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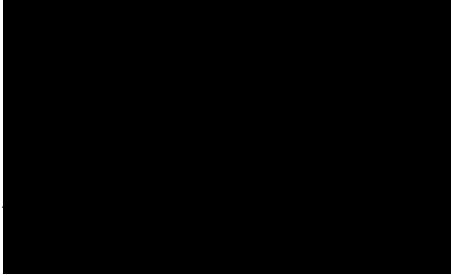
KENTUCKY DEPARTMENT OF EDUCATION
DIVISION OF EXCEPTIONAL CHILDREN SERVICES
AGENCY CASE NO. 1415-14

RECEIVED
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██████████ [the Student]

PETITIONER

Represented by:



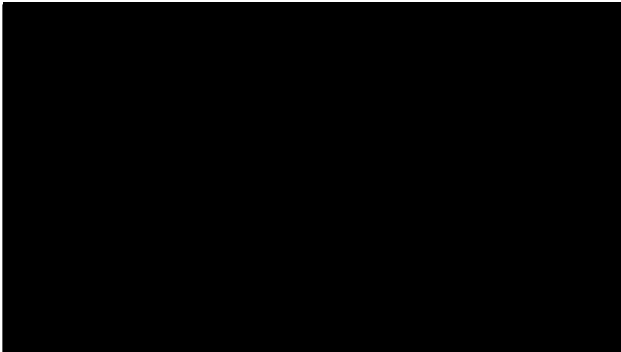
v.

DECISION AND ORDER

██ [the LEA]

RESPONDENT

Represented by:



ENTERED: 4-29-2016

KAREN L. PERCH,
DUE PROCESS HEARING OFFICER

INTRODUCTION AND PROCEDURAL HISTORY

On or about March 24, 2015, the Kentucky Department of Education received a due process hearing request on behalf of the Student. At that time, the Student was nine years old, resided within the geographic borders of the county in which the LEA is located. The Student attended schools of the Respondent LEA. Student was in the fourth grade at the time of the due process hearing request. The undersigned held the hearing in this matter in abeyance, pending the outcome of an ultimately unsuccessful mediation. A due process hearing was held November, 3-6, 2015. At the conclusion of both parties' cases, the Petitioner requested that certain audio recordings be permitted to rebut the testimony of the Student's fourth grade special education teacher. Specifically, the Petitioner challenged the credibility of that teacher. Following briefing by the parties, the undersigned Hearing Officer permitted additional rebuttal evidence for the limited purpose of impeaching the credibility of that particular witness and not for purposes of proof of any issues for hearing. An additional day of hearing was held on January 8, 2016 for the limited purpose of the impeachment evidence.

ISSUES FOR HEARING

The Petitioner states that the following alleged violations of the child's rights under the IDEIA and corresponding state regulations have been ongoing since second grade.

1. Whether the [LEA] failed to fully evaluate [the Student] as required by 707 KAR 1:300.
2. Whether the [LEA] failed to develop, implement and revise an appropriate IEP including placement for [the Student] in violation of in violation of 707 KAR 1:320.
3. Whether the [LEA] failed to make good faith efforts (*sic*) assist [the Student] in achieving

the goals, objectives or benchmarks listed in [the Student's] IEP in violation of 707 KAR 1:320.

4. Whether or not the [LEA] failed to provide [the Student] with a free appropriate public education in violation of 707 KAR 1:290.

PROPOSED REMEDIES

The undersigned has been assigned as Hearing Officer and the request for appointment of a hearing officer is therefore not listed herein below. The Petitioner proposes the following additional remedies:

1. A determination that [the Student] was denied his right to a free appropriate public education;
2. A determination that the [LEA] failed to fully evaluate [the Student];
3. A determination that the [LEA] failed to develop an appropriate IEP including placement for [the Student];
4. A determination that the [LEA] failed to appropriately revise [the Student]'s IEP;
5. A determination that the [LEA] failed to implement an appropriate IEP for [the Student];
6. A determination that the [LEA] failed to make good faith efforts to assist [the Student] to assist [the Student] in achieving the goals, objectives or benchmarks listed in [the Student]'s IEP;
7. That the [LEA] be ordered to reimburse [the Student]'s mother for the cost of outside evaluations;
8. That the [LEA] be ordered to reimburse [the Student]'s mother for all out of pocket expenses for outside professionals related to [the Student's] educational needs;

9. That [the Student] be awarded compensatory education for the time in which he was denied a free appropriate public education;
10. That attorney fees be awarded to [the Student]'s attorney of record; and
11. All such other relief that the Hearing Officer may deem appropriate.

BURDEN OF PROOF

It has been clearly established that the party seeking relief has the burden of proof in administrative hearings brought under 20 USCS §§ 1400 *et. seq.*, otherwise known as the IDEA. *See, Shaffer v. Weast*, 126 S.Ct. 528 (US, 2005) (Holding that the burden of persuasion in an IDEA case falls where it usually falls, upon the party seeking relief). In addition, KRS 13B.090(7) informs us that Kentucky follows the federal rule and spells out the level of proof required to meet the burden of persuasion, stating as follows:

In all administrative hearings, unless otherwise provided by statute or federal law, 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. The agency has the burden to show the propriety of a penalty imposed or the removal of a benefit previously granted. The party asserting an affirmative defense has the burden to establish that defense. The party with the burden of proof on any issue has the burden of going forward and the ultimate burden of persuasion as to that issue. The ultimate burden of persuasion in all administrative hearings is met by a preponderance of evidence in the record. Failure to meet the burden of proof is grounds for a recommended order from the hearing officer.

The Student, as the party seeking relief, must therefore show by a preponderance of the evidence in the record entitlement to relief, on each issue, as a result of the alleged failures of the LEA.

