

**BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION  
DIVISION OF ADMINISTRATIVE HEARINGS**

<b>IN THE MATTER OF:</b>	)	
	)	
<i>ANB, the Student, and</i>	)	
<i>S.G. and J.G., the Student's parents,</i>	)	
	)	<b>Docket No.: 07.03-127358J</b>
<b>Petitioners,</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>WILLIAMSON COUNTY SCHOOLS,</b>	)	
	)	
<b>Respondent.</b>	)	

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**INITIAL ORDER**

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This matter was heard in both Franklin and Nashville, Tennessee, on February 22-26, March 14, and April 15, 2016, before Michael Begley, Administrative Law Judge, assigned by the Secretary of State, Administrative Procedures Division pursuant to T.C.A. § 49-10-606 and Rule 520-1-9-.18, Rules of State Board of Education. Petitioner A.N.B., student, and S.G. and J.G., parents, were represented by attorney Joel Eckert. Attorney William E. Squires represented Respondent Williamson County Schools (WCS). This matter became ready for consideration upon the filing of proposed findings of fact and conclusions of law by Petitioners (July 26, 2016) and Respondent (July 27, 2016).

On August 19, 2014, Petitioners provided the Respondent with a due process complaint under the Individuals with Disabilities Education Improvement Act of 2004 (IDEA). Petitioners have requested the following relief: (1) Reimbursement by WCS to Petitioners for amounts (tuition, costs and fees) paid to send A.N.B. to Currey Ingram

Academy (“CIA”), including both retrospective and prospective expenses; (2) WCS payment for private tutoring expenses, including both retrospective and prospective expenses; and (3) attorneys’ fees, costs, and pre-judgment interest. After consideration of the entire record, testimony of witnesses, and the arguments of the parties, it is determined that Respondent is in compliance with IDEA procedures and has not committed any procedural or substantive violations of IDEA. This determination is based upon the following Findings of Fact and Conclusions of Law.

### **FINDINGS OF FACT**

1. A.N.B. is a 15 year-old dyslexic young man who has attended CIA since the time of his 6<sup>th</sup> grade school year. Petitioners’ have been very pleased with what they believe has been overall progress by A.N.B. at CIA. A.N.B.’s parents testified that they have seen a significant change in A.N.B. since he began attending CIA. For example, A.N.B. has become more self-confident and outgoing since he began at CIA.

2. Dyslexia is a specific learning disability characterized by a child with an average IQ that has difficulty putting words together and decoding words. Children with dyslexia have difficulty reading, spelling, and writing, and children with dyslexia have difficulty following directions and overall functioning in the classroom.

3. In the same testing in which A.N.B. was diagnosed as having severe dyslexia, A.N.B. was also diagnosed as having low processing speed. These challenges have contributed to A.N.B. having social anxiety, which can cause him to be more likely to withdraw and fail to ask for help in the classroom.

4. A.N.B.'s 6<sup>th</sup> grade school year was the 2013-2014 school year. At the time, A.N.B. was twelve to thirteen years old.

5. WCS recognized and continues to recognize A.N.B. as a student with disabilities. At the time the IEP was offered, WCS recognized A.N.B. as having been diagnosed with dyslexia, showing deficits specifically in the areas of reading and certain reading-related skills.

6. While attending CIA in his 6<sup>th</sup> grade year, A.N.B. was evaluated and observed by Dr. Denise Gibbs, a consultant hired by WCS. Dr. Gibbs has an extensive education and background in working with students with disabilities, and in particular, dyslexia

7. Dr. Gibbs testified as an expert witness in special education, speech-language pathology, diagnostics and assessments, reading disabilities, and dyslexia.

8. Dr. Gibbs performed an evaluation of A.N.B. on October 24, 2013, which is shortly after A.N.B. started school at CIA for the sixth grade year

9. As part of the evaluation in October, 2013, Dr. Gibbs administered the following assessments with A.N.B.: OWLS-II (Oral and Written Language Scales II); TOWRE-2 (Test of Word Reading Efficiency 2); TWS-4 (Test of Written Spelling 4); CTOPP-2 (Comprehensive Test of Phonological Processing 2); CORE Phonics Survey (Consortium on Reading Excellence Survey); SDQA (San Diego Quick Assessment); and the Multi-Level Academic Skills Inventory – Revised Edition. Dr. Gibbs also performed a records review prior to the evaluation.

