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February 25, 2020

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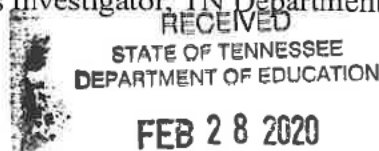
RE: In the Matter of: [REDACTED] the Student, and [REDACTED] the Student's Parents/Guardians,  
Petitioners v. Knox County Schools, Respondent.  
Docket No. 07.03-159091J

Enclosed is an Order rendered in connection with the above-styled case.

Administrative Procedures Division  
Tennessee Department of State

/aem  
Enclosure

cc Scott Indermuehle, Senior IDEA Complaints Investigator, TN Department of Education



OFFICE OF GENERAL COUNSEL

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

**IN THE MATTER OF:**

██████████ the Student, and  
██████████ and ██████████ the Student's  
Parents/Guardians,  
*Petitioners,*

**DOCKET NO: 07.03-159091J**

v.

**KNOX COUNTY SCHOOLS,**  
*Respondent.*

**FINAL ORDER**

This contested case – arising from claims made under the Individuals with Disabilities Education Act (IDEA), Title II of the Americans with Disabilities Act (ADA), and Section 504 of the Rehabilitation Act (§ 504) – was heard before Administrative Judge Phillip R. Hilliard on December 16-18, 2019. The Petitioners, the student, ██████████ and ██████████ are represented by attorneys Jessica Salonus and Justin Gilbert. The Respondent, Knox County Schools, is represented by Deputy Law Directors Amanda Morse and David Sanders.

At the close of proof on December 18, 2019, post-hearing filing dates were set as follows: proposed Findings of Fact and Conclusions of Law were to be filed, by both parties, on or before 10 business days after the filing of the transcript. The transcript was filed on January 8, 2020, and the parties filed proposed Findings of Fact and Conclusions of Law on January 23 and 21, 2020, respectively.

The issue in this case is whether ██████████ was denied a free and appropriate public education (FAPE) in the least restrictive environment (LRE) considering the placement Respondent proposed for the 2019-2020 school year and, if so, the appropriate remedy. Based on review of the entire

record, it is determined that Respondent's proposed placement was not [REDACTED] LRE, and the Petitioners are the prevailing party. This finding preempts<sup>1</sup> Petitioners' claims brought under Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (§ 504).

Witnesses who testified at the due process hearing, in order of appearance, were: (1) Ms. Elizabeth Taylor, [REDACTED] teacher; (2) Dr. Charles Ihrig, Clinical Psychologist, Petitioners' expert; (3) [REDACTED] mother; (4) Ms. Jennie Sullivan, an Occupational Therapist serving the [REDACTED] (5) Ms. Amanda (Mandy) Dye, the [REDACTED] Preschool Program Facilitator; (6) Ms. Sydney Friedman, a Speech Language Therapist serving the [REDACTED] (7) Ms. Nicky Nye, former<sup>2</sup> CDC-A Program Supervisor at [REDACTED]; (8) Dr. Katherine MacLeod, Ph.D., Petitioners' expert; and (9) Ms. Melody Hobbs, Respondent's expert.

### **FINDINGS OF FACT**

1. [REDACTED] currently lives in Knox County, Tennessee.
2. [REDACTED] mother and father, respectively.
3. [REDACTED] has a diagnosis of autism and presents with significant autistic characteristics.
4. On June 26, 2019, Dr. Charles Ihrig, a Clinical Psychologist, who testified at the hearing, conducted an assessment of [REDACTED]
5. At that time, per standardized testing, Dr. Ihrig's findings were as follows:
  - [REDACTED] communicative abilities fell in the bottom 1% of the population

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<sup>1</sup> This finding also makes it unnecessary to reach whether the fact that the proposed placement was at an out-of-zone school was a violation of the IDEA's LRE requirements.

<sup>2</sup> Ms. Nye is now retired but serves in a part-time role, assisting the current [REDACTED] CDC-A Supervisor.

- [REDACTED] daily living skill abilities fell in the bottom 2-3% of the population
- [REDACTED] socialization skills fell in the bottom 1% of the population
- [REDACTED] gross motor skills were comparable to that of a child aged 4 years and 8 months, while his fine motor skills were comparable to a child aged 3 years
- [REDACTED] receptive communication skills [REDACTED] ability to listen, pay attention, and demonstrate some understanding of what has been told to [REDACTED] was comparable to a child aged 1 year and 7 months
- [REDACTED] expressive communication skills [REDACTED] ability to communicate back, typically using speech) was comparable to a child aged 1 year and 3 months
- [REDACTED] interpersonal relationship skills (how an individual interacts with others) was comparable to a child aged 10 months
- Relative to other children similarly aged, with autism, [REDACTED] falls into the 3<sup>rd</sup> percentile regarding emotional responses (meaning the extent to which he has extreme emotional responses)
- Relative to other children similarly aged, with autism, [REDACTED] falls into the 50<sup>th</sup> percentile regarding restricted repetitive behavior (for example, wanting to interact in certain ways, such as his enjoyment of puzzles and letters, to the exclusion of others)
- Relative to other children similarly aged, with autism [REDACTED] falls into the 25<sup>th</sup> percentile regarding social interaction

6. Because of [REDACTED] communication deficits, it is difficult to quantify where [REDACTED] ranks in cognitive development. However, [REDACTED] being easily redirected and being able to practically communicate [REDACTED] needs (albeit largely non-verbally) suggest that [REDACTED] cognitive development is

above what would commonly be seen in similarly aged autistic children with the same communication deficits.

7. Persons with a diagnosis of autism typically exhibit a lack of age-appropriate social skill and restrictive repetitive behaviors. They also often have obsessive narrowed interests.

8. [REDACTED] presents with these characteristics, with [REDACTED] main areas of challenge being communication (both expressive and receptive), restricted/repetitive behaviors, and socialization.

