

**BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION**

IN THE MATTER OF:

**Te.S, S.S., and Ta.S., *Students*, and T.S.
and M.S., *Parents*,
Petitioners,**

**DOCKET NOS: 07.03-105984J
07.03-106822J
07.03-106823J**

v.

**CLARKSVILLE/MONTGOMERY
COUNTY SCHOOL SYSTEM,
Respondent.**

FINAL ORDER

This contested case was heard in Clarksville, Tennessee, on April 6 and 7, 2010, before Ann M. Johnson, Administrative Judge, assigned by the Secretary of State, Administrative Procedures Division, pursuant to Tenn. Code Ann § 49-10-606 and Tennessee State Board of Education Rule No. 0520-1-9-.08. The Petitioners were represented by the parents, T.S. and M.S., who waived legal counsel. The Respondent Clarksville/Montgomery County School System, which is the local education agency ("LEA"), was represented by John Kitch, of the Nashville bar.

These three cases were consolidated for the purposes of proof. Although it was originally announced that three Final Orders would be entered, it is determined that the proof is so intertwined that three separate orders are not practicable. Furthermore, the issues stated and the relief sought are exactly the same in all three cases. For these reasons, the three cases are also consolidated for purposes of the Final Order.

MOTIONS TO DISMISS

At the beginning of the hearing, the Respondent moved for dismissal of all three cases on several different grounds. The first was premised upon the fact that the Petitioners failed to provide a Witness and Exhibit List in a timely manner. After the hearing had begun, the Petitioners submitted to the Respondent and to the Administrative Judge a Witness and Exhibit List, explaining that this was part one of two. The Petitioners stated that the second part would be provided on the second day of the hearing. The Respondent objected, pointing out that a procedural order, entered January 5, 2010, contained the following requirement: "At least five business days prior to the hearing date, the parties must exchange and file witness and exhibit lists, including names, addresses, and telephone numbers." It was determined that the Petitioners failed to comply with this requirement. However, the Respondent's Motion to Dismiss on these grounds was denied since the Respondent was aware of the majority of the proposed proof.

Second, the Respondent moved for dismissal on the basis that the Petitioners also failed to comply with the requirement to provide a more definite statement. By Order entered March 16, 2010, the Petitioners were ordered as follows:

The Respondent filed a Motion for a More Definite Statement. It is clear from the description of the issues and the resolutions sought that there are only general allegations of failure on the part of the LEA. In order to allow the Respondent to adequately understand the specific issues giving rise to these matters, the Motion for a More Definite Statement was **granted**. *The Petitioners shall provide the Respondent with the facts, specific to each child, that provide the basis for the Complaints.*

Emphasis added. It is undisputed that these specific facts were never provided, even though the Petitioners were granted leave to file amended complaints. These amended complaints were identical for each child, and did not contain specific facts to support the charges of wrong-doing on the part of the Respondent. At the hearing, the Motion to Dismiss on these grounds was taken

under advisement. It is determined that, while the Petitioners failed to provide the specific factual allegations as ordered, this failure did not prejudice the Respondent in presenting its proof: prior to the hearing, numerous telephone conferences were convened during which the Respondent received notice of the factual allegations upon which the complaints were based. Therefore, this Motion to Dismiss is **denied**.

Finally, the Respondent moved to dismiss the case of *Ta.S. v. Clarksville/Montgomery School System*, Docket Number 07.03-106823J. The Respondent argued that S.S. has never been certified for the special education program, and therefore there is no jurisdiction to require any of the remedies sought by the Petitioners in this particular case.

The Respondent's Motion is well-taken. Tenn. Code Ann. §49-10-606(a) provides that "[s]pecial education due process cases shall be heard by administrative law judges employed by the secretary of state." The Petitioners have asserted no jurisdictional basis, other than this statute, upon which to hear the case and to grant the relief requested. The Petitioners stated that Ta.S. has never been evaluated for the special education program, and her parents have never sought such an evaluation. Since the Petitioner Ta.S. has not been certified as a student entitled to special education and related services, the Motion to Dismiss the case of *Ta.S. v. Clarksville/Montgomery School System*, Docket Number 07.03-106823J, is hereby **granted**.

RESPONDENT'S MOTION REGARDING ATTORNEYS' FEES

At the conclusion of the hearing, counsel for the Respondent requested a finding that the Respondent is the prevailing party entitled to an award of attorneys' fees, even though counsel acknowledged that under federal law the Administrative Judge does not actually award those fees.

This request is based upon 34 CFR § 300.517, the relevant parts of which contain the following language:

(a) In general. (1) In any action or proceeding brought under section 615 of the Act, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to

(ii) To a prevailing SEA or LEA against the attorney of a parent, or against the parent, if the parent's request for a due process hearing or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

The Respondent argued that attorneys' fees should be assessed against the Petitioners' advocate, Kevin Johnson, even though Mr. Johnson is admittedly not an attorney, contending that Mr. Johnson incited the Petitioners to harass the school system with multiple complaints and suits filed with various state and federal agencies and courts.