10. Dr. Gibbs created a report based on her assessment results at that time, which was dated October 24, 2013.

11. Dr. Gibbs' report indicated that some areas of reading skills, such as oral language, were in the average range. However, Dr. Gibbs' report found that A.N.B. was limited in other areas of reading, such as sight words, phonological memory, rapid naming, and phonics skills. The report found that A.N.B.'s reading level was approximately first grade.

12. Dr. Gibbs' October literacy report included a number of recommendations. Dr. Gibbs did not recommend speech-language services for A.N.B.

13. Dr. Gibbs concluded speech language services were not necessary for ANB based on her interactions with A.N.B. and the results from the OWLS assessment.

14. A prior speech language assessment had been administered by Ms. Joann Berns, a speech language pathologist employed by CIA, on or about August 21, 2013. This assessment showed lower results than Dr. Gibbs' testing in October.

15. Neither CIA nor A.N.B.'s parent provided Ms. Berns' test results to Dr. Gibbs prior to her assessments in October, and Dr. Gibbs did not specifically ask for any such results. Dr. Gibbs was not made aware of Ms. Berns' testing until after the IEP had been offered to A.N.B. in August of 2014.

16. Dr. Gibbs testified that Ms. Berns' test results would not have affected Dr. Gibbs' conclusion that speech language services were not required for A.N.B. to access the curriculum and receive an education because Dr. Gibbs' testing in October, along with testing she administered in the spring of 2014, provided more recent results and up-to-date information than those done by Ms. Berns in the August of 2013.

17. As the school year progressed, CIA held progress report meetings which included some of A.N.B.'s teachers, A.N.B.'s parents, and Dr. Gibbs. Dr. Gibbs attended two of the progress meetings, one in January of 2014, and one in May of 2014.

18. At these meetings, the CIA staff shared progress and assessment documents and also discussed A.N.B.'s performance related to his Individualized Learning Plan ("ILP").

19. An ILP is unique to CIA. It is not intended to offer or address the legal requirements of FAPE. All students at CIA are provided an ILP, and they are provided without regard to the eligibility requirements found in the IDEA.

20. As part of her continued review of A.N.B.'s performance and progress, Dr. Gibbs observed ANB at CIA for four hours on April 22, 2014. She also spoke with CIA teachers and administrators during this time.

21. Dr. Gibbs testified to having concerns with the instruction that A.N.B. was receiving at CIA. She observed that Ms. Yessick, A.N.B.'s English teacher, was using level 4 of the reading program SPIRE with A.N.B., which Dr. Gibbs determined to be too high for A.N.B. to be successful. Dr. Gibbs testified that the appropriate level of SPIRE for A.N.B. was level 1. Dr. Gibbs also noted that Ms. Yessick was using the SPIRE program incorrectly by failing to follow the correct instructional steps in sequence, not breaking down the instruction, and not correcting A.N.B.'s mistakes in the way that the SPIRE program requires.

22. The SPIRE reading program is based on the Orton-Gillingham approach, and is a multi-sensory method for teaching children with dyslexia. SPIRE is structured, and includes interventions for reading, writing and spelling. It contains multiple steps in

each lesson, and they must be performed strictly in order and according to the program's instructions in order to be effective

23. The SPIRE program requires the giving of a placement test to put the student in the correct level. The purpose of a placement test is to prevent failure of the program due to an individual's being placed in the wrong level.

24. A.N.B. was making more than 50% mistakes on content prior to level 4. SPIRE protocol does not allow a student to progress until they demonstrate at least 80% mastery of the content.

25. Dr. Gibbs observed that Ms. Yessick was not implementing the SPIRE program correctly or with fidelity.

26. CIA did not administer a SPIRE placement test to A.N.B. before placing him in level 4 of SPIRE. CIA instead used the Kaufman Test of Educational Achievement ("KTEA") to place A.N.B. in SPIRE level 4.

27. SPIRE level 4 was the lowest level available to 6<sup>th</sup> graders at CIA.

28. Dr. Gibbs' opinion was that using the KTEA to determine SPIRE placement level, rather than a SPIRE placement test, is not an appropriate or accurate method due to the differences in the two tests.

29. On May 9, 2014, Dr. Gibbs performed a second evaluation of ANB to measure growth and changes since the October, 2013, assessment. Dr. Gibbs prepared a written report from her findings, which she shared with A.N.B.'s parents and with WCS.

30. Similarly to her first assessment, Dr. Gibbs administered several tests, including the Test of Word Reading Efficiency (TOWRE-2), the Test of Written Spelling 4, the Core Phonics Survey, the San Diego Quick Assessment, the High Frequency Word

Survey, the Multi-level Academic Skills Inventory Revised (MASI-R). Dr. Gibbs also administered the SPIRE Decoding Assessment from the SPIRE initial placement test and the SPIRE Decoding Assessment.