9. [REDACTED] is largely non-verbal, although [REDACTED] has uttered such words or phrases, at [REDACTED] [REDACTED] as “do it,” “no,” “all done,” and some letter sounds. [REDACTED] has also recently continued to verbally produce more words in the home.

10. [REDACTED] can, and has, engaged with others, including [REDACTED] having noted him playing tag with nondisabled peers in the carpool line at [REDACTED] [REDACTED] despite [REDACTED] verbal communication deficits, although those instances of engagement are not currently the norm in the school setting.

11. Outside the classroom setting [REDACTED] has attended parties, baseball games, and has played recreational soccer. [REDACTED] also has swum and played catch with nondisabled peers.

12. [REDACTED] engaged with Dr. Charles Ihrig during the June 26, 2019 assessment, and spontaneously initiated interactions with both Dr. Ihrig and Dr. Ihrig’s assistant, including grabbing Dr. Ihrig’s hand and pulling Dr. Ihrig toward an activity, or object.

13. [REDACTED] also communicated that [REDACTED] wanted or was interested in certain objects, through the use of eye contact with Dr. Ihrig.

14. [REDACTED] has an Augmentative and Alternative Communication Device (AAC) with which [REDACTED] has some abilities to engage. [REDACTED] identified a few items on the AAC during school, such as bubbles. At home, beginning in the summer after the 2018-2019 school year, [REDACTED] identified some

letters, and executed simple commands of "I want" and "I need" in conjunction with a selected item. [REDACTED] proficiency with the device is an emerging skill – it is continuing to develop in a positive way.

15. No evaluation of [REDACTED] abilities with the AAC device has been performed.

16. Not unlike many autistic children, [REDACTED] sometimes engages with adults more so than [REDACTED] nondisabled peers. However, fostering such a preference to the exclusion of engaging with nondisabled peers can negatively affect an autistic child's ability to improve socialization with [REDACTED] peers, as [REDACTED] continues to age.

17. [REDACTED] does not exhibit aggressive or defiant behaviors and usually responds to redirection.

18. Children with pronounced communication and socialization deficits, due to autism, do improve, in most situations.

19. Nondisabled peers that model correct forms of socialization and communication, and who would challenge an autistic child to do the same, are helpful tools in improving an autistic child's communication and socialization skills.

20. Intensive speech therapy is indicated for a child with [REDACTED] communication deficits.

21. Children model what other children do, whether the model is good or bad.

22. [REDACTED] has modeled nondisabled peers by doing things such as getting in line.

23. The proposed CDC-A placement would include, or potentially include, children in grades K-5<sup>th</sup>.

24. The sometimes more mature language and behavior issues exhibited by older disabled children make them non-preferred models for [REDACTED]

25. Children often choose to socialize with peers they interact with most throughout a given day.

26. ██████ struggles without a routine.

27. Knox County's IEP would result in ██████ transitioning between different peer groups several times throughout the day.

28. The more transitions between peer groups ██████ is required to make, the more difficult it will be for ██████ to develop relationships with ██████ nondisabled peers, and vice versa.

29. Relevant research shows that when students are included in regular education with support and services, they will make increased academic, social, and behavioral gains, versus a similar child educated in a segregated setting surrounded only by students with disabilities and a special education teacher with paraprofessionals.

30. There is no research to support the notion that segregated small special education classrooms provide better outcomes.

31. Relevant research also shows that children educated in the regular education setting is one of the major predictors of postsecondary success.

32. ██████ completed two years of ██████ at ██████

33. ██████ spent the 2017-2018 school year in a ██████ class comprised solely of children who were being educated per Individualized Education Programs (IEPs), which programs are reduced to a document specific to an individual child, often simply referred to as "the IEP." These children all have some form of disability. ██████ had ██████ own IEP.

34. ██████ spent the 2018-2019 school year in a regular education class comprised of up to 14<sup>3</sup> students. More than 50% of these students were nondisabled.

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<sup>3</sup> A different number of children attended the class on different days.

35. ██████████ 2018-2019 class was staffed by Ms. Elizabeth Taylor, who holds teaching certificates in both regular education early childhood teaching and special education early childhood teaching, and two teaching assistants. A speech language therapist (Ms. Sidney Friedman), and an occupational therapist (Ms. Jennie Sullivan) regularly “pushed-into” the classroom to assist ██████████ and the other students in the class. This pushing-in is a form of “support or service.”

36. ██████████ was also provided other “supports and services,” including “icon pictures” (pictures of items that ██████████ might want, or be interested in, as well as pictures of step-by-step actions needed to complete an activity such as washing hands) and other visual supports, “fidgets” (small items that ██████████ could handle or play with to satisfy ██████████ sensory needs while otherwise staying on task), a “cube chair” (a chair allowing ██████████ to sit in either a high or low position), and adult cuing.

37. ██████████ Augmentative and Alternative Communication Device (AAC) is another form of support or service.

38. ██████████ attended the ██████████ ██████████ during the 2018-2019 school year for 5 hours per day, 3 days per week.

39. While ██████████ children do not receive letter grades, or report cards, students with IDEA-eligible disabilities who have IEPs, like ██████████ do receive up to nine (9) “progress reports” to document whether the student is progressing toward each one of their IEP goals. For students with IEPs, these IEP progress reports are the communication tool between the teacher and the parents to show how the child is progressing.

40. ██████████ annual IEP for 2018-2019 commenced in October 2018 and would expire in October 2019. The IEP contained four goals in three categories – pre-vocational,



social/emotional behavior, and communication – and focused heavily upon [REDACTED] socialization and language/communication.

41. The IEP goals were tied to the regular educational curriculum designed to ready [REDACTED]

42. Each of [REDACTED] IEP goals is represented on the progress reports. A “5” beside each goal indicates that the lead teacher for [REDACTED] class, Ms. Taylor, and others teaching [REDACTED] including [REDACTED] speech language therapist and occupational therapist, believed [REDACTED] was on track to meet [REDACTED] IEP goals for 2018-2019. A “6,” by contrast, would have indicated [REDACTED] was not expected to meet [REDACTED] goal(s). And a “4” would have indicated that the goal(s) had been met.

