

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

IN THE MATTER OF:

***E.C., Student, and L.S., Parent,
Petitioners,***

DOCKET NO: 07.03-112732J

v.

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

FINAL ORDER

This matter was heard in Clarksville, Tennessee on November 10, 2011, March 2, 2012, and June 1, 2012 before Leonard Pogue, Administrative Law Judge, assigned by the Secretary of State, Administrative Procedures Division pursuant to T.C.A. § 49-10-606 and Rule 520-1-9-.18, Rules of State Board of Education. Attorney John Kitch represented Respondent Clarksville/Montgomery County School System (CMC). Petitioner E.C., student, and L.S., parent were represented by attorney Merriel Bullock-Neal. The parties filed post-hearing briefs and proposed findings of fact and conclusions of law.

The subject of this proceeding, in general terms, is whether a free appropriate public education (FAPE) was provided to E.C. The specific issues are centered on a change in educational services/ placement.

After consideration of the entire record, testimony of witnesses, and the arguments of the parties, it is **DETERMINED** that Respondent is in compliance with the Individuals with Disabilities Act (IDEA) and providing E.C. FAPE. This determination is based upon the following Findings of Fact and Conclusions of Law.

Clarksville/Montgomery County School System's Motion to Dismiss

At the conclusion of Petitioners' proof, CMC moved to have the due process complaint dismissed on the basis that Petitioners failed to introduce into evidence E.C.'s 2010-2011 IEP. The motion was taken under advisement. CMC argues that since Petitioners are challenging a change of placement in the 2011-2012 IEP from the 2010-2011 IEP, a comparison of the two IEP's cannot be made if the 2010-2011 IEP was not introduced into evidence. However, the 2011-2012 contains information about the 2010-2011 IEP and there was testimony from numerous witnesses regarding the contents of the 2010-2011 IEP sufficient to make a determination as to whether or not there was a change in placement and if FAPE was provided. Respondent's motion to dismiss is therefore denied.

**Clarksville/Montgomery County School System's Motion to Strike
and Disregard the Testimony of Witness Erin Lynch Walden**

On the final day of the hearing, June 1, 2012, Petitioners called Erin Lynch Walden as an expert witness. CMC objected to her testimony since Ms. Walden was not listed on Petitioner's witness list nor previously identified as an expert. Ms. Walden's testimony was taken subject to CMC's objection and to allow both parties the opportunity to provide, post hearing, information (correspondence, witness lists, responses to discovery requests, etc.) regarding notification of Ms. Walden as an expert witness. At the hearing Ms. Walden was tendered as an expert in English, curriculum instruction, reading and special education.

A pre-hearing Order entered on June 8, 2011 provided that the parties were to file and exchange witness and exhibit lists. On November 7, 2011, Petitioners filed a Pre-Hearing Notification of Exhibits and Witnesses which did not list Ms. Walden as a witness. The hearing commenced on November 10, 2011. Seven witnesses testified on November 10, 2011. On

January 23, 2012, Petitioners filed a Supplemental to Pre-Hearing Notification of Exhibits and Witnesses, which listed Ms. Walden as a witness but did not identify Ms. Walden as an expert witness.

On September 22, 2011, CMC submitted Interrogatories to Petitioners, including an expert Interrogatory requesting the identity of any expert expected to testify at the hearing, as well as the subject matter, facts and opinions to be offered, and certain background information of the expert. On October 31, 2011, Petitioners responded to the expert Interrogatory as follows: "Will supplement answer if expert is called." Petitioners never supplemented their Interrogatory response.

Petitioners never notified CMC that Ms. Walden would be offered as an expert witness, despite CMC requesting the information through the discovery process, until the moment of her actual testimony. This clearly was prejudicial to and prevented CMC from having the opportunity to prepare and meet the testimony of an expert. Moreover, on January, 23, 2012 when Ms. Walden was first identified as a witness (but not as an expert), one full day of the hearing had already been completed and seven witnesses (some designated as experts on behalf of CMC) had testified. CMC's presentation of its case through these seven witnesses was based on its belief that Petitioners would present no expert testimony. The nature of the testimony adduced from those seven witnesses may have may have been different had CMC known of the existence of Ms. Walden and the subject matter, facts and opinions to be offered through her testimony. For the foregoing reasons, the motion to strike the testimony of Ms. Walden is **granted**.

Due Process Complaint

On June 6, 2012, L.S. filed a Due Process Complaint alleging “the proposed change in educational placement includes regular ed. class w/consult 2 x month in Eng. III, Algebra II, Chemistry & no dev. lab. Proposal doesn’t provide FAPE.” There were no other challenges to the proposed IEP. On September 2, 2011, a Stay-put Order required CMC to provide two teachers in E.C.’s chemistry class; staffing in her other classes were otherwise consistent with the prior IEP.

FINDINGS OF FACT

1. E.C. is a student with a disability who attends high school in the Clarksville/Montgomery County School System and was in the 10th grade during the 2010-11 school year. She is certified as eligible for special education and related services under the category of Other Health Impaired (ADD).

