

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

**IN THE MATTER OF:**

**L.H., *Student*, and G.H. and D.H.,  
*Parents*,  
*Petitioners*,**

**DOCKET NO: 07.03-122243J**

**v.**

**HAMILTON COUNTY SCHOOLS,  
*Respondent*.**

**FINAL ORDER**

This contested case was heard in Chattanooga, Tennessee, on October 29-31, 2013, before Marion P. Wall, 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<sup>1</sup> were represented by the parents, who waived legal counsel. The Respondent Metropolitan Hamilton County Schools (HCS), which is the local education agency (LEA), was represented by D. Scott Bennett of the Chattanooga bar.

After consideration of the record and the arguments of the parties, it is determined that the Respondent HCS has properly implemented the student's IEPs and has provided FAPE to the student, and therefore the requests for relief should be **denied**. This determination is based upon the following.

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<sup>1</sup> For clarity, the parents will be referenced as "Mr. H." or "Ms.H" herein; the student will be referenced as "Luka." It is noted that the parents waived their privacy rights, to the point of inviting the press into the hearing. Therefore, using the actual name presents no issues.

### **ISSUES PRESENTED**

The Due Process Hearing Request Form aver that the Respondent failed to properly implement the student's Individual Educational Plan (IEP) for the school year 2012-2013, resulting in a denial of a free and appropriate public education (FAPE). It further avers that the IEP for the 2013-2014 school year is not tied to any grade-level progression, reduces academic instruction, and does not provide for the least restrictive environment (LRE), which is said to be the neighborhood school, Normal Park Elementary, instead of the proposed CDC classroom in another facility.

### **RELIEF SOUGHT**

The Due Process Hearing Request Forms ask financial reimbursement for private school expenses for Luka, and funding for further private school placement, both with supplementary aids.

## **SUMMARY OF THE EVIDENCE**

Ms. H testified. Dr. Darell Meece testified on the Petitioners' behalf, and Petitioner also called Lisa Hope, L.H.'s case manager, Stephanie Higgs, Lindsey Hunt, Jeanne Manley, Willeata Kendrick, Margaret Abernathy, Jull Levine, Erin Knight, and Jamie Watts. The Respondent presented one additional witness: Dr. Susan Kabot, Ph.D.

Numerous exhibits were entered into evidence, consisting of school records, videos of L.H.'s abilities, and other documentary evidence.

## **FINDINGS OF FACT**

1. The student L.H. is a 10-year old boy who was enrolled in the Hamilton County Schools. He was in the second grade and attended Normal Park Elementary School until his parents placed him in The Montessori School at the end of the 2012-2013 school year. He has attended that school since.

2. Luka is certified to receive special education services, and has received those services for several years.

3. Luka is a very personable child. He has a diagnosis of Down's syndrome, an intellectual disability. He has an IQ of somewhere around 60, but this score is not necessarily reflective of all his abilities, particularly his social skills. He is very social, and social interactions are important to him, as are friendships. He has good social awareness, acting appropriately in social situations. He has good language skills for interaction with others. His peers enjoy his company, accept him, and provide help at times when it is necessary. In short, Luka's social skills are well-developed and an asset to him. Dr. Meece found he had a level of self help skills below that of others, but more than one would expect for a child with an intellectual disability; in fact, for this situation, Dr. Meece found him to be very advanced,

compared to other children with intellectual disabilities. Luka also has good memory skills which have helped him with reading, particularly with recognizing words.

5. Luka has received special education services since his kindergarten year. At the end of kindergarten, he was behind his peers in reading and arithmetic, but the gap was not very large. Luka repeated the first grade. At the start of the 2012-1013 school year, Luka entered second grade. At that time, he was said to be at the kindergarten level in math, and his reading level was said to be about that expected in the middle of the first grade year. His phonemic awareness in reading was a little lower, being at the level found at the end of kindergarten or the start of the first grade. It is noted that there generally is a drop-off in abilities between first and second grade, which is then made up when school resumes. In Luka's case, the drop was not particularly remarkable.