FINDINGS OF FACT

Grade 1: 2011-2012

1. **No relief is sought for this school year, which would be outside Kentucky's**

limitations period under Kentucky law and the IDEA.

2. **An IEP developed during an ARC meeting on February 15, 2012, showed that the Student's academic performance was commensurate with similar age peers but that characteristics associated with Asperger's Syndrome created social and emotional deficits that had a negative impact on the Student's ability to succeed.** JA 8. The IEP contained only one annual measurable goal, which read as follows: "[The Student] will improve [...]social emotional skills in the areas of peer interactions and authority related to 90% on 4 of 5 occasions with aggressive behavior measured as 100% on 5 of 5 days." JA 10. Short term objectives included such behaviors as keeping hands and feet to self, following directions, refraining from temper tantrums, and completing work neatly and not destroying work. JA 10. Supplementary aids and services were identified as daily behavior monitoring sheet, quiet place to calm down or to complete work when needed, social skills training in a small group. JA 10.
3. **A behavior plan was developed for the Student in February, 2012.** The behavior plan was developed because the Student exhibited multiple problem behaviors, such as screaming at adults and peers, refusing to follow directions, throwing things, whining, making faces to show defiance, hitting, kicking, pushing, spitting and shaking a fist. JA 19. The record contains no functional behavioral assessment report, which had apparently been completed in the prior school year (JA 18), but in the behavior plan, teachers believed that the functions of the Student's behaviors were to demonstrate a power struggle, to gain attention and to express anger. JA 19. The Behavior Plan included numerous interventions, such as daily behavior monitoring sheets, isolation in

the resource room for behaviors potentially harmful to others, positive reinforcers, and moving the Student's desk slightly away from peers. JA 20. This Behavior Plan was adopted by the ARC, was used for the remainder of the first grade and was part of the Student's IEP for the start of second grade.

4. **The IEP dated 2/15/2012 included behavioral goals and defined some specific behaviors for which the Student required direct instruction.** At JA 10, temper tantrum, for example, was defined as throwing self on the floor, stomping feet, screaming at peers and/or adults, sticking out tongue, making mean faces, and crying loudly. It also incorporated a Behavior Plan to be used with the Student. The Student was to receive 30 minutes per day of social skills instruction in the resource room. All core content was to occur in the regular education classroom.
5. **From May 4, 2012 through May 14, 2012, the Student's daily behavior monitoring sheets showed that the Student was 100% successful on all short term behavior goals monitored.** PC 148-154. The Annual goal only required that the Student behaviors be as defined for a period of five days. The Student behaved in the manner required by the IEP for seven consecutive school days. PC 148-154.

Grade 2: 2012-2013

6. **The Student has multiple medical issues that adversely affect learning.** Over the years, the Student has received diagnoses of developmental delay, Asperger's disorder, autism, periventricular nodular heterotopia, seizure disorder and epilepsy. TR1, 125-26, 127. The Student also has difficulty communicating feelings, difficulty with impulse control, and behaviors. TR1, 128.

7. **The Student has emotional and communication difficulties.** The Student does not understand the Student's own needs, is not able to use words to express those needs, lacks coping skills, has sensory issues and needs that cause inability to focus, and has limited endurance for the effort it takes to perform work. TR2, 357.
8. **Although the LEA staff could have concluded that the Student's IEP goal had been met before the beginning of the 2012-2013 school year because the annual goal and benchmark only required four or five days of success, no ARC meeting was held until November 1, 2012.** JA 21. Although the IEP with which the Student entered second grade included both a BIP and point sheets, the general education and special education teachers began the year without point sheets. See RD 4. The parent was not informed of this prior to that decision and no ARC meeting was held prior to making this change. Point sheets were reinstated at parent request beginning August 27, 2012. See, PC 168.
9. **The regular classroom teacher informed the parent that the Student had not shown any aggression until the week that included October 25, 2012.** RD 15. The daily behavior sheet for that date shows that the Student earned between 96% and 97% of the possible behavior points for the 22nd, 24th and 25th of October. PC 202-204. There is no sheet for October 23rd, a Tuesday that year. The sheets that exist contain no comments about the Student's behaviors that week.
10. **The regular classroom teacher informed the special education teacher that the Student's behaviors were non-stop on October 29, 2012 and that she believed the Student still needed a BIP.** RD 18. The Student nevertheless earned 93% of possible

behavior points that day. PC 206. The Student took two breaks in the resource room that day. PC 206.

11. **The November 1, 2012 IEP again included only one annual goal - that the Student identify and manage feelings.** JA 23. The BIP was eliminated but Student benchmarks included demonstrating examples of cooperative behavior, expressing anger, frustration or disappointment appropriately, and using appropriate methods to reduce anxiety and stress. JA 28. Specially designed instruction was described as role-playing, social stories, use of break cards, First/Then chart, small group instruction, prompting and cueing, corrective feedback with re-teaching, de-escalation strategies, direct teaching of replacement behavior, and modeling. JA 23. Supplementary aids and services included break cards, First/Then charts, prompting and cueing, self-monitoring timer, repeated practice of learned skills, sensory activities and a student-created reinforcement menu.
12. **Following the November 1, 2012 ARC meeting, the format of the behavior monitoring charts changed, requiring the Student to complete the form and the teacher to show agreement or disagreement.** PC 208. The Student sometimes did not fill out the sheet and sometimes also did complete both the Student and teacher portions of the sheet. Parent became concerned that the new point sheet was functioning as a punishment and wanted it removed. The special education teacher indicated that this could only be done by the ARC. See RD 34.
13. **Only partial data exists about temper tantrums between August 2012 and November, 2012.** The special education teacher testified that this was because the Student had met this goal. TR2, 480, *see also*, PC 162, dated 10/19/2012 in which the

Student is described as having a great school year and having met behavioral goals.