As the Respondent correctly noted, it is not within the province of the Administrative Judge to award attorneys' fees, only to designate a prevailing party. That designation will be made subsequently in the Conclusions of Law. The Respondent was allowed to develop the record so that any arguments regarding attorneys' fees can be made in the proper forum. Since this issue is not within the purview of the current action, the Motion for any determination regarding attorneys' fees will not be considered.

POST-HEARING MOTIONS

The hearing of this matter was concluded on April 7, 2010. Since that time, the Petitioners have filed the following:¹

April 23, 2010 Copy of letter to Assistant Commissioner Joseph Fisher regarding attendance of attorney at IEP meeting for S.S.

¹ Although multiple copies of most of the documents were filed on different dates, by email, facsimile, and U.S. mail, only one filing date is listed for each document.

Letter regarding assistance provided to the Petitioners by Kevin Johnson, objecting to the Respondent's request for sanctions against Mr. Johnson

May 7, 2010 Letter regarding request to present additional evidence

May 11, 2010 Letter requesting ruling to prohibit the attendance of Respondent's attorney at IEP or transition meetings for Te.S.

Copy of letter to Kenwood High School principal, with attachments

May 12, 2010 Motion to Present New Evidence to Administrative Court

May 13, 2010 Motion for FAPE to be Reconsidered by Administrative Court, Part I

May 14, 2010 Motion for FAPE to be Reconsidered by Administrative Court, Part II

May 17, 2010 Response to Opposition to Motion for FAPE to be Reconsidered by Administrative Court Part I, with letter attached

May 18, 2010 Response to Opposition Regarding Motion to Present New Evidence to Administrative Court

Letter requesting an independent educational evaluation for Te.S., S.S. and Ta.S., with attachment

May 19, 2010 Motion for Administrative Court to Order Clarksville/Montgomery County School System to Allow [Te.S.], [S.S.] and [Ta.S.] to Have a [sic] Independent Educational Evaluation

Letter regarding participation of Respondent's attorney in IEP meeting for Te.S.

Response to Opposition to Motion for FAPE to be Reconsidered by Administrative Court Part I

May 20, 2010 Motion to Present New Evidence of Clarksville/Montgomery County School System Refusal to Allow an Independent Educational Evaluation of the [S.] Children to Administrative Court, with attachment

May 21, 2010 Motion to Present New Evidence Regarding [T.S.] Sr. Recent Diagnosis of Being Declared Legally Blind as a Result of Having a Form of Glacuomna [sic] that is Hereditary, with attachment

Letter requesting leave to allow various organizations to file an *amicus curiae* brief and motion

- May 25, 2010 Motion Requesting Administrative Court Order Clarksville/Montgomery County School System Attorney John Kitch from Attending [Te.S.'s] IEP Meetings
- May 26, 2010 Motion Requesting Administrative Court Order Clarksville/Montgomery County School System Display Proof that [Te.S.] Is Reading on an Eighth (8th) Grade Level
- May 27, 2010 Copy of Letter from Assistant Commissioner Joseph E. Fisher
- Motions Requesting Administrative Court Allows [sic] the Parents of [Te.S.] Have their Attorney Attend Future Clarksville/Montgomery County School System IEP Meetings Concerning their Son [Te.S.]
- Letter from Kevin Johnson regarding assistance
- May 28, 2010 Motion for Administrative Court to Allow Friend of the Court Brief (*Amicus Curiae*) Regarding [Te.S.], [S.S.] and [Ta.S.] Regarding the Prolonged Effects of Glaucoma
- June 1, 2010 Motion Requesting Administrative Court Order Clarksville/Montgomery County School System Attorney John Kitch Provide Missing Page (121) from Original Transcript of Proceedings that Occurred on April 6th and 7th 2010 at the Offices of Clarksville/Montgomery County School System
- June 4, 2010 Letter regarding FAPE

These filings will be grouped and discussed according to subject matter.

Motions Regarding Additional Evidence

Since the conclusion of the hearing, the Petitioners have submitted several requests to present additional evidence. First, the Petitioners asked that medical evidence pertaining to vision issues of Te.S. and S.S., obtained through recent eye examinations, be considered in these proceedings and noted as a matter of record to be true. Second, the Petitioners asked to submit additional educational records from the State of Mississippi. Third, the Petitioners wish to submit medical records and diagnoses for T.S., Sr. Finally, the Petitioners ask for leave to present recent test scores and results of IEP meetings, all resulting from events after the close of the proof.

