

KENTUCKY DEPARTMENT OF EDUCATION
AGENCY CASE NO 1213-02

RECEIVED
JUN 13 2013

BY:
PETITIONER

[REDACTED]

V

DECISION AND ORDER

[REDACTED] COUNTY SCHOOLS

RESPONDENT

This case has been brought on behalf of a student qualified as disabled under the category of autism. A due process hearing was requested on July 30, 2012 by the student's representative. A hearing was conducted on February 7 and 8 of 2013, and on March 1, 2013.

At issue at the hearing were Petitioner's claims that Respondent failed to provide a free and appropriate public education (FAPE) during the 2011-2012 school year because Respondent allegedly did the following:

1. failed to address the unique needs of the student, causing [REDACTED] to be the victim of school violence and harassment in violation of 707 KAR 1:290;
2. failed to place the student in the least restrictive environment, as required by 707 KAR 1:350 by inappropriately denying the request to place the student in a different school or in effect forcing the student into homebound services in which [REDACTED] had no contact with non-disabled peers;
3. failed to implement the student's individualized education plan (IEP), in violation of 707 KAR 1:320 by
 - (a) failing to provide the number of hours of homebound services necessary to meet the student's educational needs, and by
 - (b) failing to provide psychological services required under the IEP; and

4. Committed procedural violations.

Petitioner seeks one year of compensatory education and an order compelling Respondent to pay tuition for the student to matriculate at a private school.

FINDINGS OF FACT

1. The student, age 14 at the time of the hearing, was diagnosed with Asperger's syndrome at age four; the student has been diagnosed with ADHD, Tourette's syndrome, obsessive compulsive disorder, depression, and anxiety.

(See TE 10, 12, 16, 37, 175). Dr. [REDACTED], a child psychiatrist who treated the student, testified that the student had Asperger's, Attention Deficit Hyperactivity Disorder (ADHD), obsessive-compulsive disorder (OCD), depression and anxiety. (TE 110)

2. The student has sensory issues, requires a lot of structure, and lacks social skills.

The student has sensory issues and does not like to be touched or jostled. (TE 86). The record is replete with evidence that the student likes a lot of structure and lacks the social skills to interact appropriately with his peers. The mother testified that the student needs an orderly classroom in order to function well due to [REDACTED] ADHD. (TE 156).

3. A diagnosis of the student was provided to [REDACTED] County when the student was age six in order to get an IEP; [REDACTED] is eligible for special education services under the category of autism; [REDACTED] has no cognitive deficits.

(TE 20).

4. The student, at times relevant to the issue of placement, resided in the [REDACTED] area, which means [REDACTED] home middle school was [REDACTED], which was a Title 1 school, and [REDACTED] home high school was [REDACTED].

(See TE 10, 14)

5. The student, prior to the times relevant to the issues in this case, had a history of being bullied at school and having behavioral problems adjusting to the school environment.

The student's mother testified as follows:

Some of [the student's] medications triggered Tourette's and made it significantly worse. [The student] has two types of tics. [redacted] has facial grimaces and [redacted] has a vocal tic, which is clearing [redacted] throat incessantly. So the kids see that difference in [redacted] and they quickly - it doesn't take much for them to realize that if they stress [redacted] out, if they call [redacted] names or they get in [redacted] face, that [redacted] tics get worse and it's like a game to them. So then [redacted] becomes even more withdrawn.... They continue to push on [redacted] until they bring out even more of [redacted] behaviors.

(TE 18). Dr. [redacted] testified that it was common for students with Asperger's to be a target for bullying. (TE 112). [redacted], a school psychologist for [redacted] County, testified that bullying can lead to depression and self-injurious behaviors (TE 396).

6. The student attended [redacted] for kindergarten and first grade; after that [redacted] attended [redacted] Elementary for two years but had to leave due to problems with bullying; then [redacted] attended [redacted], where [redacted] began to have stress-induced seizures and hives; [redacted] withdrew from [redacted] and was on homebound; then [redacted] was home-schooled for sixth and seventh grade; then [redacted] attended [redacted] (TE 20).

(See TE 13-14; 26; 35).

7. Prior to attending [redacted], the student had a history of suicidal ideations.

The student's mother testified as follows:

[W]hen [the student] was in fifth grade [redacted] started having suicidal ideations. [redacted] started talking about committing suicide, not wanting to live. And then one day [redacted] just kept beating [redacted] head on a concrete floor and I had to physically pick [redacted] up and remove [redacted] to get [redacted] to stop and [redacted] just said [redacted] wanted to kill [redacted] self.

(TE 25-26).