Although the testimony was that data was not kept on the temper tantrum issue, the 2012-2013 Monitoring Sheets summarize Student behaviors on the applicable benchmarks on a weekly basis. JC21-22. Data was, however, kept on some aspects of temper tantrums as it was defined in the benchmark. Behavior sheets beginning at PC 168, for example, show that staff recorded data regarding throwing objects, "pick"ing at peers, and showing respect to adults, all of which were included in the temper tantrum definition.

14. **The LEA also kept data monitoring sheets for other aspects of the Student's behaviors.** PC 168-326. These behaviors included keeping hands and feet to self, following directions and completing work neatly. The sheets covering the period from the beginning of the school year through November 1, 2012 seem to show the Student doing pretty well. PC 135-207. Beginning on November 5, 2012, the format of the sheets changed, requiring the Student to rate the Student's behavior and the teacher to agree or disagree with the rating. PC 208-245, 260-326. These pages show more instances of problem behaviors. The record includes typed narratives for some of the days from January 14, 2013 to February 27, 2013. PC 246-259. These show increased aggression and behaviors that would meet the earlier defined temper tantrums.
15. **The parent expressed concern about the Student's IEP and behavioral plan at the ARC meeting held on November 1, 2012.** The Student attended second grade at that time. The Student's teacher for social skills instruction knew that the parent disagreed with the IEP goals revisions, but thought that the entire ARC agreed about the changes regarding behaviors. RD 34 Although the Student's general education teacher believed

the Student still required a BIP as of October 29, 2012, (see RD18, TR4, 1033), the ARC decided to discontinue the BIP at the November 1, 2012 ARC. The Student's parent nevertheless indicated her satisfaction with the Student's regular classroom teacher. RD 23.

16. **A few months later, in March, 2013, the Student's second grade teacher requested an ARC because of increased behavioral issues, but the meeting was delayed in order to permit the parent's behavior analyst to do a Functional behavior Assessment.** The Student's behaviors escalated after the Christmas break. Exhibits PC 269-271, PC 275-276, PC 282, PC 290-292, , PC 296, PC 298, PC 300, PC 303, PC 307-309 all show that inappropriate behaviors were occurring. PC232, 235 238, 242-3, 246-59 all show physical aggression between December, 2012 and Feb 21, 2013. The requested meeting did not occur until August 7, 2013, as the Student was to begin third grade. JA 38, see also TR3, 800. The Making Better Choices (MBC) room was used as a corrective measure or consequence for aggression. JA48.
17. **The Student's parents divorced at some point during the second grade year.** TR 2, 532.

Grade 3: 2013-2014

18. **The temper tantrum goal had not been mastered by the beginning of the third grade year.** Despite prior assertions that the Student had mastered the temper tantrum goal, the August 7, 2013 ARC meeting conference summary notes indicate that the Student "will sometimes refuse to complete tasks or activities, scream at adults, throw or slam things, whine, make faces, threaten adults (e.g., hit, kick, spit, push), with some minor aggression

toward peers (lightly pushing a peer's shoulder, pushing a table toward them)." JA 43.

One of the Student's third grade teachers also reported that the Student would bang his desk, lay his head down, make heavy breathing noises and say things that shouldn't be said in school when he got frustrated. TR4, 1072-1073.

19. **The Student's ARC met to develop a new IEP following completion of a three year evaluation.** JA 58. The ARC decided to obtain additional assessments and to continue to serve the Student under the category Developmental Delay until his 9th birthday. JA65. The October 21, 2013 IEP contained one goal - to display productive school behavior. Student bench marks required timely completion, and turning in, of academic tasks, on task behaviors and cooperating with teacher/group decisions with which the Student is not in agreement. JA 55. The Student continued to have break cards, self-monitoring sheets, prompting and cueing, timers, repeated practice of learned skills, a student-created reinforcement menu, reward system, agenda, organization folder, small group setting for assessments, extended time, and breaking assignments into smaller sections. JA 55. The ARC determined that it needed additional information regarding functional verbal and nonverbal communication. JA 65.
20. **Behavior Analysis Forms were logged for two dates in August, four dates in September and one date in November, 2013.** PC 330-332. The purpose of these logs was to record what happened prior to an incident of misbehavior, describe the Student's behavior, describe what the teacher did following the behavior and what other students did.
21. **Prior to the October 21, 2013 ARC meeting, teachers had continued to use the**

behavior monitoring sheets developed in the prior school year. PC 334-361, *see also* JC 28-29. Behavior monitoring sheets were kept for the first four weeks of the school year, with no attempt made to summarize data. From September 13, 2013 through December 20, 2013, the monitoring sheets are used in the same manner as had occurred in the previous school year.

22. **Behavior monitoring sheets were modified after the October 21, 2013 ARC meeting to permit recording of the revised benchmarks.** PC 369-483. No summary data was reported for the second half of the school year.

23. **In evaluating the Student's communication difficulties, the ARC determined that the Student cognitively understands appropriate social communication skills and behaviors but is not able to utilize these skills appropriately in the classroom.** JA 79-80. At the April 10, 2014 ARC meeting the ARC agreed to continue services under the classification of Autism. JA 81. The Student's regular education teacher and an instructional assistant who worked with the Student each completed the Pragmatic Language Skills Inventory, a rating scale intended to assess a student's ability to *use* appropriate social communication skills, rather than to verbalize them. JA 68. The undersigned has no way of knowing whether this rating scale actually measures what it is intended to measure, nor does the Hearing Officer have any knowledge of its reliability. The ARC, however, relied upon the findings to develop a new IEP for the Student and to provide services. The ARC developed new goals related to language, social skills and social responsibility skills. JA 71. The Student was to initiate a break to use self-calming strategies, except that the Student was required to work fully through a class, such as

reading or math, before taking a break. JA 72, 81.