Any evidence to be considered on the issues presented in an administrative hearing must be submitted by the close of the proof, unless the record is left open. In this matter, the Petitioners did not request that the record be left open. Furthermore, they had been advised multiple times by the Administrative Judge that any evidence to be considered in the final decision must be admitted into evidence during the hearing. Since the Petitioners were not represented by an attorney, they were allowed great latitude to present documentation on the second day of the hearing, even though they had closed their proof. They were allowed to present proof at the hearing even though they failed to submit a witness and exhibit list and failed to file factual allegations specific to each child, as ordered. It is now too late in this process to begin anew by allowing the submission of additional evidence.

Additionally, some of the additional evidence is not relevant to matters at issue in this case, such as recent eye examinations and results of tests taken after the hearing. Also lacking relevance is medical information related to the children's father. Any new visual examinations or evaluations are also inapposite. The only questions under consideration in this proceeding were defined and agreed upon by the Petitioners before the hearing; only matters related to these issues are appropriate and relevant to the final decision in this case.

The same analysis applies to the request to allow *amicus curiae* briefs. The Petitioners could have made such requests prior to the hearing, when sufficient time remained for consideration of that issue. Furthermore, the Respondent would have been given a chance to respond. It is too late in this process for consideration of any outside legal argument.

Accordingly, for these reasons, the following motions are hereby **denied**:

Motion to Present New Evidence to Administrative Court (May 12, 2010);

Motion for Administrative Court to Order Clarksville/Montgomery County School System to Allow [Te.S.],[S.S.] and [Ta.S.] to Have a Independent Educational Evaluation (May 19, 2010);

Motion to Present New Evidence of Clarksville/Montgomery County School System Refusal to Allow an Independent Educational Evaluation of the [S.] Children to Administrative Court (May 20, 2010);

Motion to Present New Evidence Regarding [T.S.] Sr. Recent Diagnosis of Being Declared Legally Blind as a Result of Having a Form of Glaucoma that is Hereditary (May 21, 2010);

Motion Requesting Administrative Court Order Clarksville/Montgomery County School System Display Proof that [Te.S.] is Reading on an Eight (8th) Grade Level (May 26, 2010); and

Motion for Administrative Court to Allow Friend of the Court Brief (*Amicus Curiae*) Regarding [Te.S.], [S.S.] and [Ta.S.] Regarding the Prolonged Effects of Glaucoma (May 28, 2010).

Requests Regarding Participation in IEP Meetings

As previously discussed, the only issues presented in this case are those delineated on the Due Process Hearing Request Form and subsequently defined by agreement of the Petitioners. Consequently, any on-going disputes between the parties, other than those explicitly at issue in this proceeding, are outside the parameters of this case. Accordingly, the following are hereby **denied**:

Motion Requesting Administrative Court Order Clarksville/Montgomery County School System Attorney John Kitch from Attending [Te.S.] IEP Meetings (May 26, 2010); and

Motions Requesting Administrative Court Allows the Parents of [Te.S.] Have their Attorney Attend Future Clarksville/Montgomery County School System IEP Meetings Concerning their Son [Te.S.] (May 27, 2010).

Requests in Various Motions for Notations on the Record

Multiple motions and other documentation filed by the Petitioners contain requests asking the Administrative Court to note various facts for the record. Others ask the Administrative Court to inform various state and federal agencies of possible IDEA violations.

It is the duty of the Administrative Judge, after consideration of the evidence presented, to determine Findings of Fact. These matters are found to be true, as shown by the proof. In this case, those Findings of Fact are contained below in the Decision on the Merits. Similarly, any violations relevant to a decision in this matter are discussed and determined in Conclusions of Law, again contained below in the Decision on the Merits. Aside from these Findings and Conclusions, it is not the function of the Administrative Judge to inform other departments or agencies of “possible state and federal violations,” or to “note for the record” facts not relevant to the determination of this case.

Documents Containing Legal Argument

At least two documents are styled as “Motions,” but actually contain legal argument in support of the Petitioner’s contentions: “Motion for FAPE to be Reconsidered by Administrative Court, Part I,” and “Motion for FAPE to be Reconsidered by Administrative Court, Part II.” These documents are construed as post-hearing briefs; consequently, no separate ruling is necessary.

Other documents concern the role of the Petitioner’s advocate, Kevin Johnson. Again, these are legal argument, and are peripheral to the primary issues presented in this case.

Motion Regarding Missing Page of Transcript

On June 1, 2010, the Petitioners filed a “Motion Requesting Administrative Court Order Clarksville/Montgomery County School System Attorney John Kitch Provide Missing Page (121) from Original Transcript of Proceedings that Occurred on April 6th and 7th 2010 at the Offices of Clarksville/Montgomery County School System.” In this document the Petitioners have stated that one page, Page 121 of 232 pages, is missing from their copy of the transcript. It is noted that the certified copy of the transcript filed with the Administrative Procedures Division

includes Page 121. However, the Petitioners are entitled to a complete transcript. Accordingly, it is determined that this Motion is **granted**, in that the Respondent shall immediately provide a copy of Page 121 to the Petitioners. However, other relief requested, including “a written and detailed explanation as to the reason why this particular document was not included,” is hereby **denied**.

