

**KENTUCKY DEPARTMENT OF EDUCATION
DIVISION OF LEARNING SERVICES
AGENCY CASE NO. 2122-15**

PETITIONER

v.

SCHOOLS

RESPONDENT

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

PROCEDURAL BACKGROUND

On December 9, 2021, Petitioner’s mother, _____, 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 her _____, Petitioner _____ (“Petitioner” or “Student”). An administrative hearing was conducted August 24 – 25, 2022, via 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 mother, _____ (“_____”), represented Petitioner _____ during the hearing. The _____, represented Respondent _____ Schools (“Respondent” or “School District”). Director of Special Education

██████████ 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.

Petitioner alleges Respondent denied ██████ a free appropriate public education (“FAPE”) for the years 2018-2019, 2019-2020 and 2020-2021. Specifically, Petitioner alleges Respondent failed to implement the Individual Education Plan (“IEP”) that was in place when ██████ enrolled at Respondent and/or failed to formulate an IEP while ██████ was a student; failed to provide the least restrictive environment; failed to obtain an independent educational evaluation of ██████ as requested by ██████ parent(s); denied ██████ parent(s) the opportunity to equally and meaningfully participate in meetings; breached a mediation agreement by refusing to obtain an independent educational evaluation of ██████; failed to provide ARC notes to ██████ parent(s) after the meetings, and prepared inaccurate documentation of meetings and refused to change the notes. See Request for a Due Process Hearing. Petitioner requests Respondent provide compensatory services for these alleged violations. Petitioner requests Respondent pay ██████ \$54,135.00 (\$16,050.00 for speech therapy services, \$33,085.00 for private tutors and \$5,000.00 reimbursement for estimated expenses for “supplies, travel expenses to the hearing, etc.”) See Petitioner’s final brief. Regarding the \$5,000.00, the undersigned notes Petitioner did not travel to the hearing. The hearing was conducted via Zoom by agreement of the parties. (Petitioner’s ██████ was involved in a similar hearing in ██████, ██████, Kentucky, in June 2022 which the parties attended in person, ██████ v. ██████ Schools, No. 2122-14.)

Respondent states Petitioner's claims regarding the ARC meetings on September 11, 2018, and December 3, 2018, are barred by the statute of limitations; that Petitioner is not a "child with a disability" as defined by Kentucky law; Petitioner's parent(s) was allowed to meaningfully participate in the ARC meetings; and Respondent complied with the regulations regarding an independent educational evaluation.

ISSUES AND SHORT ANSWERS

1. Whether Respondent failed to implement the IEP that was in place when Petitioner enrolled at Respondent and/or failed to formulate an IEP while Petitioner was a student. Respondent did not "fail" to implement the IEP that was in place when Petitioner enrolled at Respondent and did not fail to formulate an IEP while Petitioner was a student. Petitioner was not a "child with a disability" as defined by Kentucky law and did not qualify for special education services.
2. Whether Respondent failed to provide the least restrictive environment for Petitioner. Respondent did not "fail" to provide the least restrictive environment for Petitioner. Petitioner was not a "child with a disability" as defined by Kentucky law.
3. Whether Respondent failed to obtain an independent educational evaluation of Petitioner as requested by ■■■ parent. Respondent did not "fail" to obtain an independent educational evaluation of Petitioner.
4. Whether Respondent denied Petitioner's parent(s) the opportunity to equally and meaningfully participate in the ARC meetings. Respondent did not deny Petitioner's parent(s) the opportunity to equally and meaningfully participate in the ARC meetings.

5. Whether Respondent breached the mediation agreement by refusing to obtain an independent educational evaluation of Petitioner. Respondent did not breach the mediation agreement.
6. Whether Respondent failed to provide ARC notes to Petitioner's parent(s) after the meetings, and/or prepared inaccurate documentation of meetings and refused to change the notes. Respondent did not fail to provide ARC notes to Petitioner's parent(s) after the meetings, and did not prepare inaccurate documentation of meetings and refuse to change the notes.
7. Whether Respondent denied FAPE to Petitioner for the years 2018-2019, 2019-2020 and 2020-2021. Respondent did not deny FAPE to Petitioner for these years.

ADDITIONAL FACTS, DISCUSSION AND CONCLUSIONS OF LAW

Petitioner was born [REDACTED], and is currently age 10. T.T. p. 12. Petitioner's parents are [REDACTED] and [REDACTED]. T.T. pp. 12, 21. Petitioner attended kindergarten at a [REDACTED] school located in [REDACTED], Kentucky, during the 2017-2018 school year before enrolling at Respondent. T.T. p. 12. [REDACTED] enrolled at Respondent as a first-grade student at the beginning of the 2018-2019 school year. Petitioner attended Respondent during the third, fourth and fifth grades (2018-2019, 2019-2020 and 2020-2021 - the years at issue). T.T. p. 11.