31. The results from Dr. Gibbs' literacy assessment showed that A.N.B. had shown gains areas such as spelling and had declined in several other areas.

32. There was a decline of sight word efficiency on the TOWRE-2 by two points. Letters on the Core Phonics Survey had declined by one point, and short vowels declined from 9 / 15 to 6 / 15. Words that A.N.B. could read on the survey declined from 62 / 129 to 46 / 129.

33. A.N.B.'s instructional and independent reading levels had not improved over the year. Attempting to read a second grade passage for one minute, A.N.B. could only read 37 words and made 10 errors in so doing. An accuracy rate of 95% is required to show one's reading and understanding of the passage correctly.

34. The SPIRE decoding test indicated that A.N.B. had not achieved mastery of SPIRE levels 1, 2, 3, or 4. Before moving on to the next level a student must show 80% mastery. A.N.B. was only showing 52% mastery of the concepts from these levels.

35. CIA held an ILP progress meeting on May 19, 2014. Some of A.N.B.'s teachers, A.N.B.'s parents, and Dr. Gibbs were at this meeting. At the meeting, CIA teachers described the performance of A.N.B. for the year. Among the positive indicators was that A.N.B. has made strides in Math. However, the issue of A.N.B.'s lack of growth in reading was also discussed.

36. The KTEA, administered by CIA at the start of the 6<sup>th</sup> grade year and at the end of the 6<sup>th</sup> grade year, showed decline in several areas.

37. Over the 6<sup>th</sup> grade school year, A.N.B.'s reading composite score on the KTEA declined from a 73 to a 64. His reading comprehension score declined from an 80, or 9<sup>th</sup> percentile, to a 63, or 1<sup>st</sup> percentile. A.N.B.'s decoding declined from a score of 77 to 68. Nonsense word decoding declined from 88 to 72, and his reading fluency composite declined from 73 to 70. An additional decoding score declined from 79 to 71.

38. Dr. Gibbs concluded that the decline happened because CIA teachers incorrectly performed interventions with A.N.B., specifically, SPIRE implementation.

39. Testimony conflicted as to the tone of this meeting. Petitioners felt that the meeting was contentious and argumentative. Dr. Gibbs testified that she was more assertive on the issue of SPIRE but was never aggressive or hostile, classifying the meeting as an in depth discussion about the test results and the steps moving forward.

40. After the meeting concluded, A.N.B.'s parents and Dr. Gibbs walked to the parking lot together. Testimony again conflicted as to the conversation as the parties exited the meeting. Petitioners testified that Dr. Gibbs informed them that WCS would not continue a placement at CIA, and that A.N.B. was only at CIA because of her. Dr. Gibbs denied that she made such statements. Dr. Gibbs testified that A.N.B.'s mother was upset about Dr. Gibbs' questioning on the issue of the SPIRE program and about what A.N.B.'s mother felt was a singular focus on reading to the exclusion of other issues.

41. Dr. Gibbs provided to WCS all of the information and performance documents obtained from CIA, along with her own evaluations and literacy reports.

42. Shortly after the ILP meeting at CIA, on May 20, 2014, WCS convened its first of three IEP meetings for A.N.B.

43. The meeting was held at Brentwood Middle School, which WCS understood to be the school of zone for the Petitioners. WCS sent an Invitation to the IEP meeting to Petitioners on May 9, 2014.

44. Petitioners refused to sign the invitation to indicate whether they would be attending the meeting.

45. Present and involved with the WCS IEP meetings was Ms. Carol Hendlmyer, Executive Director for Student Support Services for WCS. Ms. Hendlmyer is licensed as both a special education teacher and a licensed school administrator.

46. Ms. Hendlmyer's current job duties include making sure that WCS employees are implementing the IDEA correctly. In this role, she has attended hundreds of IEP meetings, written or participated in writing an estimated 1,000 IEP's, and has reviewed thousands of IEP's.

47. In addition to Ms. Hendlmyer, present at the meeting were Petitioners; Ms. Jamie Chiariello (General Education teacher), Ms. Sandy Haynie (Special Education Teacher), Ms. Kim Palmer (Student Support Services Specialist), Mr. Bill Harlin (Principal), and Dr. Denise Gibbs (Consultant).

48. Petitioners refused to sign the attendance form but were present for the meeting.

49. At the May 20, 2014 IEP meeting, the IEP team discussed Dr. Gibbs' initial literacy assessments and report from October of 2013. The team also discussed Dr. Gibbs' follow-up literacy assessments and report from May of 2014. Other topics discussed included A.N.B.'s reading, spelling and other deficits, Dr. Gibbs' observations

at CIA, the ILP progress documents and test results from CIA, the CIA ILP itself, and the KTEA scores created by CIA.