43. During the 2018-2019 school year, [REDACTED] did require assistance from teachers or staff, including prompting (verbal, gestural, visual, and hand-over-hand physical prompting/assistance) to complete many tasks.

44. [REDACTED] required more assistance from teachers during teacher-directed activities versus self-directed activities, often needing tasks to be broken down to basic steps more than once.

45. At [REDACTED] often performed better in smaller group settings and was overstimulated by noise, at times.

46. However, [REDACTED] also enjoys loud entertainment environments such as football games, concerts, and other traditionally loud children’s play environments.

47. While there were days where [REDACTED] made little progress toward the discrete goals in [REDACTED] IEP, [REDACTED] earned all “5s” (on track to meet his IEP goals for 2018-2019) on all of [REDACTED] IEP goals for each of the eight (8) progress reporting periods for each of [REDACTED] four goals during the 2018-

2019 school year. The progress reports, and the handwritten data on them, represent the full universe of written data on [REDACTED] educational progress for that year.

48. At the end of the 2018-2019 school year, Knox County Schools did not recommend summer school (also referred to as Extended School Year (ESY)) because of [REDACTED] progress during the regular school year and because [REDACTED] did not show any regression during that period.

49. In addition to progressing on [REDACTED] IEP goals, [REDACTED] also improved throughout the year with bathroom skills, including handling [REDACTED] pants; matching upper and lowercase letters; and completing an interlocking puzzle. [REDACTED] was also able to match colors and could recognize some numbers between zero and twenty.

50. With some cuing, [REDACTED] was able to stay in large group class instruction time provided that [REDACTED] was given a cube chair to sit in for [REDACTED] sensorial need to feel secure and a fidget toy or book to hold on to during that time. With some gentle guidance or prompting, [REDACTED] successfully and cooperatively transitioned between activities in the classroom.

51. At the beginning of the school year, [REDACTED] only took interest in items of [REDACTED] choosing, and if another child moved around items that [REDACTED] was playing with, this would cause [REDACTED] to become upset. As the year progressed, [REDACTED] became more interested in what the other students were doing, or items other students were using. On one occasion, another child sat with [REDACTED] and moved items with [REDACTED] which [REDACTED] tolerated well.

52. In contrast to [REDACTED] which is largely play-based, [REDACTED] is more teacher-directed, and the pace is faster than preschool. For those reasons, [REDACTED] calls for more independence than [REDACTED]

53. However, there are supports and services that could be provided to [REDACTED] in the [REDACTED] regular education setting that would assist [REDACTED]

54. These include the supports and services that he received during the 2018-2019 school year, but could also include additional supports and services, such as a resource room (where a student can be “pulled-out” for academic help), a special education teacher “pushing in” to the classroom, or a paraprofessional that could support the regular education classroom teacher in pre-teaching or re-teaching certain materials.

55. In April of 2019, prior to an IEP meeting for the following year’s transition to [REDACTED] Ms. Taylor was involved in communications with [REDACTED] CDC-A Program Supervisor, Ms. Nicky Nye, who advised Ms. Taylor that [REDACTED] placement “will probably be [REDACTED],” a reference to an out-of-zone school placement at [REDACTED]. An additional email was subsequently sent from Ms. Taylor to Ms. Mandy Dye, the [REDACTED] Program Facilitator at [REDACTED] communicating that Ms. Nicki Nye would be attending [REDACTED] May 2019 IEP meeting, along with a [REDACTED] (another out of zone school placement) representative. [REDACTED] parents were not copied on any of this correspondence. Ms. Taylor was first made aware that [REDACTED] may be going to [REDACTED] for [REDACTED] from Ms. Mandy Dye, which communication was during or before April of 2019.

56. An IEP prepared and proposed on May 15, 2019, for [REDACTED] year, included a placement at [REDACTED], splitting the 7-hour school day into 4.75 hours of each day in a comprehensive development class (CDC-A<sup>4</sup>) classroom and 2.25 hours of each day in the regular education classroom.

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<sup>4</sup> The “A” stands for “activities-based.”

57. There was no regular education [REDACTED] teacher at the IEP meeting from any Knox County school.<sup>5</sup>

58. Prior to the May 15, 2019 IEP meeting, neither Ms. Mandy Dye nor Ms. Nicky Nye were aware of the progress reports that Ms. Taylor had filled out regarding [REDACTED] progress on [REDACTED] IEP goals.

59. There was no discussion at the May 15, 2019, IEP meeting of the possibility of [REDACTED] being placed full-time in the regular education setting with a paraprofessional.

60. There was no discussion at the May 15, 2019, IEP meeting of the possibility of push-in or pull-out speech-language services for [REDACTED] in the regular education setting.

61. [REDACTED] is zoned for [REDACTED].

62. [REDACTED] is 12 miles from [REDACTED] home. With traffic, the commute can take as long as 40 minutes.

63. [REDACTED] agreed with the present levels and goals in the proposed IEP.

64. [REDACTED] did not agree with the particular school proposed – [REDACTED]. Nor did they agree with the split between time to be spent in the CDC-A and regular education classrooms. Thus, neither [REDACTED] signed the IEP.

65. [REDACTED] wanted [REDACTED] to be placed in the regular education classroom for the entire 7-hour day, at [REDACTED], “with supplementary aids and services such as a Teaching Assistant (TA) and ‘push-in’ supports as appropriate to meet his unique needs.”

66. All students in the proposed CDC-A classroom have disabilities and corresponding IEPs. This setting is also commonly referred to as self-contained and/or segregated.

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<sup>5</sup> Exhibit 5 contains a sign-in sheet for the May 15, 2019 IEP meeting. That sheet includes the signature of a Carolyn Brown. However, the only testimony elicited from any witness regarding the identity of Ms. Brown was that of Ms. Nicky Nye, who testified that she did not know who Ms. Brown was, what grade she taught, or at what school she taught.

