

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

IN THE MATTER OF:

***S.C., the Student, and
M.C., the Student's parent,
Petitioners,***

v.

**RUTHERFORD COUNTY
BOARD OF EDUCATION,
*Respondent.***

DOCKET NO: 07.03-126194J

FINAL ORDER

This matter was heard in Murfreesboro, Tennessee on March 23-25, 2015 and June 8-9, 2015 before Leonard Pogue, Administrative Law Judge, assigned by the Secretary of State, Administrative Procedures Division pursuant to T.C.A. § 49-10-606 and Rule 520-1-9-.18, Rules of State Board of Education. Petitioner S.C., student, and M.C., parent, were represented by attorney Joel Eckert. Attorneys Melinda Jacobs and Angel McCloud represented Respondent Rutherford County Board of Education (RCB). This matter became ready for consideration upon the filing of proposed findings of fact and conclusions of law by Petitioners (September 24, 2015) and Respondent (October 7, 2015).

S.C.'s mother, M.C., initiated this due process hearing on June 2, 2014, alleging that RCB refused to deem S.C. eligible for special education services. On December 12, 2014, leave was granted Petitioners to file an Amended Due Process Complaint wherein Petitioners further alleged that RCB failed to timely and properly test S.C. despite M.C.'s requests to do so and failed to offer or provide Extended School Year services to S.C. On March 17, 2015, leave was

granted Petitioners to file a Second Amended Due Process Complaint wherein Petitioners further alleged that RCB denied Petitioners certain procedural rights. Petitioners have requested past and future compensation for private tutoring expenses, reimbursement for Petitioners' expenses in obtaining a psychoeducational evaluation, and speech language therapy costs associated with Petitioner's current educational setting.

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, has not committed any procedural or substantive violations of IDEA, and Respondent did not fail to timely evaluate or fail to identify S.C. as a student with a disability under IDEA. This determination is based upon the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. S.C. attended LaVergne Lake Elementary School (LLE) from Kindergarten (2009-10 school year) through the first semester of S.C.'s fifth grade year (fall 2014).

2. S.C. started in LLE's Response to Intervention (RTI) program for reading in the first grade. LLE was implementing a RTI model before RTI² became a state mandated initiative in July of 2014. The RTI program provides 3 tiers of interventions for students that are struggling in the general education program.

3. At the beginning of her third grade year, S.C. did not do well on the Benchmark test administered by LLE. According to M.C., S.C.'s teacher, Elizabeth Brown, told M.C. that M.C. should write a letter to LLE and ask them to test S.C. M.C. wrote a letter requesting that S.C. be tested.

4. In response to M.C.'s request, RCB sent M.C. a developmental history form to complete on S.C. and scheduled a Student Assistance Team (SAT) meeting for December 5,

2012. The SAT meeting was rescheduled at M.C.'s request and was held on January 30, 2013. Ms. Brown, LLE's principal, Jeff McCann, and S.C.'s Interventionists, Gina McKee and Mandy Wiemers, discussed that S.C. was making good progress in RTI, that there was no need to test her, and that her progress would be monitored.

5. S.C. received RTI interventions for reading and math at Tier 2 and primarily Tier 3 during her third grade school year. For most of that school year, she received Tier 2 small group reading instruction in the classroom approximately 60 minutes weekly and Tier 3 pull out reading intervention in a small group of no more than five students for typically 90-120 minutes weekly. She participated in small group math instruction as needed when falling below proficiency on math assessments.

6. During the third grade, S.C. was consistently rated a 2 in reading, on a progress scale of 1-3, indicating that she could independently do the majority of the reading work assigned during a session. For math she was given a score of 3 once, a score of 2 five times, and a score of 1 once during the first five weeks of intervention. By weeks six through eleven of intervention, S.C. had improved her math rating to obtain a score of 3 eleven times, a score of 2 eight times, and no scores of 1. According to Ms. Wiemers, S.C. was in the average range of students in her classroom in math.

7. At the end of the third grade, S.C.'s TCAP scores were on the low end of the "Basic" range in Reading/Language Arts and Math. Her TCAP scores in Science and Social Studies were "Below Basic" and "Below Proficient," respectively. Principal McMann testified that at the end of S.C.'s third grade year, about 50 percent of the students attending LLE scored below proficiency levels in reading, which is slightly above average for the State of Tennessee.

On S.C.' grade report, S.C. received C's and a D in all non-special subject areas while receiving all A's in Art, Music, and PE.

8. Principal McCann called M.C. on the second to last day of S.C.'s third grade year and recommended that S.C. be retained in third grade because he was concerned that she was not academically ready for fourth grade. After discussing M.C.'s concerns with retention, Principal McCann acceded to M.C.'s wish to promote S.C. to the fourth grade with her twin sister. Principal McCann did not believe that S.C. needed to be tested at the end of her third grade year because she had made progress in RTI. Principal McCann and M.C. also discussed S.C. seeing her pediatrician to rule out medical issues, getting S.C. tutoring over the summer, and initiating an IDEA evaluation at the start of the next school year.

9. S.C. began going to Jubilee Education Services (Jubilee) for tutoring in June 2013. Also in the summer of 2013, her pediatrician referred her to Vanderbilt's Bill Wilkerson Center (VBWC) for a language evaluation.

10. On August 14, 2013, at the beginning of S.C.'s fourth grade school year, M.C. emailed Principal McCann to inform him that S.C. was scheduled to have private testing at Vanderbilt and asked whether the school should move forward with its testing or if it preferred to wait to test S.C. until the Vanderbilt testing was completed. Principal McCann responded that RCB would prefer to wait until Vanderbilt completed its language testing and asked if M.C. agreed with that decision. M.C. responded that it was "perfectly acceptable" to wait to test S.C. until the Vanderbilt assessments were completed.

11. S.C. continued to receive RTI interventions for reading and math at Tier 2 and 3 while in fourth grade during the 2013-2014 school year.

12. On September 24, 2013, M.C. emailed the LLE school counselor, Laura Deer, Principal McCann and others at the school the results of the Vanderbilt language testing (performed by Brian Golson and which diagnosed S.C. with a Receptive/Expressive Language Disorder) and further advised that M.C.'s pediatrician recommended a neuropsychological evaluation for S.C.

13. A SAT meeting was held on September 30, 2013. The SAT team members included M.C., Principal McCann, Ms. Deer, Debra Kipling, a Speech Language Pathologist at LLE, Matt Taylor, a school psychologist, a part-time counselor, the assistant principal, and several teachers/interventionists. The team discussed Mr. Golson's evaluation, S.C.'s progress, and additional strategies to assist S.C. at school/home. Ms. Kipling opined that none of the scores obtained by Mr. Golson indicated that S.C. met State eligibility criteria for special education and related services. The SAT decided to wait for the results from S.C.'s neuropsychological evaluation before RCB conducted its own evaluations. M.C. testified that she went along with this decision because she thought this was how the process worked and she did not feel that she had much of a choice.

