

**KENTUCKY DEPARTMENT OF EDUCATION
DIVISION OF EXCEPTIONAL CHILDREN SERVICES
EXCEPTIONAL CHILDREN APPEALS BOARD
AGENCY CASE NO. 2223-09**

█

APPELLANT

V.

FINAL DECISION AND ORDER

████████████████████

BOARD OF EDUCATION

APPELLEE

PROCEDURAL HISTORY

On September 16, 2022, Appellant █ (hereinafter variously “Appellant”, “█”, “█”, “Student”) filed a Request for Due Process Hearing. On November 21, 2022, the Appellee ██████████ Board of Education (hereinafter variously “Appellee”, “School District”, “School”) filed an Expedited Due Process Complaint. On December 6, 2022, Student filed Amendments to Complaint, and on December 14, 2022, Student filed a Response to Request for Expedited Hearing. Initially, Hon. Roland Merkel was assigned as the Hearing Officer. However, due to a conflict of interest, the case was transferred to Hon. Kim Hunt Price as the Hearing Officer.

This case was heard in ██████████, Kentucky, from January 4 - 6, 2023. ██████████ represented Student. ██████████ represented the School District. On March 20, 2023, Hon. Kim Hunt Price issued Findings of Fact, Conclusions of Law and Order. This case comes before the Exceptional Children Appeals Board (hereinafter “ECAB”) following a timely appeal by the Student.

ISSUES

The Hearing Officer decided the following issues:

1. Whether the Individual Education Plan (hereinafter “IEP”) was reasonably calculated to provide free appropriate public education (hereinafter “FAPE”),
2. Whether failure to implement the IEP caused a denial of FAPE,
3. Whether the School District predetermined the Student's placement at [REDACTED] [REDACTED] School (hereinafter “[REDACTED]”),
4. Whether [REDACTED] is the least restrictive environment in which the School District can provide FAPE to the Student, AC
5. Regarding the Expedited Complaint whether the behavior of the Student was substantially likely to result in injury to [REDACTED] or others, and if so, whether the School District did all it could to prevent any change in placement.

Student’s Request for Appeal of the Due Process Hearing decision requests that the student remain at [REDACTED] to complete 2022-2023 schoolyear, but it is unclear that such represents a concession that [REDACTED] was the correct placement, given that relief requested include allowing the mother to choose whatever school she wishes for [REDACTED] future matriculation. Consequently, this ECAB decision addresses all issues decided by the Hearing Officer, with particular emphasis on the issues Student focused on in briefs to ECAB.

PRELIMINARY DISCUSSION OF LAW

This is an appeal of a hearing officer’s decision as permitted by 707 KAR 1:340 § 13(1) which provides:

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 as assigned by the Kentucky Department of Education. The appeal shall be perfected by sending, by certified mail, to the Kentucky Department of Education, a request for appeal, within thirty (30) days of the date of the hearing officer's decision.

Student's appeal was timely filed and ECAB has jurisdiction to decide the appeal.

STUDENT 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".

STANDARD OF REVIEW

20 U.S.C. § 1415(g) established the appellate review process following a due process hearing for a state, such as Kentucky, that has a two-tier administrative process. *See* 707 KAR 1:340 §§ 12-13. In compliance with that process, ECAB is required to conduct an impartial review of the Hearing Order and make an independent decision upon completion of its review. 20 U.S.C. § 1415(g)(2). That review is to be conducted as a *de novo* review of the entire hearing record. 34 CFR § 300.514(b)(2).

The only limitation on ECAB's review is that it must defer to the Hearing Officer's fact findings based on credibility judgments "unless nontestimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a

contrary conclusion.” *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520, 528 (3d Cir. 1995). ECAB can make fact findings contrary to the Hearing Order that are supported by substantial evidence and are not based upon different views about credibility of witness testimony. *Id.* at 528-529. Conflicting testimony does not, by itself, warrant ECAB concluding the related fact finding was implicitly a credibility determination of evidentiary facts by the Hearing Officer rather than differences in overall judgment as to proper inferences. *Id.*

Having reviewed the record and the briefs of the parties, ECAB makes the following Findings of Fact, Conclusions of Law, and Final Decision and Order. Although much of what appears hereinbelow reproduces what appeared in the Hearing Officer’s Decision, ECAB found the format and expression utilized by the Hearing Officer reflected the view of ECAB after an independent de novo review. ECAB also makes additional fact findings that focus on issues emphasized in Student’s briefing to ECAB.

FINDINGS OF FACT

1. At the time of hearing, ■■■ was an 8th grader at ■■■■■ School (■■■■■). ■■■ was initially identified as a student with an Emotional Behavioral Disability (EBD) in February 2019.
2. Since the date of ■■■ identification, ■■■ has attended ■■■■■, ■■■■■, ■■■■■, and ■■■■■, during the 2018- 19 school year (4th grade) and 2019-20 (5th grade). PE 17.
3. In 6th grade, ■■■ attended ■■■■■ School (■■■■■). During the Covid Pandemic, ■■■ was educated in the NTI program through the remainder of ■■■ 6th grade year. ■■■ was in the ■■■■■ during the Summer of 2021. During the same Summer, ■■■ also had school enrollment at the ■■■■■

████████████████████ for a four-day period.

4. ██████ began ██████ 7th grade year at ██████ and within a couple of days, at ██████ guardian/grandmother's request, was transported for a mental health evaluation and then enrolled in the ██████. ██████ returned to ██████ where ██████ remained until October 7, 2021, when ██████ was enrolled in the ██████ school at the ██████, where ██████ remained through November 11, 2021. ██████ returned to ██████ on November 15, 2021. ██████ remained enrolled in ██████ from November 16, 2021, forward, although ██████ did not attend any classes as ██████ was hospitalized by ██████ guardian/grandmother at an out of state Psychiatric facility. On February 4, 2022, ██████ was enrolled in ██████ and remained there through February 16, 2022. ██████ returned to ██████ on February 25, 2022. On March 16, 2022, ██████ was enrolled at ██████, a residential facility where ██████ remained until May 19, 2022. Two of the hospitalizations occurred after mobile assessments at ██████. JE 153. On May 19, 2022, ██████ mother regained custody of ██████ via ██████ Family Court Order, and that same day removed ██████ from ██████ and enrolled ██████ at ██████. There were 4 days left in the school year, and ██████ attended school on two of those four days.

5. During ██████ 7th grade year, a plan was developed by board-certified behavior analyst (BCBA) to assist ██████ with ██████ behavior. This BCBA is the same one that has also worked at ██████. JE 70, p. 8; 137 p. 13. A BCBA specializes in identifying socially significant behaviors and finding a way to teach individuals to meet those needs in a more appropriate way. TE p. 815,

6. This behavior plan, referred to at times as “Action Plan,” was designed to assist ██████ transition needs when ██████ returned from hospitalization back to ██████. The plan

was as follows:

All parties that work with █ will be following the plan so that everyone is aware of what supports will be placed when █ needs a break or to regain █ composer when █ is frustrated.

- a. █ will have an instructional assistant meet █ at the beginning of the day (entering the building and leaving at the end of the day) to transition █ to cafe to receive █ breakfast and move to the classroom;
- b. Instructional assistant will remain near █ in the classroom as well as transitioning in hallway;
- c. When █ feels frustrated, █ can request to see █, grade level counsellor, mental health counsellor as needed and/or request to attend the quiet location (room 214) with an adult so that █ can use █ calming strategies and regain █ composer. █ will let staff know █ is ready to move back to the classroom (must be calm and no threats).
- d. When █ demonstrates verbal aggressive, remind █ (private redirection) to ask if █ needs a break and offer choice to seek an adult or move to the quiet location of █ goals and expectations of the classroom and school expectations. [sic] (JUST reminding █ what █ is working on █ skills). The guardian stated it depends on what makes █ mad that sets █ off. Guardian has in the past let the school be aware if █ had issues before █ enters the school building.
- e. When █ becomes verbal aggressive that leads into physical altercation, █ is to be removed immediately to provided restorative conference in a quiet

location so that ■ can think through ■ next steps either to talk to a preferred adult, call guardian or therapist and/or mental health counsellor. ■ is not to receive token economy chip (chips or snack) unless ■ returns to the classroom in a calm manner.

- f. ■ has displayed appropriate behaviors (remaining calm during instructional time) ■ is to receive immediate gratification such as small rewards (10 minutes on computer, small snack of ■ choice) and/or offer one item off ■ choice board developed by teacher and ■. The committee wants ■ to have input on what works for ■. [sic].
- g. ■ is reminded daily of ■ expectations in the hallways and in the classroom.
- h. ■ will receive "POP INS" throughout the day to check in on how ■ is doing. Those key point persons to do those check in to make sure ■ knows that we are making sure ■ is doing well in the classroom. [sic].
- i. Training will be delivered to staff involved in ■ plan or educational setting.
- j. Rewards to be developed on a choice board created by TOR and ■. JE 70, p. 4.

7. At a meeting on January 5, 2022, these recommendations appear to have been added to ■ IBP under "Program modifications and supports" as an attached "Action Plan." JE 71, p. 5. No such action plan was attached, but reference to it remained on ■ IBP until it was removed at the September 12, 2022 ARC meeting. JE 80, 81, 82.

8. During ■ time at ■, ■ did not receive counselling as a related service. TE.

46, 1.6 ■■■ was receiving counselling services at ■■■ through a ■■■ school-based therapist. TE. 391, 1. 14. ■■■ also had access to counseling at school during this first semester from a Community Support Associate, (CSA) and an adjunctive therapist, both with ■■■. TE 799, 1.12. The CSA and adjunctive were both available for crises situations but were not reachable when called. Both services were discontinued by the therapists due to ■■■ frequent absences on the days these therapists were scheduled to see ■■■. TE. 502, 1.8.

9. ■■■ therapist, ■■■, believes that if ■■■ is calm after an incident, ■■■ should be allowed to remain at school. TE p. 510, 1.25. ■■■ believes that ■■■ needs a program that's positive and relationship based, where the adults talk to ■■■ about what happened and help ■■■ figure out how ■■■ can do things differently the next time. TE 509, 1.15. Allowing ■■■ to stay at school would also teach ■■■ that ■■■ is wanted at the school. TE. 550, 1.15.