6. Luka received special education services throughout his second grade year. He had a 1 on 1 aide for the day, as well as 30 minutes of one to one instruction in both math and reading, with an additional 30 minute pull out time for reading. His IEP provided for various aids and strategies for his education<sup>2</sup>. While the IEP was tied to the levels of second grade, the school psychologist prevailed upon the IEP team to add that the assignments could be modified to meet present levels of performance. In March, Extended School Year (ESY) was proposed, but was not convenient to the family's summer schedule, and so was not done. Looking at the IEP for that year, it seems clear that the plan incorporates a great many aids and accommodations, as well as a full time aide, to try to enable his to succeed in the second grade and perform at a second grade level.

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<sup>2</sup> This IEP was arrived at by a difficult process. The LEA suggested that trying something else might be best, given that Luka was performing at a kindergarten or early first grade level. The LEA was afraid that he would not be able to keep up with the faster paced curriculum of second grade. The parents adamantly refused to consider any placement other than Normal Park Elementary.

7. Luka struggled throughout the second grade. He had behavior problems, for which there was a behavior intervention plan. His annual goal for behavior was to manage his behavior and work habits to be successful in the classroom. Although HCS reported that it anticipated meeting this goal by the year's end, the first two reporting periods show some progress on some of the various components relating to this goal, or very little progress. His behavior during the first nine weeks was characterized as "pretty severe." He frequently invaded his peer's space, he refused to come in the room, he ran away down the hall, and he also hit, touched, and pulled the hair of his classmates. He had problems with work refusal, and would throw his eyeglasses in the trash, which would mean he could not work. It may well be that this behavior was a symptom of frustration with the difficulty of the work. At any rate, a behavior intervention plan (BIP) was implemented, involving positive rewards, like doing a rock star video, positive notes home, as well as changing the seating, and negative consequences. The teaching staff tried to eliminate distractions but found that the classroom itself was a bit too stimulating.

8. Luka had problems in math with one to one number correspondence, meaning he did not understand that 6 means 6 things. He did not progress with his addition and subtraction. In reading, he could remember words, and correctly call out the word he saw, but he had no awareness of the phonemes. He could read a short passage, but could not tell you what it meant. He knew the words, but could not get the meaning. He did not have his ABC's internalized. He scored a 0 on a grammar test. He was very dependent on having an adult present; he tired of the task easily. He apparently became frustrated at the work, as he would run out of class, go under the table, or just generally misbehave to avoid some of his work.

9. By the end of the second reporting period, it was apparent that Luka was not progressing as had been hoped. He was not working at a second grade level. As a result, the teaching staff began to change the materials to those that they felt he could be successful with. His reading and math materials were not geared toward mastering the material taught to Luka's second grade peers; instead, he worked on, essentially, first grade materials. This was done so he could work on materials that related to his present level of performance. Luka's behavior improved as he became more successful in his work.

10. An IEP meeting was held in February to discuss the state of affairs. At this meeting, the parents were told that Luka had "hit a wall," and that he was not progressing. The parents walked out of this meeting.<sup>3</sup>

16. An Individual Educational Plan (IEP) was created for the 2013-2014 school after many hours of meetings. The parties agreed on the occupational therapy and speech/language therapy goals for Luka. The disagreement arose concerning placement. This IEP placed Luka at the CDC center at Red Bank. The parents are not interested in Luka attending this facility. They wish him to continue at Normal Park Elementary, which is close to their home and where Luka's friends were going to school at the time.