14. On October 25, 2013, while corresponding with M.C., Principal McCann stated "an IEP is typically necessary for a student to receive academic accommodations in class" and that could be discussed once M.C. obtained all the data from Vanderbilt. M.C. responded stating that she believed that accommodations needed to be made for S.C. "sooner rather than later in order for S.C. to have any level of success."

15. S.C. received additional language testing at VBWC which concluded in December of 2013. M.C. sent the test results to school personnel and requested a SAT meeting for late January/early February. M.C. also noted that the neuropsychological evaluation was to be

done on January 14, 2014. Principal McCann and M.C. agreed to delay meeting to allow M.C. to obtain the evaluation results.

16. The VBWC testing in December 2013 was conducted by Christine Zinzilieta, M.S., CCC-SLP, who diagnosed S.C. with a Receptive/Expressive Language Disorder based on the Diagnostic and Statistical Manual (DSM-IV-TR). Ms. Zinzilieta did not base her diagnosis on the eligibility criteria of the IDEA. Among other tests performed, Ms. Zinzilieta performed the Clinical Evaluation of Language Fundamentals-IV. S.C.'s Expressive Language Composite Standard Score was 77 (6th percentile), Core Language Composite Standard Score was 79 (8th percentile), and Receptive Language Composite Standard Score was 85 (16th percentile).

17. Ms. Kipling reviewed the testing done by Ms. Zinzilieta and informed Principal McCann that S.C.'s assessments scores did not meet the qualifications for the first prong of eligibility for language impairment under IDEA and Tennessee State law and regulations.

18. On or about February 14, 2014, one of S.C.'s fourth grade teachers, Ms. Kalish, who was S.C.'s Language, Reading, and Social Studies teacher, sent home a progress report with failing grades on it which noted "Effort" under the Reading section, a notation that Ms. Kalish had also included on a previous progress report under Social Studies. According to M.C., Ms. Kalish told M.C. on February 20, 2014 that S.C. had not been making progress in RTI or completing her classroom assignments all year to that point. Ms. Kalish did not testify at the hearing.

19. Dr. Michael Tramontana, Ph.D., conducted a neuropsychological evaluation of S.C. in January 2014, but the results were not provided to M.C. until March 2014. M.C. forwarded the testing results to Principal McCann and Ms. Deer on March 10, 2014, and again requested a SAT meeting.

20. On March 21, 2014, M.C. wrote a letter to Principal McCann asking for comprehensive educational testing to include “a full psycho educational evaluation” to determine if S.C. had a learning disability.

21. The SAT met on April 7, 2014. Ms. Zinzilieta’s and Dr. Tramontana’s evaluations were reviewed. Ms. Kipling told M.C. that the Zinzilieta testing did not qualify S.C. for services. M.C. was provided hard copies of a summary of S.C.’s RTI assessment data and intervention levels for the third and fourth grade and graphs showing S.C.’s progress with interventions. RCB requested and obtained M.C.’s written consent for a comprehensive assessment to evaluate S.C. for IDEA eligibility.

22. Within the next month, RCB conducted the Test of Language Development (“TOLD”) and the Woodcock Johnson-III, Tests of Achievement (“WJ-III”). S.C.’s evaluation included interviewing and observing, not just testing. Ms. Kipling performed the TOLD and determined that “[b]ased on this testing alone, [S.C.] does not qualify for speech therapy services.” Mr. Taylor stated in his WJ-III report that S.C. “does not meet the Tennessee Department of Education’s first criteria for a disability at this time.”

23. On May 12, 2014, RCB convened an IDEA/eligibility meeting to review and discuss S.C.’s eligibility for special education and related services. Neither of the testing scores obtained by RCB met the Tennessee eligibility criteria for a “language impairment.” Only one subtest score from the Zinzilieta’s testing met the State eligibility requirements, albeit by one point. It was determined that S.C. did not meet the criteria for a disability consistent with Tennessee state regulations and was not eligible for special education services. M.C. disagreed with the IEP team’s eligibility determination. M.C. shared with the team a list of S.C.’s current needs and challenges and the team agreed that S.C. was struggling in the listed areas, but that

S.C. was still making progress in the areas via RTI Tier 3. RCB informed M.C. that she had the right to request an independent educational evaluation, or “IEE.”

24. M.C. sent a letter on May 20, 2014, to Shirley Bell, Coordinator of Special Education for RCB, requesting an IEE because M.C. felt the testing that RCB had performed was not comprehensive or appropriate, and that those test results were at odds with the testing done by Vanderbilt. On May 23, 2014, Ms. Bell, by letter, responded to M.C.’s request stating that M.C.’s “request for an IEE applies only to testing that we performed,” and included RCB’s guidelines for obtaining an IEE. M.C. did not find Ms. Bell’s response acceptable and did not independently set up an IEE.

25. As a part of the RTI program, RCB assessed S.C.’s skills in reading and math three times during her fourth grade year through the Benchmark testing. In mathematics, Benchmark testing showed that S.C. made significant progress (almost one year’s growth) during her fourth grade school year. S.C.’s overall math skills increased by more than a year as measured by her Moby Max Beginning Level of 2.6 and Moby Max Ending Level of 3.4.

26. S.C. did not qualify for interventions based on her fourth grade fall reading Benchmark; however, RCB continued to provide her with Tier 2 and 3 interventions. During the fourth grade, S.C. participated in several RTI interventions, including 95% Phonics, Fountas and Pinnell (reading), Moby Math, and Do the Math. S.C. also participated in a comprehension group that used guided reading lessons. For any given week, S.C. participated in Tier 2 reading interventions between 60-120 minutes (most frequently 120 minutes) and Tier 3 reading interventions (Reading Roost) for 30-120 minutes per week (most frequently 90 minutes). During her fourth grade school year, S.C. received an average of three-and-a-half hours per week of direct intervention in reading, in addition to her regular classroom instruction in reading.

27. After the intervention data showed that S.C. needed more intensive intervention in reading comprehension, her reading intervention was changed to target these needs. Math intervention included a combination of computation and word problems and focused on S.C.'s deficit areas of subtraction and word problems. In addition to the RTI interventions in math and reading, RCB also provided S.C. with classroom-based strategies and accommodations.

28. As to her fourth grade report card, S.C. received a final grade of D in Language, Math, Reading, and Social Studies, a C in Science, and an A in Art, Music, and Physical Education. Her TCAP scores for fourth grade (Spring 2014) showed "Below Basic" on Reading/Language Arts, Mathematics and Science and "Below Proficient" for Social Studies.

29. In May of 2014, S.C. began receiving private speech therapy with Jennifer Porter, speech language pathologist, at the Vanderbilt Bill Wilkerson Center.