8. The student's mother informed [REDACTED] and the ARC of the student's history of being bullied and [REDACTED] suicidal tendencies.

At the ARC meeting held on September 8, 2011, the student's mother informed Respondent of the student's suicidal thoughts and tendencies because she feared the effect that bullying might have on the student. The mother testified that she brought up the student's suicidal thoughts and tendencies because

I was afraid that if they allowed [REDACTED] to be bullied, that [REDACTED] would go right back to that state of mind and I wanted to make sure that they understood the seriousness of what the consequences could be if [REDACTED] were allowed to be bullied.

(TE 39)

Respondent acknowledges being informed regarding the bullying and suicide issues. [REDACTED] the special education teacher at [REDACTED] and the student's case manager there, testified that the student's mother expressed concerns about bullying and suicide at the first ARC meeting on September 8, 2011: "What I have in my notes says, 'Bullying is a strong concern. Mom thinks [the student] has experienced suicidal tendencies.'" The ARC conference summary also reflects that "Ms. [REDACTED] notes that [REDACTED] has had suicidal thoughts and tendencies due to bullying in past school experiences." (TE 344).

9. The ARC determined that the least restrictive environment for the student would be in regular classrooms.

At the ARC meeting held on September 8, 2011, the student's placement at [REDACTED] was to be in full-time general education environment, same being the least restrictive environment, and there was to be a reevaluation of the student. (TE 38; 42; 43). [REDACTED], the special education teacher at [REDACTED] and the student's case manager there, testified that the

initial temporary IEP provided for 60 minutes per day of special education consisting of "co-teaching," which means "a paraeducator or a teacher ... attends the classes and checks up on the student to be sure that the student is staying on task and to do any monitoring that's necessary." (TE 324-325).

The mother accepted the IEP offered on September 8, 2011, but did so because she thought it was an interim IEP and something needed to get on the books, and that other matters she wished to discuss but could not because the meeting was cut short could be addressed later; she did agree with placement in the regular education classroom. (TE 175; 177)

At the May 23, 2012, the ARC changed the student from general education placement to part-time general and part-time special education. (TE 153-154; Pet. Ex. 38). However, it appears that this was to accommodate the psychological services that were to be provided sometimes in the resource room. (TE 219-220).

10. A goal on the IEP was to develop social skills.

One of the student's goals on the IEP was to "practice and develop skills which will help [redacted] be successful in school." (TE 185). Because of [redacted] disability, the student needs services in this area.

11. The student was bullied at [redacted]

Dr. [redacted] testified that the student complained to [redacted] about bullying and being picked on at [redacted] (TE 112; 125). The mother testified as follows:

Q. When you say [redacted] was assaulted, what do you mean?

A. [redacted] was punched in the face.

Q. Had there been incidents prior to [redacted] being punched in the face that came to light after October 3 or prior to October 3?

A. Yes. Prior to October 3 I had had multiple conversations with the school police officer and with other members of staff there about what was going on. [redacted] had been pushed into lockers. [redacted] had been shoved, cursed at. [redacted] had been spit in the face multiple times by a

kid with, unfortunately, a dubious background. So now we have to have [REDACTED] tested for HIV and hepatitis every so often.

(TE 50-51).

In reaction to the bullying, the student wrote down a "Pokemon list" of some other students that the school interpreted as a potential threat. The mother describes the list and its relation to "Pokemon" and the instructions she had given [REDACTED] to write down [REDACTED] frustrations and difficulties in order to express them. The student testified that "I was always told to never let my frustrations show externally, to always let them flow into writing. I've always been a bit of a poet and a writer." (TE 808). In this instance, another student stole the composition book where [REDACTED] made the list and thereby the list came to light. (TE 54).

12. The bullying is related to the student's disability.

[REDACTED], special education administrator for [REDACTED] County, testified that there is a correlation between bullying and depression and that being bullied could have long-term effects on a child. (TE 656). [REDACTED] testified that students with disabilities can be more susceptible to bullying unless there are preventative measures put in place. (TE 569).

In the present case, the connection between bullying and the disability is not hypothetical. Comments the student makes due to [REDACTED] Asperger's syndrome when [REDACTED] is unable to filter [REDACTED] thoughts is a source of friction between the student and other students. (See TE 386-387, [REDACTED] [REDACTED] referencing reports of student's mother and student's [REDACTED] teacher, [REDACTED]. [REDACTED] testified that the student did not "yet get along with classmates, deal appropriately with teasing or other inappropriate behaviors from others or organized groups." (TE 676).

13. [REDACTED] failed to take reasonable steps to prevent the bullying or provide necessary supports for the student despite the complaints of the mother.