50. When considering the documents and information they had, the IEP team identified which documents it believed contained needed information, analyzed the testing scores on hand, and had discussion about whether these facts sounded like an accurate picture of A.N.B.

51. A.N.B.'s parents also shared their thoughts and concerns as a part of their participation in the May meeting.

52. Petitioners left at the one hour mark. The school team was prepared to go longer than one hour, as evidenced by the fact that the teachers involved had gotten substitutes for the day.

53. WCS held a second IEP meeting at Brentwood Middle School on July 14, 2014. An invitation to the meeting was sent to Petitioners on June 23, 2014. The meeting lasted from 8:45 A.M. to 3:40 P.M.

54. Meeting participants included Petitioners, Ms. Kate Martin (Special Education Teacher), Ms. Jamie Chiariello (Special Education Teacher), Karen Schreck (General Education Teacher), Mr. Bill Harlin (Principal), Ms. Kim Palmer (Student Support Services Specialist), Ms. Carol Hendlmyer (Director of Student Support Services for WCS), and Dr. Denise Gibbs.

55. A.N.B.'s parents refused to sign the attendance form but were present for the meeting.

56. The IEP team continued its discussion of A.N.B. and the evaluations related to his 6<sup>th</sup> grade year at CIA. The team reviewed and discussed both of Dr. Gibbs'

literacy reports, the KTEA test results from CIA, the Gallistel-Ellis assessment, the CIA ILP progress documents, and the CIA ILP itself. The team also reviewed and discussed the information from A.N.B.'s parents as well as any points they brought up in the discussion.

57. During this meeting, Petitioners informed the school that their address had changed and that Brentwood Middle School was no longer the school of zone for A.N.B.

58. The IEP team also began the task of creating the IEP for A.N.B. The IEP team determined the Present Levels of Performance for A.N.B., and wrote goals for him based upon those present levels.

59. The team determined that A.N.B.'s Present Levels of Performance showed that he was exceptional and required services and support in the areas of Basic Reading Skills, Reading Comprehension, Reading Fluency, and Adaptive Behavior.

60. The IEP team wrote goals on that day as well, including goals based on all seven areas of exceptionality. Measurable Annual Goals were written specifically to address Basic Reading Skills, Reading Fluency, Reading Comprehension, Written Expression, and Adaptive Behavior.

61. The IEP team did not believe it had enough recent information to address any needs for Occupational Therapy, Speech language therapy, and assistive technology.

62. A.N.B.'s parents participated in the meeting, the discussion, and wrote one goal that was incorporated into the IEP.

63. The IEP team asked A.N.B.'s parents for consent to do evaluations in three areas: Occupational Therapy, Speech and language, and assistive technology. A.N.B.'s parents did not consent to any of these three evaluations.

64. Testimony indicated that, if the parents had consented to have the evaluations done, including the evaluation for speech and language services, the IEP team would have looked at the information from the assessments and reconsidered whether those services, including speech language therapy, were needed for A.N.B.

65. WCS held a third IEP meeting on August 7, 2014, at the WCS Central Office, and included school personnel from both Brentwood Middle School and Sunset Middle School.

66. Sunset Middle School (“SMS”) personnel were included because Sunset Middle School was the school of zone for the new address Petitioners provided at the prior IEP meeting.

67. Meeting participants included Petitioners, Ms. Kate Martin (Special Education Teacher), Karen Schreck (General Education Teacher - BMS), Mr. Bill Harlin (Principal - BMS), Ms. Kim Palmer (Student Support Services Specialist), Ms. Carol Hendlmyer (Director of Student Support Services for WCS), and Dr. Denise Gibbs. Present specifically from Sunset Middle were Ms. Gidget Walsh (Assistant Principal - SMS), Ms. Judith Kleiner (Special Education Teacher – SMS), and Ms. Sandy Williams (General Education Teacher – SMS).

68. A.N.B.’s parents refused to sign the attendance form but were present at the meeting.

69. At the meeting, the IEP team continued the discussion regarding A.N.B. and completed the IEP. All of the prior information was shared with the SMS staff since they had not attended the prior meetings.

70. The IEP team discussed the accommodations in the IEP, and about assistive technology and electronic resources A.N.B. might use.