Petitioner had an IEP while [REDACTED] attended [REDACTED]; [REDACTED] latest IEP was dated May 18, 2018. Respondent's Exhibit 11. Per this IEP, Petitioner's disability was autism spectrum disorder. Petitioner's "Level of Services" was deemed "minimum" as [REDACTED] received special

education services 10% or less of the school day. The IEP provided Petitioner would spend 80% or more of each school day in the general education classroom. *Id.*

Because Petitioner transferred from a non-Kentucky school, Respondent had to conduct its own initial referral and evaluation to determine whether Petitioner qualified for special education services pursuant to Kentucky standards. On August 27, 2018, school counselor [REDACTED] contacted [REDACTED] and scheduled an ARC meeting on September 11, 2018. This was the first ARC meeting for Petitioner at Respondent. Respondent's Exhibit 10.

September 11, 2018, ARC Meeting

On August 27, 2018, Respondent sent notice of the ARC meeting to [REDACTED]. The purpose of the meeting was to (1) "discuss a referral for an individual evaluation", (2) "develop, review, and/or revise the student's IEP and make placement decisions", (3) "determine reevaluation needs", and (4) "discuss records from previous school." Respondent's Exhibit 10.

On September 10, 2018, Respondent emailed an agenda for the ARC meeting to [REDACTED]. Respondent's Exhibit 40 p. 4; T.T. p. 76. The ARC meeting was held September 11, 2018, with both parents in attendance. Both parents signed the conference summary stating:

I have been advised, in my native language, and I understand the contents of this notice. I have a copy and have received an explanation of my procedural safeguards as a parent of a student with a disability or as a student with a disability. I understand that I can receive an additional copy of my procedural safeguards, a further explanation of my rights, or assistance in determining the content of this notice by contacting the student's school or Director of Special Education.

Respondent's Exhibit 9.

At the beginning of the ARC meeting, the Procedural Safeguards were reviewed verbally and a copy was given to [REDACTED]. Respondent's Exhibit 100; T.T. p. 80. [REDACTED] did not request an interpreter for this meeting. Respondent's Exhibit 9.

The ARC discussed the [REDACTED] IEP and Petitioner's progress. Petitioner was making adequate progress without the part-time one-on-one assistant. Consequently, pursuant to the notice of the meeting, the ARC amended the IEP to remove the assistant. T.T. pp. 79-80. Petitioner's parents consented to Respondent's testing Petitioner to help determine if [REDACTED] qualified for special education services under Kentucky's requirements. Respondent's Exhibit 9.

Integrated Assessment Report

After the ARC meeting on September 11, 2018, evaluations were obtained pursuant to the initial evaluation plan. Respondent's Exhibit 19. School psychologist [REDACTED] prepared an Integrated Assessment Report dated November 7, 2018, using information from multiple sources, including [REDACTED], Petitioner's teachers, a speech language pathologist and tests she administered. *Id.* at 95, 96. The methods of gathering information for the Integrated Assessment Report included, among others, parent interviews, parent surveys, teacher interviews, behavior observations, results of language and communication testing, results of cognitive functioning testing, results of adaptive functioning testing and the results of autism spectrum testing. *Id.*

December 3, 2018, ARC Meeting

On November 1 and 2, 2018, [REDACTED] contacted [REDACTED], by telephone and email, to schedule an ARC meeting. Respondent's Exhibit 40. On November 8 and 9, 2018, [REDACTED] and [REDACTED] scheduled the ARC meeting for December 3, 2018. *Id.* On

November 12, 2018, Respondent sent a notice of the ARC meeting home with Petitioner. *Id.* The notice stated the purpose for the ARC meeting was to (1) “discuss results of an individual evaluation and develop an IEP if eligible” and (2) “develop, review, and/or revise the student’s IEP and make placement decisions.” On November 13, 2018, [REDACTED] signed and returned the notice of the ARC meeting to Respondent. Respondent’s Exhibit 7. [REDACTED] indicated on the return form that she would attend the meeting. [REDACTED] did not request an interpreter to be present at the meeting, although there was a place on the return form to do that. *Id.*

On December 3, 2018, an ARC meeting was convened at Respondent’s [REDACTED] Elementary School. Respondent’s Exhibit 6. [REDACTED] attended the meeting in person and Petitioner’s father, [REDACTED], participated by telephone. Applied behavior analysis (“ABA”) therapist [REDACTED] accompanied [REDACTED]. At the beginning of the meeting, [REDACTED] provided [REDACTED] with a written copy of the Procedural Safeguards and explained parental rights to the parents. [REDACTED] signed a copy of the first page of the Procedural Safeguards acknowledging receipt. Respondent’s Exhibits 6 and 8.