67. The 4.75 hours proposed to take place in the CDC-A classroom included most of the day's academic instruction.

68. The 2.25 hours included arrival and departure time, lunch, encore (art, music, PE, library), recess, homeroom, and CARE.

69. CARE is Knox County Schools' phonics program, which includes 15 minutes of large group instruction.

70. A CDC-A classroom in Knox County typically has less than 9 students, and 3-4 staff members.

71. A regular education kindergarten classroom typically has significantly more students than a CDC-A class – between 20-25 students.<sup>6</sup>

### **APPLICABLE LAW**

#### **Individual with Disabilities Education Act**

1. The IDEA requires that a free and appropriate public education (FAPE) be made available to all children between the ages of 3 and 21. 34 C.F.R. § 300.101.

2. The IDEA defines FAPE as special education and related services that:

- a) have been provided at public expense, under public supervision and direction, and without charge;
- b) meet the standards of the State educational agency;
- 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 that meets the requirements under section 1414(d) [of the IDEA].

20 U.S.C. § 1401(9).

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<sup>6</sup> The testimony is not definitive on this point, but instead the stated range was discerned through the testimony of multiple witnesses.

3. The IDEA provides, as to LRE, that:

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 not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5).

4. The IEP is “the centerpiece of the statute’s education delivery system for disabled children.” *Honig v. Doe*, 484 U.S. 305, 311 (1988).

5. In the Sixth Circuit, “[the] IEP must provide the FAPE so as to educate the disabled student in the ‘least restrictive environment’ (LRE) possible.” *L.H. v. Hamilton Cty. Dep’t of Educ.*, 900 F.3d 779, 788 (6th Cir. 2018)(internal citations omitted).

6. “The LRE is a *non-academic* restriction or control on the IEP – separate and different from the measure of substantive benefits – that facilitates the IDEA’s strong ‘preference for mainstreaming handicapped children.” *L.H. v. Hamilton Cty. Dep’t of Educ.*, 900 F.3d 779, 789 (6th Cir. 2018)(internal citations omitted).

7. But the preference is not absolute, the Sixth Circuit having held that a school may separate a disabled student from the regular class when: (1) the student would not benefit from regular education; (2) any regular-class benefits would be far outweighed by the benefits of special education; or (3) the student would be a disruptive force in the regular class. *L.H. v. Hamilton Cty. Dep’t of Educ.*, 900 F.3d 779, 789 (6th Cir. 2018)(internal citations omitted).

8. The formulation of the IEP requires a school district’s expertise, but establishing the LRE does not. Therefore, “in some cases, a placement which may be considered better for

academic reasons may not be appropriate because of the failure to provide for mainstreaming.”  
*L.H. v. Hamilton Cty. Dep’t of Educ.*, 900 F.3d 779, 789 (6th Cir. 2018)(internal citations omitted).

9. Mastery of the regular education curriculum is not required for mainstreaming to remain a viable option. Instead, the question is whether the child, with appropriate supplemental aids and services, can make appropriate progress toward the IEP’s goals in the regular education setting, according to his or her unique circumstances. *Andrew F. v. Douglas Cty. Sch. Dist.*, 137 S.Ct. 988, 1000-1001 (2017); *L.H. v. Hamilton Cty. Dep’t of Educ.*, 900 F.3d 779, 793 (6th Cir. 2018).

### **Title II of the Americans with Disabilities Act and § 504 of the Rehabilitation Act**

10. When the least restrictive environment has been found lacking under the IDEA, claims brought under Title II of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12132, and Section 504 of the Rehabilitation Act, 29 U.S.C. §§ 794 et seq., are pretermitted. *L.H. v. Hamilton Cty. Dep’t of Educ.*, 900 F.3d 779, 784, at ftnt. 1 (6<sup>th</sup> Cir. 2018); *J.A., et al. v. Smith Cty. Sch. Dist.*, 364 F.Supp. 803, at ftnt. 4 (M.D. Tenn. 2019).

### **ANALYSIS**

#### **Expert Testimony**

The Petitioners proffered two expert witnesses during the hearing – Dr. Katherine MacLeod, Ph.D.; and Dr. Charles Ihrig, a Clinical Psychologist. The Respondent proffered one expert witness – Ms. Melody Hobbs. There was no objection to Dr. MacLeod’s being offered as an expert. However, objections were raised to the offering of Dr. Ihrig and Ms. Hobbs, as experts.

The Tennessee Rules of Evidence provide the general rules governing the qualification of experts called to testify in administrative proceedings. *Martin v. Sizemore*, 78 S.W.3d 249, 273 (Tenn. Ct. App. 2001). Tenn. R. Evid. 702 provides that evidence involving scientific, technical,

or other specialized knowledge may be presented by “a witness qualified as an expert by knowledge, skill, experience, training, or education.” The Tennessee Court of Appeals, in *Sizemore*, stated that “[t]o qualify as an expert under Tenn. R. Evid. 702, a witness should have a ‘thorough knowledge of the subject matter of his or her testimony,’ and some special as well as practical acquaintance with the immediate line of inquiry.” *Martin v. Sizemore*, 78 S.W.3d 249, 273 (Tenn. Ct. App. 2001)(internal citations omitted).

The Respondents did not object to Dr. Ihrig being offered as an expert witness relative to [REDACTED] diagnosis “and how it affects [REDACTED].” The Respondents did object, during the early stages of Dr. Ihrig’s testimony,<sup>7</sup> to his being offered as an “educational expert” or an expert in “inclusion,” and were provided a full opportunity to cross-examine Dr. Ihrig on his qualifications regarding the same. Given that LRE is “a *non-academic* restriction or control on the IEP,” whether Dr. Ihrig has knowledge, skill, experience, training, or education in the educational arena, *per se*, is not determinative of his qualification to render testimony in this case. Dr. Ihrig has performed thousands of evaluations to assist with a child’s placement in schools, including such evaluations for schools in order to make recommendations for an IEP. He is versed in how children with autism learn and has testified as an expert witness (including on LRE issues) and has evaluated roughly 1,500 children with autism. The proof shows that Dr. Ihrig satisfies Tenn. R. Evid. 702’s scientific, technical, or other specialized knowledge component for the purposes of the testimony he gave.