30. S.C. began her fifth grade school year at LLE in August of 2014.

31. RCB initiated another IDEA/eligibility meeting on October 22, 2014. M.C. attended with an advocate and the RCB team members present included: Principal McCann, a special education teacher, two regular education teachers, Ms. Kipling, and a math intervention teacher. M.C. expressed her opinions, asked questions and gave her input during the meeting. The IEP team told M.C. that S.C. was having problems with memory and processing. The team determined that S.C. met the eligibility requirements for special education and related services under a primary disability of Language Impairment, that S.C. met the criteria for a disability consistent with Tennessee state regulations and that her disability adversely impacted her educational performance in her learning environment. In reaching this decision, the IDEA eligibility team considered additional information that was not available until the fall of 2014 (as well as prior testing/data), including teacher input and observations, S.C.'s most recent TCAP

scores, and her Imagine Learning Placement Test and Aimsweb assessments. Additionally, S.C.'s teachers provided information that suggested difficulties with a language impairment, such as S.C.'s sister speaking for her in class.

32. RCB drafted a proposed Individualized Education Plan (IEP) for S.C. The proposed IEP offered speech language therapy (30 minutes per week in a pull-out setting and 30 minutes per week in an inclusion setting), offered one hour daily of direct academic services in the inclusion setting, and offered several accommodations for Reading, Language Arts, Writing, Math, Science, and Social Studies. M.C. requested a specific accommodation that was added to the IEP.

33. M.C. did not agree to the proposed IEP. She did not believe that the IEP adequately identified and addressed S.C.'s academic gaps and was insufficient in the provision of language services. Also, M.C. thought the goals specified in the IEP were inappropriate for S.C. in light of her achievement level at that time. For instance, Goal 2 proposed S.C. to define words in a fifth grade vocabulary bank; however, S.C. was not operating at a fifth grade vocabulary level and sometimes struggled with fourth grade vocabulary. Further, Goal 4 required S.C. to identify the correct operation to complete word problems with 100% accuracy. M.C. also objected to the IEP on the basis that RCB had not done comprehensive testing on S.C. as of the date of the October 22, 2014 IEP meeting.

34. After the October 22, 2014 IEP meeting, M.C. contacted the Currey Ingram Diagnostic Center to obtain further testing for S.C. S.C. was administered a comprehensive Psychoeducational Evaluation by Jovanna Emerson, Ph.D., of the Currey Ingram Diagnostic Center in early November 2014 for which M.C. paid \$1,500.

35. S.C. remained at LLE without special education and related services until the end of the fall semester. On her last Comprehensive Progress Report before leaving LLE, S.C. received an A in both Reading and Language. However, these grades reflect a number of “participation” grades for which S.C. always received 100% scores. Further, some test scores were generally low (from 10% at the lowest to 70% at the highest) and were not included in the calculation of the grades in S.C.’s Progress Report.

36. M.C. called an IEP meeting on December 19, 2014, whereby she informed RCB that she was withdrawing S.C. from LLE. Prior to withdrawing S.C. from LLE, M.C. had sought to have S.C. placed in Ezell Harding, a private school, starting the Spring 2015 semester. According to M.C., Ezell Harding did placement testing on S.C. and determined that she was performing more than two (2) years behind her grade level. Ezell Harding would not accept S.C. on grade level, and S.C.’s only option there was to be retested for fourth grade.

37. In January of 2015, M.C. started homeschooling S.C. and sending her to Jubilee for tutoring. S.C. attended Jubilee from June of 2013 through January of 2015 in its tutorial program. S.C. is enrolled in Jubilee’s “day program,” attending this program for a half-day, Monday through Thursday of each week (16 hours a week), as well as being home-schooled by M.C. In the day program S.C. participates in reading, language arts, handwriting, spelling, and math in both one-on-one and small group settings. Jubilee incorporates a number of the items in the recommendations section of Dr. Emerson’s psychoeducational evaluation. M.C. aligns her homeschooling with what Jubilee is doing in tutoring and works with S.C. approximately 15 hours a week teaching, among other subjects, cursive writing, reading comprehension, social studies, and math.

38. Jubilee works with Aaron Academy as the home school umbrella and all students in the day program take a standardized test at the end of the school year. Jubilee is not licensed, approved, or monitored by the State of Tennessee. Jubilee does not have a licensed speech language pathologist on staff; all of the tutors at Jubilee are certified teachers with college degrees. Patricia Schaefer, the founder of Jubilee, testified that a number of her students have started in the day program after struggling in public schools and that certain of them were able to close their academic gaps while at the day program and go back to public school. Principal McCann testified that Jubilee is on a list of tutoring opportunities that he provides to parents and that Jubilee has had success with some students.

39. Ms. Schaefer testified that as of March 18, 2015, S.C. operated on a third grade level in math, from third grade to fifth grade in reading, and third or fourth grade in language arts. M.C. intends to have S.C. attend Jubilee year round until she is at grade level and then return to public school. S.C. has spent \$5,425 on tutoring for S.C. through March of 2015 (which includes both costs for the tutorial and the day program); the cost of the tutoring on an ongoing basis is \$150/week.

40. M.C. requested in both the January 2013 and September 2013 SAT meetings data regarding S.C.'s progress in RTI but did not actually receive documents at that time. Information about S.C.'s RTI data and interventions were explained to M.C. at the January 30, 2013 SAT meeting, September 30, 2013 SAT meeting, and the April 7, 2014 SAT meeting. M.C. was consistent about inquiring of S.C.'s teachers about S.C.'s progress in RTI. M.C. had multiple meetings and communications with teachers during S.C.'s fourth grade year regarding how S.C. was doing in RTI. While certain teachers at LLE responded to these questions, Ms. Kalish was less than responsive to M.C.'s questions.

41. On March 22, 2014, M.C. emailed Principal McCann requesting RTI and other of S.C.'s school documents. M.C. was given documentation regarding S.C.'s progress in RTI just prior to the April 7, 2014 SAT meeting. M.C. wrote another email on May 22, 2014, to Principal McCann requesting "RTI Tier 3 information," discussed in the May 12, 2014 SAT meeting, for S.C. to provide to Vanderbilt. RCB provided M.C. with seventeen pages of its RTI documentation dating back to S.C.'s third grade year, which included RCB's personal, shorthand notes from its server. Some additional RTI documentation was provided to R.C. in the discovery phase of this matter. During S.C.'s fifth grade school year, RCB sent M.C. a letter explaining the interventions that S.C. would be receiving for the first part of the fifth grade, and documentation of her progress with these interventions in reading and math.

42. Ms. Kipling explained that the criteria for clinically diagnosing a language impairment under the DSM-5 is different than the criteria for determining whether a student has a language impairment under IDEA. When making a clinical diagnosis, anything outside of average on the bell curve (i.e., below standard score of 85) is considered a disorder. Eligibility for a language impairment under IDEA requires, among other things, a standard score of 77 for receptive, expressive, and/or composite (overall) which is lower than the standard score of 84 required for a clinical diagnosis. Ms. Kipling testified that neither individual subtest scores nor composite scores measuring skills areas other than receptive, expressive, or overall language can be used for determining eligibility. Additionally, the State requires at least two measures under this first prong. Ms. Kipling further testified that additional testing or informal data beyond the one score of 77 or below is needed to make sure that the student was not just having an "off day" or was uncomfortable with the examiner or setting. Thus, a clinical diagnosis of a language impairment under the DSM-5 does not equate to a "language impairment" under IDEA. Ms.