██████████ testified that she would have like to have known about, and it would have been important to know about, the student's suicidal ideations or suicide attempts and so ██████████ could have put in place interventions. (TE 395-396). ██████████ was unaware of the notes from the first ARC meeting that record that the student had a history of suicidal ideations and tendencies. (TE 398). ██████████ testified that if this information had come to the ARC, it would not have been appropriate to wait until the evaluation was complete in order to address the issue. However, ██████████ testified that nonetheless supports were in place to protect the student, specifically, "teachers who were watching out for ██████████" (TE 399).

Unfortunately, it appears that was not the case. The mother testified that when the student, in obedience to instructions from ██████████ staff to report bullying to a teacher, "the very first time ██████████ tried that[the teacher] told ██████████ to stop being a tattletale. After that ██████████ simply gave up." (TE 161). The student also testified that teachers called ██████████ a tattletale (TE 807).

The mother testified that she had multiple meetings with the police officer at school (TE 52), and she met with the principal and the vice-principal, but the principal was not willing to do anything to stop the student from being harassed. (TE 51) The mother testified that ██████████ gave her "bully sheets" for the student to fill out, that ██████████ turned in a few (TE 53) but ██████████ couldn't do it for some of the incidents because, as a new student, ██████████ did not even know the names of the persons who were harassing ██████████ in some of the incidents. (TE 52) The parents also filed charges in juvenile court. (TE 53).

██████████, in response to the "Pokemon list," detained the student for two hours and refused to let the student call ██████████ mother, which greatly upset the student. The mother testified that after interrogating the student, the law enforcement officer and vice principal went to get the student lunch but locked ██████████ in the room and would not allow the student to call ██████████ mother. By

the time the mother was called and arrived to pick up the student, there, the student was so upset that [REDACTED] couldn't even talk. (TE 55-56). When the mother explained to the vice-principal that the student had simply written down [REDACTED] frustrations instead of acting out because of [REDACTED] disability, the vice-principal told her that "it doesn't matter, there's a lot of Asperger's kids locked up," which the mother took as a threat that to lock up her [REDACTED]. (TE 57-58).

Because the records of the ARC meetings were not reflecting the mother's complaints regarding bullying, she created an addendum to the 10/21/11 ARC meeting documenting the bullying. (TE 85-86; Petitioner exhibit 36).

Relevant personnel appear to have been somewhat uninformed of and indifferent to the bullying problem. [REDACTED] school psychologist for [REDACTED] County, testified that [REDACTED] knew what Dr. [REDACTED] wrote about what happened when the student was at [REDACTED] Elementary. (TE 432). [REDACTED] testified that "there are children that do have problems [with suicidal tendencies] at a younger age that no longer have those problems" and that no one told [REDACTED] anything that led her to believe that the student was suicidal. (TE 434). [REDACTED] conducted the threat assessment for the "Pokemon" incident, and determined the student was not a threat to anyone (TE 404), but apparently it did not register that the list of students and their Pokemon responses suggested the student was being bullied repeatedly by multiple persons. [REDACTED] testified that [REDACTED] had heard of only one incident of bullying from Officer [REDACTED] (TE 374). However, [REDACTED]'s evaluation for the integrated report reflects that the student's mother told [REDACTED] that the student had been spat upon and punched. (TE 414).

[REDACTED] the student's caseworker, testified that [REDACTED] did not recall whether the student had attempted to report being bullied to some of [REDACTED] teachers. (TE 344). [REDACTED] was unaware of the Pokemon "hit list" incident or the school's response to it. (TE 345). Regarding

bullying, [REDACTED], testified that [REDACTED] had heard there were instances where the student thought [REDACTED] had been bullied and tried to follow up "but it was difficult to get information sometimes." (TE 346).

Respondent also was slow to develop a behavioral intervention plan. The mother had requested a functional behavioral assessment at the September 8, 2011, meeting, but it was not put in the record of the meeting and nothing was done about it; the mother requested functional behavioral assessments many times after that; at the March 9, 2012 ARC, the school agreed to conduct a functional behavior assessment and develop a behavior intervention plan, as had been requested by the parent back in October of 2011; the assessment was scheduled to be completed by May 24, 2012. (TE 42; 145; 83; 153)

14. Because of the bullying and the effect it was having on the student, the student's placement was changed to homebound.

On October 6, 2011, only a month after the first ARC meeting, the student's parents requested Home Hospital because it was their understanding that the student had been assaulted numerous times by other students. The mother testified as follows:

The decision to homebound [REDACTED] was because [REDACTED] was assaulted for - I don't even know how many times [REDACTED] was assaulted, but [REDACTED] was assaulted again on that day and at that point I talked with Dr. [REDACTED] and we had decided that [REDACTED] could no longer stay in this environment.