The ARC discussed Petitioner’s progress toward the goals in [REDACTED] IEP. Special education teacher [REDACTED] reported Petitioner’s progress. Petitioner scored between 80% and 100% on [REDACTED] weekly comprehension and vocabulary tests. Petitioner used socially acceptable vocabulary 100% of the time she was in the classroom with [REDACTED]. Speech language pathologist [REDACTED] reported Petitioner’s progress toward [REDACTED] IEP language goals. She stated [REDACTED] demonstrated understanding of language concepts/vocabulary by answering questions and following multistep directives with 90% accuracy. She also noted Petitioner made improvements on antonyms/synonyms and telling differences/similarities with 80% accuracy. General education teacher [REDACTED] reported Petitioner was doing well with

■■ comprehension assessments. Petitioner read independently with 90-95% accuracy, but struggled a little if ■■ read and answered comprehension questions independently. Respondent's Exhibit 6.

Petitioner's academic progress was also demonstrated by ■■ 2018-2019 report card where ■■ received a "B" in Primary Reading and an "A" in Primary Mathematics. Petitioner made satisfactory progress in all other subjects, including Primary Language Arts, Primary Social Studies and Primary Science. Respondent's Exhibit 5. Petitioner's academic performance continued through the end of the 2018-2019 school year as ■■ received a final grade of "B" in Primary Reading and an "A" in Primary Mathematics. ■■ also made satisfactory progress in all other subjects. *Id.*

After receiving progress and academic performance data from Petitioner's teachers, the ARC discussed the evaluation results in the Integrated Assessment Report. Respondent's Exhibit 19. ■■■■■ reviewed and interpreted the results for the committee. The speech language pathologist also reviewed the written communication assessment which was incorporated in the Integrated Assessment Report.

During the ARC meeting, ■■■■■ stated Petitioner scored within the average range on all receptive and expressive language skills on the OWLS-2 battery of tests she administered. She reported ■■ received a standard score of 99 on the listening comprehension scale and a standard score of 92 on the oral expression scale - both scores were in the average range. She also stated Petitioner scored within the average range on Receptive and Expressive One-Word Picture Vocabulary tests. ■■■■■ concluded Petitioner's communication skills were commensurate with similar-aged peers. Respondent's Exhibits 6 and 19; T.T. pp. 111-14.

During the ARC meeting, [REDACTED] reviewed the battery of tests she administered to Petitioner. She administered the KABC-II to assess [REDACTED] cognitive functioning. Petitioner obtained an overall Mental Processing Index (“IQ”) score of 123, which is in the above average range. The IQ score showed Petitioner was capable of acquiring, storing and accessing information as well as or better than most of [REDACTED] same-age peers. Respondent’s Exhibit 6 and 19. T.T. pp. 95-97.

[REDACTED] also reported Petitioner’s adaptive functioning test scores at the meeting. The General Adaptive Composite (“GAC”) is based on observational surveys completed by [REDACTED] teachers in the school setting and [REDACTED] parent(s) in the home setting. The teachers rated Petitioner’s adaptive functioning as Below Average to Average, meaning [REDACTED] had minor to no difficulty meeting the natural and social demands of the school environment. [REDACTED] rated Petitioner’s ability to deal with [REDACTED] home environment as much worse - in the borderline range. Respondent’s Exhibits 6 and 19; T.T. pp. 98-100. The test results indicated Petitioner was “not showing overall difficulty with self-help skills, those everyday skills [REDACTED] needs to be successful in a school setting.” T.T. p. 100.

[REDACTED] also reviewed the SSIS adaptive functioning test results, which were based on observational surveys by three teachers and [REDACTED]. All three teachers found Petitioner’s social skills, problem behaviors and academic competence in the school setting were within the average range. Respondent’s Exhibit 6 and 19; T.T. pp. 100-01.

[REDACTED] reported Petitioner’s autism spectrum ratings from tests she administered. Those ratings fluctuated depending on the rater. [REDACTED] rating indicated a “very likely” probability of Petitioner being in the autism range. [REDACTED] ratings showed an “unlikely”

probability of autism. [REDACTED] and [REDACTED] scores were within the “probable” range of autism. To evaluate Kentucky’s special education eligibility, [REDACTED] studied the communication and social interaction sub-scores to determine if there was an adverse effect on Petitioner’s abilities in the school setting. The sub-scores showed Petitioner’s teachers did not notice significant difficulties in communication or social interaction at school. Respondent’s Exhibits 6 and 19; T.T. pp. 102-03.

Finally, [REDACTED] discussed Petitioner’s academic performance administered by special education teacher [REDACTED]. Petitioner scored in the average range in reading and written expression, and scored above-average in Math. Respondent’s Exhibits 6 and 19; T.T. pp. 103-04.