Kipling noted that approximately 1 in every 10-15 children seen by her have a clinical diagnosis of language impairment but do not meet the eligibility criteria for a language impairment under IDEA. Under the second prong, the student must also display an adverse impact due to the language impairment.

43. Ms. Kipling testified that, prior to October 2014, there was no evidence that she was aware of in S.C.'s education records of an adverse academic impact as a result of S.C.'s language issues. Ms. Kipling indicated it was a close call, but by the October 2014 eligibility meeting, the additional data in conjunction with prior assessment data met the eligibility criteria for a language impairment. Specifically, S.C.'s drop in TCAP scores from third to fourth grade, particularly in reading/language arts, and the discrepancy between her fifth grade math calculation and math application Benchmark assessments suggested that a deficit in language skills that was also impacting her educational performance. Ms. Kipling testified that unlike in the spring of 2014, when the team had only one out of nine scores to suggest a disability, the team now had the supportive evidence required of a language impairment under the first prong.

44. Charles Hausman is a licensed SLP, assistant professor in the Hearing and Speech Division at Vanderbilt University, with a Level 4 SLP within Vanderbilt's model (the highest level) and has his clinical competency. He is currently an area coordinator at VBWC, where he supervises SLPs at VBWC, including Jennifer Porter, S.C.'s therapist, and performs pediatric assessments and therapy. Mr. Hausman previously worked in Metro Nashville Schools for 32 years as a special education teacher, a lead teacher for speech language services (where he coordinated speech services for all of Metro schools), a special education consultant, principal of a school for children with learning disabilities, and the Special Education Coordinator for all of Metro Schools

45. Mr. Hausman has observed S.C. in therapy on multiple occasions, has reviewed her treatment plan, and has had several conversations with Ms. Porter regarding S.C. He believes that the therapy that Ms. Porter is doing with S.C., including Ms. Porter's treatment plan, is appropriate, but instead of one session, one hour a week, it is Mr. Hausman's opinion that S.C. needs two sessions per week, one hour each session. Mr. Hausman opined that S.C. is rather far behind and that she is going to need a good amount of support for the foreseeable future.

46. Mr. Hausman believes that S.C. is language impaired based on the Tennessee state testing criteria for disability; he further noted that the second prong of the eligibility criteria (adverse educational impact) is to be determined by the IEP team. He is familiar with all of the language testing done by VBWC. Mr. Hausman opined that based on the CELF-4 testing administered by Ms. Zinzilieta in December 2013, S.C. met the Tennessee testing criteria in the area of expressive language impairment because her scores on that test were lower than 1.5 standard deviations below average (standard score of 77 or below). Mr. Hausman testified further that the OWLS testing that was administered by Ms. Porter in September 2014 indicates that S.C. was still language impaired at that time. Even though the September 2013 testing done by Mr. Golson did not support the "cutoff score" for special education in Tennessee (the Tennessee testing criteria), Mr. Hausman thinks this testing suggested that something was wrong with S.C.'s language skills.

47. According to Mr. Hausman, S.C.'s impairment is not minor and he feels it would be unusual for a child with a language impairment like S.C.'s to be determined not to be language impaired just a few months after testing (like the OWLS, indicated she was language impaired). Mr. Hausman opined that the decision as to whether a child is eligible for special

education services is a decision of the IEP team. He further noted that one could be diagnosed with a language impairment under the DSM and not be eligible for an IEP.

48. Jennifer Porter is a licensed SLP and has been working at VBWC since 2010. She also has experience working at a charter school in Metro Nashville Schools where she participates in IEP meetings and performs special education eligibility reevaluations. Ms. Porter had never attended an IEP meeting for any student prior to October 2014 and has never participated in an IDEA eligibility meeting.

49. Ms. Porter has provided S.C. speech language therapy at VBWC since May 2014, one time a week for an hour. She believes that the CELF-4 is a good test for identifying individuals that are language impaired. Ms. Porter opined that the December 2013 testing established that S.C. was language disordered/impaired, and that S.C. still exhibits a language impairment. Ms. Porter administered the OWLS testing (September 2014) 5 months after S.C. began therapy in order to develop a treatment plan for S.C. and to get more information regarding S.C.'s current abilities. The OWLS testing further confirmed to Ms. Porter that S.C. was language impaired. Ms. Porter developed a treatment plan with Mr. Hausman after administering the OWLS, using information from Ms. Zinzilieta's December 2013 testing, her own experiences with S.C. in therapy, as well as information from M.C. regarding issues with which S.C. was struggling in the classroom. Ms. Porter's treatment plan included specific short and long-term receptive and expressive language goals.

50. After receiving Ms. Kipling's report, Ms. Porter and Ms. Kipling discussed S.C.'s testing and the RTI program. Ms. Kipling also suggested that Ms. Porter consult with M.C. regarding S.C.'s needs. Ms. Porter testified that S.C. has made progress in some of the short term goals that Ms. Porter set for her but has not mastered any of them. Ms. Porter believes that S.C.

is functioning below grade level. Ms. Porter opined that in her experience children with language impairments do not have those impairments go away in four to five months.

51. Ms. Porter testified that she is familiar with the Tennessee testing criteria and special education eligibility criteria generally and believes that S.C. qualifies as language impaired because of her test scores and Ms. Porter's perception of the adverse educational impact that S.C. has experienced. Ms. Porter has not communicated with S.C.'s teachers or observed S.C. at LLE. At the time Ms. Porter was deposed for this matter, she thought that the DSM-5 criteria correlated with IDEA eligibility standards.

52. Jovanna Emerson, Ph.D., educational psychologist, administered the Psychoeducational Evaluation to S.C. Dr. Emerson is licensed with a Health Services Provider designation but is not a speech pathologist. As part of her doctoral program, Dr. Emerson did a full time internship in Metro Nashville Schools during which she performed psychoeducational assessments and consultations and ran IEP meetings. In her job at the Currey Ingram Diagnostic Center, Dr. Emerson performs psychoeducational testing, like the one she performed on S.C.

53. Dr. Emerson tested S.C. over three days (November 11, 12, and 17, 2014) and reviewed a number of documents provided to her by M.C., including the WJ-III testing done by Mr. Taylor, in April 2014. Dr. Emerson testified that Mr. Taylor's testing had red flags, such as math reasoning test scores in the borderline range, which, based on S.C.'s poor performance on the TCAP and her poor grades, should have warranted more testing. She opined that Mr. Taylor's testing was not robust. Dr. Emerson did not complete any language testing herself but relied on other testing previously done. In evaluating S.C., Dr. Emerson did not directly communicate with S.C.'s teachers.

54. Dr. Emerson opined that S.C.'s test results establish that S.C. has difficulty with working memory tasks which require verbal or auditory information, and that S.C. performs better when visual information is part of the task. She testified that the gaps in S.C.'s knowledge of language, her uneven cognitive and achievement profile, difficulty with analogies, and difficulty with functional communication are all common with children who have language impairment. Some of Dr. Emerson's recommendations for S.C. are consistent with RCB's proposed IEP.