24. **By the Spring of 2014, the Student remained unable to use appropriate social behaviors.**
25. **Teachers noted that the Student has a more difficult task at the end of the day and had more difficulty staying focused toward the end of the school year. JA 81.** The record does not show whether any adjustments were made to the Student's instructional schedule to permit the Student to perform the more difficult tasks earlier in the day.

Grade 4: 2014-2015

26. **A new break plan was developed in August 2014 for the beginning of the fourth grade year.** As seen in JA 84-85, the Student was permitted to take breaks following completion of work. Two types of breaks could be taken - breaks for having completed work, and used as a reward and breaks for self-calming, which could be requested by the Student or by a teacher for the Student.
27. **The Student exhibited increased behaviors in the form of mocking, aggression, stomping, eloping from the classroom setting and yelling. JA 90.** The teachers kept daily logs of Student behaviors, showing both times when the Student worked and when the Student engaged in unacceptable behaviors. RC 3-RC171. The special education teacher working with the Student at that time developed and presented to the ARC a new BIP, with the intent that it become part of the Student's IEP. JA 94-101. The proposed BIP was used as an interim plan. See JA 115.
28. **The special education teacher determined that the purpose of the Student's behaviors was to gain power and control of his life.** See JA 98 and 101. The record, however,

contains no functional behavioral analysis performed by the LEA, nor is there data showing that behavioral data had been systematically collected to attempt to determine whether the Student's behaviors were an attempt to gain power and control, for avoidance or for any other purpose. The record does show that an outside Behavior Analyst (hired by the parent) had previously completed a Functional Behavior Assessment and had concluded that the primary purpose of the Student's behaviors was escape. JA 43-44.

29. **A Functional Behavior Assessment was proposed at a November 14, 2014 ARC meeting, as well as a crisis plan.** The special education teacher reported a summary of data that appeared to indicate that some inappropriate Student behaviors had decreased somewhat between September 24th and the November ARC meeting. JA 114-115. At the same time, however, the Student was removed from class for five days, during which the aggressive behaviors escalated to the point that the Student required safe physical management four times. JA 115.
30. **The MBC room was used for in-school removals for aggressive behaviors by the Student.** The parent requested an alternative to the use of the MBC room. JA 116. The Student was removed to the MBC room as a consequence for days when the Student was out of control. JA 116, TR3, 892. *See also*, RC 13, in which it is written, "I thanked [the Student] for calming & explained that [the Student's] aggression equals automatic MBC." The MBC room was used as a consequence or punishment for bad behavior. The Student was required to earn his way back into the classroom. TR3, 896. The Student exhibited behaviors on Monday, Tuesday, Wednesday and Thursday that resulted in spending Friday in the MBC room. JA116. The special education teacher explained that there are few

options for consequences in school and that the sensory space had become a “maintaining setting” for the Student. JA 116.

31. **The testimony of the fourth grade special education teacher at [REDACTED] Elementary is not credible.** During testimony on November 5, 2015, the special education teacher stated that for calming breaks, the Student would be allowed to go to her room or to that of a particular other teacher. TR3, 855-56. When asked what would happen to help [the Student] regain calm, the witness stated,

It would depend upon what behavior he was exhibiting. I mean, if he just wanted to put his head down, that’s one thing. If you’re – you know, if you’re screaming or you’re yelling, then we respond in different ways according to whatever [the] behavior was....It’s not a good idea to try to have a conversation with a child who’s escalated.

TR3, 856.

Upon being asked what happened if the Student was not compliant or if he doesn’t do any work, the witness stated, “We just maintain.” “We kept offering instructional activity; we kept encouraging positive behavioral choices; and we maintained safety.” TR3, 886. The witness testified that “ ... as a professional, you would try to make sure that you weren’t adding to the behavior.” TR3, 889. The witness also testified that another staff member used humor to de-escalate the Student, but that the witness was not aware of that staff member mocking the Student or laughing at the Student. TR3, 976-977.

On January 8, 2016, the special education teacher heard audio recordings made by a voice activated audio recorder while the Student was in the special education teacher’s classroom. The recordings, made during a two or three day period in December, 2015, were admitted, at the request of the Petitioner, by post-hearing order of the Hearing Officer for the sole purpose of impeaching the

credibility of the witness. This teacher was able to identify the voice of the Student, the voice of the other staff person identified in the paragraph above and her own voice. TR5, 1450-1452. The special education teacher, contrary to her earlier testimony, clearly engaged the Student in conversation while he was in an escalated state. TR5, 1452-1453. She also informed the Student, despite his clear escalation, that in order to be permitted to go to the classroom, the Student must complete 30 minutes of work with no more than five instances of disrespect or defiance. TR5, 1453. The Student was already at episode 5. TR5, 1453. The same teacher ridiculed the Student. TR5, 1456, line 18 and 1457, lines 1-3. She actually appeared to be baiting the Student. TR5, 1458-1459. The teacher threatened to walk the Student to the MBC room. TR5, 1464-1465. The teacher also threatened to "carry [the Student] through the school again." TR5, 1469, 1472. Not only had the teacher threatened the Student, but it had clearly happened previously. The teacher acknowledges that the Student had been escalated during the entire audio recording. TR5, 1477. The Student was denied use of the body sock for calming himself in the audio. TR5, 1489-1490. The teacher told the Student she would climb in the window of the Student's house and take the Student's games. TR5, 1531-1532. When asked if the teacher thought statements like this might contribute to the Student's negative behaviors, the teacher's response was, "I feel like I showed frustration." TR5, 1533.

