

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

IN THE MATTER OF:)	
)	
I.L. and her parent, D.T.)	
)	
Petitioners,)	
)	
vs.)	DOCKET NOS. 07.03-128729J
)	07.03-132792J
KNOX COUNTY SCHOOLS,)	
)	
Respondent.)	

FINAL ORDER

Procedural History

On November 17, 2014, the Petitioners filed a due process complaint against the Knox County Schools (KCS). The Petitioners' core issue is whether KCS' proposed placement for the Petitioner I.L. of three hours in a general education setting and four hours in a special education setting, as proposed in an Individualized Education Program (IEP) dated October 29, 2014, violates the Individuals With Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 *et. seq.*; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 *et. seq.*; and/or the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. § 1211 *et. seq.*, as the placement is not the least restrictive environment (LRE) as required by law. Ultimately, this due process case involves the issue of a free and appropriate public education (FAPE) in the LRE for I.L.

The administrative hearing to consider the issues raised in this due process complaint was held May 20-22, June 16-18, and June 24, 2015, in Knoxville, Tennessee, before Administrative

Judge Thomas G. Stovall, assigned by the Secretary of State, Administrative Procedures Division, pursuant to Tenn. Code Ann. § 49-10-606 and Tennessee State Board of Education Rule No. 0520-01-09-.08. Mr. Justin Gilbert and Ms. Jessica Salonus represented the Petitioners, I.L and her mother Donna Taylor. Ms. Susan Crabtree and Ms. Amanda Morse, Deputy Law Directors with the Knox County Law Director's Office, represented KCS. The parties submitted proposed findings of fact and conclusions of law to the undersigned Judge on July 31, 2015.

On August 20, 2015, prior to an order being entered on the merits of the first due process complaint, the Petitioners filed a second due process complaint.¹ By Order of September 3, 2015, the two due process complaints were consolidated into one proceeding. The hearing on the second due process complaint was initially scheduled for October 29-30, 2015, but upon motion of KCS the hearing was continued to December 14-16, 2015. On October 1, 2015, the Petitioners filed a Motion For Summary Judgment in regard to the second due process complaint. During the course of a conference call held October 30, 2015, the parties were informed that the Motion For Summary Judgment would be granted and the hearing scheduled for December 14-16, 2015, would be cancelled. The parties were further informed that the written order granting the Motion For Summary Judgment would be incorporated into the final order issued on the merits of the first due process complaint. Accordingly, this Final Order will dispose of **both** due process complaints filed by the Petitioners.

After due consideration of the entire record filed in both proceedings it is determined that the Petitioners have **failed to carry their burden of proof** as to the allegations contained in the **first due process complaint** and that matter should be dismissed. KCS is determined to be the

¹ By Order of October 7, 2015, the Petitioners were directed to file an amended due process complaint. This Amended Request For Due Process Hearing was filed on October 19, 2015

prevailing party in that matter. As to the **second due process complaint, summary judgment has been granted in favor of the Petitioners** and they are determined to be the prevailing party in that proceeding. The relief contained in this Final Order addresses both due process complaints.

First Due Process Complaint

FINDINGS OF FACT

1. I.L. is an 11 year old girl with Down Syndrome. She is certified under the IDEA as intellectually disabled. An assessment performed in May 2015, by Dr. Angela Reno, a clinical psychologist, showed that I.L. has an I.Q. in the 40s which is below the 1st percentile. According to Dr. Reno, by the time an individual reaches the age of nine or ten years old their intellectual capabilities, as measured by the I.Q. level, are set and vary little as they age. Dr. Reno described I.L. as performing in the moderately intellectually disabled range. Her achievement fell at the kindergarten to first grade level.

2. I.L. began school in the KCS school system in the 2007-2008 school year as a three year old. Her recommended placement was the KCS three year old Pre-K program at Brickey-McCloud School (Brickey-McCloud). She was in a pre-school comprehensive development classroom (CDC) for the entire school day, which consisted of 3.5 hours. I.L. missed 37 days of school during the 2007-2008 school year.

3. The following school year, 2008-2009, an IEP was developed for I.L.'s four year old Pre-K program. The placement was also to be in a CDC classroom at Brickey-McCloud for the entire school day (3.5 hours). I.L.'s mother, Ms. Taylor, was dissatisfied with this educational placement and kept I.L. home for the year. As a result, I.L. did not attend school of any type in the 2008-2009 school year.