(TE 50).

Dr. [REDACTED] testified that the student had suicidal thoughts during the time [REDACTED] was enrolled at [REDACTED] (TE 113). Dr. [REDACTED] recommended that the student be on Homebound in an application dated October 7, 2011. [REDACTED] explained how [REDACTED] decided whether to recommend students for homebound:

[I]f they have a psychiatric diagnosis that is exacerbated by the stressors that are involved in being in school, then that is counterproductive either to their education usually and their psychiatric condition or their medical condition, that's when I think it's a good idea.

(TE 123-124).

From October 6 to October 21, the student received no services from ██████ County. An ARC meeting was held October 21, 2011 to approve the homebound placement for the remainder of the semester. (TE 60-62).

15. The homebound placement was necessitated only because of Respondent's failure to provide the necessary support services.

In 2007, the student's IEP included a one-on-one paraeducator, and Dr. ██████ had recommended that the one-on-one paraprofessional for the student be continued. (TE 113-114). Dr. ██████ testified that the student "does best when the environment is structured, the schedule's predictable, where the social outlets are supervised and structured so things just do not get out of hand." (TE 115). Dr. ██████ testified that ██████ believed the student would be able to attend school if the conditions set forth in Petitioner's Exhibit 15, a report from Dr. ██████ dated June 8, 2012, were met. (TE 132) The report has a number of recommendations emphasizing structure and the need to address the bullying issue but does not expressly require a full-time one-on-one paraprofessional.

The mother requested an aide for the student if ██████ was to be admitted to ██████ to keep the student from being bullied. (TE 93-94). She also requested a paraeducator for the student if ██████ was admitted to any other middle school. (See Petitioner Ex. 42).

Ultimately, Respondent offered a paraeducator to accompany the student during the school day to prevent bullying and help the student negotiate socially with other students. However, a one-on-one paraeducator was not included in the student's IEP until the 2011-2012

school year was effectively over. The ARC 5/23/12 conference summary reflects that Respondent finally agreed to a one-on-one paraeducator for the student at that time. (Resp. Exhibit 7, pp. 6-7). Had this service been provided from the beginning, it is likely that the bullying events that drove the student from the school environment would not have occurred.

16. The student could not return to regular classrooms in January of 2012 because the environment would have been harmful to the student.

Around the 1st of December, 2011, as the date for returning to school approached, the student exhibited severe symptoms of high levels of stress due to fear of returning to school. The mother testified that the student "was pulling [redacted] eyebrows out. [redacted] would pull on [redacted] hair and tug on [redacted] ears. [redacted] would scratch himself until [redacted] bled." (TE 73) The mother testified that "we could not even drive past this building or past [redacted] without him having a panic attack. We had to - literally we had to change routes to the places that we would go. We could not drive past [redacted]." (TE 77)

Dr. [redacted]'s initial recommendation had been for homebound through the first semester of 2011-2012. However, the parents and Dr. [redacted] agreed that [redacted] should not return to the school environment in January of 2012 because it would be harmful to the student and could result in suicide. (See mother's testimony, TE 64). Dr. [redacted]'s employee, an advanced nurse practitioner, signed a form requesting that homebound continue through the second semester of that school year because the student "was still exhibiting or stressor[s]...depression and anxiety as a result of the stressors [redacted] had previously," i.e., the bullying during the fall of 2011. (TE 129; also see TE 128-131).

17. Respondent did not offer the appropriate supports at any middle school

during the 2011-2012 school year, and did not provide an appropriate IEP with a one-on-one paraeducator.

██████████ testified that ██████████ would have been able to implement the student's IEP if ██████████ had come off homebound. (TE 340). However, the student's history at ██████████ demonstrates otherwise. Dr. ██████████ testified that it wouldn't have matter much whether the student was placed at ██████████ or ██████████, "unless the appropriate structure was put into place" and the structures in place at ██████████, based upon what ██████████ learned from the student, were inadequate. (TE 125-126).

The student was offered ██████████, ██████████ Middle School, and ██████████ but due to the mother's work schedule she would not have been able to pick up the student from those schools. (TE 215). The mother requested that the student be assigned to ██████████ because she understood that they had two programs for Asperger children, an after-school social skills program and a buddy program but was told it was not possible due to lack of capacity. (TE 94-95). ██████████ director of middle schools for ██████████, testified that when a parent applies for her or his child to attend out of area, by policy only schools below 95 percent capacity can be considered. (TE 696). ██████████ was at 97% capacity and had trailers parked out behind the school because of the overcrowded condition.(TE 214).