10. As early as 4th grade, while at ■■■ Elementary, ■■■ began to exhibit multiple serious behavioral incidents, including striking students and staff, destroying school property, and eloping from the classroom and school building; throwing furniture, pens, laptops, and games; threatening to kill students and staff; and kicking and spitting on staff. JE 153.

11. During the Summer of 2021, ■■■ had a verbal altercation with the bus driver, resulting in ■■■ being removed from the bus. TE pp 413-414.

12. Within two days of the beginning of ■■■ 7th grade year at ■■■ (2021-2022), ■■■ eloped from the building and threatened to harm staff and ■■■, requiring physical restraint. JE 153. As a result of this incident, ■■■ was evaluated and placed at the ■■■ ■■■.

█ returned to █ on September 24, 2021 with behavior problems continuing including striking students, fighting, throwing chairs, eloping from the classroom, destroying school property, lighting paper on fire and throwing it at Staff, and saying "I am going to burn your face", and that █ was going to "burn the building down". JE 153. █ was then enrolled at the █ at the █, where █ remained until November 11, 2021.

13. █ returned to classes at █ on November 15, 2021, and that same day and the following day had behavior referrals for using profanity, destroying school property, attempting to fight another student, and kicking and shoving staff. JE 153. █ also eloped from the building and ran into the street in front of a car yelling at the driver to hit █.

14. █ 8th grade year (2022-2023) began on August 10, 2022 at █. █ special education teacher, █, testified that █ had the ability to be a very sweet young █ and to be helpful. █ stated that there was a student in the classroom that █ tried to help out a lot. Further, █ stated that █ has a very funny personality. However, █ went on to state that █ personality can switch out of nowhere and can become very threatening and violent toward both students and staff and can be very disruptive. TE Vol. 3, pp. 631-632.

15. During █ 8th grade year, prior to the home instruction period, █ had the following incidents and referrals at █ for █ behavior:

- a. On August 18, 2022, █ engaged in a verbal altercation with another student in the classroom, threatening physical violence. As the student tried to leave the classroom, █ ran behind █, grabbed █ by the jacket, and tried to pull █ back into the classroom.

- b. On August 19, 2022, ■ attempted to instigate a fight between two students in the classroom. After the attempted fight was broken up by the teacher, ■ threatened to beat up and kill one of the students. ■ then ran through the room flipping desks. The Student Response Team (SRT) was called. ■ continued to throw objects throughout the classroom, including the teacher's full cup of coffee at the teacher. SRT removed ■ from the classroom. ■ later saw the student ■ had been threatening outside the classroom and continued to threaten to kill ■. ■ then eloped from the school building. JE 98. TE Vol. 3 pp. 644-647.
- c. On August 22, 2022, ■ was verbally aggressive with another student in the classroom and ■ behavior escalated. The teacher attempted to deescalate ■, and ■ in response took a laptop and ran out of the classroom. When ■ came back into the classroom, ■ continued ■ verbal attack, which included profanity toward the student. The teacher attempted to deescalate ■ again with assistance from three female staff members. ■ continued to escalate following the student around the classroom. Ultimately, all students had to be cleared from the classroom. During that time, ■ threw a bag of markers at a student and hit ■. After the students were out of the classroom, ■ began destroying school property, throwing desks and breaking one; throwing chairs; throwing a mini refrigerator; rummaging through other students' backpacks and throwing their items over the classroom; drawing on the classroom walls and other objects with a permanent marker; calling a female safety administrator a "■";

striking school staff; and grabbing multiple staff members' glasses off their face and breaking some. JE 153 and TE Vol. 1 pp. 287-288.

- d. There was a second incident on August 22, 2022, in which [REDACTED] threw an object at a substitute instructional assistant and called [REDACTED] a "[REDACTED]". The instructional assistant was hit in the head. As [REDACTED] continued to escalate, the plan in place for [REDACTED] was followed by female staff arriving to clear the room. [REDACTED] began to fight through the female staff. As the staff was trying to exit other students out of the room safely, [REDACTED] approached a staff member and began punching [REDACTED] in the arms. Male staff were present, but were not engaging with [REDACTED]. Nonetheless, [REDACTED] walked up to one of the male staff members, threatened to hit him, tried to shove him, and said that [REDACTED] was going to swing on him. [REDACTED] called [REDACTED] mother, and the Assistant Principal, ECE coach and Principal spoke with Mother. [REDACTED] was suspended for this incident. JE 153,101 and TE Vol. 2 pp. 423-424.
- e. On September 9, 2022, [REDACTED] got into a verbal and physical altercation in the classroom with another student. [REDACTED] went up to the student and started punching and slapping the other student in the head.
- f. On September 12, 2022, [REDACTED] was verbally aggressive to another student, threw a metal bottle at the student and hit them. [REDACTED] was also physically aggressive with staff, slamming [REDACTED] body into female staff members and stating "Imma beat your [REDACTED]". [REDACTED] began to then taunt staff members by touching them and repeatedly saying "don't touch me". [REDACTED] destroyed items throughout the classroom and threw pens and pencils hitting

multiple staff members.

- g. A second incident occurred on September 12, 2022, while a substitute was covering █ morning special education class, so █ regular special education teacher could attend █ ARC meeting. █ refused to follow the substitute's directions and was playing █ music very loudly from █ device in the classroom. After multiple refusals to lower the volume, the substitute walked to █ desk to turn it off, and at that time █ slammed the device onto the substitute's hand.

16. Behavior that continued after the Due Process Request was filed included as follows:

- a. On September 13, 2022, students unloading from the bus began fighting. Both █ and other students were engaged in throwing punches until the bus driver got off the bus and was able to get between them. █ then entered the school building and began stating "Where is she?". █ was given verbal prompts to go to █ cool off spot pursuant to █ behavior plan but refused to do so. █ walked out of the gym and exited the building, reentered the building in the cafeteria saying that █ was going to "█ up". The ECE implementation coach then began to implement the crisis plan, but █ ignored that and walked in the opposite direction. █ then exited the building a second time. When staff were able to get █ back into the building, █ began throwing music stands and instruments in the Orchestra room with other students present. █ ignored multiple verbal cues to stop. Staff had to restrain █ and SRT was contacted to ensure that █ was safely transported home, per █ mother's request. █ was suspended for this

incident. JE 126, TE Vol. 424-425.

- b. On September 26, 2022, ■■■ taunted and baited another student. A physical altercation broke out and ■■■ had to be restrained. ■■■ was suspended for this incident JE 128, TE Vol. 2 pp. 426-427.
- c. On September 28, 2022, while students were taking a test, ■■■ was to be working on a study guide for the test as ■■■ had been absent the day before. ■■■ began throwing pencils at another student and was asked by the teacher to stop. ■■■ then began getting louder with two students while ■■■ was sitting at ■■■ desk. The teacher could not initially tell if ■■■ was playing, or if things were getting serious, but asked ■■■ to quiet down. ■■■ then started verbally abusing the two students by saying that ■■■ would "kill them" and "■■■ them up". SRT was immediately called, and ■■■ continued the behavior of screaming, cussing, and threatening students. The other two students remained relatively calm at the threats. When the SRT arrived, ■■■ became more aggressive to reach a female student. Staff intervened by using proximity to redirect ■■■ attempts to go after the other students. Other students had to be cleared from the classroom for safety purposes. ■■■ was suspended for this incident (JE 129).
- d. On October 4, 2022, ■■■ threw objects at another student and threatened the other student by saying "I will whoop your ■■■" and "I will kill you". ■■■ hit one of students in the face then eloped from the classroom, ran down the halls yelling the ■■■ word.
- e. A second incident occurred on October 4, 2022, in which ■■■ threatened to

"beat [REDACTED]" to another student; went through a classmate's belongings and took out their phone trying to break it by throwing it around the room, against walls, on the ground, and slamming walls and desks saying that [REDACTED] was going to break the phones. Multiple times [REDACTED] nearly hit the students and staff members throwing the phones. [REDACTED] ran the halls looking for another student, and when staff passed [REDACTED], [REDACTED] attempted to strike the other student, but instead struck the Counselor and Assistant Principal. [REDACTED] ran through the halls refusing to follow adult verbal redirection. [REDACTED] went on the stage, picked up another student's Chromebook, and slammed it to the floor, and jumped up and down on the computer. [REDACTED] started throwing items from the staff's desk before running off the stage again. [REDACTED] was suspended for these multiple incidents. JE 131 and TE Vol. 2 pp. 427-428.

- f. On October 13, 2022, [REDACTED] began verbally challenging and threatening a 6th grade student to fight because the student sat next to [REDACTED] in the cafeteria. When the 6th grade students were dismissed from the cafeteria, [REDACTED] followed the 6th grader out of the cafeteria, down the hallway, yanked the student's hair from behind, threw [REDACTED] to the ground, and jumped on [REDACTED] from behind and began punching and stomping the 6th grader near the head. As the 6th grade student was laying on the ground being assisted, an 8th grade teacher who had been supervising the transition, held [REDACTED] back from the other student. While multiple staff were addressing the situation, [REDACTED] pulled away from the teacher and ran off through multiple hallways until four adults were able to physically separate [REDACTED] by creating a barrier in the corner of the

cafeteria. A female SRT restrained █ while █ was kicking and verbally threatening to spit on staff and swing on staff. As staff attempted to release the hold on █, █ began punching, striking the Assistant Principal. █ was suspended for this incident. JE 132 and TE Vol. 2 pp. 428-429. It should be noted that this incident occurred the morning after █ found out that █ mother had been incarcerated again. TE Vol. I pp. 379-380.