Having reviewed the progress data, input from teachers and parents, and the assessment data, the ARC considered the issue of whether Petitioner qualified as a child with a disability under Kentucky’s guidelines for autism and/or speech language impairment. Having considered all the information and the guidelines, the ARC determined Petitioner did not meet Kentucky’s eligibility requirements. The ARC completed the Initial Evaluation Report which provided a review of the relevant criteria under Kentucky’s standards. Respondent’s Exhibit 17. The ARC concluded **Petitioner “. . . does not meet the eligibility criteria for autism and is not eligible for specially designed instruction and related services.”** *Id.* The ARC determined to the extent Petitioner may be suspected of having autism **the information did not confirm an adverse effect on [REDACTED] educational performance.** *Id.*

The ARC also found **Petitioner “. . . does not meet the eligibility criteria for a speech or language impairment and is not eligible for specially designed instruction and related**

services.” *Id.* The ARC determined **the evidence did not indicate a communication disorder and did not confirm an adverse effect on educational performance.** Respondent’s Exhibit 17; T.T. pp. 104-05; T.T. pp. 83-84; T.T. pp. 114.

Because Respondent concluded Petitioner did not qualify for special education services, it did not develop an IEP for [REDACTED]. Respondent discontinued the services it offered that were comparable to those specified in Petitioner’s [REDACTED] IEP. Petitioner’s father, [REDACTED], indicated he agreed with the eligibility decision; [REDACTED] did not agree. Respondent’s Exhibit 6.

Petitioner’s Educational Progress After ARC’s Decision

Petitioner was not adversely affected by the ARC’s eligibility decision. [REDACTED] grades for the second semester of the 2018-2019 school year remained very good. Petitioner’s grades during 2019-2020, [REDACTED] second grade, were also very good. Specifically, Petitioner received an “A” in Primary Language Arts, a “B” in Primary Reading, an “A” in Primary Mathematics and an “A” in Primary Social Studies. Respondent’s Exhibit 5. Petitioner received satisfactory scores, which was the highest possible ranking, in all other subjects during the 2019-2020 school year. Respondent’s Exhibit 4.

[REDACTED] was Petitioner’s second grade teacher in 2019-2020. She described Petitioner as a very good to average student and a hard worker. [REDACTED] testified Petitioner made significant growth during the school year. T.T. p. 58. She testified she gave Petitioner reading and math inventory assessments in August 2019 and December 2019. Petitioner increased [REDACTED] reading inventory score from 147 in August 2019 to 320 in December 2019.

[REDACTED] described this increase as a significant amount of growth. T.T. p. 63. Petitioner

increased [REDACTED] math inventory score from 264 in August 2019 to 488 in December 2019.

[REDACTED] testified this was the highest growth of any student in her class that year. *Id.*

[REDACTED] also administered the Fountas and Pinnell assessment of reading skills in August and December 2019. In August, Petitioner scored at Level J, which [REDACTED] described as “. . . right where a second grader should start out.” *Id.* In December 2019, Petitioner scored at Level N, “. . . which is where a student should be at the beginning of third grade.” [REDACTED] said, “So, [REDACTED] was in December already reading on a third-grade level.” *Id.* at 64.

While she sometimes referred students for special education services, [REDACTED] testified she never had a reason to refer Petitioner. *Id.* at 59. [REDACTED] further testified Petitioner exhibited good behavior in her classroom, describing [REDACTED] behavior as average for a second grader. *Id.* at 60.

Petitioner enrolled in virtual learning at Respondent during the 2020-2021 school year. During this school year, Petitioner received all A’s and B’s in [REDACTED] courses. Respondent’s Exhibit 3.

Independent Educational Evaluation

[REDACTED] from [REDACTED] University performed an independent educational evaluation of Petitioner. Respondent’s Exhibit 37. [REDACTED] assessed Petitioner’s language skills, communication skills, social functioning, speech, adaptive skills and cognitive ability. T.T. p. 119.

[REDACTED] testified Petitioner’s IQ was in the upper end of the average range. Petitioner’s verbal learning and reasoning abilities were in the lower end of the average range, and [REDACTED] conceptual and abstract thinking abilities were very strong. [REDACTED] stated “. . . this tells me

that [REDACTED] processing and retaining information as well or better than other children [REDACTED] age.” T.T. p. 120.

[REDACTED] also administered the Woodcock-Johnson academic achievement assessment, which included two reading tests, two math tests and a written language test.

[REDACTED] summarized [REDACTED] finding on Petitioner’s academic achievement. “[REDACTED] basic reading skills, reading comprehension skills, solidly average; math calculation, math reading skills, solidly average; [REDACTED] ability to express [REDACTED] in writing, solidly average.” T.T. p. 120.