The Petitioners did not object to Ms. Hobbs being offered as an expert in [REDACTED] to [REDACTED] transition and instructionally appropriate early childhood education. However,

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<sup>7</sup> At the time of the objections, the undersigned advised that for purposes of making a complete record, testimony from both Dr. Ihrig and Ms. Hobbs would be allowed but that objections would be considered in the Final Order.



Petitioners did object to Ms. Hobbs giving expert testimony regarding “inclusion,” least restrictive environment, or [REDACTED] proper educational placement. Ms. Hobbs has both an undergraduate and a master’s degree in early childhood development and is certified to teach preschool through 3<sup>rd</sup> grade in the State of Tennessee. Ms. Hobbs also holds an educational leadership specialist degree, for which she is completing a “capstone,” which will be a published work to illustrate her learning and understanding of the content from her studies, dovetailing with a fellowship study she undertook with the University of Tennessee Leadership Academy. Ms. Hobbs further holds a school administrator’s license, which would enable her to serve as a school principal, or in a central office setting. Ms. Hobbs further holds certifications as a “reliable” observer of two tools used in Tennessee’s public schools to gauge and improve the quality of preschool classroom environments.

Ms. Hobbs’ relevant work experience includes her having served as a preschool teacher, a teacher of prospective classroom teachers, a district preschool program director, and a lecturer/teacher at the University of Tennessee (guest lecturing in both language and literacy for young children; and kindergarten methods), East Tennessee State University (instructional methods for math and literacy), and Pellissippi State Community College (developmental assessment, language and literacy; and development of exceptional children, which is course specific to creating inclusive preschool environments). Her duties as a district preschool program director, a role in which she currently serves, include collaborating in the IDEA’s Child Find process and attending IEP meetings for students in preschool as well as students transitioning from preschool to kindergarten.

Ms. Hobbs has had a work published in developmentally appropriate teaching practices, as well as a case-study on the needs of those who teach early childhood teachers. She has also had a

number of presentations published on various early education subjects, and the teaching of early education teachers. She serves on the leadership committee for her local preschool district and the advisory committees for teacher licensure path at both Pellissippi State Community College and East Tennessee State University.

Ms. Hobbs' specific experience regarding the topics of inclusion, least restrictive environment, and mainstreaming, include her aforementioned work in her job as preschool program director – collaborating in the IDEA's Child Find process and attending IEP meetings for students in preschool as well as students transitioning from preschool to kindergarten – and a undergraduate course she teaches in the development of exceptional children, focusing on creating inclusive preschool environments.

Ms. Hobbs' unquestionably possesses the scientific, technical, or other specialized knowledge component for an inquiry of what programs are instructionally appropriate for a nondisabled student transitioning from [REDACTED]. Such an inquiry is similar to reaching a determination on a question of least restrictive environment, with the obvious caveat that the latter concerns a disabled child. Regarding that caveat, Ms. Hobbs did credibly testify that she does have significant experience with IEPs, which clearly include the least restrictive environment component. And she does teach an undergraduate course concerning inclusive [REDACTED] environments. Therefore, while the question of whether Ms. Hobbs has the requisite knowledge to testify as an expert regarding [REDACTED] least restrictive environment is a close one, the tribunal does determine that she was qualified, in accordance with Tenn. R. Evid. 702, to give testimony, concerning that issue, in the hearing of this matter.

### The IDEA's Mainstreaming Mandate

The IDEA's strong preference in favor of mainstreaming is well-recognized, but not absolute. Therefore, following the binding Sixth Circuit precedent established by *L.H. v. Hamilton Cty. Dep't of Educ.*, 900 F.3d 779 (6<sup>th</sup> Cir. 2018), and the District Court's roadmap from the underlying case, the analysis centers on three questions, identifying categories of children for whom mainstreaming would not be appropriate. They are: (1) where the child would not receive a benefit from mainstreaming; (2) where any marginal benefits of mainstreaming would be far outweighed by the benefits of a separate setting that could not feasibly be provided in a non-segregated setting; or (3) where the child would be a disruptive force in the non-segregated setting. *L.H. v. Hamilton Cty. Dep't of Educ.*, 900 F.3d 779, 789 (6<sup>th</sup> Cir. 2018).

The second category is further broken down into three steps, which are: (a) reasons why the school district believes a segregated setting is superior for the child; (b) the feasibility of providing the segregated setting's supposedly superior services in the regular-education setting; and (c) weighing the benefits of the segregated setting against the benefits of a regular education setting. *L.H. v. Hamilton Cty. Dep't of Educ.*, No. 1:14-CV-00126, 2016 WL 6581235, at \*19 (E.D. Tenn. November 4, 2016).

#### **1. Could [REDACTED] benefit from mainstreaming?**

It is virtually undisputed that [REDACTED] could receive a benefit from inclusion in the regular education environment. Those benefits to an autistic child in general, and to [REDACTED] specifically, were established at the hearing through testimony and related exhibits.

Both of the Petitioners' experts testified that being amongst nondisabled peers assists in improving an autistic child's socialization and communication skills. This occurs due to the disabled child modeling his nondisabled peers, the disabled child's ability to participate in

exchanges with his nondisabled peers throughout the day, and the disabled child's ability to build relationships with a consistent peer group. Dr. MacLeod, in particular, testified that all of the relevant research – over 40 year's worth – shows that children with autism fare better through school, and thereafter, academically, socially, and behaviorally versus children educated in a segregated setting. Dr. MacLeod continued by testifying that there is no research to support the notion that segregated small special education classrooms provide better outcomes.