However, regardless of the options offered, Respondent was not going to provide a full-time para at any of the middle schools, something the mother had demanded (See Petitioner Ex. 42). ██████████ testified that she told the mother in January, 2012, via email, that a paraeducator could be provided for the student in all classes (TE 698), although the email indicates that escorts to and from class would have to be discussed at an ARC (See Petitioner exhibit 5). The lack of a para was the stumbling block that meant reentry into general classrooms would not take place until the student entered high school. ██████████ testified that when ██████████ attended the March

ARC meeting, it was [REDACTED] understanding that [REDACTED] would be the next school that the student would be attending. (TE 547).

A full-time para should have been part of an appropriate IEP, and Respondent ultimately did include that in the IEP for [REDACTED].

18. The math instruction the student received was not inadequate in quality.

[REDACTED], the homebound teacher, testified that [REDACTED] had to teach the student math without a math book for two months because the school could not or would not provide one. (TE 293). During that period [REDACTED] used an outdated book [REDACTED] had, which was not the book the student would have had in the classroom. (TE 315). However, [REDACTED] was able to provide the math instruction.

19. Failure of the [REDACTED] program did not violate the requirements of the IEP.

[REDACTED], special education administrator for [REDACTED] County high schools, testified that she has been involved with the [REDACTED] program since 1998 and found it to be a beneficial program opportunity for the student. (TE 545). The student was given [REDACTED] during homebound. [REDACTED] testified that the [REDACTED] program didn't work and they decided to stop using it because they couldn't get it to work. (TE 300). However, [REDACTED] was not specifically required by the IEP.

20. The student did not receive the social skills related services to which [REDACTED] was entitled during homebound.

A goal of the IEP concerns developing social skills necessary for the student to interact successfully with other students. [REDACTED] testified that it would be difficult to implement the goal of interacting appropriately with other children and adults in a homebound setting. (TE 358). This hearing officer would state it more strongly than that. While social skills training was

provided during home hospital and was beneficial, the fact that the student could not attend school and implement it meant [REDACTED] was not receiving the related services to which [REDACTED] was entitled.

21. The student was not given the minimum two hours of instruction during homebound.

Incorporating the social skills training into regular home hospital instruction resulted in failure to give the student two hours of instruction per week. [REDACTED] testified that the goal regarding teaching replacement coping strategies was something Ms. [REDACTED] was to teach along with the core curriculum, but that it was "embedded" in the core curriculum. (TE 337-338). However, Ms. [REDACTED] testified that in order to teach replacement coping strategies, one of the student's IEP goals, Ms. [REDACTED] had to "eat into" the time she spent teaching core content. (TE 313). This meant the student was getting less than the two hours per week instruction to which [REDACTED] was entitled.

22. The student did not receive enough instruction time during homebound.

Also, two hours per week was not enough. [REDACTED] testified that the two hours per week with the student was not enough time to cover the concepts [REDACTED] was teaching. (TE 298-299). Ms. [REDACTED] testified that she has in the past taught as many as four hours a week to a homebound student when told to do so by an ARC. (TE 290; 302). [REDACTED] testified that at every ARC meeting she attended, the mother asked for more hours of instruction. (TE 300-301).

23. Respondent did not adequately monitor implementation of the IEP.

Respondent's records do not indicate good monitoring of implementation of the IEP. [REDACTED], the special education teacher at [REDACTED] and the student's case manager there, brought [REDACTED] entire file on the student, or what [REDACTED] could find, but testified that there was only information from two of the student's teachers in the file, though the student had more than two

teachers. (TE 341-342). [REDACTED] testified that there might be other notes regarding communications from students but "[t]hese are the ones I could find two years later." (TE 357). [REDACTED] testified that observations of the homebound teacher would have been useful to determine present levels of performance, and [REDACTED] relied upon Ms. [REDACTED] to provide that information to [REDACTED], but the file [REDACTED] brought contained no information from Ms. [REDACTED]. (TE 358). Ms. [REDACTED] testified it was [REDACTED] responsibility to see that the IEP was implemented but seemed unaware regarding whether psychological services had been implemented (TE 353).

24. There was insufficient evidence to determine that the student suffered an academic loss due to Respondent's failure to provide services.

The mother testified that testing data shows student regressed during the year (TE 215) but this hearing officer does not know what to what data reference was made. [REDACTED] testified that the student did A and B work during home hospital. (TE 305). The student took an MSTC test and scored in the top 50 percent. (TE 92). During the student's matriculation at [REDACTED] he earned Bs. (TE 166).