DECISION ON MERITS

In general, the subject of this hearing concerned the claim of the Petitioners that they failed to receive a free and appropriate public education (“FAPE”) from the Respondent. After consideration of the record and the arguments of the parties, it is determined that the Respondent Clarksville/Montgomery County School System has provided FAPE to both of the students, and therefore their requests for relief should be **denied**. This determination is based upon the following.

ISSUES PRESENTED

By agreement of the parties prior to the hearing, this case presents two issues:

- (1) Incorrect placement; and
- (2) Inadequate transitional program.

RELIEF SOUGHT

Prior to the hearing the Petitioners agreed that this matter was brought to obtain the following relief:

- (1) Enrollment in the Tennessee School for the Blind;
- (2) Reimbursement for private school tuition;
- (3) Assessment of present levels of academic achievement; and

- (4) Formulation of an appropriate transitional program, including employment and independent living skills.

SUMMARY OF THE EVIDENCE

In addition to T.S., Sr. and M.S., the children's parents, one witness testified on behalf of the Petitioners: Kevin Johnson, advocate. The Respondent presented five witnesses: Elaine Brown, Brandi McRedmond, Virginia Chapman, Cara Alexander, and Tijuana Carmichael.

Twenty-two exhibits were admitted into evidence:

- EXHIBIT 1 High School Graduation Requirements, Power Point Presentation
- EXHIBIT 2 Closing the Achievement Gap
- EXHIBIT 3 Addenda 2009-2010 TCAP Accommodations
- EXHIBIT 4 2009-2010 TCAP Accommodations for Students with Disabilities
- EXHIBIT 5 Emergency Motion for Preliminary Injunction
- EXHIBIT 6 Resume of Elaine Brown
- EXHIBIT 7 Brandi McRedmond CV
- EXHIBIT 8 Virginia Gray Chapman CV
- EXHIBIT 9 Eligibility Report for S.S.
- EXHIBIT 10 IEP for S.S.
- EXHIBIT 11 Eligibility Report for Te.S.
- EXHIBIT 12 IEP for Te.S.
- EXHIBIT 13 Cara Alexander C.V.
- EXHIBIT 14 Your Score Report for Te.S.
- EXHIBIT 15 TCAP Achievement Test, Spring 2009, S.S.
- EXHIBIT 16 Letter to Tennessee Department of Human Services from Ms. Chapman RE: S.S.
- EXHIBIT 17 Letter to Tennessee Department of Human Services from Ms. Chapman RE: Te.S.
- EXHIBIT 18 Correspondence for Social Security Administration, dated February 18, 2010, Claim No. 425-81-4045DC
- EXHIBIT 19 Correspondence for Social Security Administration, dated February 18, 2010, Claim No. 425-75-7920DC
- EXHIBIT 20 Request for School Records RE: Te.S.
- EXHIBIT 21 Registration Form 6-8 RE: Te.S.
- EXHIBIT 22 Test Results K-8 RE: Te.S.

FINDINGS OF FACT

1. The Petitioner Te.S. is 17 years old and attends Kenwood High School in Clarksville, Tennessee.

2. Kenwood High School is a part of the Clarksville/Montgomery County School System.

3. Te.S. is in the tenth grade.

4. Te.S. is qualified for special education and related services because he is visually impaired.

5. Te.S. has a diagnosis of aniridia, a partial or total absence of the iris, with secondary glaucoma, which are both diseases of the eye that can affect vision. He also is very nearsighted, or myopic, and has a slight astigmatism.

6. Te.S. was treated at the Vanderbilt Eye Institute through the project to provide access to the visual environment ("PAVE"). He was referred to this program through the Clarksville/Montgomery County school system for a clinical low vision evaluation. The purpose of the evaluation was to determine whether any optical devices would benefit the student's ability to function in the classroom.

7. Brandi McRedmond is a vision specialist and therapist with the Vanderbilt Eye Institute, providing services through Project PAVE. Ms. McRedmond testified as an expert in the education of visually impaired children.

8. The Vanderbilt PAVE program provided Te.S. with polycarbonate high index near glasses for full-time wear.

9. According to Ms. McRedmond, Te.S.'s glasses allow him to read regular-sized print at a distance of about seven inches. With large print options, he could read from farther away. The glasses also allow him to see at a distance, such as reading the blackboard from a student desk in the classroom.

10. Virginia Chapman is a Certified Teacher of the Visually Impaired. She is employed with the Clarksville/Montgomery County school system to teach both blind and visually impaired students, presenting an expanded core curriculum which includes skills of daily living, social interaction, and recreation.

11. Ms. Chapman first came into contact with Te.S. in September of 2008. She performed a functional vision assessment and obtained medical vision records, all of which demonstrated that Te.S. has a visual acuity of 20/60 plus two, which qualifies him for a classification of visually impaired.

12. According to Ms. Chapman, Te.S. does not meet the state requirements to be classified as legally blind or the state requirements for admission to the Tennessee School for the Blind.