55. According to Dr. Emerson, S.C. not only meets the DSM-V criteria for language disorder, S.C. also meets the Tennessee testing criteria for language impairment. Dr. Emerson opined that these standards indicate that both Expressive Language and Language Processing scores in the disabling range can meet the Tennessee testing criteria, and that a number of the subtests in S.C.'s VBWC testing meet this criteria. However, Dr. Emerson was unfamiliar with the eligibility requirements for a language impairment under IDEA until she reviewed them after her deposition in this matter; at the time of her evaluation, Dr. Emerson was not considering whether S.C. was eligible for services under the IDEA. Dr. Emerson considers language impairment a lifelong disorder.

56. As to Dr. Gibbs' testing, Dr. Emerson testified that, in her experience, it was not surprising to see that S.C. had made significant increases in some of the tests because certain skills will fluctuate. M.C paid Dr. Emerson \$1,500 for her testing and \$1,000 for Dr. Emerson's time related to her trial testimony.

57. Dr. Denise P. Gibbs, Special Education and Speech-Language Pathology Consultant, ASHA Fellow, CCC/SLP, and Ed.D. Special Education, conducted a Literacy and Language Evaluation with S.C. on February 24 and 25, 2014. She reviewed all of S.C.'s

educational records and spoke to approximately nine different school staff. Dr. Gibbs concluded that S.C. was not language impaired.

58. Dr. Gibbs described RTI as a model that provides interventions prior to a referral for special education in an effort to alleviate or remediate a reading or math problem before identifying a student with a specific learning disability. She believes that the LLE RTI program was more intense than what the State of Tennessee eventually required school districts to implement for RTI. Dr. Gibbs opined that S.C. was making progress through the RTI interventions and the RTI documents do not reflect a basis for S.C. to have been referred for IDEA determination for a suspected learning disability in reading and math. Dr. Gibbs testified that the level of intervention S.C. received via the RTI program during her fourth grade year was probably as intense or more intense than any services S.C. would have received in special education and that RCB did not use RTI to delay or deny special education services to S.C.

59. Dr. Gibbs opined that the fact that a student is making good progress in reading and math due to RTI interventions does not always mean that such progress will translate to the student's grades. She believes that a school district would not be in violation of the Child Find provision of the IDEA when deciding not to evaluate a child diagnosed with a clinical language impairment if the child was making progress with interventions. Dr. Gibbs feels that S.C. was making progress in the RTI program from the third grade through the fifth grade. Although it is not clear to Dr. Gibbs why S.C. began to obtain lower grades starting at the end of her fourth grade year, Dr. Gibbs testified that S.C.'s poor grades could be attributed to other factors that occurred around this point in time, namely being diagnosed with a language impairment. She noted that in her expert experience, it is not uncommon for a child to give up after being "told there's something wrong with them."

60. According to Dr. Gibbs, if the scores used by Vanderbilt to diagnose a language impairment were applied to the Tennessee standards for eligibility, S.C. would not have been called language impaired. She testified that most of S.C.'s non-academic testing has been uneven. Dr. Gibbs opined that low classroom performance is not necessarily indicative of a disability and students who score "below proficient" on the TCAP do not necessarily have a disability. In general, approximately 50% of students in the state of Tennessee fall below proficient on the TCAP.

61. The decision in October 2014 by the IEP team that S.C. was language impaired and eligible for services was deemed to be a good decision by Dr. Gibbs because of the new information (that was not available to the team in May 2014) that was reviewed. Dr. Gibbs was of the opinion that the proposed IEP offered in October 2014, was excellent in terms of addressing S.C.'s needs; she found the goals, accommodations, and services appropriate for S.C. Dr. Gibbs does not think that Jubilee is providing any services/instruction to address a language impairment and are working on S.C.'s academic skills.

CONCLUSIONS OF LAW

1. Petitioners in this case have the burden to introduce evidence that would by a preponderance of the evidence prove the issues should be resolved in Petitioners' favor. 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. Petitioners allege in their Amended Due Process Complaint that RCB failed to offer or provide Extended School Year services. However, no proof was presented on this issue. Therefore, Petitioners have failed to carry the burden of proof by a preponderance of the evidence regarding Extended School Year services

Child Find

3. The Individuals with Disabilities Education Act (IDEA) requires RCB to provide a “free appropriate public education” (FAPE) in the least restrictive environment to all students with disabilities who are in need of special education and related services. Under IDEA’s “child find” provisions, school districts have an obligation to identify, locate, and evaluate all children with disabilities. 34 C.F.R. § 300.111. If a school district fails to satisfy its child find duty or fails to offer a disabled student an appropriate IEP, and if that failure affects the student’s education, then the district has necessarily denied the student a FAPE. Boose v. District of Columbia, 786 F.3d 1054, 1056 (D.C. Cir. 2015).

4. To prove that a delayed evaluation for a student was a procedural violation of IDEA’s child find, a petitioner “must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate.” Bd. of Educ. of Fayette County, Ky. v. L.M., 478 F.3d 307 (6th Cir. 2007). The law does not require that schools evaluate and identify as disabled every student that is having academic difficulties. D.K. v. Abington Sch. Dist., 696 F.3d 233 (3d Cir. 2012). The mere fact that a school district decides not to evaluate a student is not a child find violation. E.g., A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225 (D. Conn. 2008), *aff’d*, 370 Fed. Appx. 202 (2nd Cir. 2010).

5. The Sixth Circuit Court of Appeals has found that a school district did not overlook clear signs of a disability when a student was moderately successful with interventions over approximately a two-year period. Bd. of Educ. of Fayette County, Ky. v. L.M., 478 F.3d at 307. Furthermore, when there are no clear signs of a disability due to success with RTI

interventions, a district does not violate IDEA's child find mandate. See Demarcus v. Bd. of Educ., 2014 U.S. Dist. LEXIS 30932, *15-18 (N.D. Ill. Mar. 11, 2014).

6. Petitioners argue that RCB violated child find by ignoring testing that Petitioners believe showed a language impairment, by ignoring an alleged adverse educational impact resulting from the language impairment, and by delaying and improperly performing an educational evaluation.

7. M.C. testified that she requested testing for S.C. at the suggestion of S.C.'s third grade teacher in October 2012. As a result, at a SAT meeting in January 2013, it was discussed that S.C. was making progress in RTI, testing was not needed and her progress would be monitored. S.C. continued to receive RTI for the remainder of the third grade in math and reading, including small group in the classroom and smaller group pull-out. Her scores showed she could independently do the majority of the reading work assigned during a session and she was in the near average range of students in math. She received C's in language, math, and reading on her final grades. S.C.'s TCAP scores were on the low end of the "Basic" range in Reading/Language Arts and Math. Her TCAP scores in Science and Social Studies were "Below Basic" and "Below Proficient," respectively. At the end of S.C.'s third grade year, about 50 percent of the students attending LLE scored below proficiency levels in reading, which is slightly above average for the State of Tennessee. The RTI data, grades, and TCAP scores all indicate that RCB did not overlook clear signs of disability, S.C. was not in need of specialized instruction and that there was no reason to evaluate. There was no child find violation during the third grade.