17. The 2013-2014 IEP for Luka, besides placing him at the CDC center, was not geared to third grade levels; instead, it was geared to the Luka's present levels of performance. At that time, he was still working at the first grade level, at best. He could write no more than two sentences; he could tell time to the hour and half hour, and count by twos to eight<sup>4</sup>, by fives

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<sup>3</sup> It is unfortunately the case that there are ill feelings between the parties. The school staff spoke of being intimidated, and there was testimony of extremely offensive statements being made to the case manager at the hearing. Both would seem true. Regardless, the issue in this case is Luka; the ill feelings, however, could not have helped in working together to arrive at a mutually agreed upon plan.

<sup>4</sup> Luka's abilities in these areas, particularly counting by twos or tens, seem to vary from time to time, and he has shown greater abilities at times.

to forty, and by tens to forty or fifty. He had a relatively high “learning level,” meaning he could concentrate, pay attention, and retain information, short term, but was not able to convert this short term memory into long term memory. In fact, it was this problem that was said to be behind his ability to progress. The school personnel, and the school’s expert witness, testified that Luka needed things broken up into small packets of information which would then be repeated until he was able to internalize them. He needed over-learning, meaning not only initial learning, but also re-learning, and consistent practice.

18. The testimony is un rebutted that the CDC placement would provide a setting for just this sort of learning. The proposed IEP would have had Luka receiving numerous supports and accommodations that would allow for overlearning. It would allow for specialized instruction in reading and math, and also time for social studies and science. He would have some four hours of specialized instruction, and supposedly three hours with typical peers, including lunch, recess, and related arts (music, art, physical education). It also proposed an ESY to prevent regression.

19. Rather than continue Luka’s education under this IEP, the parents removed Luka from HCS, and placed him at the Montessori school, for which reimbursement is sought. At the Montessori school, he is taught by Jamie Watts. Mr. Watts has eight years experience as a teacher, but this is his first year as a lead teacher. He has no teaching degree. He took a correspondence course for his Montessori certification. He has no professional certifications like Ms. Hope, but none would be expected in the system in which he works. He has no experience teaching children with disabilities, whether intellectual or otherwise. His class consists of 4 first graders, 3 second graders, and 10 third graders. Luka spends all day with his typical peers. He

has a full time aide. He has little in the way of behavior problems, according to Mr. Watts<sup>5</sup>. Mr. Watts did not start Luka at the third grade level, but lower, so that he could make up whatever he had missed. As of the time of the hearing, Luka was working on material that was either at the first grade level or the kindergarten level. Mr. Watt, too, has noticed that Luka can remember words, but does not know his phonics. Luka has not yet mastered the first grade math test, though he has taken it three times. Mr. Watts testified that Montessori students often linger at one plateau until, like a light coming on, they suddenly progress. Mr. Watts stated that he thought Luka would be at the third grade level at the end of the year, but this was just a guess. In short, Luka has not progressed academically to any significant degree, at least at the time of the hearing.

20. The IEP development process, for both the 2012-2013 year and the 2013-2014 year, complied with required procedures, including meaningful parental participation. There is no contention of any failings in this area.

21. As to the 2012-2013 IEP, the parents contend that it was not faithfully implemented<sup>6</sup>. They particularly point to the fact that instruction was modified to deviate from the core second grade materials, and also point to the relative inexperience of Ms. Hope, Luka's case manager. They assert that it is because of this inexperience and abandonment of second grade goals that Luka did not progress as hoped.

21. This contention is utterly rejected. The IEP was implemented in a manner so as to confer a genuine academic benefit; in fact, it was implemented in a way that seems well calculated to do so. As to inexperienced teachers, it is true that Luka was the first child with an

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<sup>5</sup> Luka has refused to go in to school a few times, and is off task maybe half the time. Half the time seems a lot.