71. The accommodations included abbreviated assignments, extra time on tests, fewer items/questions, guided fill-in notes, directions given in smaller steps, use of short breaks, reduce/minimize distractions, and others. Many of the accommodations were tailored to A.N.B. specifically, and they were incorporated into every major academic subject area (math, English, science, and social studies).

72. The IEP also included special education services to be offered to A.N.B., including one hour of SPIRE reading program every day in a 1-1 or 2-1 setting, and support from special education professionals in all major academic subjects in the inclusion or regular classroom setting (math, English, science, and social studies). Services were also offered for a study focus time briefly each day.

73. In total, the proposed IEP offered 1175 minutes of special education services offered to A.N.B., amounting to approximately 19.5 hours of special education services each week.

74. The IEP team discussed placement for A.N.B. and determined that the IEP could be implemented at Sunset Middle School.

75. That same day, Ms. Hendlmyer provided the final version of the IEP to Petitioners. Petitioners refused the IEP. All of the school personnel had signed in agreement with the IEP. The next day, August 8, 2014, Ms. Hendlmyer provided a collection of additional documents from the meeting.

76. Dr. Gibbs testified that the IEP was carefully calculated based on the information available and that it included input from all members of the team. She also

testified that the goals were measurable, the accommodations appropriate, and the services were offered in such a way that A.N.B. would have had support throughout the school day. Ultimately, Dr. Gibbs testified that the final IEP would have been able to provide A.N.B. with a FAPE.

### CONCLUSIONS OF LAW

1. Petitioners in this case have the burden to introduce evidence that would by a preponderance of the evidence prove the issues should be resolved in their favor. Rule 1360-4-1-.02, Uniform Rules of Procedure for Hearing Contested Cases before State Administrative Agencies; Schaffer v. Weast, 546 U.S. 49 (2005).

2. The Individuals with Disabilities Education Act (hereinafter and above as “IDEA”) requires WCS to provide a “free appropriate public education” (hereinafter and above as “FAPE”) in the “least restrictive environment” to all students with disabilities who are in need of special education and related services. IDEA, 20 U.S.C. §1400, et. seq. The requirements of the IDEA have been adopted, with some additional state requirements, by the State Board of Education. TN State Board of Education Rules, Regulations, and Minimum Standards, Chapter 0520-1-9.

3. In this case, Petitioners bear the burden of proving that WCS failed to propose an IEP that offered a FAPE to A.N.B. in accordance with the mandates of the IDEA and related State laws. Bd. Of Educ. of the Hendrick Hudson School Dist. v. Rowley, 458 U.S. 176 (1982).

4. Under the IDEA, Petitioners may be entitled to obtain reimbursement for the unilateral placement of their children in a private school. *School Committee of Town*

of *Burlington, Mass. v. Dept. of Educ. of Mass.*, 471 US 359 (1985). In order to obtain reimbursement for A.N.B.'s placement in a private school, Petitioners must satisfy a two-factor analysis and must prove that: (1) the public school placement that had been provided or offered for the child was not an appropriate placement under the terms of the IDEA; and (2) that the private school placement chosen by the parents was an appropriate placement under the IDEA. *Town of Burlington*, 471 US at 370-71.

5. Under the IDEA, states must provide A.N.B., a FAPE. *Knable v. Bexley City School Dist.*, 238 F.3d 755, 762 (6<sup>th</sup> Cir. 2001) (citing to 20 USC § 1401(a)(18)). The two-prong test for determining whether WCS provided A.N.B. a FAPE is as follows: (1) whether procedural requirements under the IDEA were violated; and (2) whether the IEP developed through the IDEA's procedures was reasonably calculated to enable the child to receive an educational benefit. *Knable*, 238 F.3d at 763 (6<sup>th</sup> Cir. 2001) (citing *Bd. of Educ. v. Rowley*, 458 US 176, 206-07 (1982)).

6. In order to obtain relief under the first prong of the *Rowley* test, Petitioners must show that the complained-of procedural violations have caused substantive harm. *Id.* at 764. Petitioners must also establish that either A.N.B.'s IEPs were not reasonably calculated to enable him to receive an educational benefit or that the procedural requirements of the IDEA were violated so as to cause A.N.B. substantive harm.

7. To successfully make out a case for reimbursement under *Burlington* and *Rowley*, Petitioners must show: (1) that WCS did not provide A.N.B. a FAPE because the final IEP was not reasonably calculated to enable him to receive an educational benefit or because the procedural requirements of the IDEA were violated so as to cause A.N.B.

substantive harm; and (2) that CIA is the appropriate placement for A.N.B. under the IDEA.