4. I.L. was scheduled to begin kindergarten in the 2009-2010 school year. The IEP team at Brickey-McCloud met on September 11, 2009 to develop an IEP for the upcoming year. The IEP called for I.L.'s placement to be in a special education setting where she would receive all of her academic instruction. Despite the fact that Ms. Taylor agreed to the IEP, she withdrew I.L. from Brickey-McCloud after only 21 days to homeschool her. I.L. actually attended school only four days during this 21 day period. Ms. Taylor homeschooled her daughter without an official curriculum for the balance of the 2009-2010 school year. There is no educational data for I.L. from that time period.

5. The Tennessee Virtual Academy (TNVA) is a computer based school that exclusively utilizes uses an on line curriculum. Ms. Taylor initially stated that I.L. attended first grade in the 2010-2011 school year through TNVA. Upon learning that TNVA did not begin operation until July 1, 2011, Ms. Taylor then conceded that I.L. did not attend school that year but was again homeschooled without an official curriculum. As was the case for the preceding school year, there is no educational data for the 2010-2011 school year.

6. For the 2011-2012 school year, Ms. Taylor contended that her daughter attended TNVA. However, no IEP or other educational documentation was presented that establishes what if any schooling I.L. had that year, whether it be from TNVA or homeschooling.

7. In August 2012, Ms. Taylor moved to Hamilton County, Tennessee for the purpose of enrolling her daughter in a public school there that she believed would be a good fit for I.L. This was to be I.L.'s second grade school year. I.L. enrolled at Normal Park Museum Elementary School on or about August 7, 2012. An IEP was developed by the Hamilton County school personnel based upon a thorough assessment that included both testing and extensive classroom observations. The assessment included a lengthy description of I.L.'s behavior in a

classroom setting. I.L. frequently exhibited disruptive and inappropriate behavior. She would throw objects on the floor and at other students, strike other students, run away from the table where she was seated with an adult, and climb on furniture. She attempted to touch the chests of some of the female adults. During the assessment, I.L. would often say “boobs” or “lipstick” and made loud noises including animal sounds. In the report prepared by June Cooper, a school psychologist for Hamilton County, I.L.s social skills were described as “seriously immature” and her adaptive behavior skills as “significantly impaired.” I.L.’s intellectual ability score was found to be in the “significantly below average range.”

8. An IEP was completed and signed by Ms. Taylor and the Hamilton County school personnel on September 13, 2012. The IEP placed I.L. in a special education setting for 5.25 hours a day, with 1.75 hours per day in a general education classroom with an aide. All of her academic instruction was to be received in the special education setting. Again, not satisfied with this placement, Ms. Taylor removed I.L. from the Hamilton County Schools on or about September 25, 2012. There are no educational records for the fall 2012 semester. Ms. Taylor then enrolled I.L. in TNVA sometime in January of 2013, where she completed the second half of the 2012-2013 school year.

9. I.L. attended TNVA for the 2013-2014 school year. Pursuant to the IEP developed by TNVA and agreed to by Ms. Taylor, I.L. was to be instructed using the special education curriculum known as “ULS.”

10. According to Ms. Taylor, by January 2014, she had decided to enroll I.L. in a traditional school for the following school year so her daughter would have the benefit of socializing with her peers. Despite this fact, on April 14, 2014, a new IEP was developed by TNVA and agreed to by Ms. Taylor for the 2014-2015 school year which continued I.L.’s

placement at TNVA and being instructed by use of the ULS or special education curriculum. However, just six weeks later on May 27, 2014, the TNVA IEP team met again at Ms. Taylor's request, and changed I.L.'s curriculum to the general education model or "OLS," and deleted all references to the ULS curriculum. The notes from the IEP team indicate that the TNVA members of the IEP team expressed concern that I.L. would be frustrated by the general education programming and recommended trying this curriculum for only one grading period at the beginning of the next school year.

11. On or about August 11, 2014, I.L. entered KCS and was enrolled at West Hills Elementary School (West Hills). It must be noted that over the previous six years, I.L.'s only experience in a traditional school setting had been four days at Brickey-McCloud in the fall of 2008 and approximately six weeks in Hamilton County in the fall of 2012. The balance of the six year period I.L. was home with her mother, with records from TNVA only for the 2013-2014 school year to establish that she was receiving school instruction of any type. Because of her lack of an educational background, I.L. entered KCS without the social and learning skills a child typically acquires in the pre-school or kindergarten/first grade years. Despite the paucity of her educational experience, I.L. was enrolled in the third grade at West Hills upon the request of Ms. Taylor.