This teacher, while she may have had good reason to feel frustrated, testified in November that she acted in certain ways. The audio recordings, which the teacher acknowledges were recordings of her, another staff person and the Student, showed that the statements made in some of her prior testimony were not true or were not accurate. For these reasons, the Hearing Officer cannot rely on the testimony of this witness as truthful regarding the Student's fourth grade year.

32. **The Student transferred to a school within the LEA which had a special program for students with Autism.** During the period that is under consideration for purposes of this hearing, the Student attended [REDACTED] Elementary. In January, 2015, the Student transferred to [REDACTED] Elementary, to participate in a program there for students with Autism. TR 2, 355. In the new program, the Student receives social skills instruction several times throughout the day, in a small, self-contained classroom, and teacher expectations for Student work are broken down into smaller chunks. TR 2, 345-348. Sensory activities, reinforcers for small successes and redirection are used to help the Student experience success and learn social skills. TR 2, 360-363. The MBC room is NOT used. TR 2, 390. The Student has made progress in this environment, making the honor role. TR 2, 409.
33. **Failure to utilize the Autism program earlier was not a violation of any kind because that program did not exist.**

General

34. **The Student passed from grade to grade each year.**
35. The parent provided no evidence regarding costs of outside evaluations or of out of pocket expenses.

DISCUSSION

Issue 1: Whether the [LEA] failed to fully evaluate [the Student] as required by 707 KAR 1:300

Section 4, of 707 KAR 1:300 requires an LEA to ensure that a full and individual evaluation is conducted for each child considered for specially designed instruction and related services prior to the provision of the services. In addition, these evaluations must be sufficiently comprehensive

to identify all the child's special education and related services needs, whether commonly linked to the disability category in which the child has been classified. An LEA is not required to conduct re-evaluations if certain criteria are met, except that a re-evaluation must be conducted at least every three years to determine:

- (a) The present levels of performance and educational needs of the child;
- (b) Whether the child continues to need special education and related services;

and

- (c) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP and to participate, as appropriate, in the general curriculum.

A behavior plan was developed for the Student in February, 2012, prior to entering the second grade. FF 2. Until the age of nine, the Student's eligibility category was developmental delay. FF 4. Thereafter, the eligibility category was Autism. Regardless of the eligibility category under which the Student received services, behavioral needs were evaluated just prior to the time frame under consideration for this due process hearing request. Behavioral needs were again addressed as part of a three-year re-evaluation. FF 10. When a question arose as to whether or not the Student had the ability to actually use, rather than parrot back, appropriate social communication skills, the LEA evaluated this, also. FF 12.

The evidence in this case does not support a finding that the LEA failed to evaluate the Student in all areas of suspected disability for any of the years in question. There is, however, a question as to the timing of evaluations, especially in Grade 4.

Issues 2 and 3. Whether the [LEA] failed to develop, implement and revise an appropriate IEP

including placement for [the Student] and whether the [LEA] failed to make good faith efforts (sic) assist [the Student] in achieving the goals, objectives or benchmarks listed in [the Student's] IEP in violation of in violation of 707 KAR 1:320.

707 KAR 1:320 requires an LEA to develop an IEP for a student with a disability before providing specially designed Instruction and related services. An ARC must develop the IEP, but

An ARC shall *not* have to be convened in order to make minor, nonprogrammatic, changes to an IEP, such as typographical errors, incorrect directory information about the student (such as, birth date, age, grade, address, or school), and other information required on the IEP that was agreed upon by the ARC but incorrectly recorded. If the LEA makes any minor, nonprogrammatic changes, all members of the ARC shall be given a copy of the changes and an explanation as to why the changes were made within ten (10) school days of the changes being made. If any member of the ARC objects to the changes, an ARC meeting shall be convened within a reasonable period of time to discuss the changes.

Id., Section 2 (2), Emphasis added.

In the case of a child whose behavior impedes his or her learning or that of others, consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior. 707 KAR 1:320, Section 5(2)(a). Finally, an LEA shall provide specially designed instruction and related services to each child with a disability in accordance with his IEP and shall make a good faith effort to assist the child in achieving the goals, objectives, or benchmarks listed in the IEP. *Id.*, Section 9.

Grade 2: 2012-2013

The Student began the 2012-2013 school year with an IEP developed in the last few months of the prior school year. FF3. Although teachers reasonably could have concluded that the Student had achieved the only IEP goal as it was written on the February, 2012 IEP, data was kept, at parent request, for some aspects of the temper tantrum benchmark and all other behavior benchmarks. The

decision by the LEA staff to discontinue to the behavioral point sheets at the beginning of the second grade year, in effect changed the program of the Student. This change was not a minor, non-programmatic change. Although this change did not mean that the Student no longer received specially designed instruction, it eliminated, without ARC approval or prior knowledge, the only mechanism for possible measurement of the benchmarks and the single IEP annual goal. Within two weeks, however, upon the parent's discovery of the point sheet question and the request that these be reinstated, the behavior sheets were kept until the November 1, 2012 ARC meeting. The problem here is that if the prior IEP goal had been met, the Student had no IEP goal to work toward until the November ARC meeting.

If the parent had not requested re-instatement of the daily point sheets, the LEA would not have been able to definitively state that the Student had not engaged in aggressive behavior until the week of October 22nd. If the LEA truly considered the Student to have met the IEP goal, then the Student did not have an appropriate IEP from the beginning of the school year until November 1, 2012, when the new IEP was developed.