[REDACTED] also administered two additional tests of Petitioner’s expressive and receptive language skills. These tests showed Petitioner’s expressive language skills were in the lower end of the average range consistent with [REDACTED] verbal IQ and [REDACTED] receptive language skills were average. Regarding these tests, [REDACTED] testified “. . . there were no problems there whatsoever.” T.T. p. 120.

Regarding adaptive skills, [REDACTED] administered two parent-based tests where [REDACTED] was the source of information. [REDACTED] discounted these scores because the information from [REDACTED] varied from the language, IQ and academic testing [REDACTED] obtained directly from Petitioner, particularly the Vineland Adaptive Behavior Scale. Regarding behavior and adaptability, [REDACTED] concluded Petitioner was well-adjusted, well-behaved and adaptable. T.T. pp. 121-24.

[REDACTED] also performed certain assessments regarding autism. The Gilliam test showed [REDACTED] perceives Petitioner to be autistic. The Childhood Autism Scale and the Social Responsiveness Scale indicated there was no meaningful evidence of autism. T.T. p. 124.

██████████ testified that ██████ “. . . found no evidence of autism or any other condition.” T.T. p. 125. ██████ did not find Petitioner needed special education services. T.T. p. 125.

On September 18, 2020, special education teacher ██████████ emailed ██████████ to schedule an ARC meeting to review and consider ██████████ independent educational evaluation. ██████████ responded she wanted to wait until a speech and occupational therapy evaluation was completed. Respondent’s Exhibit 40.

On October 5, 2020, Petitioner was evaluated in a clinical setting at ██████████, ██████████, ██████████. Petitioner was diagnosed with a mild mixed receptive-expressive language disorder. Respondent’s Exhibit 16.

On November 24, 2020, ██████████ emailed ██████████ to schedule an ARC meeting to review ██████████ report and the ██████████ report. The ARC meeting was scheduled for December 18, 2020. Respondent’s 40.

December 18, 2020, ARC Meeting

On December 8, 2020, ██████████ emailed a copy of the Procedural Safeguards to ██████████. On December 10, 2020, ██████████ emailed ██████████ a notice of the ARC meeting. Respondent’s Exhibit 23. The notice stated the purpose of the ARC meeting was to review ██████████ report and the ██████████ report. On the return acknowledgment of the notice, ██████████ requested the presence of ██████████, Petitioner’s second grade teacher. Respondent arranged for ██████████ to attend the ARC meeting.

The ARC convened on December 18, 2020, to review ██████████ evaluation and the ██████████ evaluation. The Language Line Interpreting Service was connected to the

meeting. [REDACTED], [REDACTED] (special education parent advocate), [REDACTED] [REDACTED] (Petitioner's ABA therapist), [REDACTED] (virtual general education teacher) and [REDACTED] (Petitioner's second grade teacher) attended the meeting virtually. Respondent's Exhibit 64.

Assistant Director of Special Education [REDACTED] attended virtually and chaired the meeting. [REDACTED] summarized the Procedural Safeguards. [REDACTED] did not have any questions regarding her rights. *Id.*

School psychologist [REDACTED] presented [REDACTED] report to the ARC. [REDACTED] stated her concerns with [REDACTED] evaluation. [REDACTED] stated the results of [REDACTED] evaluation were similar to the Integrated Assessment Report prepared by Respondent in the fall of 2018. [REDACTED] stated [REDACTED] report only had parental input regarding certain adaptive function measures and did not contain information from teachers. [REDACTED] said [REDACTED] gave low adaptive functioning scores in 2018, but the teachers reported average adaptive functioning which supported [REDACTED] decision to discount [REDACTED] low scores. *Id.* at 5. [REDACTED] read [REDACTED] concerns about [REDACTED] report, which were noted in the Conference Summary. Respondent's Exhibit 23.

During the ARC meeting, [REDACTED] stated there was no disagreement between [REDACTED] evaluation and the Integrated Assessment Report of 2018. After considering [REDACTED] report and the similar December 3, 2018, determination of ineligibility, the ARC decided not to revisit the determination of ineligibility. Respondent's Exhibit 64, pp. 8-9.

Speech language pathologist [REDACTED] reviewed the [REDACTED] report with the ARC. She stated Petitioner's Core Language score was 87, which was average. She further

noted that under the Clinical Evaluation of Language Fundamentals Five test, Petitioner exhibited average to above average skills in formulating sentences, word structure, linguistic concepts and word classes. She said Petitioner exhibited below average skills recalling sentences, following directions and understanding spoken paragraphs. Petitioner's articulation, fluency and voice were all within normal limits. Respondent's Exhibit 64, pp. 9-10.

The ARC determined the [REDACTED] report was similar to [REDACTED] 2018 written communication report as the comprehensive language assessment continued to be in the average range and commensurate with same-aged peers. Therefore, the ARC did not revisit the prior eligibility decision. Respondent's Exhibit 64, p. 10.