8. The issue of testing arose again at the beginning of the fourth grade. On August 14, 2013, M.C. informed Principal McCann that S.C. would be receiving a private language

evaluation at Vanderbilt and asked whether the school preferred to wait to test S.C. until the Vanderbilt testing was completed. Principal McCann responded that RCB would prefer to wait and asked if M.C. agreed with that decision. M.C. responded that it was “perfectly acceptable” to wait to test S.C. until the Vanderbilt assessments were completed. After receiving the initial private evaluation results (Golson testing) and informing RCB that S.C. was scheduled for additional testing, M.C. again agreed with the SAT (September 30, 2013) to wait to evaluate S.C. until RCB received all the testing results. At the meeting, Ms. Kipling opined that none of the scores obtained by Mr. Golson indicated that S.C. would meet State eligibility criteria for special education and related services. Language testing was concluded in December 2013 (Zinzilieta) and Principal McCann and M.C. agreed to delay meeting to allow M.C. to obtain the neuro psychological evaluation results. Once all the results were received in March 2014, RCB scheduled a SAT meeting with M.C. to discuss S.C.’s private evaluation results and obtain consent for an evaluation. On March 21, 2014, M.C. wrote a letter to Principal McCann asking for comprehensive educational testing. The SAT met on April 7, 2014, and RCB obtained M.C.’s written consent for a comprehensive assessment which was conducted within the month. The proof demonstrated that M.C. agreed to wait on private assessment results from August 2013 until March 2014. It was not unreasonable for RCB to wait until the private evaluations were completed before 1) doing its own testing or 2) making an eligibility decision. The evidence does not show that RCB delayed testing/evaluating S.C. or that there was any child find violation regarding the request for testing/evaluating.

9. All of S.C.’s private testing was reviewed and considered by RCB, as well as, discussed at the SAT meetings and the May 2014 and October 2014 eligibility meetings. None of S.C.’s private evaluations caused RCB to suspect a disability. Ms. Zinzilieta and Mr. Golson

diagnosed S.C. with a Receptive/Expressive Language Disorder based on the Diagnostic and Statistical Manual (DSM-IV-TR) and did not base their diagnoses on the eligibility criteria of the IDEA. The criteria for clinically diagnosing a language impairment under the DSM is different than the criteria for determining whether a student has a language impairment under IDEA. Prior to the May 12, 2014 eligibility meeting, RCB performed testing itself and the results did not meet the state standards for eligibility. Testing did not show clear signs of a disability. All the testing was evaluated and taken into account by RCB and there was no child find violation in this regard.

10. S.C. continued with RTI in the fourth grade, as well as, classroom-based strategies and accommodations. In mathematics, Benchmark testing showed that S.C. made significant progress for the year, and although she did not qualify for interventions based on her fourth grade fall reading Benchmark, RCB continued to provide her with Tier 2 and 3 interventions. S.C. received an average of three-and-a-half hours per week of direct intervention in reading in addition to her regular classroom instruction in reading. Ms. McKee, a reading intervention teacher, noted that at no time during S.C.'s fourth grade did she think that S.C. should be referred to special education because S.C. was benefiting from interventions and her progress monitoring data, despite some inconsistencies, never displayed a consistent downward trend. Progress monitoring at S.C.'s instructional level showed that she was making progress. Dr. Gibbs believes S.C. was making progress through the RTI interventions and that the RTI documents do not reflect a basis for S.C. to have been referred for an IDEA determination for a suspected learning disability in reading and math. The level of interventions and S.C.'s progress with interventions during her fourth grade year negate a child find violation. The RTI program was not used as a means to delay testing or determining eligibility for services under the IDEA.

11. Petitioners contend that any RTI progress was not evidenced by S.C.'s grades and TCAP scores. On her fourth grade report card, S.C. received a final grade of D in Language, Math, Reading, and Social Studies, a C in Science, and an A in Art, Music, and Physical Education. It is understandable that a student may not make progress on grade level skills when intervention is focusing on lower level skills. Dr. Gibbs opined that the fact that a student is making good progress in reading and math due to RTI interventions does not always mean that such progress will translate to the student's grades. Some of S.C.'s TCAP scores declined from third grade to fourth, and her fourth grade scores were "Below Basic" on Reading/Language Arts, Mathematics and Science and "Below Proficient" for Social Studies. Dr. Gibbs opined that low classroom performance is not necessarily indicative of a disability and students who score "below proficient" on the TCAP do not necessarily have a disability. In general, approximately 50% of students in the state of Tennessee fall below proficient on the TCAP. The fact that S.C. scored "Below Proficient" on the TCAP is not an indicator of a disability. Also, S.C.'s grades do not evidence an adverse educational impact resulting from a language impairment.

12. Near the end of S.C.'s fourth grade year, on May 12, 2014, (RCB had just concluded its testing) an IDEA eligibility meeting was held. It was determined that S.C. was not eligible for services. In October 2014, S.C. was found to be eligible under the IDEA. As will be discussed below, RCB points to several factors occurring between May and October that support RCB's change of position regarding eligibility. Petitioners argue that these factors that led to a change of eligibility are not significant and that eligibility existed at least in May 2014 or earlier.

13. In order to be eligible to receive special education services in Tennessee, a student must both meet the Tennessee testing criteria for a disability and the disability must adversely impact the student's educational performance. As previously noted, a disability diagnosis

pursuant to the DSM is not the same as the criteria for determining whether a student has a language impairment under IDEA. As of May 2014, private and school testing had resulted in conflicting results. The Golson and school tests did not meet the Tennessee eligibility criteria for language impairment and only one subtest of the Zinzilieta testing met the State eligibility (by one point). In terms of an adverse educational impact, the parties disagree as to whether such existed in May 2014 or earlier (grades, TCAP scores, RTI progress).

14. The change in RCB's position in October 2014 is attributed to several pieces of information not available in May 2014. First, S.C. experienced a decline in TCAP scores from third to fourth grade (a drop from "basic" to "below basic" in Reading/Language Arts and Math). Second, the Aimsweb test indicated a deficit regarding math word problems compared to her math computation ability (not present in Mr. Taylor's April 2014 testing). Third, the Imagine Learning test showed an oral vocabulary and grammar weakness. Additionally, S.C.'s teachers provided information that suggested difficulties with a language impairment, such as S.C.'s sister speaking for her. Petitioners contend that although S.C.'s TCAP achievement level for Math and Reading/Language Arts changed from "basic" to "below basic," her actual scores did not fall significantly in each subject. It is further argued by Petitioners that teacher observations prior to October 2014 established an adverse educational impact.