12. IEP team meetings were held at West Hills on August 11 and 12, 2014. On August 12, the IEP team accepted the last TNVA IEP from May 27, 2014, with slight modifications made to the service numbers to reflect a five day a week program instead of the TNVA four day a week program. The six educational goals contained in the TNVA IEP were accepted by KCS. Pursuant to the accepted IEP, I.L. was to be placed in a general education classroom with non-disabled peers for the entire school day except for a 20 minute daily session

with a special education teacher. In addition, KCS recommended that a one to one paraprofessional/teaching assistant would be in the general education classroom with I.L. as additional support. KCS also recommended evaluations for occupational therapy (OT), vision and language interventions. All of these changes and recommendations were agreed to by KCS and Ms. Taylor. The IEP team agreed to come together again in a few weeks to develop a new IEP.

13. I.L. was placed in the general education classroom of Kari Matthews at West Hills. Ms. Matthews is an experienced third grade teacher. One of the reasons that I.L. was placed in Ms. Matthews' class was because she had a child with Down Syndrome in her class the previous school year. Elena Smith, a special education teacher, was assigned as I.L.'s case manager, to monitor and administer her special education services of 20 minutes a day. As part of her duties, Ms. Smith supervised and trained the paraprofessionals who worked with I.L. while she was at West Hills. As the process of hiring a full-time dedicated paraprofessional is intensive, I.L. was initially assigned paraprofessionals pulled from other special education rooms. These paraprofessionals were already trained and had daily meetings with Ms. Matthews and Ms. Smith to ensure consistency in the programming. For the first two weeks of school, due to scheduling and lunch breaks, approximately three paraprofessionals a day rotated into the class with I.L. Additionally, while at West Hills, I.L. was assessed for both vision services and occupational therapy services.

14. As she routinely does with all her students, Ms. Matthews gave I.L. several informal assessments during the first days of school. Based upon Ms. Matthews' assessments, I.L. was placed with the lower level reading group during small group instruction. Ms. Matthews, Ms. Smith and her team extensively modified I.L.'s daily classwork using the third

grade Tennessee curriculum and scaffolded the work down to I.L.'s learning level in order to help her meet the six goals contained in her IEP.

15. Almost immediately it became apparent to Ms. Mathews, Ms. Smith and others at West Hills not only that I.L. was not performing at the present levels of performance (PLOPs) documented in her TNVA IEP, but that her behavior was detrimental to her learning and the learning of other students in the class. Numerous KCS personnel observed I.L. repeatedly engage in extremely disruptive and inappropriate behavior such as: grabbing at the crotch and breast area of female teachers and aides, sometimes to the extent of causing bruising; pulling up the skirt of a teacher and the top of a female student; hitting and spitting at staff and other students; pulling the hair of other students; throwing objects; elopement; frequently shouting out words such as "big anus," "big titties," and "big boobies;" and referring to an African-American staff member as "big chocolate." A few parents of other students in the classroom asked that their children be transferred to another classroom because of I.L.'s behavior.²

16. As with all her students, Ms. Mathews initially placed I.L. in a cooperative learning group with three other children in a square seating arrangement. However it became readily apparent to Ms. Mathews that this seating arrangement was impossible to manage due to I.L.'s disruptive behavior. Ms. Mathews initially pulled I.L.'s desk a slight distance away from the other students in the square. Ms. Mathews and other KCS staff attempted several other accommodations, such as but not limited to visual cues and moving her paraprofessional closer to her to help I.L. properly identify her own personal space and the space of others. When these changes failed to correct I.L.'s behavior, Ms. Mathews and other staff create a preferred seating area for I.L. along the side of the classroom. This area was approximately two feet away from

² It is noted that the behavior I.L. exhibited at West Hills is quite similar to the behavior described by the Hamilton County school psychologist based upon her observations of I.L. in August 2012 as described in Finding of Fact No. 7 above.

other children and prevented I.L. from being able to touch children inappropriately or to run outside. This space had two work areas for her and her aide and was also supplied with all of the materials needed for I.L. such as pre-modified classwork and reinforcers. I.L. was still able to see and be seen by Ms. Mathews and her classmates, she was not placed in a visibly isolated area. However, despite all of these modifications, sometimes I.L.'s behaviors were so extreme and her needs so time consuming that Ms. Matthews had other teachers and principals from West Hills come in to her classroom and teach small groups of the other students so that they could receive their required instruction. At times there would be as many as four staff members in the classroom to provide instruction to the entire class, including Ms. Mathews, I.L.'s aide, and two other persons, all as a result of the disruptive nature of I.L.'s behavior. Primarily because of her behavior, Ms. Mathews believed that I.L. received little or no educational benefit from her schooling at West Hills.