[REDACTED] attended the ARC meeting at [REDACTED] request. [REDACTED] recounted her observations of Petitioner as an average student and the tremendous progress [REDACTED] made as a second-grade student. Respondent's Exhibit 64, p. 11.

Petitioner's Academic Performance After Transferring to [REDACTED] School

Petitioner's last day at Respondent was March 31, 2021. Respondent's Exhibit 2. In August 2021, [REDACTED] enrolled in [REDACTED] School ("[REDACTED]") in [REDACTED] as a fourth grader. Petitioner's Exhibit 15. Although Petitioner did not have an IEP while [REDACTED] attended Respondent, [REDACTED] performed on grade level at [REDACTED] during the first two grading periods of the 2021-2022 school year. *Id.* During those two grading periods, Petitioner received A's and B's in all subjects, including reading, written language, oral language and mathematics. *Id.* at pp. 25-26. On October 22, 2021, [REDACTED] teacher wrote Petitioner "... was Above Standard in math and Near Standard (very close to Met Standard) in Reading on IAB's taken this week. In both cases [REDACTED] is at the higher end of the class as a whole. In iReady, [REDACTED] scored late-3rd in

Reading and mid-4th in Math. Again, at the higher end of the class as a whole and tests were taken in mid-August.” *Id.* at 26.

In 2021, the ██████████ School District (“██████████”) obtained a Report of Psycho-Educational Assessment (“██████████ report”) regarding Petitioner. *Id.* at 21. The cognitive assessments in this report are similar to Respondent’s 2018 Integrated Assessment Report and ██████████ 2020 report. Petitioner’s verbal IQ score of 100 was average and ██████ nonverbal IQ score of 119 was above average. *Id.* at 32-34.

Per the ██████████ report, Petitioner’s receptive and expressive communication was within normal limits. This assessment was similar to ██████████ and ██████████ findings, but somewhat inconsistent with the ██████████ report. *Id.* at 34. The speech pathologist determined Petitioner had articulation errors, which was not found by ██████████, ██████████ or ██████████. *Id.* The IEP team meeting notes from January 21, 2022, state:

The Speech Language Pathologist shared that she is impressed with Petitioner’s growth in speech-language development over the last few years. ██████ is doing well with comprehension. The SLP spoke to this in particular as she knows this was one of ██████████-██████████ concerns. With expression, ██████ did well. ██████ has a good memory. ██████ could tell a story in a sequence. ██████ doesn’t speak off-topic. She picked up on some dysfluency when ██████ was doing a story retell. She didn’t see disorganized speech with Petitioner though. ██████████ says that Petitioner has difficulty explaining what ██████ just read or what ██████ did at school with mom. The SLP stated that Petitioner qualified for speech due to articulation errors that should have resolved by now.

Id. at 14.

Consequently, Petitioner qualified for special education services in ██████████ under its standards for articulation errors that reportedly should have resolved by the fourth grade, not for

difficulties associated with expressive or receptive language (which was [REDACTED] concern when Petitioner attended Respondent). Articulation errors were not noted by any prior evaluator or mentioned in any prior record.

Per the [REDACTED] report, [REDACTED] rated Petitioner's adaptive skills much lower than [REDACTED] classroom teacher. [REDACTED] rated Petitioner's adaptive skills as moderately low or low; the classroom teacher rated [REDACTED] adaptive skills as average. The evaluator wrote ". . . concerns regarding emotionality and behavior raised at home are not seen in the school setting." The [REDACTED] evaluator's observation was similar to Respondent's Integrated Assessment Report and [REDACTED] evaluation. Petitioner's Exhibit 15, pp. 39-40.

The autism ratings in the [REDACTED] report were similar to Respondent's Integrated Assessment Report and [REDACTED] report. The [REDACTED] evaluator concluded, "Petitioner does not exhibit the educational profile consistent with that of a student with autism." *Id.* at 43.

1. Whether Respondent failed to implement the IEP that was in place when Petitioner enrolled at Respondent and/or failed to formulate an IEP while Petitioner was a student.

INDIVIDUAL EDUCATION PLAN

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

INDEPENDENT EDUCATIONAL EVALUATION

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 to the child.

CHILD WITH A DISABILITY

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 (emphasis added).

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. After evaluating Petitioner, Respondent determined an IEP was not warranted.

Petitioner had an IEP when [REDACTED] attended [REDACTED] just before transferring to Respondent; the latest version was dated May 18, 2018. Respondent's Exhibit 11. Petitioner alleges Respondent failed to implement this IEP. Respondent did not implement the [REDACTED] [REDACTED] IEP, but this was not a "failure". Because Petitioner transferred to Respondent from a non-Kentucky school, Respondent was required to conduct its own evaluation to determine whether Petitioner qualified for special education services under Kentucky standards. Based on the testing and evaluations, Respondent ultimately and correctly determined Petitioner did not qualify for an IEP.