15. Whether or not S.C. had a language disorder qualifying her for services under the IDEA in May 2014 or earlier is not unequivocal or easily ascertainable. Since S.C. clearly had educational challenges and skill deficits, an argument can be made for the proposition that she was eligible in May 2014, but, based on all of the proof, it is determined that she was not eligible. Professionals disagreed and testing/assessments showed conflicting results. Grades and TCAP scores are a factor to be considered but are not determinative. As discussed above, there

was progress in interventions and RTI. The IEP team appropriately decided that S.C. did not meet eligibility guidelines for special education services in May of 2014. Further, there were significant enough changes/new information, enumerated above, between May 2014 and October 2014 to warrant the IEP team's decision that S.C. did meet eligibility guidelines for special education services in October 2014. As a corollary, the changes/new information between May 2014 and October 2014 were not inconsequential or immaterial such that RCB should have made the October 2014 decision in May 2014.

The October 2014 Proposed IEP

16. The IDEA and Tennessee law require RCB to provide a FAPE to S.C. by developing an Individualized Education Program (IEP) that is both procedurally and substantively compliant. See Bd. of Educ. of the Hendrick Hudson School Dist. v. Rowley, 458 U.S. 176 (1982). The Rowley court developed a two-prong test for determining the appropriateness of a proposed IEP. First, the IEP must be substantively appropriate by offering goals and objectives that are "reasonably calculated to provide educational benefit" to the child. Id. Second, the procedural safeguards of the Act must be provided to the parents, including the right to participate in the development of the IEP and to receive notification and explanation of their rights. Id.

17. An IEP shall include, among other things, (1) a statement of the child's present levels of educational performance (2) a statement of measurable annual goals (3) a statement of the special education and related services and supplementary aids and services to be provided to the child that, to the extent practicable, are based on peer-reviewed research (4) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the nonacademic and extracurricular activities and (5) a statement of how the child's

progress toward the annual goals will be measured. 20 U.S.C. §1414(d)(1)(A). Although minor technical violations of these requirements may be excused, there must be appropriate objective criteria for measuring progress. Cleveland Heights-University Heights City School District. v. Boss, 144 F.3d 391 (6th Cir. 1998).

18. FAPE must be “tailored to the unique needs of the handicapped child by means of an IEP. Rowley, 458 U.S. at 205. The educational benefit must be beneficial and that benefit must be gauged in relation to a an individual child’s capabilities and potentialities. Deal v. Hamilton County Board of Education, 392 F.3d 840 (6th Cir. 2004). An IEP goal has been said to be well-written if it can pass the “stranger test,” meaning that a person unfamiliar with the goal would “be able to implement the goal, be able to assess the student's progress on the goal, and be able to determine whether the student's progress was satisfactory.” Mason City Community Sch. Dist., 46 IDELR 148 (SEA IA 2006). Annual IEP goals should reflect what a student is reasonably capable of performing in a twelve month period, not where the student is on the day the IEP is implemented. See Encinitas Unified Sch. Dist., 56 IDELR 147 (SEA CA 2011). The IDEA does not compel school districts to provide special education and related services that are preferred by a child’s parent. Tucker v. Calloway County Board of Educ., 136 F.3d 495, 505 (6th Cir. 1998).

19. S.C.’s IEP proposed speech language therapy one time per week for 30 minutes in a pull-out setting, as well as, an additional one time per week for 30 minutes in an inclusion setting. The IEP also offered one hour daily of direct academic services in the inclusion setting. Numerous classroom accommodations were also offered (with input from S.C.’s teachers) to address the impact of S.C.’s language impairment on her academics. Three distinct language

goals are specified and described in addition to one goal related to academics-math problem solving.

20. M.C. objected to the proposed IEP. She does not believe that the IEP adequately identified and addressed S.C.'s academic gaps, that the goals were inappropriate and vague, and the provision of language services was insufficient. Petitioners further argue the IEP has shortcoming by contrasting the IEP to the treatment plan of Ms. Porter, which includes both short and long-term goals; Petitioner also criticizes RCB for not consulting Ms. Porter or her plan regarding the proposed IEP.

21. Dr. Gibbs suggested that the inclusion aspect of the IEP was of benefit to the teacher and S.C. Many of the IEP accommodations were consistent with the recommendations proposed by Dr. Emerson. Mr. Hausman opined that S.C. needed to receive language therapy within the curricular setting and needed accommodations to address her needs in the classroom, both found in the IEP. Principal McMann noted that S.C.'s IEP goals were individualized based on S.C.'s present levels of performance obtained through her assessments and evaluations. It is determined that the goals are not vague, general, or set too high for S.C but are reasonable and can be objectively measured to determine progress. The proof demonstrated that the proposed services, accommodations, and goals reflect a consideration of S.C.'s individual capability/potential and are appropriate for S.C. The proposed IEP was reasonably calculated to provide S.C. an educational benefit. The first prong of the Rowley test was met.

22. M.C. was provided a copy of her procedural safeguards and a prior written notice indicating the district's proposal to determine eligibility for S.C. and develop an IEP. M.C. attended the IEP meeting on October 22, 2014, with an advocate to assist her and expressed her opinions, as well as, gave input during the meeting. Petitioners take issue with the fact that a

draft of the IEP was prepared prior to the October 22, 2014 meeting; however such action does equate to predetermination and a denial of meaningful participation. Petitioners also question why neither the school psychologist, Mr. Taylor, nor the private evaluators served as members of S.C.'s IEP team. The IDEA requires that each IEP team meeting include at a minimum the following individuals: (1) the parent of the child, (2) a regular education teacher, (3) a special education teacher, (4) a district representative, and (5) "an individual who can interpret the instructional implication of evaluation results," who may be the same as an individual in (1)-(4). 34 C.F.R. 300.321(a). In addition to these required team members, either the parent or the school can include "individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate." 34 C.F.R. 300.321(a)(6). The IEP team included the proper school personnel. The RCB team members, including the speech pathologist and several of S.C.'s teachers, were well qualified to address the areas of need for a student with a language impairment. S.C.'s tutors and evaluators were allowable but not required team members and RCB had no obligation to include S.C.'s private practitioners when developing the IEP. It is determined that M.C. was provided an opportunity for meaningful participation in the development of S.C.'s proposed IEP. The second prong of the Rowley test was met.

Providing RTI Documents

23. A school district must comply both procedurally and substantively with the IDEA. N.B. v. Hellgate Elementary Sch. Dist., 541 F.3d 1202, 1207 (9th Cir 2008). The inquiry of the courts regarding the provision of FAPE is twofold: 1) has the State complied with the procedures set forth in the Act? and, 2) is the IEP developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits. Rowley, 458 U.S. at 206-207. With regard to procedural matters, a court should "strictly review an IEP for procedural

compliance,” although technical deviations will not render an IEP invalid. Deal v. Hamilton County Board of Education, 392 F.3d 840, 853 (6th Cir. 2004) *citing* Dong ex rel. Dong v. Bd. of Educ. of the Rochester Cmty. Sch., 197 F.3d 793, 800 (6th Cir. 1999).