- g. On October 18, 2022, █ started saying that she "didn't want to █ be in the classroom". █ stood on █ chair and refused to sit down. The teacher asked if █ needed to take a break with a preferred adult, and █ said "█ no, I ain't going nowhere". █ then began making comments toward a male student telling him to "shut the █ up", then threw a pencil at him. The student asked █ to stop, and █ said "what the █ are you going to do, you ain't going to hit no █". █ came and offered to give █ a break. █ shut the door in █ and █ face. They called for █ and she said, "I'm not going with that █ either". Another male student who had been trying to work on his assignment told █ to stop and █ told him to "shut the █ up before I beat your █ ass". █ then took another student's laptop and threw it in the trashcan. That student asked to take a break, and █ stood in front of the door, and wrapped █ arms around his neck. The student got █ off and then went back to his seat. █ then walked up to the student's face and began to punch him in the stomach. █ picked up a tissue box and threw it at him, hitting him in the back. Another student was sitting at his desk talking to another student, and

█ told him to "Shut the █ up before I beat your █". As █ was walking out of the classroom █ looked at yet another student and said "Don't worry I got your █, I know where you live and your bus stop, and I am going to kill your █". █ was suspended for this incident. JE 133, TE Vol. 2 pp. 429-430.

17. In an attempt to address █ behaviors, the school and █ mother agreed to try home instruction for a two-week period. TE Vol. 2 pp. 582-583. This was to be from October 31-November 9, 2022. JE 141. █ delivered █ Chromebook and assignments to the home. JE 142. █ did generally well during █ home instruction. TE Vol. 3 pp. 649-652.

18. After coming back to █ from the two weeks of home instruction, █ had continued behaviors. Namely, the following events occurred:

- a. On November 14, 2022, █ began to make comments toward another student calling his dad a "deadbeat". When the student asked █ to stop and █ continued, █ began talking about how █ beat up a student's sister multiple times calling her and him a █. The student asked █ to stop, and █ stated multiple times "make me". The student then requested a break to get away from the situation, and █ stated, "that's right █", and followed him out the door telling him that █ was going to get off at his bus stop. On that same day, █ eloped from the classroom.
- b. On November 15, 2022, █ threatened to "hit you over the head with this computer", to an instructional assistant. █ threatened to hit and kill another student. █ took a box of staples from the teacher's desk and threw them at

others in the classroom. ■ threw the teacher's laptop on the floor, and began stomping on it, causing it to be broken beyond repair. ■ was suspended for this incident. JE 147, TE Vol. 2 pp. 430-432.

- c. On December 1, 2022, ■ was involved in three separate bus incidents. During these, ■ engaged in verbal altercations and fights with multiple students on the bus. ■ struck the bus driver and spit on him. After ■ got off the bus, ■ had another physical fight with another student that had to be broken up by a school employee. ■ was suspended for these incidents. JE 154.
- d. On December 12, 2022, ■ threw a pencil at another student, and slapped him in the face.
- e. On December 13, 2022, as the class was returning from lunch, ■ was running through the halls. When ■ returned to class, ■ hit a peer who made it clear that he did not want to play with ■ and was in no mood to play games. ■ continued to taunt him and took his shirt and ran around the room with it. ■ gave the shirt back, and at the same time took his computer and continued to taunt him, running around the room, saying ■ would smash it. ■ peer again made it clear that he did not want to play games and wanted the Chromebook back. SRT and ■ were called for support. ■ began threatening to assault the student, and the student was removed from the class. ■ continued to pursue the student, threatening to assault him. The Security Administrator offered ■ a break, and ■ proceeded to punch the Security Administrator with two hands, grabbed a

radio from their pocket and smashed it on the ground. ■ then ran into the hallway and refused to comply with the SRT, ■ and administrators' prompts. ■ ran into the cafeteria, ripped posters off the wall, destroyed a holiday food drive display, ran down the hallway and exited the building into the foyer, and destroyed school furniture in the foyer. ■ ran out of the building and went after two students exiting the building. Staff was able to restrain ■ at that time. As ■ was restrained, ■ assaulted a staff member by kicking them, and another by headbutting him. TE Vol. 1 pp. 59-61 and pp 296-301. ■ was suspended for this incident. JE 165 and TE Vol. 2 p. 432.

19. ■ has endured numerous traumas in ■ life that have contributed to ■ mental health issues and behaviors. These traumas include gun violence, homelessness, and repeated hospitalizations in psychiatric and therapeutic facilities. The hearing officer's findings of fact numbered 21-23 describe other relevant traumas the details of which ECAB finds are not necessary to recount in ECAB's findings.

20. ■ has changed schools numerous times as reflected hereinabove. PE. 17.

21. On or about May 4, 2021, custody of ■ was awarded to ■ grandmother. TE Vol. 3 pp. 523-524.

22. ■ held numerous ARC meetings, conducted reevaluations, amended IEPs. conducted Functional Behavior Assessments (FBA) and revised the Behavior Intervention Plan (BIP) in efforts to assist ■ with ■ behavior. Chronologically, the following events were taken in attempts to assist with ■ behaviors:

a. On March 25, 2022, the ARC met to review the results of a reevaluation and confirmed that ■ continued to meet eligibility as a student with an EBD. ■ IEP was also

reviewed. At that time [REDACTED] current diagnosis was disruptive mood dysregulation disorder and there was a past diagnosis of ADHD (Rage and Impulsive behaviors) JE 79. The ARC reviewed [REDACTED] academic performance, social and emotional status, and an FBA that had been completed by the Special Education Teacher at [REDACTED]. The ARC determined that [REDACTED] remained eligible for special education under the category of EBD.

After reviewing the FBA, the ARC considered whether [REDACTED] needed a BIP while [REDACTED] was at [REDACTED]. It was noted that during [REDACTED] first seven days at [REDACTED] that [REDACTED] behaviors had significantly improved, and that [REDACTED] continued to work to address [REDACTED] target behavior. The structured program and behavior instruction at [REDACTED] allowed the facility to work to address [REDACTED] target behavior. A point person for [REDACTED] was designated to go to in order to deescalate [REDACTED] behavior. [REDACTED] had three staff members who had made a connection with [REDACTED]. Given the structure at [REDACTED] for [REDACTED] and the success [REDACTED] had been enjoying while there, it was determined by the ARC that a BIP was not necessary for [REDACTED] while she was at [REDACTED]. [REDACTED] grandmother/guardian at the time stated in the ARC meeting that "She trusts us with [REDACTED] education as the experts". The IEP was amended as necessary to reflect the transition to [REDACTED]. It was specifically noted in the Conference Summary of the meeting that a BIP was not necessary because

[REDACTED] is currently in a highly structured residential facility with an onsite educational program that emphasizes support for student's success. The program provides explicit instruction and behavioral expectations, uses daily behavioral monitoring, formal and informal instruction in social skills, and support from facility staff both in the classroom and therapeutically outside the classroom within the facility program. Students receive both rewards and consequences in the classroom within the structure of the program for behaviors. The goal of the highly-structured setting is to develop social, behavioral, and academic skills that will help [REDACTED] be successful in future academic and social settings.

JE 80, p. 5. Despite [REDACTED] success at [REDACTED], as soon as [REDACTED] mother regained custody of

████ on May 19, 2022, █████ immediately removed █████ from █████. TE Vol. 1 p. 48.

b. An ARC was held on May 23, 2022, to revise █████ IEP and make placement decisions. In attendance were █████ mother; █████ ECE implementation coach (████); school counselor and district representative (████); █████ Special Education teacher from █████ the regular education teacher (████); school counselor (████); █████ Assistant Principal (████); and █████ ECE supervisor for the middle schools (████). JE 88. The ARC reviewed █████ attendance and behaviors in the schools that █████ had attended in the 7th grade. In addition to █████, these were the █████, with three separate enrollments, █████, with two separate enrollments, and █████ with four separate enrollments. PE 17. It was noted in the ARC conference summary report that while █████ was at █████, █████ met school expectations 70% of time over the seven-week period. █████ had 7 behavioral incidents at █████ for harassment toward staff, leaving class without permission, fighting, talking out in class, and striking another student. As a result of this information, the ARC decided that a BIP would be necessary in helping to transition █████ from the structured small environment of █████ to █████, which is a large comprehensive school with over 1,000 students.

The ARC further discussed some of the behavioral interventions that █████ had been successful with at █████ to be used at █████, such as talking to a trusted adult, taking a time out, using a point sheet, and having an escort. TE Vol. 1 pp 41-42. These intervention strategies were included in █████ IEP. JE 81. The following behavioral intervention strategies were adopted by the ARC: calming strategies, verbal/visual prompts, replacement behaviors, use of break cards, trusted adults inside the school building, FBA, a crisis plan, movement breaks, self-regulation skills, self-monitoring skills, positive feedback, explicit

instruction in daily behavioral point sheets, reward systems, conferences with a trusted adult, and access to a cool-down area. TE Vol. 1 pp 50-51.

At the request of [REDACTED] mother, during this meeting the ARC reviewed [REDACTED] current crisis plan and made necessary changes to help [REDACTED] with [REDACTED] transition to [REDACTED]. The ARC also explained to [REDACTED] mother the use of the break cards and the data driven basis for the academic goals that were on [REDACTED] IEP. The ARC recommended [REDACTED] have counseling added as a related service to [REDACTED] IEP, but Mother declined this service. JE 81 and 88.

c. Another ARC meeting was scheduled on August 25, 2022. The school psychologist, [REDACTED], was invited by [REDACTED] to participate and share information and strategies that [REDACTED] thought could help [REDACTED]. JE 99. The meeting had to be cancelled after [REDACTED] mother admitted [REDACTED] to the hospital on August 24, 2022. JE 106. Attempts to reschedule began on August 26. [REDACTED] emailed the mother stating that it was important to discuss [REDACTED] transition to [REDACTED], the supports, and the best setting for where those could be implemented. JE 107. It was also disclosed to [REDACTED] mother in advance of the meeting that the ARC would discuss whether [REDACTED] would be a better placement for [REDACTED], given the supports [REDACTED] needed and based upon [REDACTED] escalating behavior at [REDACTED]. [REDACTED] Mother agreed that the ARC meeting would be held on September 8, 2022. Mother agreed to have [REDACTED] [REDACTED] [REDACTED] therapist, and [REDACTED] mental health practitioner attend the ARC meeting. JE 109. Unfortunately, again the meeting had to be rescheduled to accommodate the schedules of all of those who would attend. JE 118.