Dr. MacLeod also pointed to the progress that ██████ made during the 2018-2019 school year, in a regular classroom with supplemental supports and services, to support her finding that ██████ had already, and could further, benefit from mainstreaming. This progress was borne out by the progress reports filled out by ██████ teacher, Ms. Taylor, during the 2018-2019 year. Additionally, while not agreeing with Dr. MacLeod's ultimate opinion on the appropriate placement for ██████ and while not in every facet, all of the Respondent's witnesses acknowledged that ██████ made progress during the 2018-2019 school year, during which ██████ was in the regular education setting.<sup>8</sup> Moreover, both ██████ teacher from the 2018-2019 school year, Ms. Taylor, as well as Ms. Dye, the Elementary ██████ Program Facilitator, agreed that ██████ can make progress on ██████ IEP goals in the regular education ██████ classroom.

In addition to testimony from the Respondent's witnesses regarding progress made by ██████ during the 2018-2019 school year, those same witnesses also testified regarding ██████ continued deficits. While these deficits unquestionably exist – they are what form the basis, at least in part, of ██████ disability – they do not rebut the findings regarding ██████ progress.

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<sup>8</sup> Specific examples of ██████ progress included improved bathroom skills, matching upper and lowercase letters, completing interlocking puzzles, recognizing some number between zero and twenty, staying for longer periods in large group time, successfully transitioning from one activity to another, and becoming more interested in the activities of others; including one instance of allowing another child to move one or more of the objects ██████ was engaged with (such objects are sometimes referred to, in the IEP or otherwise, as preferred items).

Therefore, based on the foregoing, [REDACTED] does not fall within the first category of students for whom mainstreaming is not appropriate.

**2. Are the non-portable benefits of mainstreaming far outweighed by the benefits of a non-mainstreaming setting?**

**a. Reasons why Knox County Schools believes the CDC-A is superior for [REDACTED]**

Witnesses for Knox County Schools testified that the benefits of a CDC-A classroom – its smaller student size, higher staffing, and curriculum that is designed to be hands-on with opportunities for task break down and explicit instruction embedded as part of the curriculum – will far outweigh the benefits [REDACTED] would receive in a full-time regular education placement.

Ms. Nicki Nye, the CDC-A Program Supervisor, testified that a CDC-A classroom is a special education classroom that has fewer students (typically less than 9) and more staff (3-4) compared to most special education classrooms.<sup>9</sup> Ms. Nye also testified that the academic curriculum used in the CDC-A classroom is comprised of 90 minutes of English and language arts, 20 to 30 minutes for science and social studies, and 60 minutes of math.<sup>10</sup> According to Ms. Nye, this curriculum in the CDC-A class is taught at a much slower pace than the general education setting to allow time for discrete trials of skills and repetition of key elements of the curriculum, and to provide built-in time for working on routines for adaptive skills such as taking the child's coat off and hanging it on a hook, taking off the child's backpack and getting materials out, and toileting.

Ms. Mandy Dye, the Program Facilitator at [REDACTED] testified similarly to Ms. Nye. She spoke of the level of support in the CDC-A setting, the teacher-student

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<sup>9</sup> This level of staffing and class size resembles that of [REDACTED] 2018-2019 [REDACTED] classroom.

<sup>10</sup> All of these time periods are understood to be daily, cumulative totals.

ratio, the slower pace of the class, its hands-on approach, and the constant presence of a special education teacher.

Ms. Melody Hobbs testified that [REDACTED] difficulty in engaging in teacher-directed activities would prevent [REDACTED] from being able to access the regular education curriculum. According to Ms. Hobbs, a [REDACTED] teacher is required to teach certain state-set standards to all of the students at a very fast pace, and the teacher would be unable to slow the curriculum down enough to allow [REDACTED] the slower pace, repetition, and direct instruction that [REDACTED] needs.

In sum, all of the Respondent's witnesses felt that [REDACTED] needs were very similar to 3 of the 4 needs also identified by the school district in the *L.H.* case – the need for (1) focused instruction, (2) on the prerequisite skills [REDACTED] currently lacks, (3) at a pace slow enough for [REDACTED] to truly internalize the concepts. *L.H. v. Hamilton Cty. Dep't of Educ.*, No. 1:14-CV-00126, 2016 WL 6581235, at \*20 (E.D. Tenn. November 4, 2016). The similarities with the *L.H.* case continue from there. The Respondent's witnesses, just as in *L.H.*, believe that the answer to [REDACTED] needs is for [REDACTED] to receive the vast majority of [REDACTED] academic instruction in a specialized, segregated classroom. The reasoning of the Respondent's witnesses is also basically the same as that employed by the school district's witnesses in *L.H.* – because the CDC-A is more focused on adaptive skills (life-help skills), such placement will enable [REDACTED] to acquire those skills that [REDACTED] currently lacks; and the lower student-teacher ratio would allow for more personalized instruction and attention from specialized instructors.

**b. The feasibility of providing the CDC-A's supposedly superior services in the regular setting**

Several of the Respondent's witnesses testified that the progress [REDACTED] made during the 2018-2019 school year was due to the unique character (i.e., the supports and services provided) of that [REDACTED] classroom. They further testified that Knox County's proposed placement time

in the CDC-A setting is the most comparable to ██████ 2018-2019 preschool setting. Therefore, those witnesses concluded that the proposed CDC-A setting is preferable to ██████ being in the regular education classroom for the entirety of the day. While this testimony shows some of the supports and services that allowed ██████ to make progress during the 2018-2019 school year, it does little to answer the question of whether those same services can be provided in the regular education setting in ██████

On that particular question, Ms. Taylor, ██████ regular education classroom teacher, who is also a certified special education teacher, agreed that the supports and services provided to ██████ during the 2018-2019 school year could, or possibly could, be provided to ██████ in the regular education setting in ██████. Similarly, Ms. Mandy Dye, Knox County Schools' Program Facilitator at ██████ testified that some of the supports and services provided to ██████ during the 2018-2019 school year could be provided to ██████ in the regular education setting, including sensory and visual aids, a paraprofessional trained to support a child with autism,<sup>11</sup> and time in the resource room<sup>12</sup>.