13. As a visually impaired student, Te.S. is qualified for special education and related services in the Clarksville/Montgomery County school system. Ms. Chapman, along with other members of the student's team, developed an Individualized Education Program ("IEP") for Te.S. in October of 2008.

14. As part of the services under the IEP, Ms. Chapman provides consultation vision services twice a month. She works with Te.S.'s teacher to implement the IEP and to make sure the student has all the modifications in place to give him equal access to his education that his peers also have.

15. According to Ms. Chapman, the IEP is implemented correctly and provides appropriate educational benefits for him.

16. Te.S. is entitled to transition planning because of his age, although services such as vocational rehabilitation are not normally available to students until the senior year.

Vocational rehabilitation, and other similar services, are not usually provided for tenth grade students.

17. Te.S.'s IEP contains a transition plan that includes consideration of his postsecondary goals. It also includes the expanded core curriculum that provides instruction on skills that are required to function in society.

18. The transition plan contained in the IEP is appropriate for Te.S.'s grade level.

19. Te.S.'s parent signed his most recent IEP to signify agreement with its provisions. The parent was accorded meaningful participation in the development of the student's IEP.

20. The IEP reflects that Te.S.'s mother is concerned about his reading ability and his continuing failure to wear his glasses. This difficulty is ongoing and has been observed by Ms. Chapman as well.

21. According to Ms. Chapman, as well as Te.S.'s teacher Tijuana Carmichael, Te.S. does not have problems with vision in the classroom if he wears his glasses; if he wears the glasses, he can access the general curriculum.

22. With the exception of his morning block class for reading, Te.S. spends all of his day in the general classroom. This placement is less restrictive than that available at the Tennessee School for the Blind.

23. Te.S. has difficulty with reading, although according to his teacher Tijuana Carmichael, he reads on the same level as do the other students in his class. Ms. Carmichael assessed his reading in her class at the third grade level, although he has improved during the course of the year.

24. Ms. Carmichael stated that Te.S.'s reading problems are not related to his vision impairment, but to other issues.

25. Ms. Carmichael believes that Te.S. is making progress under his IEP.

26. Cara Alexander is the Director of Exceptional Children's Services for the Clarksville/Montgomery County schools. Previously she was Director of Compliance for the State of Tennessee, where her duties included assessment of IEPs to insure compliance with all state and federal laws.

27. Ms. Alexander stated that Te.S.'s IEP is appropriate and provides substantial educational benefits.

28. Ms. Alexander also explained that Te.S. has received all necessary and required testing and evaluation to assess his educational achievement. TCAP tests must be given in grades three through eight; of these grades, Te.S. was enrolled in Clarksville/Montgomery County schools only in the seventh grade, so TCAP scores are available for this year only.

29. Ms. Alexander verified that all the Petitioner's educational records in the possession of the Clarksville/Montgomery County School System have been provided to the Petitioners. She stated that these have been provided at least five times.

30. All of Te.S.'s educational records available to the Clarksville/Montgomery County school system have been released to the Petitioners.

31. Elaine Brown is Director of Outreach Services and Admissions at the Tennessee School for the Blind. Ms. Brown is an expert in the area of the education of visually impaired and blind students.

32. In order to be accepted for admission to the Tennessee School for the Blind, a student must be legally blind, as defined by state law.

33. Legal blindness in Tennessee means that a person's visual acuity, even with the best vision correction, is 20/200 or less, the person has a restricted field of vision, or the person has been diagnosed with a degenerative condition that would eventually result in blindness.

34. Visual evaluations and medical records show that Te.S. does not meet the criteria for legal blindness.

35. According to Ms. Brown, Te.S. is not eligible for admission to the Tennessee School for the Blind.

36. Although the Petitioners requested reimbursement for private school as an alternative for admission to the Tennessee School for the Blind, Te.S. has not applied for, enrolled in, or attended a private school.

37. Furthermore, the Petitioners have not identified a suitable private school and therefore do not know whether a private school could provide services that are appropriate to the needs of the students.

38. The Petitioner S.S. is 14 years old and attends school at Kenwood Middle School in Clarksville, Tennessee.

39. Kenwood Middle School is a part of the Clarksville/Montgomery County School System.

40. S.S. is in the seventh grade.

41. S.S. meets the criteria for special education and related services because she is visually impaired.

42. Virginia Chapman, Certified Teacher of the Visually Impaired, observed and evaluated S.S., after receiving medical records. According to her eligibility report, S.S. has a visual acuity of 20/50.

43. Ms. Chapman noted that S.S. has some difficulty with remembering to wear her glasses.

44. S.S.'s eligibility report contains the following summary: "It is the professional opinion of this evaluator [Virginia Chapman] and that of her eye doctor, (see the report), that S.[S.] does not have a serious vision loss after correction. S.[S.]'s vision does not interfere with her ability to learn."