Ultimately, the meeting was rescheduled and held on September 12, 2022. Attendees at this ARC meeting were [REDACTED] (the District Representative); [REDACTED] ([REDACTED] Special Education teacher); [REDACTED] ([REDACTED] general education teacher); [REDACTED] ([REDACTED]

Principal); District Counsel [REDACTED]; [REDACTED] (ECE Supervisor); [REDACTED] (mother's attorney); [REDACTED] (school psychologist); [REDACTED] ([REDACTED] Mental Health Provider); [REDACTED] ([REDACTED] School counselor); [REDACTED] ([REDACTED] School Psychologist); Mother; Mother's fiancé and [REDACTED] (Mother's counsel). Mother requested that [REDACTED] not attend. JE 121.

The meeting's purpose was to review and revise the IEP and make placement decisions, discuss post-secondary transition needs and discuss parent concerns. A review was made of [REDACTED] diagnoses and treatment, [REDACTED] 7th grade enrollment and behavioral events or referrals, [REDACTED] incidents and referrals at [REDACTED], [REDACTED] current crisis plan and current BIP, [REDACTED] current IEP goals and [REDACTED] progress towards those, the need for a FBA, [REDACTED] SAS, and [REDACTED] accommodations and program modifications. It was discussed that, although [REDACTED] did not have a BIP at [REDACTED], [REDACTED] BIP that was developed from [REDACTED] was still available and would be implemented at this time period. TE Vol. 1 pp 72 and 94. The ARC agreed that a new FBA was needed and agreed to collect data on [REDACTED] behaviors and consider changes in [REDACTED] BIP. Mother gave consent for this FBA.

Mother raised her parental concerns at this ARC meeting that included that [REDACTED] was being bullied by a peer. Mother was told that the bullying department had been notified of this allegation on August 22, had investigated it fully, and that the bullying was not substantiated. JE 121 and 102.

Mother was concerned with [REDACTED] being observed by a board-certified behavioral analyst (BCBA). [REDACTED] had suggested having BCBA [REDACTED] observe [REDACTED] in a phone call with Mother during the time of the August 22 incidents in order to offer behavior intervention strategies. JE 1. Mother rejected the offer on that day. The ARC meeting again

suggested having this BCBA observation of [REDACTED] in the classroom to make recommendations for behavioral intervention strategies. After being told by her attorney that it would be helpful, Mother gave verbal consent for this to occur.

Mother was concerned about [REDACTED] crisis plan. The ARC recommended after review of [REDACTED] current crisis plan that [REDACTED] trusted persons at [REDACTED] be added to [REDACTED] crisis plan. However, Mother indicated that she wanted the same individuals to remain on the plan and the ARC conceded to this request. TE Vol. 1 pp 278.

[REDACTED] Mother was concerned about [REDACTED] having access to this self-selected list of trusted persons at [REDACTED]. [REDACTED] list of [REDACTED] go-to people was reviewed, and Mother did not agree for [REDACTED] to have a list of people in the school to meet with [REDACTED]. Mother was opposed to [REDACTED] placement as an option for [REDACTED] and did not want to hear about that, arguing that "[REDACTED] is not a behavior student". The ARC listened to this input, but ultimately agreed by consensus that [REDACTED] was an appropriate placement.

Mother stated that she had documentation showing that [REDACTED] was not a candidate for [REDACTED]. However, that documentation was not presented at the ARC, nor at the hearing. Mother was also concerned about provision of additional counseling for [REDACTED]. The ARC recommended adding counseling as a related service, but Mother declined that offer as well.

Much of the discussion during this ARC meeting was of the escalating pattern of [REDACTED] behavior and what would be an appropriate placement for [REDACTED]. By this point, [REDACTED] had had 18 behavioral incidents during [REDACTED] first month at [REDACTED], as compared to only 5 incidents in 41 days at [REDACTED], and 2 incidents when [REDACTED] was at the [REDACTED] during 7th grade. JE 121 and TE Vol. 1 pp 370-371. The ARC noted that [REDACTED] had performed better in 7th grade, due to being in a smaller, more restricted school environment. The ARC

discussed providing █ with more behavioral and therapeutic support in a smaller setting, but stated that could not be accomplished in a comprehensive school setting such as █. Dr. █ and █ from █ gave a detailed presentation as to the services that █ had available. Dr. █ stated that █ serves students that have not been successful in comprehensive schools and that need extra levels of therapeutic support in addition to their educational needs. TE Vol. 1 pp 201-202. The ARC was informed that █ is a 100% special education school with students riding the special needs transportation with special education students. It was described as structured, with students remaining in the classroom all day long and mental health practitioners coming into the classroom to assist the students. JE 121. █ classrooms have extra adult assistance; five mental health therapists, in addition to █ staff; and calming centers where students can go to cool down and take a break from the classroom setting. TE Vol. 1 p. 202 and Vol 2 pp. 568-569.

The ARC team, other than Mother, felt that █ would be an appropriate placement for various reasons, including that █ would get more therapeutic help █ needed (█); █ would consistently provide █ the supports █ needed (Dr. █), █ needed supports and structure that █ could provide (█); a therapeutic environment like █ would be more supportive and would prepare █ to return to a comprehensive school (Dr. █); given █ documented history and data, that █ needs therapeutic support and █ smaller environment, and that █ would provide █ with a support and structure system similar to that █ had been relatively successful in at █. TE Vol. 2 p. 417, Vol. 1 pp. 74-75, Vol. 2 pp. 567-568. Vol. 1 p. 206,207 and 210. Based upon the review of all potential benefits and

harm to the change in placement to [REDACTED], the ARC determined that the least restrictive environment would be for placement to be changed to [REDACTED].

d. The ARC also amended [REDACTED] IEP at a September 12, 2022 ARC from [REDACTED] March 25, 2022 IEP. JE 82. Changes made were an update to [REDACTED] education plan to address [REDACTED] current needs, a change in [REDACTED] least restrictive placement to [REDACTED]; an update to [REDACTED] present level of performance based on current data; adding [REDACTED] 8th grade classes; adjusting provided services, adding information to goal 5, and updating [REDACTED] SAS, Special Education Services Program Modifications and Related Services. JE 121 and 82. The updated related services were to provide bus transportation to [REDACTED]. Other specific amendments were adding the use of break card to [REDACTED] SAS JE 81, 82; amending [REDACTED] program modifications and supports for school personnel section to read that "information will be shared with all staff members (including bus driver and SRT staff about [REDACTED] BIP and Crisis Plan); updating [REDACTED] Crisis Plan to add that [REDACTED] current [REDACTED] therapist, [REDACTED], to the call list; adding [REDACTED] observational data to [REDACTED] present levels; amending [REDACTED] behavior goal #5 to state "when frustrated or upset with a peer, adult, or situation, [REDACTED] will appropriately take a break and interact without use of inappropriate language, threats and physical aggression 80% of the time in three out of four opportunities as measured by daily behavior monitoring sheet two times per week." At the time that the Due Process Hearing Request was filed on September 16, [REDACTED] was in [REDACTED] part-time general education and part-time special education placement at [REDACTED] and remained in said placement through the date of the hearing, with the exception of the two weeks of home instruction.

e. [REDACTED] ARC met again on November 1, 2022 for a manifestation determination

review meeting due to the fact that [REDACTED] had been suspended more than 10 days. JE 140, 136. At that point in time data showed that [REDACTED] had 14 behavior referrals for 19 separate events, which included 6 times of striking staff, 2 times striking a student, 1 time fighting a student, 2 times intentionally throwing objects, taunting, baiting, inciting a fight 3 times, 3 incidents of harassing communications toward students, 1 count of 3rd degree assault, and 1 instance of profanity.

The ARC also reviewed [REDACTED] progress toward [REDACTED] IEP goals and it was noted that [REDACTED] performance in this area had dropped from the September 12th meeting. [REDACTED] general education teacher, [REDACTED], reported that [REDACTED] behaviors had increased in the classroom and resulted in [REDACTED] not completing [REDACTED] work. [REDACTED] had attempted to fight students and threatened to kill a student. JE 136. [REDACTED] had incurred 21 behavior incidents in the six weeks since the September 12th ARC meeting.

Discussion was had as to [REDACTED] current BIP. Because [REDACTED] was showing the same behaviors the BIP was amended to address [REDACTED] behaviors and supports. JE 145. [REDACTED] morning transition plan was discussed so [REDACTED] would be met at the bus unloading area by [REDACTED] [REDACTED] who would escort [REDACTED] to breakfast and then to one of [REDACTED] trusted people. JE 136. These items of [REDACTED] preferred adults and [REDACTED] morning transition plan were added to the BIP. This status of the FBA for [REDACTED] was reviewed for use in amending the BIP. Although some FBA data had been collected, there was not 10 days' worth of data due to absences and suspensions. TE Vol. 1 p 156. [REDACTED] had conducted three classroom observations.

[REDACTED] testified that she worked with [REDACTED] and [REDACTED] teachers to provide different resources to use to conduct the FBA, including a data sheet, a question-and-answer form to be used by teachers and other individuals who knew [REDACTED], and the structured ABC

sheet to use for data collection for the assessment process. ■■■ met with both of ■■■ teachers and went over how replacement behavior would be used with ■■■. They discussed break cards that they were using in the classroom and both teachers were on the same page as to how those cards would be used. Discussion was held trying to target precursor behaviors when an escalation first became noticeable and intervention would be made at that point. ■■■ actually observed the teacher doing that. ■■■ also reviewed check-ins with preferred individuals. ■■■ stated that these were proactive interventions put in place prior to the implementation of the most recent BIP while they working on the FBA. TE Vol. 3 pp 858-859, 865.

After review of all of the above information, the ARC determined that the behavioral incidents were manifestations of ■■■ disability and that ■■■ could be disciplined in accordance with ■■■ Student Support and Behavior Intervention Handbook. At that time, it was determined ■■■ would remain in ■■■ current placement. JE 136.