In November, when the ARC first met, the IEP developed again contained one goal for emotional and behavior issues. This IEP, however, deleted the BIP previously in place but added more detailed teaching strategies and altered the behavior monitoring sheet to one that required the Student to rate personal behaviors. Nevertheless the Student's behaviors continued and increased after the Christmas break. In March, the Student's teacher requested an ARC meeting because of the escalation in Student behaviors, but the parent hired a behavior analyst to perform a functional behavior assessment. The meeting was therefore delayed until the next school year while the parent and LEA awaited the results of the FBA.

The two week period without the point sheets, though an error, does not appear to have caused the Student substantive harm. Of greater concern is the lack of an appropriate IEP that may have occurred. It seems clear that the Student had not truly mastered the social and behavior goal of the February, 2012 IEP. Rather, the Student only had to have behaved in an acceptable manner for at most five days. The LEA, however, after the point sheets were re-instated, acted as if the IEP goal had not been met, which made sense in the circumstances. It is also not clear whether the escalation in Student behaviors that year were more because of an inadequate IEP or because of the divorce of the Student's parents.

Grade 3: 2013-2014

The ARC met in October, 2013 to review the Student's progress and IEP and to discuss behavioral issues. Again the only IEP goal pertained to Student behavior, though the goal was revised such that the Student was now to display productive school behavior. The benchmarks supporting this goal required the Student to complete and turn in, on time, academic tasks, demonstrate on task behavior and to cooperate with teacher and group discussions with which the Student's was not in agreement. Specially designed instruction was increased to 45 minutes per day, but all in the regular education classroom.

It was during the third grade year that the ARC determined that the Student cognitively understood appropriate behavior but was unable to use that knowledge to control behaviors in the manner required by his IEP and school rules. In other words, the Student was able to verbalize appropriate behaviors but was unable to conform behavior to expectations. The Student also struggled with difficult tasks at the end of the school day. The record is silent regarding adjustments to the Student's work schedule, if any were made. Nevertheless, the LEA did conduct new

evaluations and did revise the IEP in response to the results of the evaluation. It implemented the IEP developed by the ARC. The Student has not shown lack of good faith efforts during the third grade.

Grade 4: 2014-2015

The Student changed schools during the second half of the school year. The Student acknowledges that the current IEP and placement were appropriate for that portion of the school year. The Hearing Officer only considers, therefore, the IEP development and implementation during the first half of the fourth grade year.

The ARC met in September to discuss evaluation results from the prior April. The special education teacher proposed a new behavioral plan because the Student's behaviors had continued to escalate. Because the ARC accepted the view that the primary purpose of the Student behavior was control, and that he chose not to behave appropriately, the new plan adopted an if/then plan by which if the Student engaged in certain unacceptable behaviors the consequences might be removal to the resource room, loss of recess that day or the next, physical assistance for removal to the resource room, or removal to the MBC room for the following day. The Student's behaviors continued to worsen during this period. The record does not show how, or even if, the ARC attempted to resolve the differences between the findings of the Student's third grade ARC, which found that the Student, though he understood the appropriate behavior was unable to use it, the independent behavior analyst who believed the Student's primary purpose of inappropriate behaviors was escape, and the new, unsupported, determination that the function of the behavior is control/power. The ARC revised and implemented an IEP in November, 2014, based on this unsupported presumption. The Student was removed from the regular education classroom and

resource room for days at a time. So he was either rewarded by being permitted to escape or he was punished for making poor choices (previously determined not within his control), but which of these is unknown because of the implementation of the IEP in fourth grade.

The LEA did not make good faith efforts to develop and implement an appropriate IEP for the Student in the first half of the fourth grade. Merely developing and implementing an IEP is insufficient. The IEP must be developed after careful consideration of the Student's unique needs. The BIP developed by the fourth grade special education teacher made assumptions not supported by data regarding the purposes of the Student's behaviors. Student behavior became more aggressive after implementation of the new plan that assumed the Student merely chose not to behave appropriately and that this was for control, rather than escape.

Issue 4. Whether or not the [LEA] failed to provide [the Student] with a free appropriate public education in violation of 707 KAR 1:290.

Pursuant to 707 KAR 1.290, Section 1, an LEA must make a free appropriate public education (FAPE) available to children with disabilities aged three (3) to twenty-one (21) residing within its district's boundaries who have not received a high school diploma. FAPE must be provided to each child with a disability even though the child has not failed or been retained in a course and is advancing from grade to grade, based on the child's unique needs, and not on the child's disability. The education provided must be based upon an appropriate IEP, developed after a thorough assessment of the student's unique special education needs.

The Supreme Court has explicitly rejected the argument that school districts are required to provide services "sufficient to maximize each child's potential commensurate with the opportunity provided other children." *Rowley*, at 198, 102 S.Ct. 3034 (internal citation omitted (finding no

congressional intent to achieve strict equality of opportunity or services); see *Renner v. Bd. of Educ. of the Pub. Sch.*, 185 F.3d 635, 644 (6th Cir. 1999). At the same time, however, the services provided must be reasonably calculated to confer a meaningful educational benefit.

See *Deal* at 862; *Cypress-Fairbanks Indep. Sch. Dist. V. Michael F.*, 118 F.3d 245, 247 (5th Cir. 1997). This means that the student will receive a basic floor of opportunity, specifically designed to meet the child's unique needs, *supported by services that will permit him to benefit from the instruction. Id.*, at 247-248, emphasis added. That basic floor of opportunity must be reasonably likely to produce more than trivial progress. See *Michael F.* 118 F.3d at 248.