8. In order to qualify for eligibility under the IDEA, a student must (1) meet the eligibility criteria for one of the specific categories of eligibility delineated in the Act, and (2) "by reason thereof, need special education and related services." 20 U.S.C. §1401(3)(A). No single individual can make an eligibility determination. Id. Rather, a team comprised of educators with parental participation must make this decision. Id.

9. Petitioners allege that WCS failed to offer A.N.B. a FAPE on the grounds that the final IEP was not reasonably calculated to enable A.N.B. to receive an educational benefit and that WCS violated the procedural requirements of the IDEA so as to cause A.N.B. substantive harm. Lastly, Petitioners assert that CIA has and continues to provide A.N.B. an appropriate education so as to warrant the reimbursement. For the reasons outlined below, Petitioners have failed to carry the burden of proof by a preponderance of the evidence.

10. Courts have outlined the legal standard used to determine if an Individualized Education Plan ("IEP") is appropriate for a student and offers a FAPE. Bd. of Educ. of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176; 102 S. Ct. 3034; 73 L. Ed. 2d 690 (1982). Specifically, the IEP in this case must be reasonably calculated to enable A.N.B. to receive educational benefits. The IEP does not have to be perfect or ideal, but rather needs only to be reasonably likely to provide benefit that is "more than de minimis." The Sixth Circuit stated that the IDEA provides a "basic floor of opportunity ... consisting of access to specialized institutions and related services which are individually designed to provide educational benefit to the handicapped child." Doe v.

Bd. of Educ. of Tullahoma, 9 F.3d 455 at 459 (6<sup>th</sup> Cir. 1993) (quoting Rowley, *supra*, and Doe By and Through Doe v. Smith, 879 F.2d 1340, 1341 (6th Cir. 1989)).

In the Tullahoma case, the Sixth Circuit held:

The Act requires that the Tullahoma schools provide the educational equivalent of a serviceable Chevrolet to every handicapped student. Appellant, however, demands that the Tullahoma school system provide a Cadillac solely for appellant's use. ... Be that as it may, we hold that the Board is not required to provide a Cadillac, and that the proposed IEP is reasonably calculated to provide educational benefits to appellant, and is therefore in compliance with the requirements of the IDEA.

Doe v. Bd. of Educ. of Tullahoma, 9 F.3d 455 at 459-460 (6<sup>th</sup> Cir. 1993).

11. In evaluating whether an IEP offered a student a FAPE, evidence about how a child performed after an IEP has been offered and rejected is irrelevant. Rather, the focus lies on what the school system knew at the time the IEP was finalized and offered. Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031 (3<sup>rd</sup> Cir. 1993). Specifically, "An IEP is a snapshot, not a retrospective. In striving for "appropriateness", an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." Fuhrmann v. East Hanover Bd. of Educ., *Mansmann concurring*, 993 F.2d 1031 at 1041 (3<sup>rd</sup> Cir. 1993)(quoting Roland M. v. Concord School Committee, 910 F.2d 983, 992 (1st Cir. 1990), cert. denied, 113 L. Ed. 2d 230, 111 S. Ct. 1122 (1991)). Thus, the operative time period for review of the IEP in this case begins in the fall of 2013 and ends when the IEP was offered to the parents in the fall of 2014.

12. In this case, WCS was in compliance with the requirements of the IDEA by convening an IEP team, taking all available information about A.N.B., and by analyzing and discussing that information with IEP team members and parents in IEP as

required by law. The IEP team used that information to create and draft appropriate present levels of performance for A.N.B., goals for A.N.B., services to support A.N.B., and accommodations to support A.N.B. in the classroom.

13. WCS convened three IEP meetings in creating the IEP. During these meetings, the IEP team reviewed, analyzed, and discussed a large volume of information when drafting the IEP. The team discussed and incorporated into the IEP, among other things, Dr. Gibbs' initial literacy assessments and report from October of 2013 and her second report from May of 2014, information about ANB's reading, spelling and other deficits from 6<sup>th</sup> grade, Dr. Gibbs' observations at CIA, the ILP progress documents and test results from CIA, the ILP itself, and the KTEA scores created by CIA. The IEP team identified which documents contained information they felt they needed. The team also discussed the testing scores on hand, analyzed those scores, and had discussion about whether their findings appeared to be an accurate picture of A.N.B. A.N.B.'s parents also participated in the IEP meetings and shared their thoughts and concerns with the IEP team.

14. Dr. Gibbs testified that the IEP offered A.N.B. a FAPE. More specifically, she testified that the team took their time, accepted input from everyone involved, and made changes along the way. Dr. Gibbs stated the present levels of performance were carefully calculated to benefit A.N.B., the goals were measurable for A.N.B., and the accommodations were specifically tailored to A.N.B.