45. This conclusion is also supported by a vision report from the Petitioner's optometrist in Mississippi, Dr. Jones: "This patient does not have a serious visual loss after correction."

46. Although S.S. qualifies as visually impaired, she is not legally blind.

47. S.S. is not eligible for admission to the Tennessee School for the blind.

48. S.S. was treated at the Vanderbilt Eye Institute through the PAVE project. The purpose of the evaluation was to determine whether any optical devices would benefit the student's ability to function in the classroom.

49. The Vanderbilt PAVE program provided S.S. with glasses, with which she is able to read regular print.

50. According to Brandi McRedmond, vision specialist and therapist with the Vanderbilt Eye Institute, S.S. is able to access the general curriculum with her corrective lenses.

51. S.S. has an IEP for the 2009-2010 school year. This plan calls for her to receive specified academic course work through the resource teacher, not in the regular classroom. She spends time in the general classroom with nondisabled peers for related arts.

52. According to Ms. Chapman, this setting is the least restrictive environment in which S.S. is able to function effectively.

53. S.S.'s IEP contains a transition plan. Transition plans are usually developed during the school year in which the student becomes 14 years old.

54. M.S., the Petitioner's parent, signed this IEP, granting permission for S.S. to receive the proposed educational program. The parent was accorded meaningful participation in the development of the student's IEP.

55. S.S.'s IEP and transition plan are appropriate and provide good educational benefits. S.S. has made reasonable educational progress under her current IEP.

56. S.S. has received all necessary and required testing and evaluation to assess her educational achievement.

RELEVANT LAW

1. The Petitioners have the burden of proof in this matter, to show by a preponderance of the evidence that the relief they seek is warranted under state and federal law. *Schaffer v. Weast*, 546 U.S. 49, 62 126 S.Ct. 428, 163 L.Ed.2d 387 (2005).

2. Each LEA is required to provide a "free appropriate public education ("FAPE")" to "all children with disabilities." 34 CFR § 300.101; Rule 0520-01-09-.05, TENN. COMP. R. & REGS.

3. A free appropriate public education ("FAPE") is defined in 34 CFR § 300.17:

Free appropriate public education or FAPE means special education and related services that –

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA, including the requirements of this part;
- (c) Include an appropriate preschool elementary school, or secondary school education in the State involved; and

(d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.320 through 300.324.

4. The IEP must be “reasonably calculated to confer education benefit” to the student. *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982). According to the Court in *Rowley*, “If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.” *Rowley* at 207. The law does not require the LEA to maximize the student’s educational benefits, or to guarantee that the student reaches a specific level of academic achievement. *Rowley* at 107.

5. The Sixth Circuit has held that federal law does not “require public schools to maximize the potential of disabled students commensurate with the opportunities provided to other children.” *Renner v. Board of Education of the Public Schools of City of Ann Arbor*, 185 F.3d 635, 644 (6th Cir. 1999). See also, *Doe v. Tullahoma City Schools*, 9 F.3rd 455 (6th Cir. 1993).

6. According to 34 CFR § 300.324, an individualized education program (IEP) must contain the following elements: (1) a statement of the child’s present performance levels; (2) a statement of measurable annual goals; (3) a description of progress toward meeting those goals; (4) a statement of the special education, related services, and supplementary aids and services needed; (5) an explanation of the extent to which the child will not participate with non-disabled peers; (6) a statement of any necessary appropriate accommodations; and (7) the date the services will begin, as well as the frequency, location, and duration of those services.

7. The Sixth Circuit stated that the required IEP elements “are requirements by which the adequacy of an IEP is to be judged, although minor technical violations may be

excused.” *Cleveland Heights-University Heights City School District v. Boss*, 144 F3d 391, 398 (6th Cir. 1998).

8. In *Rowley*, the Supreme Court developed a two-prong test for determining the sufficiency of a proposed IEP. First, it must be substantively appropriate by offering goals and objectives that are “reasonably calculated to provide education benefit” to the child. Second, the procedural safeguards of the IDEA must be provided to parents, including the right to participate in the development of the IEP and to receive notification and explanation of their rights.

9. Although the educational benefits accruing to the child must be “meaningful,” there is no requirement that the program provide the maximum benefit or the best available program. *Rowley* at 200-201.

10. The IEP must include transition services in specified circumstances, according to 34 CFR § 300.320(b):

Transition services. Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include –

(1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and

(2) The transition services (including courses of study) needed to assist the child in reaching those goals.

11. One disability that may qualify a student for special education and related services is “Visual Impairment,” as defined in Rule 0520-10-09-.02(19):

“Visual Impairment,” including blindness, means impairment in vision that, even with correction, adversely affects a child’s educational performance. The term includes both partial sight and blindness.