<sup>6</sup> There is no question raised as to whether the IEP was appropriate. The only people who felt that it might not meet Luka's needs were the school, and the IEP incorporated those concerns by allowing modification of assignments. The placement and supports at Normal Park were done at the insistence of the parents.

intellectual disability served by Ms. Hope. The mere fact that Luka was her first child with an intellectual disability establishes little, if anything. Firstly, every teacher must begin with some child, or there would be no experienced teachers. The question is not whether Luka was the first, but whether she could properly serve Luka. Secondly, Ms. Hope prepared for the situation, consulting closely and frequently with other educators regarding Luka. She utilized the significant data collected about Luka's performance to arrive at an understanding of the nature of the challenge, and she consulted with others on both what the data showed and strategies to deal with what it showed. She adapted strategies and accommodations as she could to incorporate this input. Thirdly, she is hardly a neophyte; she has seven years of teaching experience, and has her Master's degree in special education. She is considered Highly Qualified to teach reading and language arts for the years K-6 (It is noted that this was the area she worked with Luka). She is rated Highly Effective by the State's new evaluation procedure, the highest rating possible. Finally, she testified as to her commitment to teaching Luka. She was carefully scrutinized throughout her testimony by the undersigned, and her testimony is credited, including this last as to her commitment. The contention that the IEP was not faithfully implemented because it ceased teaching to grade level is likewise utterly rejected. The IEP allowed for this change by its own language, which had been placed in there at the instance of Ms. Willeata. Moreover, failing to change the assignments to meet present performance would have been failing the child. Teaching Luka subject material which it was known he could not master, at least at that time, would have been a waste of time and probably would have had very negative impacts on Luka. He had had significant behavior problems which had abated somewhat when he was given material that he could succeed with<sup>7</sup>. His frustration likely exacerbated those

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<sup>7</sup> It is noted that at the Montessori school where the parents placed Luka in rather than the proposed placement at CDC lets students work at their own level, and there are said to be relatively few behavior problems with Luka.

problems, and the presentation of doable material likely abated it. His current level of performance is the same, or nearly the same, as that achieved the previous year.

22. The 2013-2014 IEP was reasonably calculated to confer a meaningful educational benefit, and was appropriate to Luka. It would have provided FAPE. One of the main areas of disagreement concerns the placement at the CDC center. The parents contend that it separates him from his friends at the neighborhood school, Normal Park, who are neighborhood children. It undoubtedly does. Luka will nevertheless have some interaction with typical peers in the course of the day, if not the friends he had before he went to the Montessori school. Secondly, the parents complain that the CDC placement is not a placement within the least restrictive environment. Actually, it would seem that as Luka fell further and further behind his typical peers in third grade, he would have been more and more segregated with his aide, off in a separate part of the class where material more appropriate to his level of performance could be presented to him. It seems clear that presenting third grade material to Luka right now would not only be fruitless, it would be counterproductive in that it would lead to frustration and behavior problems.<sup>8</sup> It is a very real question in these circumstances exactly what environment he would have been in, the classroom with the typical peers or the classroom in the back of the room which had a one student population.

23. The development of the 2013-2014 IEP was done properly. The law first requires identification of present levels of performance in all areas, including an evaluation of all deficits.

24. Next, the IEP team develops goals and objectives to remediate those deficits.

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<sup>8</sup> Behavior problems in class would affect not just Luka's education but that of others. There was not sufficient proof, however, to establish such disruption would be bound to occur. Accommodations could be made, but might well segregate him further. At any rate, presenting third grade materials to Luka right now would be educationally inappropriate.

25. The IEP team is required to begin with the specified curriculum of the student's grade level, since all students, except those with a significant cognitive disability, must be taught core or grade level standards. The IEP team then modifies the core curriculum to address the particular student's educational needs. This was done. Luka does have a significant cognitive disability, and so the curriculum was properly modified. After goals for each child are determined, then objectives are formulated to achieve the identified goals.

26. Before each school year, the IEP team may look to the previous year's IEP to evaluate the student's progress under that IEP. Then the team factors in additional information from teachers and any new assessments in determining a new IEP for the coming school year. Some elements may remain the same, but others will change according to the student's progress and current needs. This happened with the 2013-2014 IEP.

27. This procedure was followed in developing the IEP for Luka, both for the current school year and the previous one. There is no allegation as to inappropriate procedures, only improper implementation of the previous one, and the inappropriateness of the second.