2. In academic year 2010-2011, her sophomore year, E.C.’s IEP provided that several of E.C.’s courses were “Inclusion.” Inclusion classes consist of a general education teacher and a special education teacher. The special education teacher was not assigned to assist E.C. specifically but was available to assist any student in the class who needed extra help. The classes were general education classes and only were called “inclusion” because certain special education students were assigned to them.

3. In September 2010, the high school requested L.S. attend a meeting to discuss E.C.’s science track. L.S. was the only witness who recalled two meetings in September, 2010 but the subject matter basically would have been the same whether or not there was one or two September meetings. Justin McClellan, E.C.’s case manager, Tracy Perly, guidance counselor, Ms. Beauchamp, Biology teacher, Theresa Muckleroy, assistant principal, and Sheila Barnes,

special education department chair, were present at some point at one or both meetings. The school representatives explained to L.S. the science graduation requirements and science course options for E.C. One option presented was for E.C. to switch to Resource Biology for the current year (she was in Biology Inclusion at the time) and the following year. L.S. was also advised that Chemistry would not be offered as an inclusion class the next year. According to Dr. Muckleroy, it was determined that E.C. should not change class (from Inclusion Biology to resource Biology) because she was doing well in her current Biology class. L.S. was not in favor of the class change. The September, 2010 meeting(s) was not an IEP team meeting(s).

4. An annual IEP meeting was held in April, 2011. According to the proposed IEP, E.C.'s classes would consist of general education with consult (allows E.C. and her teachers to consult with special education department regarding any issues and academic progress) except Inclusion U.S. History. L.S. wanted E.C. to take Chemistry Inclusion and the CMC representatives advised that inclusion was not offered for Chemistry. L.S. understood that Chemistry Inclusion was not an option because of staffing issues for such a class. Because L.S. did not agree to the proposed IEP, Shane Smith, assistant principal, suggested she meet with Cara Alexander, director of exceptional children services for CMC. L.S. met with Ms. Alexander on May 3, 2012 without any resolution to the issues.

5. Another IEP meeting was held in May 2011. The class offerings were the same as in the April meeting and L.S. expressed concerns about how the class placements were determined by CMC, her disagreement to the non-inclusion classes, and questioned the course of action if E.C. struggled in regular Chemistry.

6. L.S. believed that E.C.'s grades were the only objective criteria used to evaluate classroom placement. Judy Springer, a CMC counselor, was present at the May meeting and

testified that in addition to grades that EXPLORE and PLAN TEST were reviewed. As noted by Mr. Smith, the rationale for regular classes with consult was because E.C. had demonstrated success in her inclusion classes during the 2010-2011 school year and had done so without the help of her inclusion teachers. The consult could address any problems that arose and a new IEP meeting could convene to look at other options if necessary.

7. Mr. McClellan, designated as an expert in special education, has twice served as a co-teacher with a regular education teacher for E.C. (while she was in 9th grade Algebra and for the 2011-2012 Chemistry class) as well as serving as E.C.'s case manager. E.C. has never requested any assistance from Mr. McClellan in Chemistry nor accessed accommodations regarding test taking. He characterized E.C. as an excellent learner and opined that she did not need to be in an inclusion class. E.C. once stated in an IEP meeting that Mr. McClellan attended that she didn't think she needed to be in special education.

8. Ms. Barnes is familiar with E.C. as a special education teacher and as chairman of the special education department. She was the special education teacher in E.C.'s 11th grade English class, assigned to all the students. E.C. never sought assistance from Ms. Barnes except to clarify an assignment on two occasions and never accessed the classroom accommodations set forth in E.C.'s IEP. Ms. Barnes, designated as an expert in special education, opined that E.C. was an average learner making reasonable educational progress and did not need a special education teacher in her class.

9. Cresta McGowan, the regular education teacher in E.C.'s 10th grade English class, testified that E.C. never consulted with the special education teacher and was on target and successful. Ms. McGowan, designated as an expert in general education and inclusion classroom co-teaching, opined that E.C. did not need to be in an inclusion class. Laura Martin, the special

education teacher in E.C.'s 10th grade English class, testified that E.C. refused the classroom accommodations set forth in her IEP and that E.C. did not need to be in an inclusion class.

10. Constance Brown is E.C.'s chemistry teacher. Since Mr. McClellan has been assigned to her room, E.C. has not requested his assistance and does not need his help. In Ms. Brown's class E.C. is on task, engaged and always turns in her assignments. According to Ms. Brown, who was designated an expert in Chemistry, E.C. is making reasonable educational progress and does not need to be in an inclusion classroom.

11. Dr. Muckleroy described E.C. as very bright and opined, based on E.C.'s 9th and 10th grade years, that she did not need to be in an inclusion class. Both Ms. Alexander, designated as an expert in special education, and Mr. Smith opined that did not think E.C. needed to be in any inclusion classes.

12. E.C. is on track to graduate with a general education diploma. She received a grade of "C" in Chemistry. As of May 16, 2011, she had a cumulative GPA of 2.8.