Also at this meeting, compensatory education to ■■■ for the days of time that ■■■ had been suspended, totaling over 10 days, was discussed. ■■■ had a total of 18.81 days in out-of-school suspension, and it was agreed that 12 hours of instruction on ■■■ academics would be provided as ■■■ compensatory education and that the plan would begin once ■■■ returned to school. JE 19. Mother did not want ■■■ "to do anything with the behavior" such as working on social skill goals. JE 136. The ARC also reviewed ■■■ crisis plan and discussed making changes to remove the adults to be called when ■■■ was in crisis when others ■■■ had on ■■■ list could not be reached. The crisis plan was updated to continue to have the FBA data collected and the FBA completed and drafting a new BIP, if indicated by the data. It was also agreed that the BCBA would continue to work with ■■■ teachers.

f. Another ARC meeting was convened for a manifestation determination review as a result of disciplinary actions that took place between November 14th and December 13, 2022 after ■■■ returned from ■■■ two weeks of home instruction. JE 162. Multiple notices of this meeting were provided to Mother and her counsel, but they refused to attend any meetings until after the Due Process Hearing. It was discussed that ■■■ had incurred 20 behavioral referrals for 25 events, including 6 striking of staff, 2 striking of students, 4 fighting students, 2 intentionally throwing items, 3 taunting, baiting and inciting a fight, 4 harassing communications toward students, 1 assault 3rd degree, 1 profanity, 1 leaving class without permission, and 1 harassing communications toward staff. Progress toward ■■■ goals was discussed and none of the goals had been met at that time. JE 164, 162. At this time ■■■ behavior goal performance was 31%, with ■■■ often refusing to complete tasks or request breaks. ■■■ writing goal performance was at 54% and it was noted that ■■■ would refuse to do ■■■ work, sleep, shut down or cause distractions. ■■■ math goal performance was at 55% and reading at 66%. ■■■ refused to take ■■■ MAP test. Social skills goal performance was at 31% and noted that ■■■ struggled with peers and feels ■■■ was being talked about. It was noted that ■■■ would avoid work and state that ■■■ wanted to get suspended. Further, it was noted that ■■■ would call ■■■ parent when upset or escalated and that these calls typically made ■■■ behavior worse.

At this point, the FBA had been completed and was reviewed by the ARC. JE 162 and 155. The FBA noted that when ■■■ felt ■■■ peers were talking about ■■■, threatening ■■■ or doing something ■■■ didn't like, ■■■ engaged in verbal and physical aggression and destroyed property. The FBA reviewed interventions that had been

provided to ■■■, including ■■■ morning transition plan, break cards, bus change, and lunch with the preferred adults, and notes that ■■■ was having continued difficulties with ■■■ targeted behaviors. JE 162.

Most of the behaviors above had occurred in the classroom. The FBA noted that Mother being convicted of a crime, an unstable home situation, and ■■■ past traumas and witnessing of domestic violence may have contributed to ■■■ behaviors. JE 155. It was believed that there was enough FBA data to create a new BIP to target ■■■ aggression and property destruction behaviors. It was determined that the behavior incidents were manifestations of ■■■ disability and that ■■■ could be disciplined in accordance with the Student Support and Behavior Intervention Handbook while remaining in ■■■ current placement. JE 162.

Additional compensatory education was also discussed and it was agreed there would be 24 hours total, with that being 12 additional hours from the previous compensatory education. Mother had previously told ■■■ that she wanted to wait until the summer of 2023 before beginning any of ■■■ compensatory education.

23. In addition to the multiple ARC meetings, manifestation determinations, FBA, and modification to ■■■ IEP and BIP, the school implemented numerous strategies and supports within the classroom to address ■■■ behavior.

a. In the special education classroom setting, ■■■, used a reward system such as allowing ■■■ 10-15 minutes of reward time to play a game on the computer when ■■■ completed ■■■ work. TE 3 Vol. 3 pp. 656-657. He allowed ■■■ to take breaks as ■■■ requested. TE Vol. 3 p. 634. When ■■■ took breaks from the classroom, they were with trusted adults that ■■■ had chosen ■■■ with ■■■, the head of the school security,

being one such trusted adult. Secondly, another security personnel, [REDACTED], or [REDACTED], had been designed and used as a preferred adult for [REDACTED] to speak with when [REDACTED] took breaks from the classroom. *Id.* p. 634. [REDACTED] also used point sheets to track [REDACTED] behavior goals from August 14 through at least November 15, 2022. *Id.* pp. 674-675. TE 12.

b. [REDACTED] crisis plan was implemented when behavioral intervention strategies and supports did not resolve [REDACTED] escalated behavior. The crisis plan included (1) prompts to redirect [REDACTED] when [REDACTED] displayed acts of defiance; (2) if [REDACTED] displayed acts of verbal or physical aggression, calls to SRT were made and [REDACTED] would be removed from the classroom to [REDACTED] cool down area, or if [REDACTED] refused to leave, the classroom would be cleared; (3) once [REDACTED] was in the cool down area, if [REDACTED] continued to escalate, staff were to call [REDACTED] designated list of adults, aunt [REDACTED], [REDACTED], [REDACTED] ([REDACTED]), [REDACTED] [REDACTED] (Mother) and [REDACTED], in that order. In such circumstances, staff was to remain hands-off, ignoring [REDACTED] negative or offensive comments, and keep verbal or physical engagement to a minimum; (4) an additional monitor was to be present to ensure staff followed proper procedures; and (5) if [REDACTED] escalation continued, Mother was to be contacted and permission for a mobile assessment would be requested. JE 82.

24. Most of the attempts to contact [REDACTED] designated adults on the crisis plan were unsuccessful. One time when [REDACTED] was reached, she asked why the school was not calling [REDACTED] mother and then stated that she was in [REDACTED] and could not do anything to help. On that particular occasion after proceeding down the rest of the list, nobody responded. TE Vol. 3 pp. 634-635.

25. Numerous examples of [REDACTED] staff working together on behavior interventions and implementation of [REDACTED] crisis plan occurred. Some of the specific testimony was as follows:

a. On August 22, 2022, the teacher redirected █ when █ was playing SMART boards. This redirection did not work and █ further escalated hitting a peer in the head with a bag of markers, following him around the room and cursing him. Three adult female staff came to the room to assist in deescalating █, but █ continued to escalate. The classroom was cleared. Two calls were placed to a preferred adult, █, and █ hung up on him once. JE 153.

b. On September 12, 2022, the teacher redirected █ when █ refused to follow directions. When the redirection did not work and █ slapped the device on the teacher's hand, the SRT was called. JE 153.

c. On September 13, 2022, when █ unloaded from the school bus in the morning and began fighting, the school bus driver broke the fight up. █ was redirected to go to █ cool off spot, but that did not work, and █ continued to escalate by eloping from the building and yelling that █ was going to "█ her up". Staff contacted █, but █ did not deescalate with █ on the phone. Messages were also left with █ and █ on the preferred contact list. Staff gave █ space and verbal cues to allow █ to deescalate, but that did not work and █ began throwing the music stands and instruments with other students present. JE 153.

d. On September 28, 2022, when █ became disruptive while the class was taking a test, █ was redirected and asked to stop, but escalated and engaged two students. The teacher stood near the students and again redirected █ to quiet down. █ continued to escalate, yelling at the students that █ would "kill them" and "█ them up". The teacher then called the SRT who had to clear the room due to the escalation. JE 153.

e. On October 4, 2022, as █ displayed aggressive behaviors throughout the day, staff

attempted to redirect █ with prompts, cuing and providing choices and space. █ continued to escalate, throwing things, swinging on students, striking staff, eloping from the classroom, and destroying school property. Multiple staff members continued to work with █, but it was ineffective. █ was taken to a cool down area where █ did eventually calm down. JE 153.

f. On October 11, 2022, when █ was upset and stating █ wanted to fight when █ got off the bus due to a social media issue, █ spoke with █ and offered to call █ case manager, █. █ did this and was successfully deescalated on this occasion. JE 1.

g. On October 13, 2022, when █ attacked a student, █ was redirected and provided verbal cues but had to be corralled into a corner by four adults where █ continued to escalate and strike. A female SRT had to restrain █. Staff contacted aunt █ twice about a plan to transport home because Mother was incarcerated. Staff also called █ grandmother but was told she did not have custody of █ at that time and could not come and get █. JE 1.

h. On October 18, 2022, █ began acting out in class and was offered a break with a preferred adult, but refused. █ behavior continued to escalate with striking another student, throwing objects and threatening students. █ was suspended on this occasion. JE 153.

i. On December 13, 2022, █ became physically aggressive with another student. █ was given more than twenty (20) redirects to calm down and follow direction but continued to escalate. SRT was called and █ responded. █ walked the halls, destroyed property and eloped from the building. A physical restraint was required to get █ to settle

down. JE 153.

26. Mother's communications with school staff were consistently verbally abusive and obstructive to [REDACTED] response to [REDACTED] behavior. For example:

a. On August 22, 2022, Mother contacted [REDACTED] with multiple people on the phone. She accused [REDACTED] of "not following the plan". [REDACTED] asked Mother if BCBA [REDACTED] could observe [REDACTED] and offer suggestions on how to help. Mother refused.