28. The parent had meaningful participation in the IEP process for the students and agreed with the educational plan set forth in the first IEP. In fact, this IEP was drawn to meet their insistence that Luka remain at Normal Park. Likewise, their input was considered in arriving at the second IEP; it was not acted upon as it had been the previous year, but then, that IEP had not resulted in much progress.

29. The allegation that the 2013-2014 IEP was inappropriate deals mostly with the placement issue. It is very important to the parents that Luka attend his neighborhood school. The question is, however, whether that placement is appropriate. It is clear from the previous year that Luka did not make much progress at Normal Park. There is no reason to think that

further placement there will work any better. No strategies or accommodations were suggested, let alone proved to be likely to be effective, that would change this expectation. Luka would derive some benefit from the social interactions, but there is no reason to think that he would perform any better. It is noted that although the parents state he is doing better at the Montessori school, he is at the same level he always was. Parents have shown videos of Luka reading and doing arithmetic. He has considerable support from his mother, but according to the experts, what is shown is a child performing at the first grade level. He can call out words, but cannot decode new words he does not already know. He has no one to one correspondence with numbers. In short, there is no proof that Luka is doing any better, and considerable proof that he is not.<sup>9</sup>

30. The appropriateness of the placement at CDC is called into question by the testimony of Dr. Meece. While Dr. Meece testified as a fact witness, his expertise in the field of child development cannot be ignored. He observed the interactions between the students in the CDC classroom, at lunch, and in the music class. He observed little interaction between students at any of these locations. In the CDC classroom, the students were very much on task, with little interaction. The CDC students arrive at lunch together, and sit at a separate table, so it cannot really be said that lunch is a time for interaction with typical peers. Dr. Meece felt that given Luka's social skills and gregariousness, this classroom atmosphere would be frustrating to him, and would cause him to be disruptive. It is noted, however, that frustration, and acting out based on that frustration, was something that was prevalent in Luka's second grade classroom, particularly when given material beyond his level of mastery; placement in a regular third grade classroom, with constant exposure to third grade materials which he is not prepared for, will fairly surely lead to frustration and acting out, or segregation in some portion of the class where

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<sup>9</sup> The undersigned would be delighted to be wrong about this,

he can be presented with materials at his present level of performance. While placement at the CDC classroom has the very real possibility that it will cause Luka frustration, it cannot be said that this makes it an inappropriate placement if the alternative is placement in a regular classroom where it has been shown he acts out based on frustration with material beyond his ability.

31. Taken as a whole, the 2013-2014 IEP was reasonably calculated to confer a meaningful educational benefit. Parents complain that it does not provide for teaching grade appropriate materials on a path to a regular high school diploma. In this they are correct. The IEP is geared to what is presently possible, given Luka's present level of performance.

32. The placement at the Montessori school is problematic. The strength of the school is exactly the complaint against HCS; it allows students to work at their own level and pace instead of a particular grade level. Parents complain of a lack of experience by the HCS teachers, but his Montessori class is taught by someone in his first year of teaching as a lead teacher, and who has never taught a child with special needs similar to Luka's needs. Finally, Luka has apparently made little progress there, at least at the time of the hearing. Given the nature of the complaints against the implementation of the 2012-2013 IEP, placement at the Montessori school is a little puzzling. At any rate, given the experience of the last year in the HCS system, it cannot be said that placement at the Montessori school is any more calculated to lead to provision of FAPE than that proposed by HCS; in fact, it would seem less so.

## 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 (6<sup>th</sup> Cir. 1999). See also, *Doe v. Tullahoma City Schools*, 9 F.3<sup>rd</sup> 455 (6<sup>th</sup> 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 mandatory 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 (6<sup>th</sup> 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. 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.

11. 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).