Two questions must be asked in evaluating any IEP. *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 853-54 (6th Cir. 2004). First, the finder of fact must determine whether the school system has complied with the procedures set forth in the IDEA. *Id.*, citing *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982); *McLaughlin v. Holt Pub. Sch. Bd. of Educ.*, 320 F.3d 663, 669 (6th Cir. 2003). Second, the finder of fact must assess whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefits. *Rowley*, 458 U.S. at 206-07, 102 S.Ct. 3034.

The Court of Appeals for the Sixth Circuit has on several occasions addressed the issue of procedural violations that cause substantive harm. One such case is *Knable v. Bexley City School District*, 238 F.3d 755 (6th Cir. 2001), wherein the Court considered, among other things, whether failure to conduct an IEP meeting denied the parents meaningful participation. *Id.*, at 765-66. Using the two-pronged approach of *Rowley*, the *Knable* Court first determined that a procedural violation had occurred. See, *Board Education Hendrick Hudson Central School District v. Rowley*, 458 U.S.

176; 102 S.Ct. 3034 (1982). Then, recognizing that a procedural violation alone is insufficient to find a denial of FAPE, the Sixth Circuit went on to explain that substantive harm occurs when “the procedural violations in question seriously infringe upon the parents’ opportunity to participate in the IEP process.” *Knable*, at 765. Substantive harm constituting a denial of FAPE also occurs when the procedural violations deprive a student of an IEP or if they result in the loss of educational opportunity. *Id.*, at 766.

In determining whether procedural violations caused substantive harm, the finder of fact must apply the reasoning of *Knable* and *Deal*. *Knable* tells us that we must ask whether the procedural violation deprived the Student of an IEP. We must consider the impact of the deprivations on the Student’s educational performance. The IDEA does not define “educational performance,” nor does it define “adversely affects.” 707 KAR 1:002(2), however, provides that “[a]dverse effect means that the progress of the child is impeded by the disability to the extent that the educational performance is significantly and consistently below that of similar age peers.”

Except in cases where a student has poor social skills or where a student has exhibited behavioral difficulties, most courts seem to focus on academic performance in determining whether or not adverse effect on educational performance exists. In *Corvallis Sch. Dist. 509J*, 28 IDELR 1026 (SEA Or. 1998), for example, a student with Asperger’s syndrome was found ineligible for special education and related services because she had earned high-average grades, demonstrated satisfactory progress in social skills, work habits, study habits and had achievement test scores showing she was at least at grade level in all areas. The court also found that the student was also satisfactorily served by a Rehabilitation Act of 1973 Section 504 plan.

Corvallis is easily distinguishable from the matter before this Hearing Officer. Although the

Corvallis court found an Asperger's student not eligible for services under the IDEA, the ARC here found the Student eligible. The Student in *Corvallis* had demonstrated satisfactory progress in social skills and was also served by a Rehabilitation Act of 1973 Section 504 plan that met her needs. The Student here has not been served by any Section 504 plan and has not made satisfactory progress in social skills or behaviors.

Grade 2: 2012-2013

The evidence shows that the LEA committed procedural error by not fully implementing the IEP developed for the Student during the first two weeks of the school year. A poorly written annual goal from the prior school year, may have led teachers of the second grade to believe the Student had mastered behavioral issues, but the ARC did not meet to revise the IEP until November of that year. Functionally, the Student had no IEP at all. Procedural errors did deprive the Student of an IEP and therefore of FAPE for the first two and one-half months of the school year. Thereafter, the IEP was reasonably calculated to provide educational benefit to the Student. The sole goal of the IEP remained improvement of the Student's social and behavioral functioning, which the ARC found to adversely affect Student performance but new strategies were employed. Also, when the LEA requested an ARC meeting, it was delayed at parent request.

Grade 3: 2012-2014

The ARC met several times during the third grade year to discuss behaviors, revise the Student's IEP, and to receive and discuss the results of new assessments. As in all years, the IEP focused on Student behavior. Based upon the results of the assessments and data collection to that point, the IEP was reasonably calculated to provide educational benefit. Because the ARC determined that Student social and behavioral difficulties adversely impacted the Student's

education, specially designed instruction focused on that area. The Student received FAPE during the 2013-2014 school year.

Grade 4: 2014-2015

For the reasons discussed pertaining to Issues 2 and 3 for Grade 4, herein above at page____, the Student did not receive FAPE during the first half of the fourth grade year.

RE Remedies

Having determined that some denial of FAPE has occurred in this case, the Hearing Officer must now consider appropriate remedies. In *Board of Educ. Of Fayette County, Ky. V. L.M.*, 478 F.3d 307 (6th Cir. 2007), a hearing officer had determined that a student had been denied FAPE for two years and awarded 125 hours of compensatory education, consisting of one-on-one instruction in reading and language arts skills plus an “additional number of hours equal to the number of hours that the student would have been eligible for ESY, had the [Committee] considered and determined the need for ESY services in the Summer of 2003.” *Id.*, at 312. The School District appealed and the ECAB upheld the hearing officer’s finding, but altered the remedy, ordering “the [Committee] to prepare and carry out a plan for providing T.D. with compensatory education services and to meet as required to review and modify the plan, not less than once every twelve months, until the Committee determines that the award is fulfilled.” *Id.* The school district appealed the ECAB decision to the District Court, which affirmed the ECAB decision in its entirety. The Student then appealed through his guardian.