JE 1, p 14.

b. On August 22, 2022, Mother was contacted several times regarding [REDACTED] escalated behavior. [REDACTED] asked to go home, and Mother refused.

c. On September 13, 2022, [REDACTED] Assistant Principal [REDACTED] contacted Mother regarding [REDACTED] escalating behavior. Mother was "verbally aggressive and uncooperative" and "confrontational and threatening legal action". Initially, Mother would not agree for [REDACTED] to be transported home. Ultimately, she was told that [REDACTED] would have to be taken to Safe Place and Mother agreed for [REDACTED] to be transported home. JE 1.

d. On September 13, 2022, [REDACTED] spoke to Mother who was "verbally aggressive and yelling" at [REDACTED]. The Mother spoke with the adults in the room while on speaker phone very aggressively.

e. On September 28, 2022, Mother called [REDACTED], the [REDACTED] principal, upset because she felt another student who had been involved in an altercation with [REDACTED] should have been suspended more days. Mother threatened to file a discrimination suit against the school and hung up on [REDACTED]. JE 1 p. 11.

f. On October 4, 2022, Mother sent [REDACTED] to school despite the fact [REDACTED] was suspended. On the same date [REDACTED] and [REDACTED] contacted Mother regarding [REDACTED]

behavior and suspension. As they were trying to tell her what was happening Mother stated, "I don't want to take (sic) to you anymore" and "I don't care about the lies you be telling on my [REDACTED]" and hung up. JE 1 p. 9.

g. On November 11, 2022, [REDACTED] spoke with Mother and requested permission for a BCBA to support [REDACTED] in the classroom. Mother declined this assistance. JE 1 p. 4.

h. On November 14, 2022, [REDACTED] spoke with Mother who did not like the plan that was put into place at the most recent ARC meeting. Mother did not like any of the answers that [REDACTED] provided to her questions and questioned every answer provided to her. Mother ended the conversation by telling [REDACTED] that she did not make any sense and hung up on her.

i. On December 9, 2022, [REDACTED] contacted Mother about issues with [REDACTED] on the bus and Mother refused for [REDACTED] to be transferred to another bus. JE 1 p. 2.

j. On December 12, 2022, [REDACTED] spoke to Mother regarding a change in bus assignments due to [REDACTED] behavior. Mother complained that [REDACTED] was being treated differently and stated she would contact her lawyer about [REDACTED] being suspended. [REDACTED] asked Mother's permission to hold a mediation between [REDACTED] and the other student involved in the bus altercation and Mother refused.

k. On December 13, 2022, [REDACTED] contacted Mother about aggressive behavior that [REDACTED] had exhibited at school and recommended a mobile mental health assessment. Mother declined this as well.

l. At any time when [REDACTED] called [REDACTED] mother from the classroom while [REDACTED] was escalated, the mother only further escalated [REDACTED] behavior and did not make any attempt to

deescalate ■■■. TE Vol 3 pp 636-637, Vol 2 pp. 435-436 and Vol I pp. 275-276. During such calls Mother screamed, yelled and threatened staff and students.

27. The student was enrolled at ■■■■ for four days and attended only two days at the end of the spring semester of 2022. When the student enrolled in ■■■■ for the fall semester of 2022, the “Action Plan,” incorporated by reference in the IEPs that had been adopted in the spring semester of 2022 was removed at the first ARC that could be convened in fall of 2022, which, for reasons set forth elsewhere in these findings, was delayed until September 12, 2022. However, during the first few weeks of school, until September 12, the “Action Plan” was technically part of the student’s IEP by reference.

28. ■■■ asserts that the school concealed the existence of the Action Plan, but ECAB finds no evidence of concealment. ■■■ asserts the existence of the Action Plan was unknown to ■■■ until sometime during the hearing, but as ■■■ points out in briefs, the Action Plan is referenced on several IEPs that certainly were disclosed as part of the student’s records well in advance of the hearing.

29. ■■■ argues that the “choice board” was not developed per the “Action Plan,” but there was not evidence to that effect. Witnesses were not questioned about a “choice board” as such, by either party, but there was much testimony that a system of rewards was being employed as provided for in the IEPs.

30. The “Action Plan” in substance mostly duplicates what appears expressly in the IEP and crisis plan. The provisions of the IEP and the student’s crisis plan mostly mirror the “Action Plan” and those provisions were implemented. Other provisions, unique to the “Action Plan” were substantially implemented as follows:

- a. The Action Plan provided that an instructional assistant should be “near” ■■■ in the

classroom and in hallways transitioning to classes. ECAB finds that “near” did not mean that a one-on-one instructional assistant should be assigned to █ exclusively. There was not evidence proving such an intent or establishing the student needed █ own one-on-one instructional aide. As counsel for █ points out, the school considered one-on-one but concluded it was unnecessary. What the student needed was “wrap-around” access to “█ adults when █ needed them.” [I]t was “an extra level of support for ‘█.’ that kept █ and other individuals safe in the building.” (TE 66-67).

b. The student had very few transitions. █ had all █ classes but one in the special classroom with seven or fewer other students, █ teachers, and an instructional assistant. (TE 66-67). “█ didn't transition except to special area or related arts. And when █ transitioned to related arts, the assistant walks students to related arts.” (TE 88). The related arts class was right next door to the special classroom (TE 363). There was always an escort for █ within the building during the day, (TE 175).

c. The “Action Plan” also called for the student to be escorted from the bus to the cafeteria in the morning. Counsel for █ correctly points out that there was no such physical escort prior to November 1, 2022. The escort was only visual surveillance by █ to see that the student made it into the building (TE 158;175). Since the Action Plan was not dropped until the September 12, 2022 ARC, the visual surveillance did not implement the provision requiring physical escort from the bus to the cafeteria. The student had 18 incidents at █ prior to September 12, 2022, (TE 370), but there was not evidence that any of them occurred during the walk from the bus to the cafeteria.

d. The IEP did not provide for an escort from the bus to the cafeteria between

September 13, 2022, and November 1, 2022, when such escort began. There was evidence that the student got into a fight after exiting the bus on September 13, 2022, and that there was an incident in the cafeteria on the morning of October 13, 2022. However, there was not evidence establishing that presence of an escort during the walk from the bus to the cafeteria would have prevented either of these incidents. Indeed, incidents sometimes occurred when an instructional aide was sitting right beside the student. (TE 143-144).

e. The parent instructed the school to NOT provide an escort for the student from the bus to the cafeteria and objected when the school did so on its own initiative. The principal testified:

it was made very clear to us that "█████." was not to have any different looks to the day. [The parent] said she wants "█████." to have a normal day, ██████ not going to have anything different than what a student coming off the bus or coming through the front doors would have. So that's what we did.

Q. So at the end of November, then she consented to that and it worked?

A. She did not consent to it. She didn't. That's what the phone call was. She was upset that we started that.

(TE 453).

f. The change in the student's morning routine occurring in November that matters was not the escort from the bus to the cafeteria, but something not provided for in the "Action Plan." The school instituted what ECAB will refer to as "the breakfast plan," a practice of having ██████ eat ██████ breakfast with a trusted adult teacher and away from the other students:

We got to a point where we were noticing that coming in, in the morning to a cafeteria where there's not assigned seats -- because it's a holding space for students. They have gym that they can pick from, a cafeteria or in the hallway, so that we can monitor, that that was not conducive to start the day. So people that ██████ has listed, that ██████ has relationships with, to greet ██████ off of the bus, to say, you know, hey, good morning, and then let ██████ get breakfast and then eat in a calm space. Not a disciplined

space, not somewhere where ■■■ has to talk to anybody, but just start the day off calm, on a positive note, and then transition to class.

(TE 418-419). This isolation away from the other students was not intended as punishment:

■■■ was eating breakfast with a preferred adult. Sometimes ■■■ talked and sometimes ■■■ didn't want to talk. So it was with a preferred person, so it was not a consequence for ■■■ behavior. It was a proactive plan to prevent any potential behaviors.

(TE 593-594). The key to calming the student was to get ■■■ out of the cafeteria, away from the other students, and to a quiet place with a trusted adult:

■■■■■ greeted ■■■ in the cafeteria, took ■■■ to breakfast. Then ■■■ went to ■■■ ■■■■ who was typically in the front, in the office front of the building, and there's a conference room right off the office, and ■■■ ate breakfast with ■■■. ■■■ was somebody that "■■■" trusted and talked with. They typically had little chats in the morning. And then ■■■ -- or ■■■■ escorted ■■■ down to ■■■ classroom after all students had left the hallways.

(TE 159).

g. Several witnesses testified that the "breakfast plan" reduced the number of ■■■ behavior incidents occurring in the morning. However, the behavior incidents continued at a high level. As pointed out by ■■■ counsel in cross-examination, the student had been suspended more than 14 days since November 5, 2022. (TE 338). Even in the class outside the special classroom, a class ■■■ liked, ■■■ stopped completing ■■■ work and was attempting to fight with students.

(TE 179-180).

31. There was not proof sufficient to establish that training for those interacting with the student was insufficient. The principal testified:

First and foremost, again, ■■■■ has been very intentional on educating

everyone on [REDACTED] IEP, making sure that we are all very well aware of it, and if we have questions that [REDACTED] is the point person. In addition to that, everyone has the copy of the crisis plan, and [REDACTED] went over it – [REDACTED] didn't just hand it, [REDACTED] went over it with each person that received it.

(TE 418). [REDACTED] argues there could have been more training but did not present evidence that more was needed or mistakes were made which would have been prevented by additional training.

CONCLUSIONS OF LAW

I. THE IEPs PROVIDED OR WOULD HAVE PROVIDED FAPE TO [REDACTED].

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 FAPE. 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 *Endrew 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.” *Endrew 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). *Andrew F ex rel Joseph F v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988 (2017) holds that an IEP has to be “reasonably calculated to enable a student to make some progress.” *Id.* at 1,342. The *Andrew* case further focused on the district’s inability to address Andrews’ behavioral needs as evidenced by “the district’s lack of success in providing a program that would address the [student’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.*

The IBP used at █████ prior to September 12 and the IBP developed for █████ on September 12 were proper to provide FAPE. The ARC considered all requirements of 707 KAR 1:320 Section 5(1) including the child's strengths and concerns of the parent for enhancing █████ child's education, the results of evaluations of the child, and the academic, developmental and functional needs of the child. Because █████ has behavioral issues that impede █████ learning, the ARC also had to consider under 707 KAR 1:320 Section 5(2) "appropriate strategies, including positive behavioral interventions, strategies and supports to address that behavior". Considerable effort was made by the ARC in this regard and numerous strategies were implemented in an effort to address █████ behavior.

The IEPs met all requirements for a valid IEP under 707 KAR 1:320 Section 5(7) in that they contained a statement of █████ present levels of academic and functional performance, including how █████ disability affected █████ involvement and progress in the general curriculum, and contained a statement of measurable goals, both functional and academic, designed to meet █████ needs resulting from the disability to enable █████ to be involved in and progress in the general curriculum. They included a statement of specially designed instruction and related services and supplementary aids and services as set forth in 707 KAR 1:320 Section 5(8). Both IEPs included a statement of the program modifications and supports for school personnel that

would be used for ■■■ to advance appropriately toward attaining ■■■ annual goals, being involved in and making progress in the general curriculum, participating in extra-curricular and non-academic activities, and being educated and participating with non-disabled children.