17. Ms. Mathews discussed I.L.'s behavior with Ms. Taylor on an almost daily basis, either before or after school. Ms. Taylor told Ms. Mathews that her daughter did not exhibit similar behaviors at home.

18. Numerous members of the KCS professional staff worked with Ms. Mathews, Ms. Smith and other West Hills personnel in an attempt to develop strategies to manage I.L.'s behavior. These persons included Rebecca Burks and Dr. Clovis Stair. Ms. Burks is a Behavior Liaison with KCS who has a master's degree in school counseling with a focus on behavior management. Dr. Stair is a clinical psychologist and the Psychological Services Supervisor for KCS.

19. Ms. Burks received a referral to work with I.L. on August 17, 2014, only a few days after I.L. began school at West Hills. Typically upon an initial referral, Ms. Burks silently

observes a child in the classroom setting in an attempt to determine target behaviors and antecedents to behaviors in order to decide what behavior strategies might be useful. However, I.L.'s behaviors were so extreme that Ms. Burks immediately stepped in and often operated as I.L.'s paraprofessional in order to model appropriate behavior strategies for other KCS staff and to collect the best information regarding the behavior. Ms. Burks stated that despite the fact that all of I.L.'s paraprofessionals were special education trained staff they were having difficulty with I.L.'s intense behaviors. Ms. Burks visited West Hills and observed I.L. on 11 separate occasions between August 18 and September 10, 2014. These observations would last from three hours to a full day. In addition to her personnel observations, Ms. Burks also reviewed data kept by the West Hills staff regarding I.L.'s behavior and the frequency of incidents. Ms. Burks stated that she personally stopped wearing a dress on the days when she was working with I.L. so that I.L. would not pull her dress up.

20. Ms. Burks determined that I.L.'s behavior was attention seeking, and not frustration with the difficulty of school work or the avoidance of that work. Ms. Burks observed "frustration" in I.L. when she wanted attention and was not receiving it, such as when two adults were briefly having a conversation without her.

21. Ms. Burks worked with Ms. Mathews and Ms. Smith in developing strategies and accommodations to work with I.L., including the re-arrangement of her seating and work areas as described in Finding of Fact No. 16. Other strategies she employed included moving I.L.'s transitions ahead of other students so that she would be less distracted, setting up visual transitions in academic work, moving her supplies to bins readily at hand for the paraprofessionals so that tasks could be easily adapted or changed, movement breaks, clearly defining expectations of safe hands and safe feet, structured play on the playground, a clearly

laid out schedule, extremely modified school work and constant practice of social skills. Despite all of these strategies employed by Ms. Burks and the West Hills team there was no improvement in I.L.'s behavior.

22. Dr. Stair was involved in the development of the IEP developed by KCS and Ms. Taylor after the enrollment of I.L. at West Hills in August 2014. Dr. Stair reviewed I.L.'s previous educational records and past IEPs. Dr. Stair relied heavily upon the Hamilton County assessment and evaluation prepared in support of the IEP completed there on September 13, 2012. Dr. Stair considered this to not only be the most current evaluation, but also believed the evaluation to be extremely thorough and informative.

23. In addition to her involvement in the development of the initial KCS IEP at West Hills, Dr. Stair made numerous visits to the school to personally observe I.L. in the classroom. Dr. Stair observed the same behaviors that have been extensively discussed above that in her opinion were extremely disruptive to the classroom. On some of her visits Dr. Stair would assist in teaching small groups of children their regular curriculum so that Ms. Mathews could focus on I.L. Dr. Stair stated that in her professional opinion I.L. was not misbehaving due to frustration over her IEP goals being too high, but rather that her behavior was driven by a desire for attention. Dr. Stair stated that I.L.'s behaviors occurred not just in the classroom but also in low stress situations such as recess and lunch.

24. After approximately one month at West Hills, the IEP team met on September 12, 2014, to discuss a functional behavior assessment (FBA) for the purpose of developing a behavior intervention plan (BIP). Ms. Taylor agreed to the FBA on that date, but I.L. stopped attending school shortly thereafter. I.L.'s last day at West Hills was on or about September 17,

2014.³ I.L. attended school at West Hills for a total of 26 days. Ms. Taylor moved in with her parents and I.L. was enrolled at Brickey-McCloud, the zoned school for her new residence, on or about October 3, 2014.