The student's continued good academic performance throughout 2011-2012 and into the beginning of 2012-2013 may be because [REDACTED] is very smart - he has an IQ of 134, according to the mother - see TE 154. It may also be because [REDACTED] had already been well-educated during [REDACTED] home-schooling, perhaps beyond the level of instruction being given in middle school. The student testified that [REDACTED] math class at [REDACTED] was "stuff I had gone over a couple years back while I was still being home-schooled, but it was an enjoyable class." (TE 805).

25. Psychological services were not provided for a period, but the missed services were made up.

In this case, it is undisputed that there was a period of time during which the student was entitled to but did not receive psychological services from Respondent. Petitioner's exhibit 13 lists a schedule of services provided. [REDACTED] testified that the student received no counseling services in December, January, February and until the end of March, even though the November ARC meeting indicates that counseling should be provided by the school psychiatrist for 60 minutes per month. (TE 654). The mother testified that the student began receiving psychological services on March 25, 2012. (TE 140).

[REDACTED] testified that the plan was that if the psychological services weren't implemented immediately "those services would be made up, which was what sometimes we do with kids. Sometimes if a child is not at school one week, we spend an extra time the next week making up for those services if they were missed that week." (TE 431). [REDACTED] testified that Respondent "fixed" the failure to provide this counseling by providing more frequent counseling later. (TE 656).

While this hearing officer wonders whether "making up" the services gives the same end result that would have occurred if the services had been provided as scheduled, there is no evidence to find that it does not or that the hiatus in providing services resulted in a loss or deficit to the student.

26. The student enrolled in [REDACTED], a private school, at the beginning of the 2012-2013 school year.

[REDACTED] is a residential program in which the student enrolled in August of 2012. (TE 165). [REDACTED] grades the first quarter, were all Bs and one B plus. (TE 166). [REDACTED] left [REDACTED] in November because of alleged improprieties occurring at the school unrelated to the student. (TE 166). [REDACTED] is presently being home-schooled by his mother. (TE 168)

██████ testified that the student's mother indicated at the May ARC meeting that they were looking at the ██████ program. (TE 547). At the June 29, 2012 ARC meeting the mother gave notice of her intent to enroll the student in a private school (TE 163).

27. ██████ provides no special education services.

██████ is licensed but not certified by the state of Kentucky and is not accredited by Kentucky or one of the major accrediting agencies. (TE 239). It is a military school with hard and fast rules and allegedly 24-hour supervision (TE 256). The student liked ██████ because it was very structured. (TE 810). There is a faculty of five, none of whom are educators. (TE 241). There were 25 students, two of whom were female. (TE 252).

The school uses a system called "Odysseyware that supplements and we use it as a textbook." (TE 240-241) Regarding Odysseyware, the student testified that ██████ prepared a textbook and a composition book. (TE 810).

Regardless of the merits or demerits of the instruction provided at ██████, the student received no special education or psychological services at ██████, nor are there any special education teachers there. (TE 228). There was no IEP for the student at ██████ and as a private school it is not required to provide or abide by an IEP. (TE 254).

28. The parents expended \$26,850 for the student to attend ██████s, though it is not clear whether some portion of that will be refunded due to the student's short stay. (TE 280-282).

29. The IEP and BIP developed for 2012-2013 was appropriate for the student and could be implemented at ██████, the student's home high school.

Exhibit 12 is the IEP that would have been implemented at ██████. The IEP seems appropriate for the student.

██████ has experience dealing with the issues faced by this student. ██████, special education teacher at ██████, testified that none of the six students on ██████ caseload have been bullied to ██████ knowledge. (TE 458; 462). ██████, Dean of Students at ██████, testified that ██████ was aware of the student's diagnoses, past suicidal ideations, and bad experiences at ██████, but was confident the student's IEP could be implemented at ██████. (TE 481-484). ██████ testified that "we have dealt with many students with Asperger's that have suicide ideation." (TE 486). ██████ testified that

[██████ tries] to place them in the most advanced classes that we can. And fortunately, [the student] is a very smart young ██████ and... whatever they're able to do to put ██████ in the most advanced classes as we can because ██████ is around more mature peers, students that are more focused on learning.... [and] that's an environment that we found to be very successful with our Asperger's kids.

So I think it's a matter of taking it day by day, implementing the IEP that we have and then setting up monthly meetings for, you, very intensive kids we would set up meetings and parents could call an ARC at any time. The case manager could call an ARC at any time. We also had in place going to be with a one-on-one paraeducator to help Mom and student feel more confident that ██████ was not going to be, you know, teased.

(TE 486-487). To the extent that additional training was necessary, the training requested by the mother for teachers at ██████ would have been completed in time for school. (TE 149).