Ms. Sydney Friedman, the speech language therapist serving ██████ testified that she was familiar with the idea of bringing in supports to the regular education classroom and that she had worked with paraprofessionals (or teaching assistants) in the regular education classroom in kindergarten, but her testimony on the subject of whether the supports and services ██████ needs would be available in the regular education setting in ██████ went no further.

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<sup>11</sup> Ms. Nye testified that Knox County has an autism team that supports the schools' teachers and staff.

<sup>12</sup> A resource room is a service/support whereby a child can go to a room, or that room's staff can come to the child, for one-on-one instruction.

Ms. Jennie Sullivan, the occupational therapist serving [REDACTED] testified that the supports and services [REDACTED] needs could be provided in the regular education setting but not to the extent that [REDACTED] needs them. She based this conclusion on her opinion that [REDACTED] still needed a lot of support in [REDACTED] class even though [REDACTED] classroom provided a great deal of support already. Respectfully, this does not answer the question of whether the supports and services [REDACTED] needs would be available in the regular education setting in [REDACTED]

Ms. Nicky Nye, Knox County Schools' CDC-A Program Supervisor testified that she did not know whether the supports and services [REDACTED] needs would be available in the regular education setting in [REDACTED]

Ms. Melody Hobbs testified that the level of support [REDACTED] needs could not be provided by a [REDACTED] classroom teacher because of the pace at which the teacher must move to ensure the nondisabled students were led through the requisite curriculum. Thus, according to Ms. Hobbs, "a lot" of the needed supports would have to come from the teaching assistant. She further testified that the rigidity of the typical [REDACTED] schedule (e.g., when the children lunch and recess) would be an impediment to the accommodations [REDACTED] may need.

While Ms. Hobbs' concerns, which were echoed by other of the Respondent's witnesses at various times throughout the hearing, are valid, they fall short of showing that [REDACTED] needs cannot be feasibly met in the regular education environment with appropriate supports and services under the IDEA. Regarding pacing, as the Court recognized in *L.H.*, the IDEA does not require a child to keep up with the pace of typically developing peers in order to be mainstreamed; and certain children covered by the IDEA will inevitably fall farther and farther behind their typically



developing, same-age peers. *L.H. v. Hamilton Cty. Dep't of Educ.*, No. 1:14-CV-00126, 2016 WL 6581235, at \*21 (E.D. Tenn. November 4, 2016).

Ms. Hobbs, and other of the Respondent's witnesses, questioned whether a paraprofessional can adequately serve an autistic child in the regular education setting. The proof shows these concerns to be mitigated in at least two ways. First, according to Ms. Nye, Knox County has an autism support team that is available to assist its paraprofessionals. Secondly, there is no suggestion that the paraprofessional would displace the classroom teacher, the special education teacher, or any other professional support [REDACTED] might need (such as a speech language therapist or occupational therapist). Instead, the paraprofessional would assist, and work through and with, those professionals in a coordinated effort. This dynamic was noted by Dr. MacLeod, who testified that paraprofessionals do not teach new content, but instead that they aide through pre-teaching, re-teaching, or administering lessons already designed by teachers.

Ms. Hobbs was lastly concerned that the rigidity of the [REDACTED] schedule would not allow for accommodations needed by [REDACTED]. While it is understood that the [REDACTED] day is typically more rigid in its schedule for nondisabled children than a [REDACTED] this says nothing about whether that schedule can be deviated from, through appropriate planning, for a disabled child.

For the Petitioners, Dr. MacLeod testified that the supports and services provided to [REDACTED] during his 2018-2019 [REDACTED] year, during which [REDACTED] indisputably made progress, could and should be carried over into [REDACTED] and that there was nothing about [REDACTED] IEP goals for [REDACTED] that required [REDACTED] to be placed in a CDC-A classroom.

Weighing all the proof, it is determined that the supports and services Knox County believes make the CDC-A a superior placement<sup>13</sup> could feasibly be provided in the regular education setting.

**c. Weighing the benefits of the CDC-A against the benefits of a regular education setting**

Any benefits the CDC-A would provide do not far outweigh the significant benefits [REDACTED] would receive from mainstreaming. The benefits that mainstreaming generally provides to children with autism are undisputed. For [REDACTED] in particular, some of these benefits were realized during [REDACTED] 2018-2019 [REDACTED] year, and also evidenced by [REDACTED] interactions at home and in the community. Moreover, Dr. MacLeod, in the only expert opinion testimony provided during the hearing by an expert steeped in the field of inclusion of students with disabilities in the regular education setting (mainstreaming), rebutted any notion that the benefits of a CDC-A class would outweigh the benefits of a regular education setting.

For instance, Dr. MacLeod testified, based on relevant research, that it is a myth that a disabled [REDACTED] student would need to learn foundational skills such as connecting with peers, routines, staying on task, letter identification and literacy in a CDC-A class, wherein there may be students with even more complex needs. Instead, according to the relevant research, these skills are better taught and learned in the regular education setting because of the value of peer

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<sup>13</sup> The Petitioners elicited certain testimony from the Respondent's witnesses in an effort to show both that the proposed placement had been predetermined prior to the IEP meeting of May 15, 2019, and that Respondent's witnesses were not knowledgeable about what LRE requires or what [REDACTED] placement should be. These facts include emails between school personnel prior to the May 15, 2019 IEP meeting, regarding placement; that neither Ms. Mandy Dye nor Ms. Nicky Nye were aware of [REDACTED] IEP progress reports from the 2018-2019 [REDACTED] year; that there was no discussion about the possibility of [REDACTED] being placed in the regular education setting with supports and services; that there was no [REDACTED] teacher present at the meeting; and other statements reflecting misgivings about [REDACTED] being in the regular education classroom. These facts could represent a lack of knowledge regarding LRE, or they may simply reflect the honest opinions of the Respondent-witnesses' regarding what they thought best for [REDACTED] or both. And while some of the statements made by the Respondent's witnesses are of the type the 6<sup>th</sup> Circuit rejected in the *L.H.* case, it is unnecessary to further parse them for purposes of this opinion.

modeling. Additionally, Dr. MacLeod testified that constant transitioning between peer groups would be harmful to █████ because █████ would not be learning from nondisabled peer modeling, and because it would impede him from making meaningful relationships in the regular education classroom. Furthermore, Dr. MacLeod testified that having older children in the CDC-A classroom, which is comprised of kindergarten through 5<sup>th</sup> grade students, could be problematic due to age-inappropriate language and/or behaviors from more mature children, again noting that children will model their environment – the good and the bad.