Visual Impairment includes at least one of the following:

(a) Visual acuity in the better eye or both eyes with best possible correction:

1. Legal Blindness – 20/200 or less at distance and/or near;
 2. Low vision – 20/50 or less at distance and/or near.
- (b) Visual field restriction with both eyes:
1. Legal blindness – remaining visual field of 20 degrees or less;
 2. Low vision – remaining visual field of 60 degrees or less;
 3. Medical and educational documentation of progressive loss of vision, which may in the future affect the student’s ability to learn visually.
- (c) Other Visual Impairment, not perceptual in nature, resulting from a medically documented condition.
12. TENN. CODE ANN. § 1-3-112 provides as follows:
- (a) In all statutes, rules and regulations enacted and/or promulgated by the state of Tennessee, its departments, agencies, and institutions, wherein the term “total blindness,” that is, unable to distinguish between light and dark, is used or referred to, hereinafter, the term “**legalblindness**” meaning a person having not more than 20/200 with correcting glasses but with a limitation in the field of vision such that the widest diameter of the visual field subtends an angle no greater than twenty degrees (20°) shall be used.
- (b) Such blindness shall be certified by a duly licensed ophthalmologist, and/or optometrist.
- (c) In statutes enacted and/or rules and regulations promulgated prior to and in effect on March 17, 1961, the use of the term “total blindness” shall be construed to mean “**legalblindness.**”

Emphasis in original.

13. TENN. CODE ANN. § 49-10-801(g) provides the fundamental requirement for admission to the Tennessee School for the Blind:

- (1) Any blind child whose parents are citizens of this state may be placed in the institution at the expense of the state.
- (2) All other pupils shall be admitted by or under the state board upon terms it deems proper, but pupils who cannot pay shall have preference over those whose parents or families are able to provide for them.

14. TENN. CODE ANN. § 49-10-103(d)(1) provides as follows:

As an exception to [the least restrictive environment requirement], children who are **legally blind**, acting through their parents or guardians, shall have free choice between education in regular classes alongside children without visual handicaps and education at the Tennessee School for the Blind.

Emphasis added.

15. Federal rules contain requirements for reimbursement of tuition when FAPE is at issue in 34 CFR § 300.148, the relevant portions of which read as follows:

(a) General. This part does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility. . . .

(b) Disagreements about FAPE. Disagreements between the parents and a public agency regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to the due process procedures in §§ 300.504 through 300.520.

(c) Reimbursement for private school placement. If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate.

16. According to 34 CFR § 300.114(a), a student who qualifies for special education and related services must be placed in the least restrictive learning environment:

(a) General. (1) Except as provided in § 300.324(d)(2) (regarding children with disabilities in adult prisons), the State must have in effect policies and procedures to ensure that public agencies in the State meet the LRE requirements of this section and §§ 300.115 through 300.120.

(2) Each public agency must ensure that -

(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

See also TENN. CODE ANN. § 49-10-103(c).

17. The IDEA contains procedural due process safeguards for parents and children. 34 CFR §§ 300.500 et seq. Some of these include the opportunity to examine records and to participate in educational meetings (34 CFR § 300.501); to obtain an independent educational evaluation in certain circumstances (34 CFR § 300.502); notice in specified instances (34 CFR §§ 300.503 through 300.505); and procedures to resolve disputes (34 CFR §§ 300.506 through 300.517).

18. The parents of a child receiving special education and related services have a right to inspect educational records of that child:

Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to § 300.507 or §§ 300.530 through 300.532, or resolution session pursuant to § 300.510, and in no case more than 45 days after the request has been made.

34 CFR § 300.613(a).

ANALYSIS

The Petitioners in this case asserted that the students failed to receive a free appropriate public education in the Clarksville/Montgomery County Schools because their placements are inappropriate and transitional plans are inadequate. To remedy these asserted deficiencies, the Petitioners requested placement for the students at the Tennessee School for the Blind or, in the alternative, reimbursement for private school tuition. The Petitioners also requested an

assessment of the students' current academic achievement and modification of transition plans to include employment and independent living skills.

As a preliminary issue, the Petitioners asserted that they failed to receive procedural due process rights because the school system refused to provide educational records as required by state and federal law. As specified by rule, the LEA is required to make available records that are "collected, maintained, or used" by the LEA. As contemplated by the language of the rule, the LEA can provide only those records available to the LEA. The proof at the hearing showed that, on multiple occasions, the Respondent provided copies of all educational records to which it had access. Based upon the evidence, it is determined that the Respondent complied with its obligations under state and federal law to provide records to the Petitioners. Furthermore, the proof showed that the LEA provided other required procedural safeguards, including an opportunity for parental participation.