CONCLUSIONS OF LAW

1. Petitioners in this case have the burden to introduce evidence that would by a preponderance of the evidence prove the issues should be resolved in Petitioners' favor. Schaefer ex rel. Schaefer v. Weast, 546 U.S. 49, 62; (2005)

2. The IDEA provides that children with disabilities be provided FAPE. Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176 (1982). As part of providing FAPE, school districts are required to establish an individual education plan for each child with a disability. Id. The inquiry of the courts regarding the provision of FAPE is twofold: 1) has the State complied with the procedures set forth in the Act? and, 2) is the IEP developed through the Act's procedures reasonably calculated to enable

the child to receive educational benefits. Id. at 206-207. While 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. Id. At 200-201.

3. With regard to procedural matters, a court should “strictly review an IEP for procedural compliance,” although technical deviations will not render an IEP invalid. Deal v. Hamilton County Board of Education, 392 F.3d 840, 853 (6th Cir. 2004) *citing* Dong ex rel. Dong v. Bd. of Educ. of the Rochester Cmty. Sch., 197 F.3d 793, 800 (6th Cir. 1999). A finding of procedural violations does not necessarily entitle Petitioners to relief. Id. The procedural violation must cause substantive harm, and thus constitute a denial of FAPE, for relief to be granted. Id.

4. States and school districts should be afforded discretion in determining what type of program is appropriate based on the individual needs of a disabled child. McLaughlin v. Holt Public Schools Board of Education, 320 F.3d 663 (6th Cir. 2003). The burden of proof is on the parent to prove by a preponderance of the evidence that the IEP proposed by the school violates the IDEA. Id.

5. The previous IEP is the “current educational placement” for analysis of whether there has been a change in placement: “...the current educational placement is typically the placement described in the child’s most recently implemented IEP.” Johnson ex re. Johnson v. Special Educ. Hearing Office, 287 F.3d 1176, 1180 (9th Cir. 2002). In N.D. v. Hawaii Department of Education, 600 F.3d 1104 (9th Cir. 2010), the court held that a change in placement occurs when a student is moved to a different type of program or when there is significant alteration of the student’s program even though she stays in the same setting.

6. CMC argues that the issue in this matter is not a change of placement but rather a classroom assignment/personnel matter. This argument ignores the fact that there is a change in the proposed IEP (2011-2012) from inclusion (a regular education classroom with a regular education teacher and a special education teacher) to a regular education classroom with consult. Such a move constitutes a change in placement but does not necessarily mean that the proposed IEP was inappropriate and/or denied FAPE.

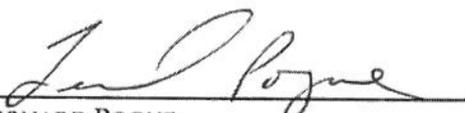
7. There was some evidence presented that a reason E.C. could not be placed in a Chemistry Inclusion class was because CMC was unable to staff such a classroom. The proposed IEP should take into consideration the individual needs of E.C. If the unique needs of E.C. meant that Chemistry Inclusion was necessary for her to receive meaningful educational benefit, then the class should be available, regardless of staffing issues. However, in this instance the proof established that Chemistry Inclusion was not necessary to meet the individual needs of E.C. and the change of placement was done appropriately and lawfully.

8. In formulating the proposed IEP presented at the meetings in April and May 2011, CMC teachers and administrators consulted E.C.'s teachers, evaluated and reviewed E.C.'s grades, EXPLORE and PLAN TEST. Moreover, CMC considered that E. C. had been successful in her inclusion classes without the assistance of the special education teachers. Additionally, with the proposed IEP, E.C. would have the benefit of a consult that could address any problems that arose and a new IEP meeting could be convened if necessary. CMC administrators and teachers, many designated as experts in special education or other education fields, were in consensus that E.C. did not need to be in inclusion classes. Petitioners failed to present proof that the procedures used by CMC in proposing the IEP were insufficient or injurious to E.C. or violated the IDEA.

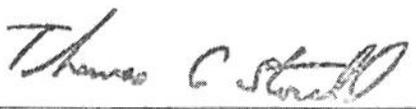
9. CMC administrators and teachers, many designated as experts in special education or other education fields, opined that E.C. was making reasonable educational progress and considered her a good student. E.C. has made meaningful educational progress. All the witnesses were in agreement on this point. Petitioners have failed to carry the burden of proof, and show by a preponderance of the evidence, that E.C. was not provided FAPE by CMC. CMC has made every reasonable effort to meet E.C.'s educational needs. The record supports a finding that CMC provided E.C. with FAPE.

It is determined that Respondent is in compliance with IDEA procedures, has not committed any procedural or substantive violations of IDEA, and Respondent is providing E.C. FAPE. It is **ORDERED** that the remedies and relief sought by Petitioners are **Denied**. Respondent is the prevailing party in this matter.

Entered this 27th day of August, 2012.


LEONARD POGUE
ADMINISTRATIVE JUDGE

Filed in the Administrative Procedures Division, Office of the Secretary of State,
this 27th day of August, 2012.


Thomas G. Stovall, Director
Administrative Procedures Division