24. A finding of procedural violations does not necessarily entitle Petitioners to relief. Id. The procedural violation must cause substantive harm, and thus constitute a denial of FAPE, for relief to be granted. Id., Metropolitan Bd. of Pub. Educ. V. Guest, 193 F. 3d 457, 464-465 (6th Cir. 1999). A court need not reach the question of substantive compliance if the court finds procedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents’ opportunity to participate in the IEP formulation process, or that caused a deprivation of educational benefits. M.M. v. Lafayette School Dist., 767 F.3d 842, 852 (9th Cir. 2014 *citing* N.B., 541 F.3d at 1207. In M.M., the Court held that the district violated the IDEA by “failing to ensure that the RTI data was documented and carefully considered by the entire IEP team and failing to furnish the parents with the data, thereby making the parents unable to give informed consent for both the initial evaluation and the special education services C.M. received.” Id. at 853.

25. The IDEA provides the parent of a child with a disability the opportunity to examine all records and participate in all meetings related to the identification, evaluation and educational placement of the child and provision of FAPE to the child. 34 C.F.R. 300.501(a)-(b). However, the IDEA does not address a school district’s obligation to provide parents with general education records or invite parents to general education meetings prior to initiation of the special education process. The court in A.P. v. Woodstock Bd. of Educ. rejected a parent’s argument that “any ‘meeting’ regarding a child who is having difficulties triggered the

procedural protections of the IDEA.” A.P. v. Woodstock Bd. of Educ., 572 F.Supp. 2d 221, 229 (D. Conn. 2008).

26. Petitioners argue that RCB did not provide M.C. with RTI documentation; as a result, M.C. was prevented from advocating for S.C. and meaningful participation, which constitute a denial of FAPE under M.M. v. Lafayette School Dist. RCB counters that pursuant to A.P. v. Woodstock Bd. of Educ. it is questionable as to whether it had to provide RTI documentation, that it did in fact provide or explain the RTI materials, and if there were any violations such violations were merely procedural and did not rise to the level of substantive harm.

27. Although it may be difficult to establish a bright line date when initiation of the special education process occurred in this case thus allowing M.C. the opportunity to examine all records and participate in all meetings related to the identification, evaluation, and educational placement, it seems apparent that such a point did arise during the ongoing discussions between M.C. and RCB as to whether or not S.C. should receive services under the IDEA. Therefore, RCB cannot simply argue that October, 2014 is the starting point for compliance with 34 C.F.R. 300.501(a)-(b).

28. Information about S.C.’s RTI data and interventions was explained to M.C. at the January 30, 2013 SAT meeting, September 30, 2013 SAT meeting, and the April 7, 2014 SAT meeting. Additionally, M.C. had multiple meetings and communications with teachers during S.C.’s fourth grade year regarding how S.C. was doing in RTI. M.C. understood that interventions were being provided and how S.C. was responding to RTI although she believes “data behind the data” was not provided. M.C. also received hard copies of a summary of S.C.’s RTI assessment data and intervention levels for the third and fourth grade and graphs showing

S.C.'s progress with interventions at the April 7, 2014 SAT meeting. During S.C.'s fifth grade school year, RCB sent M.C. a letter explaining the interventions that S.C. would be receiving for the first part of the fifth grade, and documentation of her progress with these interventions in reading and math.

29. This matter is distinguishable from M.M. v. Lafayette School Dist. In that case the IEP team violated a provision in IDEA which requires specific RTI documentation be used for determining eligibility for a student with a specific learning disability (S.C.'s eligibility determination was not for a specific learning disability). Also, that procedural violation caused substantive harm because the student was determined eligible based on data that conflicted with the student's RTI data and the parent was unaware of the student's unique deficits and conflicting scores in the data, while other team members knew such information, causing the parent to be unable to properly advocate for the student. Further, S.C.'s IEP was developed based on her language needs, not her lack of progress with RTI interventions, and any general education data not provided to M.C. was not used for eligibility or IEP programing.

30. RCB may not have provided M.C. with every single school work document of S.C.'s general education interventions and the response to a request may not have been immediate; however, any procedural violation in this regard did not result in substantive harm. M.C. was not precluded from being able to advocate for S.C., there was no loss of educational opportunity or deprivation of educational benefit, and M.C. was able to meaningfully participate.

RCB Evaluation/Testing

31. The scope of what must be included in a comprehensive evaluation is described as follows by the Ninth Circuit:

In conducting the initial evaluation, the school district must "use a variety of assessment tools and strategies to gather relevant functional, developmental, and

academic information” to determine both whether the child is a child with a disability and the content of the child’s IEP.

The agency “shall not use any single measure or assessment as the sole criterion” for determining eligibility.

M.M. v. Lafayette School Dist., 767 F.3d at 852. Under 34 C.F.R. §300.305(a), the IDEA sets forth the following provisions to address existing evaluation data and additional data needed for an evaluation:

As part of an initial evaluation (if appropriate)...., the IEP Team and other qualified professionals, as appropriate, must (1) Review existing evaluation data on the child including (i) Evaluations and information provided by the parents of the child; (ii) Current classroom-based, local, or State assessments, and classroom-based observations; and (iii) Observations by teachers and related services providers; and (2) On the basis of that review, and input from the child’s parents, identify what additional data, if any, are needed to determine (i) Whether the child is a child with a disability...and the educational needs of the child...; (ii) The present levels of academic achievement and related developmental needs of the child; (iii) Whether the child needs special education and related services...; and (iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

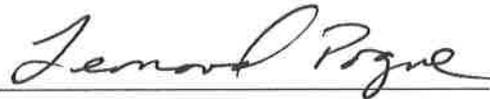
32. Petitioners contend that the two tests that RCB performed in April 2014 were not a “full and individual” evaluation of S.C “in all suspected areas of disability” and therefore a child find violation. As previously noted, the SAT team discussed S.C.’s private evaluations, RTI interventions and assessment data, and teacher observations of her classroom performance prior to obtaining consent for an evaluation. The consent for testing provided that the following areas/procedures were to be addressed: (1) Vision/Hearing Screening, (2) Classroom Observation, (3) Academic Achievement, (4) Language Skills, and (5) Early Childhood Development. Then, a Speech and Language Evaluation was performed by Ms. Kipling, and Mr. Taylor conducted a Psychoeducational Assessment. According to Ms. Kipling, the evaluation

also included interviewing and observing, as well as consideration of the assessments completed by Vanderbilt.

33. The IDEA does not require a certain number of assessments be completed. RCB had an abundance of data available to address S.C.'s language and academic needs which included S.C.'s private evaluations, general education data, and standardized assessments completed by RCB. Petitioners' allegation that RCB failed to fully evaluate S.C. is without merit.

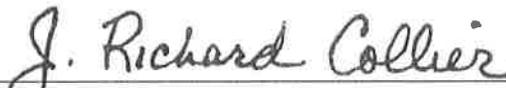
It is **Determined** that Respondent is in compliance with IDEA procedures, has not committed any procedural or substantive violations of IDEA, and Respondent did not fail to timely evaluate or fail to identify S.C. as a student with a disability under IDEA. It is **ORDERED** that the remedies and relief sought by Petitioners are **denied**. Respondent is the prevailing party in this matter.

Entered this the 9th day of December, 2015.



LEONARD POGUE
ADMINISTRATIVE JUDGE

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 9th day of December, 2015.



Richard C. Collier, Director
Administrative Procedures Division

Notice

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

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