The student argued that the ECAB decision was vague, unenforceable and allows the school district to determine the remedy for its own wrongdoing. *Id.*, at 315-16. Although the student in *L.M.* sought hour for hour compensatory education, the Sixth Circuit opined that an award of

compensatory education is an equitable remedy that a court can grant as it sees fit, there being no obligation to provide a day-for-day compensation for time missed. *Id.*, at 316, citing *Park ex rel. Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1034 (9th Cir. 2006). The Sixth Circuit upheld the denial of a specific number of hours of compensatory education, accepting the ECAB's reasoning that the number of hours is less important than the amount of extra services the Student will receive over a period of time and the form of those services. *Id.*, at 316. The Court said, "An appropriate award of compensatory education is 'relief designed to ensure that the student is appropriately educated within the meaning of the IDEA'" quoting *parents of Student W. v. Puyallup Sch. Dist., No. 3*, 31 F.3d 1489, 1497 (9th Cir. 1994). *Id.* Ideally, an award of compensatory education should aim to place a disabled child in the same position he or she would have occupied, but for a school district's violation of IDEA. *Id.*, at 317, quoting *Reid ex rel. Reid v. Dist. Of Columbia*, 401 F.3d 516, 518. The *L.M.* Court thus adopted the more flexible approach of *Reid*, and then considered whether or not it was appropriate for an IEP team to decide if and when a student no longer requires services. *Id.*

In deciding the latter question, the Sixth Circuit again turned to *Reid*, which first examined the authorizing statute, and noted that "IDEA due process hearings 'may not be conducted by an employee of the State educational agency or the local educational agency involved in the care or education of the child.'" *Id.*, See *Reid*, citing 20 U.S.C. 1415(f)(3). The Sixth Circuit agreed with *Reid* that a delegation, to an IEP team, of power to reduce or terminate a compensatory education award would, in effect, mean that the IEP team could exercise a hearing officer's powers. *Id.*, at 317-18. In *L.M.*, the Sixth Circuit held that neither a hearing officer nor an appeals board, such as this ECAB may delegate to a student's IEP team the power to reduce or terminate a compensatory

education award. *Id.*, at 218. This places the responsibility for determining an appropriate equitable remedy squarely on the shoulders of the Hearing Officer.

DECISION

1. The Student was denied his right to a free appropriate public education for two and one-half months of the second grade and for the first half of the fourth grade only;
2. The LEA evaluated the Student appropriately except during the first half of the fourth grade;
3. The IEPs developed by the LEA were appropriate except for two and one-half months of the second grade and for the first half of the fourth grade;
4. The LEA failed to appropriately revise the Student's IEP during the first two and one-half months of the second grade;
5. The LEA failed to implement an appropriate IEP for the Student for two and one-half months of the second grade and for the first half of the fourth grade, denying the Student FAPE during those periods ;
6. The LEA failed to make good faith efforts to assist the Student in achieving the goals, objectives or benchmarks listed in the Student's IEP during the first half of the fourth grade only;
7. The Student's behavioral education throughout the time period in question has been inconsistently implemented and, at times, without foundation. It may therefore take a longer period of time to put the Student in the position that would have existed but for the violations;
8. The Student has presented no evidence of costs paid for outside evaluations and these cannot be reimbursed; and

9. The Student presented no evidence of costs paid for out of pocket expenses for outside professionals related to the Student's educational needs and these cannot be reimbursed.

ORDER

1. The Student shall receive, at LEA expense, weekly behavioral therapy and/or counseling, to be performed by a behavior therapist independent of the school district. Such sessions shall continue for one full year from the date of the first such session, shall be for one-hour sessions and shall continue through the summer months for a full 52 weeks, in order to provide consistent reinforcement of skills being taught. The Student, through his parent, and the LEA shall each suggest three names of potentially acceptable behavior therapists for this purpose. If at least one name appears on both lists, that person shall be deemed appropriate to conduct the ordered therapy. If the lists do not contain any names in common, then the parties shall meet to discuss and carefully consider each name on both lists. If the parties are unable to agree on a name, they shall each suggest a new list of three names and begin the above described process anew.
2. The parties shall have an agreement as to the identity of the therapist no later than June 1, 2016. The therapy sessions shall begin as soon as possible thereafter, but in no event shall they begin later than August 1, 2016.
3. The parent is not entitled to reimbursement for prior outside evaluations.
4. The parent is not entitled to reimbursement for out of pocket expenses.
5. The Hearing Officer lacks subject matter jurisdiction to award attorney fees.

SO ORDERED this 29th day of April, 2016.


KAREN L. PERCH, DUE PROCESS
HEARING OFFICER

NOTICE OF APPEAL RIGHTS

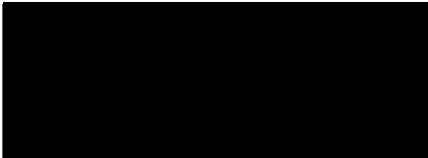
KRS 13B. 140, which pertains to appeals to administrative hearings in general, in Kentucky, and not to civil actions under Part B of the Act (the IDEIA), provides:

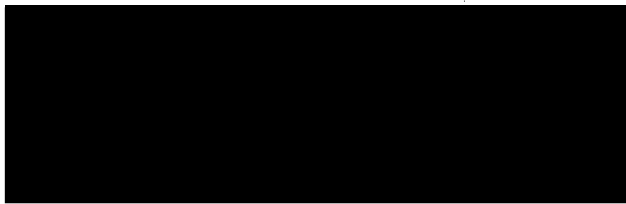
(1) All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not in the enabling statutes, a party may appeal to Franklin Circuit Court of the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner 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.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Order was served to the above-named representatives, by United States mail, postage pre-paid and first class, to the persons shown below, on this the 29th day of April, 2016 to:

Att'n. Tina Drury
Division of Exceptional Children Services
Kentucky Department of Education
500 Mero Street, 8th Floor
Frankfort, KY 40602





Karen L. Perch
KAREN L. PERCH