Respondent writes in its Post-Trial Brief, “To the extent that the Request for Due Process Hearing relates to actions that occurred before December 7, 2018, this case is time-barred.” KRS 157.224(6) provides, “A parent, public agency, or eligible student may only request the administrative hearing within three (3) years of the date the parent, public agency, or eligible student knew about the alleged action that forms the basis of the complaint, unless a longer period is reasonable because the violation is continuing.” While Respondent is correct regarding the statute of limitations, it does not completely resolve this issue.

At the ARC meeting on September 11, 2018, Respondent determined Petitioner was not eligible for specially designed instruction and related services. At the ARC meeting on December 3, 2018, Respondent decided to remove the one-on-one assistance from the [REDACTED] IEP. Although these decisions were made before December 7, 2018, the undersigned must still consider the time beginning December 7, 2018, and thereafter, to determine if Respondent committed any violations of FAPE, including whether an IEP should have been developed for Petitioner.

Petitioner alleges [REDACTED] was a “child with a disability” and should have been provided with “specially-designed instruction” under an IEP. As the party seeking relief, Petitioner bears the burden of proof on this issue by a preponderance of the evidence. *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".

Petitioner alleges [REDACTED] qualified as a “child with a disability” under the categories of “autism” and “speech or language impairment.”

707 KAR 1:002 sets forth important definitions regarding this issue.

“Adverse effect” means that the progress of the child is impeded by the disability to the extent that the educational performance is significantly and consistently below the level of similar age peers.

“Autism” means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three (3) that adversely affects a child’s educational performance.

“Child with a disability” means a child evaluated in accordance with 707 KAR 1:300, as meeting the criteria listed in the definitions in this section for autism, deaf-blindness, developmental delay, emotional-behavior disability, hearing impairment, mental disability, multiple disabilities, orthopedic impairment, other health impairment, specific learning disability, speech or language impairment, traumatic brain injury, or visual impairment which has an adverse effect on the child’s educational performance and who, as a result, needs special education and related services.

“Specially-designed instruction” means adapting as appropriate the content, methodology, or delivery of instruction to address the unique needs of the child with a disability and to ensure access of the child to the general curriculum included in the Program of Studies, 704 KAR 3:303.

“Speech or language impairment” means a communication disorder, including stuttering, impaired articulation, a language impairment, a voice impairment, delayed acquisition of language, or an absence of language, that adversely affects a child’s educational performance.

A “child with a disability” for autism, or speech or language impairment must show the child’s condition “adversely affects” the child’s educational performance. To constitute an adverse effect, the disability must impede the child “to the extent that the educational performance is significantly and consistently below the level of similar age peers.”

As discussed above, Petitioner’s academic performance without an IEP was not “significantly and consistently below the level of similar age peers.” To the extent Petitioner had an impairment, it did not significantly affect [REDACTED] educational performance. None of the numerous evaluations or assessments shows Petitioner was a “child with a disability”.

Respondent did not “fail” to implement the IEP that was in place when Petitioner enrolled at Respondent and did not fail to formulate an IEP while Petitioner was a student there. Petitioner was not a “child with a disability” and did not qualify for special education services.

2. Whether Respondent failed to provide the least restrictive environment for Petitioner.

Petitioner alleges Respondent failed to provide the least restrictive environment for Petitioner. This allegation is not supported by the record. As discussed under issue one, Petitioner was not a “child with a disability” as defined by Kentucky law.

3. Whether Respondent failed to obtain an independent educational evaluation of Petitioner as requested by [REDACTED] parent.

Respondent did not fail to obtain an independent educational evaluation.

After the ARC meeting on December 3, 2018, [REDACTED] noted her disagreement with the eligibility decision and requested information about an independent educational evaluation for Petitioner. Respondent’s Exhibit 6. 707 KAR 1:340 § 2(1) provides, “If a parent requests an independent educational evaluation, the LEA shall provide information to the parent about where an independent educational evaluation may be obtained and the LEA's applicable criteria for independent educational evaluations.”

Respondent precisely followed this regulation. On December 11, 2018, Director of Special Education [REDACTED] mailed a letter to [REDACTED] regarding an independent evaluation and Respondent's criteria for evaluators for which Respondent would pay. The letter included the name and contact information of an individual who met the criteria and who had agreed to complete the independent evaluation at Respondent's expense. The letter also enclosed the Procedural Safeguards. Respondent's Exhibit 40, p. 3 and Exhibit 101. Although [REDACTED] received the necessary information to arrange an independent evaluation, she did not schedule one at this time. Later, pursuant to a Mediation Agreement, the parties scheduled an independent educational evaluation with [REDACTED].