The Petitioners also contend that the Respondent failed to provide FAPE to the students, in that their placement and transition plans were inadequate. In support of this assertion, the Petitioners provided only general claims, often in statutory or regulatory language, that failings occurred. There was a complete lack of proof, a dearth of factual evidence to demonstrate any insufficiency on the part of the LEA. On the contrary, the Respondent presented witnesses to show that the students had appropriate IEPs and that they received a substantial educational benefit from these programs. Similarly, the proof showed that the children's progress under their IEPs has been appropriately evaluated. Both IEPs incorporate transition plans suitable to the children's grade level, including consideration of postsecondary goals and an expanded core curriculum providing instruction on societal functioning skills. In short, the Petitioners' bare assertions that their children were not provided with FAPE, without any specific facts to support

those assertions, do not suffice under the law, particularly since the Respondent presented proof to compel the opposite conclusion.

The Petitioners argued that Te.S.'s difficulty with reading shows that he did not receive FAPE. This contention is without merit. A school system cannot guarantee results, and may not have optimum results even though the individualized education program is designed to provide the student with an educational benefit. Te.S.'s poor reading ability is not proof to demonstrate a failure on the part of the LEA to comply with the law. Testimony also indicated that the student's issues with reading are unrelated to his vision problems.

The Petitioners also argued that the Respondent failed to take into account the possibility of potential blindness of both students when formulating and implementing IEPs. First, it is significant to note that the parent signed the latest IEPs, signifying agreement with the program. Second, the record contains no proof to show that the students' vision is failing, or that they were unable to access educational benefits, using corrective lenses and appropriate accommodations. On the contrary, the proof in the record shows that the Petitioners can read, both at a distance and at close range, when they use their glasses.

The primary motivation behind these due process complaints appears to be the parents' desire that their children attend the Tennessee School for the Blind. Although the Petitioners asserted that the children have a progressive disease that could ultimately result in blindness, they presented absolutely no proof to support this contention. While it is understandable that the parents wish to provide what they believe to be the best learning opportunities for their children, the proof was abundantly clear that neither student qualifies under state law for placement at the Tennessee School for the Blind; furthermore, neither would be accepted for admission even if the LEA requested such a placement.

There is a similar lack of proof regarding the necessity for private school placement. The parents have not enrolled the children in a private school, or applied for their children's admission. The proof showed that the Petitioners have not even identified a private school setting which they believe would be appropriate, other than some later-to-be determined school for blind children. Again, this is insufficient under the law. Furthermore, even had the Petitioners identified a private school setting, the evidence showed that the current placement is appropriate and provides an educational benefit for the children. The LEA could not be required to provide reimbursement for private school tuition when it is currently providing FAPE for both of the children.

It is understandable that these parents want the best for their children, and it was clear that they are sincere in the belief that the children's visual issues may cause problems in the future. However, this case is remarkable in that the Petitioners presented virtually no proof. They relied upon generalized allegations of fault on the part of the Respondent without showing any factual basis for their complaints. The Petitioners, as an unrepresented party, were accorded great latitude with their proof: the documents they presented were not previously disclosed to the Respondent, and many were only marginally relevant at best. Many documents presented by the Petitioners consisted of general statements of student rights and LEA responsibilities under the IDEA, but failed to discuss specific facts, relevant to each student, to show any violations. Even had the Respondent elected to offer no proof, but merely denied the allegations, the Petitioners could not have prevailed because of the paucity of their evidence.

In summary, the Petitioners have failed to carry the burden of proof, to show by a preponderance of the evidence that the Respondent has failed to provide FAPE to Te.S. and S.S.,

that the children's IEPs and evaluations were legally inadequate, and that they children are entitled to placement in the Tennessee School for the Blind or a private school.

CONCLUSIONS OF LAW

It is concluded that the Respondent has provided FAPE to both Te.S. and S.S.

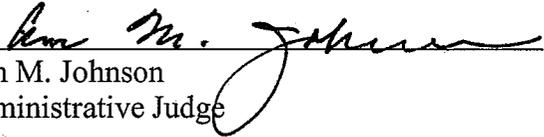
It is concluded that both Petitioners have received an educational benefit through their IEPs, and that their educational placement satisfied requirements under state and federal law.

It is concluded that the Petitioners have been accorded the procedural safeguards specified under the IDEA, including disclosure of educational records and meaningful parental participation in the IEP process.

It is concluded that the Respondent is the prevailing party on all issues in this matter.

Accordingly, based upon the foregoing, it is **ordered** that the Petitioner's requests for enrollment in the Tennessee School for the Blind, or alternatively, reimbursement of private school tuition, for additional assessment of academic achievement levels, and for modification of transition plans are hereby **denied**.

This Final Order entered and effective this 28th day of June 2010.


Ann M. Johnson
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this
20th day of June 2010.



Thomas G. Stovall, Director
Administrative Procedures Division

Notice

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee or the Chancery Court in the county in which the petitioner resides or may seek review in the United States District Court for the district in which the school system is located. Such appeal or review must be sought within sixty (60) days of the date of the entry of a Final Order. In appropriate cases, the reviewing court may order that this Final Order be stayed pending further hearing in the cause.

If a determination of a hearing officer is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the Chancery or Circuit Court, under provisions of Section 49-10-601 of the Tennessee Code Annotated.