The mother wanted a paraeducator with the student to act as a buffer in social interactions with students. (TE 151-152). The mother testified that "we did talk about [the student] having an environmental support person at ██████, but then the conversation immediately went to weaning ██████ off of that at a fairly quick pace." (TE 146). However, ██████ testified that the student would be placed with a one-on-one paraeducator that would be gradually "faded out" because it was harmful for the student to become too dependent on someone and because "sometimes other students don't interact and talk with that student because...they're with a paraeducator." (TE 504). ██████ testified that ██████ took to heart, in terms of what ██████ should be like for the student, Dr. ██████'s statement that "there is no perfect situation and [the student] has to learn to

tolerate a wider range of social settings.” (TE 645). The idea of weaning the student gradually from the paraeducator seems reasonable.

██████████ testified that jostling by other students in the hallways “could be somewhat problematic” for this student. (TE 395). ██████████ agreed to let the student leave class early or arrive late to avoid jostling in the hallway. (TE 150). ██████████ testified that with other Asperger’s students ██████████ has allowed them to have earphones or earplugs to reduce the level of noise in the hall. (TE 494).

At ██████████ it had been difficult for the student to go from the first to second class because they were located on separate sides of the school and there was no order in the hallway. (TE 804). The student testified that “[i]t took about a week or so for me to fully be used to the schedule and around the time I didn’t really talk to anyone because the only thing on my mind was making sure that I get everywhere.” (TE 803). ██████████ testified that at ██████████ the student “could have been escorted [by a paraeducator to and from class] and ██████████ could have left early or maybe two minutes early or stated two minutes late...” (TE 492).

██████████ testified that “I know from personal experience once I get a child out of school, it is very hard to get them back in.” (TE 669). Regarding transition from homebound to general classroom, ██████████ testified that activities discussed to smooth the transition both before and while at ██████████ included archery and staggered transitions so the hallways weren’t so crowded. (TE 549). ██████████, a special education teacher at ██████████, testified that ██████████ recommended, at the March ARC meeting, the student’s involvement in the archery program, to connect with the school, and mentioned the availability of “██████████,” a group for students who work on social skills. (TE 448-449).

The student finds it upsetting when others break rules and Petitioner introduced evidence that students break rules at [REDACTED], [REDACTED], special education administrator for [REDACTED] County Schools, testified that the student has a rigid sense of right and wrong that triggers behaviors that are of concern. (TE 630-631). However, the reality in which the student will live and work will contain some rule-breakers. Regarding the student's concern to learn that some [REDACTED] students break rules by smoking, [REDACTED] testified

we've got to teach [REDACTED] to have perspective-taking skills and to deal with that in life because, you know, you won't be able to work if you're upset all the time with someone breaking a rule. We've got to learn to handle and cope and deal with that and let other people deal with that, whatever's appropriate.

(TE 496). [REDACTED] testified that "students on the spectrum think that people have the same understanding as they do and have difficulty why those perspectives vary." (TE 676). Part of the social skills the student will need to learn to function successfully in life will be perspective-taking.

[REDACTED] presented a BIP at the June ARC meeting (TE 640) that this hearing officer finds suited to the student's unique needs. [REDACTED] testified that

in terms of procedures put in place to address the issues and concerns for [the student], we looked at...everything that was brought up as a concern, we tried to match that with a safety procedure. We tried to talk about no interactions in the hallway We talked about preferential seating. We talked about every possible scenario that we could think of to try to ... maximize [the student's] personal safety.

(TE 648). [REDACTED] testified that "I have researched the literature on autism and bullying. When it comes down to it....the strategies are the same that they try to teach in terms of anti-bullying." (TE 663).

The parents are understandably skeptical of any promises made by Respondent after the student's middle school experience. However, this hearing officer believes that what is offered at [REDACTED] is designed to meet the student's unique needs.

CONCLUSIONS OF LAW

1. The student was denied FAPE during the 2011-2012 school year.

Fayette County Bd. of Educ. v. M.R.D. ex rel. K.D., 158 S.W.3d 195 (Ky.,2005) holds that the Individuals with Disabilities Education Act (IDEA) does not charge a school district with the obligation to maximize each student's potential; rather, the IDEA requires only that the school district provide a basic floor of opportunity, sufficient to confer some educational benefit upon the handicapped child. However, the educational benefit of an individualized education program (IEP) under IDEA must be gauged in relation to a child's potential, and to fulfill this mandate, a district court must analyze the type and amount of learning of which the student is capable. *T.R. v. Kingwood Tp. Bd. of Educ.* 205 F.3d 572 (C.A.3 (N.J.).