15. Several of Petitioners' witnesses testified to facts and events about A.N.B. which took place after the IEP at issue was offered. The following witnesses either did not know A.N.B. during the relevant time period or did not work with him during his 6<sup>th</sup>

grade year: Dr. John Fite, Mary Ragsdale, Rose Freeman, and Cynthia Lofton. While these witnesses may provide context for A.N.B.'s condition and needs, their testimony may not extend to the issue of whether WCS offered A.N.B. a FAPE. Excepting Ms. Joann Berns, A.N.B.'s parents, and Coach Hixenbaugh, Petitioners' witnesses testified primarily to facts regarding A.N.B. which occurred or arose after the IEP was offered.

16. Dr. Michael Tramontana and A.N.B.'s parents testified as to their opinions of the appropriateness of the IEP in this case. Dr. Tramontana's testimony of his evaluations of A.N.B. on October 21, 2015, would fall outside of the category of information that would have been available at the time of the IEP offering.

17. Dr. Tramontana's opinions about the IEP offered by WCS were formed after looking at a draft IEP rather than the final IEP. Dr. Tramontana testified in an effort to improve the IEP. He did not provide an opinion as to whether or not the IEP offered to A.N.B. was in compliance with the IDEA.

18. Petitioners have raised several reasons why they believe they have met their burden in this case. Petitioners have asserted that CIA teachers should have been present at the IEP team meetings. A.N.B.'s parents testified they were given the impression that CIA staff was not invited to the meetings. Ms. Hendlmyer was involved in e-mail communication with Petitioners upon which Petitioners' based their opinion. However, WCS sent invitations to each IEP meeting that indicated A.N.B.'s parents could invite whomever they pleased to the IEP meetings. Ms. Hendlmyer felt it was unnecessary to have CIA staff present due to the information the IEP team already had from CIA, as well as Dr. Gibbs' observations of A.N.B. Ms. Hendlmyer also attempted to invite CIA staff in spite of her own opinion on its necessity.

19. Regardless, WCS met its legal obligation to have the appropriate team members present without teachers from CIA being at the meeting. The persons required to be in attendance at the IEP team meeting are: (1) the parents, (2) a regular education teacher, (3) a special education teacher, and (4) a representative of the school system that can provide or supervise provision of services, has knowledge of the general education curriculum, and has knowledge of the resources of the district, and (5) an interpreter of evaluation results, if needed. 20 U.S.C. § 1414(d)(1)(B). Persons beyond that may attend purely at the discretion of the parents or the school system. Id; *see also* Rodriguez v. Fort Lee Bd. of Educ., 458 Fed. Appx. 124, 2011 U.S. App. LEXIS 18791 (3d Cir. 2011).

20. Petitioners also claim SPIRE was being recommended for A.N.B. in the IEP, but that SPIRE training had not occurred at Sunset Middle. The final IEP was offered to Petitioners the day before school was to start for the following year. However, the SPIRE materials had been purchased, and training was going to occur and the program ready to be used the very next day if A.N.B. were to attend Sunset Middle. Moreover, the training would include follow-up training, review by the trainer, and conferencing with the trainer to ensure SPIRE was implemented with fidelity.

21. Petitioners also expressed concerns about the class sizes. However, the class sizes typically seen at WCS are similar to those seen at CIA, ranging from 2-10 students per teacher and more likely 7-8 students per teacher.

22. Finally, Petitioners assert that speech language services were not included in the IEP. However, The IEP team asked the parents for consent to do evaluations in three areas: Occupational Therapy, Speech and language, and assistive technology. A.N.B.'s parents did not provide consent to perform those evaluations. Thus, WCS had to

move forward with the information it had at the time. WCS cannot be held deficient for a perceived shortcoming when Petitioners refused WCS' efforts to further test A.N.B.

23. According to established legal precedent, the issue not which of the two schools can provide a FAPE to A.N.B. or even which school would be the best for A.N.B.'s growth. Rather, the issue is whether WCS can provide A.N.B. with a FAPE. Any analysis of the appropriateness of CIA is only necessary if it is determined that WCS failed to provide A.N.B. a FAPE. Moreover, the only information upon which a decision can be rendered is the information WCS would have had at the time the IEP was offered, and whether WCS offered an IEP that could have provided A.N.B. with a FAPE at that time.