Therefore, even assuming that the CDC-A placement would provide a better benefit to █████ in any way, versus the regular education setting, these benefits do not outweigh those realized by mainstreaming. Accordingly, █████ does not fall within the second category of students for whom mainstreaming is not appropriate.

**3. Would █████ be too disruptive for the regular education classroom?**

There was no proof that █████ was disruptive in █████ setting, and no indication that █████ may be disruptive in a █████ setting. To the contrary, testimony from both sides show █████ to be a compliant child. Therefore, █████ does not fall within the final category of students for whom mainstreaming is not appropriate.

In conclusion, █████ does not fall within the categories of students for whom mainstreaming is not appropriate. █████ can benefit from being in the regular education setting; the non-portable benefits of a non-mainstream setting do not far outweigh the benefits of a regular education setting; and █████ would not be too disruptive for the regular education classroom. Accordingly, the Petitioners have met their burden of proof that the proposed placement for █████ year was not █████ least restrictive environment.

**CONCLUSIONS OF LAW**

1. The Petitioners have shown by a preponderance of the evidence that the proposed placement for [REDACTED] year was not [REDACTED] least restrictive environment.
2. Petitioners are the prevailing party on this issue.
3. The least restrictive environment having been found lacking under the IDEA, the Petitioners claims brought under Title II of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12132, and Section 504 of the Rehabilitation Act, 29 U.S.C. §§ 794 et seq., are pretermitted.

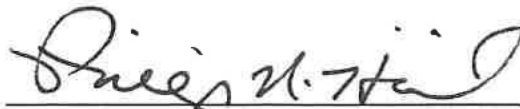
**REMEDY**

[REDACTED] IEP team shall reconvene to develop an IEP that places [REDACTED] in the regular education classroom with a paraprofessional trained in serving autistic children, which paraprofessional shall be assisted by Knox County’s Autism Support Team. [REDACTED] shall be evaluated to determine the most beneficial ways in which to use [REDACTED] AAC device. After that evaluation, [REDACTED] teachers, and other support personnel, shall be trained on the AAC, according to the recommendations of the AAC evaluation.

The policy reason for this decision is to uphold the federal laws pertaining to the education of children with disabilities.

**It is so ORDERED.**


Entered and effective this the 24<sup>th</sup> day of February, 2020.



**PHILLIP R. HILLIARD  
ADMINISTRATIVE JUDGE  
ADMINISTRATIVE PROCEDURES DIVISION  
OFFICE OF THE SECRETARY OF STATE**

Filed in the Administrative Procedures Division, Office of the Secretary of State, this the

24~~th~~ day of February, 2020.



STEPHANIE SHACKELFORD, DIRECTOR  
ADMINISTRATIVE PROCEDURES DIVISION  
OFFICE OF THE SECRETARY OF STATE

██████████ the Student, and ██████████ the  
Student's Parents/Guardians, Petitioners v.  
Knox County Schools, Respondent.

**NOTICE OF APPEAL PROCEDURES**

**REVIEW OF FINAL ORDER**

Attached is the Administrative Judge's decision in your case in front of the **Tennessee Department of Education**, called a Final Order, with an entry date of **February 25, 2020**. If you disagree with this decision, you may take the following actions:

1. **File a Petition for Reconsideration:** You may ask the Administrative Judge to reconsider the decision by filing a Petition for Reconsideration. Mail to the Administrative Procedures Division (APD) a document that includes your name and the above APD case number, and states the specific reasons why you think the decision is incorrect. The APD must **receive** your written Petition no later than 15 days after entry of the Final Order, which is **March 11, 2020**.

The Administrative Judge has 20 days from receipt of your Petition to grant, deny, or take no action on your Petition for Reconsideration. If the Petition is granted, you will be notified about further proceedings, and the timeline for appealing (as discussed in paragraph (2), below) will be adjusted. If no action is taken within 20 days, the Petition is deemed denied. As discussed below, if the Petition is denied, you may file an appeal no later than **April 25, 2020**. See TENN. CODE ANN. §§ 4-5-317 and 4-5-322.

2. **File an Appeal:** You may appeal the decision in federal or state court within 60 days of the date of entry of the Final Order, which is no later than **April 25, 2020** by:
  - (a) filing a Petition for Review "in the Chancery Court nearest to the place of residence of the person contesting the agency action or alternatively, at the person's discretion, in the chancery court nearest to the place where the cause of action arose, or in the Chancery Court of Davidson County," TENN. CODE ANN. § 4-5-322; or
  - (b) bringing a civil action in the United States District Court for the district in which the school system is located, 20 U.S.C. § 1415.

The filing of a Petition for Reconsideration is not required before appealing. See TENN. CODE ANN. § 4-5-317. A reviewing court also may order a stay of the Final Order upon appropriate terms. See TENN. CODE ANN. §§ 4-5-322 and 4-5-317.

**STAY**

In addition to the above actions, you may file a Petition asking the Administrative Judge for a stay that will delay the effectiveness of the Final Order. A Petition for stay must be **received** by the APD within 7 days of the date of entry of the Final Order, which is no later than **March 3, 2020**. See TENN. CODE ANN. § 4-5-316.

**FILING**

To file documents with the Administrative Procedures Division, use this address:

Secretary of State  
Administrative Procedures Division  
William R. Snodgrass Tower  
312 Rosa L. Parks Avenue, 8<sup>th</sup> Floor  
Nashville, TN 37243-1102  
Fax: (615) 741-4472