4. Whether Respondent denied Petitioner's parent(s) the opportunity to equally and meaningfully participate in the ARC meetings.

Respondent did not deny Petitioner's parent(s) the opportunity to equally and meaningfully participate in the ARC meetings. As discussed under issue one, the three-year statute of limitations bars claims regarding the meetings that occurred on September 11, 2018, and December 3, 2018. KRS 157.224(6). However, as an alternative ruling, the undersigned will address Petitioner's claims regarding all ARC meetings, including the meeting held December 18, 2020. The statute of limitations does not preclude claims regarding the December 18, 2020, ARC meeting.

Petitioner alleges [REDACTED] mother, [REDACTED], was not allowed to meaningfully participate in the ARC meetings. The record does not support Petitioner's allegations. Before scheduling a meeting, Respondent always contacted [REDACTED] to set the time and date of the meeting so she could attend. All notices of the meetings were sent sufficiently in advance to permit her attendance. The notices always stated the purpose, time and location of the meetings. The

notices always stated [REDACTED] could bring information or someone to assist her to the meetings and she did always bring an advocate or an ABA therapist. All notices stated [REDACTED] could request an interpreter and contained a simple check-the-box form for requesting one. Respondent provided an interpreter for [REDACTED] whenever she requested and provided one for the December 18, 2020, meeting, although she did not request one. Respondent's Exhibits 7 and 23.

The audio recordings [REDACTED] submitted and the conference summaries show she was a full and active participant in the ARC meetings. The conference summaries show Respondent made great efforts to ensure [REDACTED] understood the proceedings. Although English is not [REDACTED] native language, her English language skills are very good as demonstrated during this proceeding. Respondent provided [REDACTED] with a copy of the Procedural Safeguards and verbally explained them to her at the beginning of every ARC meeting. Respondent's Exhibits 9, 44, 60, 61, 62, 63 and 64.

Respondent did not deny Petitioner's parent(s) the opportunity to equally and meaningfully participate at the ARC meetings.

5. Whether Respondent breached the mediation agreement by refusing to obtain an independent evaluation of Petitioner.

Petitioner alleges Respondent breached the mediation agreement by refusing to obtain an independent evaluation. The record does not support this allegation. In June 2020, [REDACTED] and Respondent executed a Mediation Agreement. Respondent's Exhibit 20. Paragraph 18 of the Mediation Agreement states Petitioner ". . . will have an independent evaluation (focusing on language, communication, social function, speech, and occupational therapy). . . . The parent

and school system hope this evaluation can be completed by August 7, 2020 but understand that this date may need to be changed because of the pandemic.” *Id.* at 4.

Pursuant to the Mediation Agreement, Director of Special Education [REDACTED] emailed a list of independent evaluators (occupational therapists and speech therapists) that could perform an independent evaluation. The parties encountered difficulties scheduling an evaluation because of the Covid-19 pandemic. Petitioner’s Exhibit 18.

However, despite the difficulties, on July 27, 2020, [REDACTED] performed an independent educational evaluation of Petitioner. [REDACTED] report is dated August 12, 2020. Respondent’s Exhibit 37. [REDACTED] report was discussed above in detail. The report was completed a few days after the goal, but the Mediation Agreement recognized the date might have to be extended because of the Covid-19 pandemic.

Respondent did not breach the mediation agreement.

6. Whether Respondent failed to provide ARC notes to Petitioner’s parent(s) after the meetings, and/or prepared inaccurate documentation of meetings and refused to change the notes.

Petitioner alleges Respondent did not provide ARC notes to [REDACTED] parent(s) and/or prepared inaccurate documentation of meetings and refused to change the notes. The record does not support these allegations.

As discussed under issue one, the three-year statute of limitations bars claims regarding the meetings that occurred September 11, 2018, and December 3, 2018. KRS 157.224(6). However, as an alternative ruling, the undersigned will address all ARC meetings.

Although Petitioner makes these allegations against Respondent, ■ did not produce any credible evidence that Respondent failed to provide ARC notes to Petitioner's parent(s) or prepared inaccurate documentation of meetings. The record as a whole indicates Respondent made great efforts to keep accurate records and to provide copies of notes to Petitioner. Petitioner has not carried ■ burden of proof on this issue.

7. Whether Respondent denied FAPE to Petitioner for the years 2018-2019, 2019-2020 and 2020-2021.

For the reasons stated herein, Respondent did not deny FAPE to Petitioner for the years 2018-2019, 2019-2020 and 2020-2021.

FINAL ORDER: For the reasons stated herein, the undersigned finds Respondent did not deny FAPE to Petitioner or commit any of the violations alleged in Petitioner's Request for a Due Process Hearing. No relief is due Petitioner.

/s/ D. Lyndell Pickett
D. Lyndell Pickett
Hearing Officer
July 14, 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 July 14, 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