations of the evaluation; it just requires Respondent to **consider** it. [REDACTED] presented the clinical speech evaluation [REDACTED] submitted from [REDACTED] to the ARC as an independent evaluation. T.T. p. 782. Respondent accepted the evaluation and **considered** it when developing an IEP for Petitioner. Respondent complied with this portion of the mediation agreement.

Provisions 6 and 7 of the mediation agreement are not in contention. Provision 7 states [REDACTED] will provide training on Petitioner’s BIP to the teachers, assistants, bus personnel and administrators who work with Petitioner. [REDACTED] provided the required training. Respondent’s Exs. 153, 158. Provision 8 is not in contention.

Provision 9 states Petitioner’s teacher will provide a daily report to [REDACTED] that includes specifics of what Petitioner is working on each day, what [REDACTED] did and did not complete, and why something may not have been completed. Petitioner claims Respondent did not provide daily reports to [REDACTED] as agreed and when provided, the reports did not contain all the requested information.

The record indicates [REDACTED] provided detailed daily updates to [REDACTED], except when [REDACTED] was sick, at one of her children's doctor's appointments or on the occasional house day. On those days, [REDACTED] staff generally provided reports to [REDACTED]. T.T. pp. 77, 98-102; Respondent's Exs. 110, 149 pp. 18, 19. The record does not show the exact number, but there were a few days when the reports were not sent to [REDACTED]. Respondent notes in its brief that it prepared daily reports only for Petitioner; no other child received daily reports. *Id.* However, when Respondent signed the mediation agreement, it became obligated to provide daily reports. [REDACTED] supplemented daily reports to [REDACTED] through an online platform named Class Dojo. T.T. p. 104. Although there were a few days when Respondent did not send reports to [REDACTED], overall Respondent complied with this portion of the mediation agreement. Further, there is nothing in the record to show [REDACTED] alerted Respondent on a day a report was not sent so Respondent could have sent it the next day. Petitioner did not show [REDACTED] suffered any harm because Respondent did not send a few daily reports.

Provision 10 of the mediation agreement acknowledged Respondent provided report cards and progress reports four times a year to Petitioner. The parties agreed that Petitioner's progress reports will have detailed information about each of [REDACTED] IEP goals including current data, a description of data collection methods and a written analysis of the data. Petitioner alleges Respondent did not comply with this provision. During the November 11, 2020, meeting, [REDACTED] said [REDACTED] had received a blank report card. Petitioner's Initial Brief 2020-2021 4(b), 5; Respondent's Ex. 3, p. 8. [REDACTED] stated [REDACTED] would try to fix the problem with the [REDACTED] program. It was also noted that [REDACTED] would receive progress notes weekly in addition to a report card every 9 weeks. *Id.* The record does not show Respondent breached this provision of the mediation agreement.

There were no allegations in the Request for a Due Process Hearing that Respondent violated provisions 11 or 12 of the mediation agreement.

Provision 13 of the mediation agreement provides an evaluation will take place 8 weeks after the behavioral plan has been put in place that will influence the decision about the amount and kind of one-on-one assistance Petitioner needs. Pursuant to this provision, [REDACTED], Ph.D, from [REDACTED] University performed an independent education evaluation. Respondent's Ex. 255. [REDACTED] evaluation indicated Petitioner had autism and needed significant support. [REDACTED] found Petitioner's verbal functioning, social functioning and behavior difficulties were significant, but [REDACTED] nonverbal intelligence was average. The findings were consistent with the observations made by [REDACTED] and other evaluators at Respondent. Respondent's Ex. 255. [REDACTED] recommended small class sizes and one-on-one supervision during transitions only. [REDACTED] recommendations were quite similar to the procedures Respondent already had in place. *Id.* The record shows Respondent complied with this provision of the mediation agreement.

Provision 14 of the mediation agreement provides for advance notice of meetings and a draft agenda. The record shows Respondent complied with this provision of the mediation agreement.

Provision 15 of the mediation agreement provides ARC meetings will allow the full participation of [REDACTED]. ARC meeting notes indicate various times when the ARC adopted [REDACTED] suggestions, increasing Petitioner's speech minutes and placing him in alternate assessment as two examples. The notes indicate [REDACTED] fully participated in all meetings. The record shows Respondent complied with this provision of the mediation agreement.

Petitioner did not allege in the Request for a Due Process Hearing that Respondent violated provisions 16 through 21 of the mediation agreement.

As discussed herein, Respondent complied with the terms of the mediation agreement.

ISSUE 11 - ALLEGED ABUSE

Petitioner alleged Respondent verbally and physically abused him, and refused to allow [REDACTED] to eat lunch [REDACTED] brought from home. [REDACTED] stated [REDACTED] saw a bruise on Petitioner's arm on October 25, 2019. [REDACTED] testified no one bruised Petitioner and that was a great day for [REDACTED]. She stated [REDACTED] is divided into four houses. T.T. p. 103. One day a month, [REDACTED] has a "house day" where they celebrate students having birthdays, making the honor roll, having perfect attendance, etc. *Id.* October 25, 2019, was a house day and the students performed team-building activities with another class.

[REDACTED] did not know how Petitioner's arm was bruised, but stated there was an issue with Petitioner that occurred the day before (October 24, 2019). During a bus evacuation, Petitioner was running around and Assistant Principal [REDACTED] grabbed [REDACTED] to keep [REDACTED] from getting hurt, and Petitioner's arm **may** have been bruised at that time. *Id.* at 104, 705-06. **In paragraph No. 13 of Petitioner's second brief, [REDACTED] admits [REDACTED] does not understand safety.** It is understandable and advisable for one of Respondent's personnel to grab Petitioner to keep [REDACTED] from getting hurt.