Fayette County Bd. of Educ. v. M.R.D. ex rel. K.D., 158 S.W.3d 195 (Ky.,2005) holds that a central tenet of the Individuals with Disabilities Education Act (IDEA) is the belief that disabled children should be taught with non-disabled children to the maximum extent possible; this belief is expressed in the IDEA's requirement that the disabled child be placed in the least restrictive environment (LRE) consistent with the child's needs. *T.R. v. Kingwood Tp. Bd. of Educ.*, 205 F.3d 572 (C.A.3 (N.J.) holds that the "least restrictive environment" is the one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled.

In the present case, the student was placed in general classrooms and could have been educated there with the proper supports. Instead, because of the lack of such supports and the resulting bullying, the student was forced to go on homebound, which was not the least restrictive environment. While this was the "choice" of the mother, she had no real choice - removal was recommended by the student's psychiatrist, necessary for the mental health of the student, and caused by the failures of Respondent to provide the necessary supports to prevent the student from being bullied because of [REDACTED] disability.

While on homebound, the student was entitled by law to receive a minimum of two hours instruction per week. KRS 157.270. Per the fact-findings, the student did not receive the minimum required, did not receive enough time generally, and did not receive effective social skills services because the student was not in a setting where the skills could be implemented.

2. The student was not denied FAPE after the end of the 2011-2012 school year.

The IEP proposed for matriculation at [REDACTED] is reasonably calculated to provide a free and appropriate public education designed to meet the student's unique needs.

3. The student is not entitled to compensatory education.

Reid ex rel. Reid v. District of Columbia, 401 F.3d 516, 523 (C.A.D.C.,2005) holds that "[c]ompensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student" (emphasis added) and "just as IEPs focus on disabled students' individual needs, so must awards compensating past violations rely on individualized assessments." *Id.*, 524.

In the present case, the student made As and Bs before [REDACTED] was on homebound; the student did A and B work during homebound; and the student did B work when [REDACTED] returned to a

classroom at [REDACTED] after homebound. There was no testimony that the failure to receive the full two hours or more time for homebound instruction caused an educational deficit. This is fatal to a claim for compensatory education, because compensatory education must be crafted to remedy a specific educational deficit. This hearing officer cannot follow the cookie cutter approach, rejected by case law known to counsel, whereby the question of whether an educational deficit exists is evaded by equating the period FAPE was not provided to an "educational deficit" and remedying it by providing services for a like period.

Similarly, while it is reasonable to speculate that had the student been able to implement social skills in the general classroom during 2011-2012, that would have benefited the student, without expert or other evidence upon which to base an opinion, it remains only speculation whether, if at all, the lost opportunity to do so has affected the student and what services, if any, could "undo" that effect.

4. The parents are not entitled to reimbursement for tuition at [REDACTED].

[REDACTED] did not provide any special education services. Placement at and reimbursement of tuition for private schools that do not or cannot provide special education services is not permitted under IDEA. *Berger v. Medina City Sch. Dist.*, 348 F.3d 513 (6th Cir. 2003); *Rome Sch. Comm. V. Mrs. B.*, 247 F.3d 29,33 (1st Cir. 2001); *Florence County Sch. Dist. Four v. Carter by & Through Carter*, 510 US 7, 12-13 (1993); *J.G. Kiryas Joel Union Free Sch. Dist.*, 777 F.supp 2d 606 (S.D. N.Y. 2011); *Covington v. Yuba City Unified School District*, 780 F. Supp. 2d 1014 (E..D. Cal. 2011).

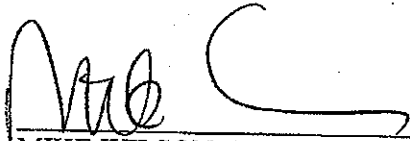
DECISION

Respondent failed to provide FAPE during the 2011-2012 school year but Petitioner is not entitled to compensatory education or tuition reimbursement.

NOTICE

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 at Office of Legal Services, Capital Plaza Tower, First Floor, 500 Mero Street, Frankfort KY 40601. The appeal shall be perfected by sending, by certified mail, to the Kentucky Department of Education, a request for appeal within thirty (30) calendar days of date of the hearing officer's decision.

Dated June 11, 2013.


MIKE WILSON, HEARING OFFICER

CERTIFICATION:

A copy of the foregoing was mailed to the following on June 12, 2013, to [REDACTED], [REDACTED], and [REDACTED], and Hon. Kevin Brown Assistant General Counsel, Kentucky Department of Education, Capital Plaza Tower, 500 Mero St., Frankfort KY 40601


MIKE WILSON, HEARING OFFICER