The IEPs also included a starting date and the frequency, location and duration of services, and modifications required by 707 KAR 1:320 Section 5(12). The IEPs and their content and the conference summaries showed content that included an extensive presentation of ■■■ present levels of academic achievement and functional performance; ■■■ transition service needs and proposed course of study in assisting ■■■ in reaching post-secondary goals; the strategies including positive behavioral intervention strategies and supports, to address ■■■ behavior; had measurable annual goals with benchmark objectives, methods of measuring ■■■ goals, and specially designed instruction tailored to help ■■■ meet the goals; a detailed listing of all SAS to be provided to ■■■ for ■■■ behavior interventions and support; the accommodations to be provided to ■■■ for ■■■ state and classroom assessments; the program modifications and supports to be provided to the staff working with ■■■, the appropriate special education and related services that ■■■ would receive at ■■■ and at ■■■. The Crisis Plan was also updated.

It is undisputed that all appropriate members were at the ARC meeting and were qualified to provide the input that each provided. The IEPs were developed considering ■■■ enrollment history; ■■■ disability eligibility, ■■■ behavior incidents and referrals; ■■■ progress toward ■■■ measurable goals, ■■■ BIP and data therefrom; ■■■ crisis plan; Mother's parental input; the ■■■ representatives' presentation; the expertise of ARC members; and most importantly in the opinion of the Hearing Officer, ■■■ mental health needs. JE 121.

█████ complied with IDEA's substantive requirements. Case law is clear that for a school to satisfy its substantive obligations under IDEA it must offer

an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgement by school officials. The act contemplates that this fact intensive exercise will be informed not only by the expertise of school officials but also by the input of the child's parents or guardians. Any review of an IEP must appreciate that the questions of whether the IEP is reasonable, not whether the Court regards it as ideal.

. *Andrew F 580 US at 399*. The IEP s contained appropriate provisions to address █████ behavioral needs. They were modified to adjust supplemental services as behaviors occurred overtime. The child's circumstances outside of school adversely effected the behavior measures contained in the IEPs. Numerous efforts were made by the ARC and school to employ needed counseling and mental health intervention to enable █████ to meet behavioral goals. Most of the efforts were refused by Mother.

The hearing officer correctly found, and ECAB concludes, █████ Mother did not prove that the IEPs, were not reasonably calculated to provide FAPE.

II. THE IEP AT █████ WAS PROPERLY IMPLEMENTED TO PROVIDE FAPE.

To prevail on claims of failure to implement, Student

must demonstrate that the school has materially failed to implement [her] IEP. And to do that, [she] must prove more than a minor or technical gap between the plan and reality; *de minimis* shortfalls are not enough. A material implementation failure occurs only when a school has failed to implement substantial or significant provisions of [her] IEP.”

L.J. by N.N.J. v. Sch. Bd. of Broward Cnty., 927 F.3d 1203, 1211 (11th Cir. 2019); *see also*,

Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000) (“a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.”). This materiality standard provides that “students and parents can be assured that they will receive the benefits of a properly designed IEP, while schools work to meet those requirements without being inappropriately penalized for *de minimis* failures that do not themselves deprive a student of the educational promise of the IDEA.” *L.J.*, 927 F.3d at 1211.

The materiality standard recognizes that schools are not subject to a “perfect” implementation requirement under the IDEA. *Id.* at 1212. In reviewing a school’s alleged failure to implement a student’s IEP, the task “is to compare the services that are actually delivered to the services described in the IEP itself.” *Id.* at 1214. Moreover, the analysis focuses on “implementation as a whole in light of the IEP’s overall goals.” *Id.* at 1215. In other words, “the question is not whether the school has materially failed to implement an individual provision in isolation, but rather whether the school has materially failed to implement the IEP as a whole. Cumulative analysis is therefore built into the materiality standard itself.” *Id.*

█ argued that 707 KAR 1:320 Section 6 was not adhered to by the school, that the "one page" summarizing the plan to address █ behavior which was provided to bus drivers and SRT resulted in a failure of those personnel to provide specially designed instruction to █, thus creating a failure to provide FAPE. This argument is not persuasive as specially designed instruction is of necessity provided by teachers, not other school personnel. 707 KAR 1:002 Sec 1 (58) defines specially designed instruction as "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 students." Only teachers provide instruction in the general curriculum.

The regulation requires that an IEP

- (a) be accessible to each regular special education teacher related services provider, and other service providers who are responsible for its implementation;
- (b) prior to implementation of the IEP, each implementer is informed of his specific responsibilities related to implementing the child's IEP; and
- (c) the specific accommodations, modifications, and supports are provided for the child in accordance with the IEP.

Regarding the "Action Plan" incorporated by reference but not attached to some IEPs, per the findings of fact there was sufficient education and training – relevant personnel were informed of their responsibilities. The school's vast efforts in implementing the behavior plan are noted in the Findings of Fact. Teachers provided services exactly as the plan set out, although [REDACTED] inability to calm at times prevented movement to calm areas as [REDACTED] simply would not go. The school provided information to collateral personnel, such as bus drivers and SRT ([REDACTED] TE Vol 2, p 385 [REDACTED] TE Vol 2, p 416) to assist with behaviors, both orally and with a "one page" summary. The Findings of Fact illustrate examples of when staff, other than teachers, implemented the behavior plan. All staff, including bus drivers and security personnel) who dealt with [REDACTED] had ample knowledge of [REDACTED] behavior plan and implemented it appropriately, including but not limited to security guards chosen by [REDACTED] as trusted individuals who were called to help implement [REDACTED] plan to deescalate [REDACTED], not as a disciplinary response, in many cases. The SRT followed the behavior plan. [REDACTED] simply could not always be deescalated, resulting in restraints on a couple of occasions for the safety of [REDACTED] and others.

The school met the implementation requirements. All teachers and service providers were provided with access to the challenged IEP and the substance of related behavior or crisis plans

and informed of their responsibilities. The regular and special education teachers were ARC members who helped with the development and approval of the IEP and had intimate knowledge of same. Further, the school insured that others who had contact with [REDACTED] (such as bus drivers and SRT members) had information that was relative to their position. [REDACTED] goals and strategies, BIP, and Crisis Plan were provided to the SRT members and [REDACTED] bus driver in writing or verbally. TE Vol. 2 pp. 335-337. Certainly, these individuals were not required to have access to the entire IEP, given their limited roles of keeping [REDACTED], [REDACTED] peers, and staff safe and transporting [REDACTED] so that [REDACTED] and [REDACTED] peers were safe. Even throughout the school year, [REDACTED] amended the challenged IEP including the BIP and crisis plan to address [REDACTED] continued escalating behavior. JE 136, 162.

A school's implementation of an IEP is not a guarantee of success in school. *Knack* 454 F3d at 614. The school did everything it could do in terms of providing assistance to [REDACTED] to deescalate [REDACTED] behaviors. This is despite the fact that the mother did not cooperate with numerous suggested supports, specifically related to mental health services. JE 121. Further, the Mother flip-flopped on whether the BCA could work with and observe [REDACTED] changing her mind at least three (3) times according to [REDACTED] testimony. TE Vol. 3 p 831. [REDACTED] needs stability and consistency across all areas of [REDACTED] life to be able to achieve [REDACTED] behavioral goals and that simply has not been provided at home. It is reasonable to believe that [REDACTED] home situation contributed vastly to [REDACTED] behavior incidents in school. The Mother was in and out of jail. [REDACTED] lived with different people; during which time [REDACTED] witnessed what would be charged as an attempted murder, and [REDACTED] was reportedly the subject of potential abuse. Further, the Mother's behavior toward staff, which was discussed in the Findings of Fact, make it reasonable to believe that the Mother behaved in a similar manner toward the child at home. The Mother was not willing to accept any responsibility that [REDACTED] needed structure,

discipline and stability in order to change [REDACTED] behavior. It is unreasonable to think that all of [REDACTED] behavior problems at school were caused by only failure of the school. The school did all it could to help [REDACTED] with [REDACTED] behavior, given their inability to have mental health assistance due to Mother's refusal, the flip flopping of Mother on what services could be provided at school, [REDACTED] multiple change in homes and schools due to Mother's incarceration. Mother's behavior on the phone with [REDACTED] while [REDACTED] was escalated did not assist, and in fact made the situation worse. Perhaps most disturbing is Mother's abrupt removal of [REDACTED] from placement at [REDACTED], that was addressing [REDACTED] needs to set [REDACTED] on the right path behaviorally for 8th grade, immediately upon Mother's release from incarceration and with only four school days left in seventh grade. Transitioning to a new school is never easy for a teenage child, but to do this to a child with mental health needs and only four days of school left was totally irresponsible and self-centered. Perhaps if [REDACTED] had been allowed to complete the school year and summer transition at [REDACTED] to [REDACTED] would have been more successful.

Regarding the argument emphasized by [REDACTED] on appeal, implementation of the "Action Plan," per the findings of fact, the substance of it was implemented and failure to have an escort between the bus and cafeteria in the morning was not a material failure to implement.

III. PLACEMENT AT [REDACTED] WAS NOT PREDETERMINED

Although [REDACTED], on appeal, does not address this question directly in briefs, it appears that [REDACTED] does not concede that the [REDACTED] placement was appropriate and the least restrictive environment. Therefore, ECAB will address this issue in order to be judicially prudent.

Meaningful parental participation is the most important procedural requirement of

IDEA in developing the IEP. 34 CFR Section 300.322; *Doe by and through Doe v Defendant 1*, 898 F2d 1186, 1191 (6th Cir. 1990). Predetermination had been held to be a procedural violation of IDEA that denies a parent the opportunity to meaningfully participate in their child's IEP. *HB ex rel PB v Las Virgenes Unified*, 239 F App'x 342, 344 (9th Cir. 2007). However, preparation does not equal predetermination. Evaluators may prepare reports and come with preformed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and the parents have the opportunity to make objections and suggestions. *Knack ex rel Knack v Orange City School Dist.*, 454 F3d 604,610 (6th Cir. 2006).

In the present case, the school did not predetermine a placement at [REDACTED]. The Mother received appropriate notice of the September 12, 2022, ARC meeting. Further, she was specially notified that [REDACTED] representatives would be making a presentation at the meeting so that the ARC could consider a change of placement from [REDACTED] to [REDACTED]. Specifically, an email forwarded to her stated "because of [REDACTED] recent patterns of behavior my principal [REDACTED] and supervisor [REDACTED] have requested that I included [REDACTED] to discuss their program and how they can support [REDACTED]. This school offers more support staff and services than we can offer. They will be there to explain their program and how they can support [REDACTED]." JE 107.