Respondent had a similar explanation for how scratches on Petitioner's arm **may** have happened on December 5, 2019. On this day, Petitioner went outside during a fire drill and began running towards the road. [REDACTED] and a few other adults tried to grab [REDACTED] to keep [REDACTED]

safe. *Id.* ██████ did not testify Petitioner was bruised or scratched while at school. ██████ explained that if Petitioner was bruised or scratched at school, this was how it likely happened.

Respondent objected to Petitioner making these allegations at the hearing on the grounds they were not asserted in the Request for a Due Process Hearing. 34 CFR 300.511 provides, in relevant part: *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. Respondent's objection is sustained and Petitioner is prohibited from raising these issues in this case.

However, as an alternate finding, assuming *arguendo* these issues were properly raised, Petitioner did not present any credible evidence to show Respondent intentionally or negligently caused a bruise or scratches to ██████. The bruise/scratches could have happened before, during or after Petitioner was at school. If the bruise/scratches happened at school, they probably occurred when Respondent's personnel were trying to protect Petitioner. At all relevant times, Respondent's personnel acted in the best interest of Petitioner's health and safety. Respondent did not verbally or physically abuse Petitioner.

Issue 12 - ALLEGED RESTRAINT

During the hearing, ██████ testified Respondent inappropriately restrained Petitioner by locking ██████ in the bathroom. ██████ testified no one ever locked Petitioner in the bathroom. T.T. pp. 79-81. ██████ said, "I have no way of locking anybody in my bathroom. It is locked from the inside, not the outside." *Id.*

During the ARC meeting on November 18, 2019, ██████ expressed concern about restraints because Petitioner had talked at home about not wanting to be restrained. *Id.* at 81.

██████████ explained that the ██████████ had been in ██████████ classroom to observe and provide consultation services. ██████████ professionals recommended teachers and assistants warn special education students not to engage in violent conduct or the adult would have to restrain the child as a way of getting the child to calm down. The warning was given to prevent restraining from having to be done. *Id.* ██████████ stated this was probably why Petitioner talked about not wanting to be restrained. *Id.*; T.T. p. 79.

During the February 14, 2020, meeting, ██████████ expressed concerns about Petitioner having come home with a bruise after ██████████ was placed in in-school suspension in the Safe Room on January 21, 2020. On this day, Petitioner started kicking, punching and slapping teacher's aide ██████████. Respondent attempted, but was unable, to contact ██████████. Consequently, Petitioner was placed in the SAFE room the rest of the day. Respondent's Ex. 19; T.T. p. 680. Respondent investigated the matter and informed ██████████ that no restraint had been used on Petitioner. ██████████ explained that when Petitioner becomes violent, the School District's discipline code may be enforced, which could include in-school or out-of-school suspension for up to 10 days. T.T. pp. 705-08. ██████████ reported the alleged incident to Child Protective Services who investigated the matter and determined the complaint was unsubstantiated. T.T. pp. 208-09.

██████████ testified ██████████ had no knowledge of Petitioner ever being restrained. *Id.* at 680. Similarly, Assistant Principal ██████████ testified ██████████ did not recall Petitioner ever being restrained, though ██████████ did recall grabbing Petitioner during a fire drill outside the school to keep ██████████ from getting away and possibly getting injured. T.T. pp. 705-06.

Respondent objected to this issue being raised during the hearing on the grounds it was not alleged in the Request for a Due Process Hearing. Respondent points out there are no

allegations in the complaint of any improper restraint or seclusion, except for the sentence after all the substantive allegations are made. At that point, Petitioner writes as a request that Respondent not allow inappropriate restraining of Petitioner by unauthorized staff members and to not place Petitioner in an isolated room, but to offer a calming area with trained staff monitoring [REDACTED].

The undersigned overrules Respondent's objection regarding raising this issue at trial. Petitioner, represented by [REDACTED] non-attorney mother, did allege/request enough facts to put Respondent on notice of this issue. However, the result is still the same. The undersigned finds Respondent never at any time inappropriately restrained Petitioner. The record does not contain any credible evidence Respondent did so.

ISSUE 13 – FREE APPROPRIATE PUBLIC EDUCATION

The undersigned finds Respondent appropriately implemented Petitioner's IEPs with the exception of when it cancelled and did not reschedule ten [REDACTED] sessions with Petitioner. However, pursuant to a Corrective Action Plan ordered by the DIMR on May 21, 2021, Respondent made up the 10 cancelled sessions by paying a tutor in [REDACTED], Petitioner's new home state. Respondent's Ex. 282; T.T. pp. 797-99. Respondent also provided an additional 450 minutes of compensatory education to Petitioner and timely arranged for additional training of its teachers and staff as required by the DIMR. T.T. pp. 797-99.

FINAL ORDER: The undersigned finds and hereby orders that the 10 makeup sessions and 450 compensatory minutes Respondent provided to Petitioner pursuant to the DIMR's Report of Findings dated May 21, 2021, fully compensates Petitioner for the violations Respondent committed. Respondent is not required to provide any additional compensation to Petitioner.

/s/ D. Lyndell Pickett
D. Lyndell Pickett
Hearing Officer
June 5, 2023

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 at the following address, a request for appeal, within thirty (30) calendar days of the Hearing Officer's decision. The address is:

Kentucky Department of Education
Office of Legal Services
300 Sower Blvd
Fifth Floor
Frankfort, KY 40601

CERTIFICATE OF SERVICE

This is to certify that on June 5, 2023, I served a true and correct copy of the foregoing
via email as follows:

Kentucky Department of Education
kdelegal@education.ky.gov

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

/s/ D. Lyndell Pickett
D. Lyndell Pickett
Hearing Officer