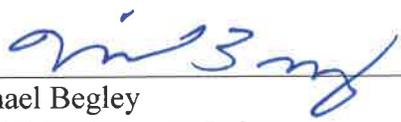
24. WCS committed no substantive violations of the IDEA in this case. The IEP submitted may not have included every topic Petitioners' claim it should have. Based on the information it had at the time, however, WCS did offer an IEP that was reasonably calculated to provide A.N.B. with an educational benefit. Moreover, Petitioners' own actions of refusing to allow A.N.B. to be further tested in areas in which WCS had additional questions during the process contributed to things like speech language therapy being left out of the final proposed IEP.

25. WCS committed no procedural violations of the IDEA either. While there was no requirement to invite CIA staff to the IEP meetings, WCS did reach out to CIA staff during the process. Additionally, A.N.B.'s parents were invited to every meeting, and their input was incorporated into the IEP. Placement was discussed upon completion of the IEP. Conflicting testimony about what Dr. Gibbs may have said after the ILP

meeting at CIA is not enough evidence to prove that WCS had already made up its mind about placement prior to going through the IEP process.

It is therefore **Determined** that Respondent is in compliance with IDEA procedures. It is also **Determined** that Respondent has not committed any procedural or substantive violations of the IDEA. As such, it is unnecessary to address the issue of CIA's appropriateness. Therefore, it is **ORDERED** that the remedies and relief sought by Petitioners are **DENIED**. Respondent is the prevailing party in this matter.

This Initial Order entered and effective this 6th day of September 2016.

  
\_\_\_\_\_  
Michael Begley  
Administrative Law Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State,  
this 6th day of SEPTEMBER 2016.

  
\_\_\_\_\_  
J. Richard Collier, Director  
Administrative Procedures Division

## **APPENDIX A TO INITIAL ORDER**

### **NOTICE OF APPEAL PROCEDURES**

#### **Review of Initial Order**

This Initial Order shall become a Final Order (reviewable as set forth below) fifteen (15) days after the entry date of this Initial Order, unless either or both of the following actions are taken:

(1) A party files a petition for appeal to the agency, stating the basis of the appeal, or the agency on its own motion gives written notice of its intention to review the Initial Order, within fifteen (15) days after the entry date of the Initial Order. If either of these actions occurs, there is no Final Order until review by the agency and entry of a new Final Order or adoption and entry of the Initial Order, in whole or in part, as the Final Order. A petition for appeal to the agency must be filed within the proper time period with the Administrative Procedures Division of the Office of the Secretary of State, 8<sup>th</sup> Floor, William R. Snodgrass Tower, 312 Rosa L. Parks Avenue, Nashville, Tennessee, 37243. (Telephone No. (615) 741-7008). See Tennessee Code Annotated, Section (T.C.A. §) 4-5-315, on review of initial orders by the agency.

(2) A party files a petition for reconsideration of this Initial Order, stating the specific reasons why the Initial Order was in error within fifteen (15) days after the entry date of the Initial Order. This petition must be filed with the Administrative Procedures Division at the above address. A petition for reconsideration is deemed denied if no action is taken within twenty (20) days of filing. A new fifteen (15) day period for the filing of an appeal to the agency (as set forth in paragraph (1) above) starts to run from the entry date of an order disposing of a petition for reconsideration, or from the twentieth day after filing of the petition, if no order is issued. See T.C.A. §4-5-317 on petitions for reconsideration.

A party may petition the agency for a stay of the Initial Order within seven (7) days after the entry date of the order. See T.C.A. §4-5-316.

#### **Review of Final Order**

Within fifteen (15) days after the Initial Order becomes a Final Order, a party may file a petition for reconsideration of the Final Order, in which petitioner shall state the specific reasons why the Initial Order was in error. If no action is taken within twenty (20) days of filing of the petition, it is deemed denied. See T.C.A. §4-5-317 on petitions for reconsideration.

A party may petition the agency for a stay of the Final Order within seven (7) days after the entry date of the order. See T.C.A. §4-5-316.

### **YOU WILL NOT RECEIVE FURTHER NOTICE OF THE INITIAL ORDER BECOMING A FINAL ORDER**

A person who is aggrieved by a final decision in a contested case may seek judicial review of the Final Order by filing a petition for review in a Chancery Court having jurisdiction (generally, Davidson County Chancery Court) within sixty (60) days after the entry date of a Final Order or, if a petition for reconsideration is granted, within sixty (60) days of the entry date of the Final Order disposing of the petition. (However, the filing of a petition for reconsideration does not itself act to extend the sixty day period, if the petition is not granted.) A reviewing court also may order a stay of the Final Order upon appropriate terms. See T.C.A. §4-5-322 and §4-5-317.