The decision to place [REDACTED] at [REDACTED] was made at the end of the meeting after the ARC developed the challenged IEP. The ARC meeting had multiple purposes, other than discussing protentional placement at [REDACTED], including reviewing and revising [REDACTED] IEP, discussing post-secondary transition needs, and discussing parental concerns. As set forth in the Findings of Fact above, numerous parental concerns were discussed at this meeting.

During the meeting, the ARC also discussed information to develop the IEP including [REDACTED] diagnosis and treatment, [REDACTED] 7th grade enrollments and referrals, [REDACTED] incidents and referrals at [REDACTED], [REDACTED] crisis plan, [REDACTED] BIP, and [REDACTED] prior IBP. The Mother was present, with both counsel and her fiance, to participate fully in all of these discussions and in fact presented her parental concerns to the ARC members during this meeting. After the provision of the detailed information presented by [REDACTED] representatives as to their programs, services and supports, the ARC took a thorough amount of time to discuss the appropriate placement for [REDACTED].

Although the Mother stated during the ARC that she had documentation to show that [REDACTED] was not a candidate for [REDACTED], no such documentation was provided at the ARC meeting, nor at the hearing herein. *Lachman v Illinois State Board of Education*, 852 F2d 290, 297 (7th Cir. 1988) (citing *Rowley*, 458 US at 227) states that "Rowley and its progeny leave no doubt that parents, no matter how well motivated, do not have a right under the [IDEA] to compel a school district to provide a specific program or employ a specific methodology for providing in the education of their handicapped child."

IV. [REDACTED] IS AN APPROPRIATE, LEAST RESTRICTIVE ENVIRONMENT

Although [REDACTED], on appeal, does not address this question directly in briefs, it appears that [REDACTED] does not concede that the [REDACTED] placement was appropriate and the least restrictive environment. Therefore, ECAB will address this issue in order to be judicially prudent.

IDEA requires that a child be educated in the least restrictive environment and mainstreamed with students who are not disabled, to the extent possible, but this does not mean that education with non-disabled students is required in all circumstances. 707 KAR 1:350 Section 1(1) requires that to satisfy the least restrictive environment requirement a district is required to:

ensure that to the maximum extent appropriate, children with disabilities, are educated with children who are non-disabled. The district shall ensure that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if education in the regular education environment with the use of supplementary aids and services cannot be satisfactorily achieved due to the nature or severity of the disability.

In determining an LRE the ARC must take into consideration any potential harmful effects on the child or quality of services she needs with a change of placement. 707 KAR 1:350 Section 1(8). Neither of [REDACTED] Therapists, [REDACTED] and [REDACTED], testified that [REDACTED] was an improper placement. TR Vol. 2. p 488, 537. Every member of the ARC, except Mother, believed [REDACTED] was the least restrictive environment. It's uncertain where the mother wants [REDACTED] to attend school. She made it clear she did not want [REDACTED] placed at [REDACTED], which is [REDACTED] home school, and in relief requested on appeal asks for an order letting her pick the school [REDACTED] attends.

Poolaw v Bisho, 12, 67 F3d 830, 836 (9th Cir. 1995) recognizes that "the IDEA's preference for mainstreaming is not an absolute commandment. It establishes a presumption, not an inflexible federal mandate. Under its terms, disabled children are to be educated with children who are not handicapped only "to the maximum extent appropriate." Mainstreaming is not appropriate when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. *Hartmman by Hartmman v Loudoun*, 118 F3d 996, 1001 (4th Cir. 1997). Every effort must be made to place a student in the least restrictive environment, but it must be the least restrictive environment which also meets the child's IBP goals. *County of San Diego v California Special Educ. Hearing Off.*, 93 F3d 1458, 1468 (9th Cir. 1996). [REDACTED] has engaged in numerous behavioral incidents at [REDACTED], a comprehensive school with over a thousand students, before even the first month of [REDACTED] eighth-grade year was over. [REDACTED] behavior at [REDACTED] previous placements in [REDACTED] smaller more

structured special schools during 7th grade were much less. ■■■ has trauma to the extent that ■■■ requires a smaller structured setting with numerous mental health supports available to ■■■ every day. Those simply cannot be provided within a comprehensive school. ■■■ offers the setting ■■■ needs and is the least restrictive environment in which ■■■ can be placed.

V. THE HEARING OFFICER CORRECTLY ORDERED IMMEDIATE CHANGE OF PLACEMENT AS REQUESTED UNDER THE EXPEDITED NOTICE.

Although ■■■, on appeal, does not address this question directly in briefs, and the passage of time may have made it moot, it appears that ■■■ does not concede that the ■■■ placement was appropriate and the least restrictive environment. Therefore, ECAB will address the issue in order to be judicially prudent.

20 USC Section 1415(k)(3)(A); 34 CFR Section 300.532(a); and 707 KAR 1:340 Section 16(1) provide that a district may request a Due Process Hearing to authorize a change of placement when it "believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others..." 707 KAR 1:340 Section 16(3)(b) further authorizes a Hearing Office to order a change of placement of a child to an appropriate interim alternative for not more than forty-five school days if the Hearing Officer determines that maintaining the current placement is substantially likely to result in injury to the child or others. When interpreting these regulations, case law has required that "[a] school district seeking to remove an assertively dangerous, disabled child from her current educational placement must show (1) that maintaining the child in that placement is substantially likely to result in injury to himself or herself, or to others, and (2) that the school district has done all that it can to reduce the risk that the child will cause injury." *Light* 41 F3d at 1221. *Arcadia Unified, Number 2018120032*, 119 LRP 3402, p 8 (January 18, 2019) and *NL v*

*Springboro Community City School, Number 1:19-CV-334, 2019 WL 225 2433 at *3 (SD Ohio May 26, 2019).* ECAB finds, as did the Hearing Officer, that the school district satisfied both requirements.

Continued placement at ██████ was substantially likely to result in injury to ██████ or another student. In fact, such injury had already happened on more than one occasion with a younger 6th grade child being attacked, multiple staff being attacked and with glasses being broken, and multiple threats to students and staff. Not only does such behavior pose a risk to all staff and students at the school, it poses a substantial risk to ██████ safety as it can only be a matter of time before another student fights back and injures ██████.

The school did all it could do to reduce the risk ██████ will cause injuries. Implementation of the IEP and related behavior plans is addressed elsewhere hereinabove. Pursuant to *Light*, 41 F3d at 1228, "where injury remains substantially likely to result despite the reasonable efforts of the school district to accommodate the child's disabilities" the student's placement can be changed pending the outcome of the due process proceeding. The Hearing Officer had the authority under these rules and regulations to order that ██████ be placed at ██████ for forty-five (45) days, pending any appeals of this Order. Courts have held that a child's capacity to form harmful intent does not play a role in the analysis. *Light*, 41 F3d at 1228. Therefore, the fact that one of ██████ therapists stated that ██████ actions were not planned behavior (TE Vol. 2 pp 533-534) does not stop the provisions from applying in this case. Further, it is not required that a child first inflict serious harm before being deemed substantially likely to cause serious injury. *Id.* at pp. 1229-1230.

██████ has made extensive efforts to reduce the injury risk, both to ██████ and to others in the school. ██████ supplementary aids and services include reinforcement and behavior

modifications strategies; positive feedback; extended time; a cool-off area inside and outside the classroom with a trusted adult inside the school building; movement breaks; prompts and cues; verbal and private redirection; wait time; structured transitions and advanced transition support; point sheet; preferential seating; modified assignments; graphic organizers; crisis plan; FBA; calming strategies; de-escalation strategies; conflict resolution; and use of a break card. JE 82.

As set forth in the Findings of Fact above, the school took numerous steps to develop a list of trusted persons, describe the crisis plan steps, redirect and de-escalate [REDACTED] use positive rewards, use point sheets, a wraparound plan for transitions, use of break cards, and following the crisis plan. Further, all people who are directly involved in providing [REDACTED] services have knowledge of both the IEP and Crisis Plan. Those who are responsible for security and bus transportation received instructions on how it is to be followed. The school even agreed to a two-week period of home instruction to attempt a restart with the child's behavior. None of these efforts worked.

ECAB finds the Hearing Officer correctly ordered immediate change of placement.

FINAL DECISION AND ORDER

The Exceptional Children Appeals Board affirms the decision of the hearing officer and finds no relief is due Appellant.

SO ORDERED on July 10, 2023, by the Exceptional Children's Appeals Board, the panel consisting of Kathleen Schoen, D. Lyndell Pickett and Mike Wilson, Chair.

NOTICE OF APPEAL RIGHTS

This decision is a final, appealable decision. Appeal rights of the parties under 34 CFR 300.516 state:

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

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

707 KAR 1:340 § 8. Appeal of Decision provides the following information to aggrieved parties, in subsection (2): A decision made by the Exceptional Children Appeals Board shall be final unless a party appeals the decision to state circuit court or federal district court.

KRS 13B.140, which pertains to appeals to administrative hearings in general, in Kentucky, and not to civil actions under Part B of the Act (the IDEA), provides: (1) All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not in the enabling

statutes, a party may appeal to Franklin Circuit Court of the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the student upon the agency and all parties of the record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

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

EXCEPTIONAL CHILDREN APPEALS BOARD

_____/s/ *Mike Wilson* _____
Mike Wilson, Chair
July 9, 2023

CERTIFICATE OF SERVICE

The foregoing was emailed this 10th day of July 9, 2023 to the following:

Ashley Lant, KDE Deputy Legal Counsel
Ashley.Lant@education.ky.gov

With copies emailed to:

KDE Legal Services
kdelegal@education.ky.gov
Legal Department, Kentucky Department of Education

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Mike Wilson

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ECAB Panel Member

Kathleen Schoen

[Redacted]

ECAB Panel Member

D. Lyndell Pickett

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ECAB Panel Member

 /s/Mike Wilson
MIKE WILSON, CHAIR
EXCEPTIONAL CHILDREN APPEALS BOARD