12. In determining the LRE appropriate for the child, attention is to be paid to whether the child is receiving a real academic benefit in the less restrictive environment. *J.H. V. Fort Bend Ind. Sch. Dist.*, 59 IDELR 122 (5<sup>th</sup> Cir. 2012).

12. 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).

13. In order to prevail on a claim for reimbursement for the parents must show that the LEA failed to provide FAPE, and that the private placement does provide appropriate educational services. *R.S. v. Lakeland Cent. Sch. Dist.*, 59 IDELR 32 (2<sup>nd</sup> Cir. 2012). It is not enough to show that the private placement is a better fit; it must be shown that the LEA did not provide an appropriate educational program for the student. *C.C v. Fairfax County Bd. of Education*, 59 IDELR 95 (E.D. Va. 2012).

## ANALYSIS

Parents do not allege any procedural violations.

The Petitioners in this case asserted that Luka did not receive a free appropriate public education (FAPE) because the HCS failed to implement the students' IEPs in several respects. First, as a preliminary matter, the Petitioners argued that the school district failed to failed to teach the second grade curriculum as set forth in the IEP. The proof does not support this

allegation. HCS tried, but was not able to bring Luka to mastery of this material. The IEP specifically allowed modifications in assignments to meet the actual level of performance shown, and this was what was done.

The Petitioner alleged that HCS failed to implement the 2012-1013 IEP because of the inexperience of the teachers, particularly Ms. Hope. The proof does not establish anything of the sort. This is a naked allegation, lacking any evidentiary basis, and is utterly rejected.

Petitioners allege that the 2013-2014 IEP is not calculated to provide a meaningful educational benefit and that it is not done in the least restrictive environment. There was no proof that this program will not provide such a benefit. The only evidence that would support this allegation is the testimony of Dr. Meece. His testimony is credited, actually; the CDC environment has certain drawbacks. Overall, however, the CDC placement would seem better calculated to confer an educational benefit than retaining him in his previous setting or keeping him in his present setting at the Montessori school. The expert testimony of the teachers and the hired expert establish this, and establish that Luka would likely receive a meaningful educational benefit. As to the allegation that this is not the least restrictive environment, it is true that Normal Park could be considered a less restrictive environment. It is also true, however, that isolating Luka in the back of the class where he would work on material that none of the other children are working on could work as a sort of exclusion within the class. *See, J.H. v. Fort Bend Ind. Sch. Dist., supra.* At any rate, given Luka's lack of progress in the second grade, it would seem that the Normal Park environment, even with the extensive aids and accommodations given Luka, just did not work. The school district is not required to continue to pursue futile educational strategies just to maintain placement in a neighborhood school.

The long and the short of this case is that parents have failed to substantiate the allegations of not implementing the 2012-2013 IEP, and have likewise not shown that the 2013-2014 IEP was not reasonably calculated to provide FAPE. Finally, parents have not shown that the Montessori placement will provide FAPE.

It is quite clear that the parents are devoted parents, who want only what they consider best for their child. It is also quite clear that HCS likewise is looking at what they consider best for Luka's education. The dedication and commitment of the staff was just as apparent. This case is, essentially, about educating Luka at the CDC center. The parents maintain it is not appropriate; HCS maintains it is. Based on the documentary evidence of Luka's progress, or lack thereof, his behavior problems partly caused by this lack of progress, and the supports envisioned in the 2013-2014 IEP, and the expert testimony regarding appropriate instructional settings and techniques, the position of HCS is the more persuasive.

#### **CONCLUSIONS OF LAW**

**It is concluded** that the Respondent has provided FAPE.

**It is concluded** that the 2013-2014 IEP was reasonably calculated to provide FAPE, and that the 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 proper notice 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 Petitioners' request for reimbursement for private school tuition is hereby **denied**.

This Final Order entered and effective this 20<sup>th</sup> day of DEC 2013.



Marion P. Wall  
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this  
20<sup>th</sup> day of DECEMBER 2013.



J. Richard Collier, 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.