25. Despite her enrollment at Brickey-McCloud on October 3, I.L. did not actually begin attending the school until November 17, 2014. Ms. Taylor contended that she did not want I.L. to begin school at Brickey-McCloud until an educational program was agreed upon. Ms. Taylor believed that part of I.L.'s problem at West Hills was due to the fact that the school had not adequately prepared for her daughter by developing a program with appropriate support systems in place. She was most distressed by the frequent turnover in classroom aides assigned to I.L. while at West Hills. To avoid this situation happening again, Ms. Taylor wanted the personnel at Brickey-McCloud to have an appropriate program designed and ready to implement before I.L. entered school. Ms. Taylor contended that KCS consented to her daughter not attending school while the program was developed. While KCS, including Dr. Stair, deny that it acquiesced to I.L. not attending school from October 3 until November 17, 2014, KCS did nothing to address the issue of her lengthy absence from school.

26. Because Ms. Taylor removed I.L. from West Hills before a new IEP could be developed and agreed upon, the IEP team meetings moved to Brickey-McCloud after I.L.'s enrollment in that school. A total of five IEP meetings were held at Brickey-McCloud during the month of October. These meetings were held on October 3, 7, 20, 24 and 29, 2014. Because the Brickey-McCloud staff had no experience with I.L., personnel from West Hills attended the IEP meetings to assist the Brickey-McCloud staff in the development of the IEP by sharing their

³ The specific reason that Ms. Taylor removed I.L. from West Hills is somewhat unclear. During her testimony she suggested that it was because of an allegation of abuse that was made against her to the Department of Children's Services (DCS) that she assumed came from personnel at West Hills. No substantiation of the abuse allegation was made by DCS.

knowledge about I.L. gained from working with her while she attended West Hills. Dr. Stair also attended the majority of the IEP meetings. The five IEP meetings were attended by Ms. Taylor and her advocates.

27. Over the course of the five October IEP meetings, considerable discussion ensued over all aspects of the proposed IEP. In addition to academics the IEP team discussed I.L.'s classroom behaviors and the need for an FBA which would eventually result in the development of a BIP.

28. There was considerable disagreement over I.L.'s PLOPs. The PLOPs contained in the existing August IEP had been incorporated from the IEP developed by TNVA. The PLOPs in the TNVA IEP were essentially those reported by Ms. Taylor based upon her observations of I.L. while working with her at home. The TNVA PLOPs for I.L. indicated that she was average to outstanding in almost all categories. However, based upon the data collected from multiple sources, the KCS personnel were of the belief that the PLOPs contained in the existing IEP were inaccurate. This data included not only I.L.'s school work and behavior records from West Hills, but STAR and Brigance Assessments, vision and OT evaluations, as well as the Hamilton County psychoeducational evaluation and personal observations conducted pursuant to the development of the IEP in September 2012. KCS personnel believed I.L.'s PLOPs to be in the pre-K to Kindergarten level. The PLOPs addressed areas such as prevocational levels, academic readiness for language, word recognition, sight word vocabulary, math application/calculation, and self-help skills. Ms. Taylor believed her daughter's ability was much higher than did the KCS personnel. Therefore after extensive discussion and negotiation it was agreed to by the IEP team that I.L. would need to "demonstrate" proficiency in the 13 new

goals set forth in the new IEP. All members of the IEP team were in agreement that the six goals contained in the August 12, 2014 IEP were too difficult and unrealistic.

29. By the time of the IEP meeting on October 29, 2014, the IEP team had agreed upon the 13 new goals with supplemental aids and services, as well as the FBA and development of a BIP. However, the parties could not agree upon I.L.'s placement. The KCS staff uniformly believed that I.L. was receiving little educational benefit from her current placement and the 13 new goals could not be implemented with the mere 20 minutes a day of direct special education services that I.L. was receiving pursuant to the existing IEP. KCS believed that I.L.'s behavior was such that her teachers and aides were spending an inordinate amount of time managing her behavior rather than providing academic instruction. Dr. Stair, Ms. Burks and other KCS staff believed that I.L.'s behavior was primarily attention seeking. As such, in their opinion the best way to address such behavior was to ignore the behavior rather than react to it. KCS staff believed it was much easier to ignore disruptive behavior in a special education setting with fewer children than it was in a general education setting where the learning environment for other students was being adversely impacted. In the regular education classroom I.L. received the attention she sought by her misbehavior when staff immediately responded so as to limit the impact her behavior had on the other students. Based upon its view of how best to manage I.L.'s behavior, the KCS team proposed that I.L.'s school day be split between general education and special education. I.L. would receive three hours per day of general education services with a full-time paraprofessional providing one on one support, and four hours per day of direct special education services. The four hours per day of direct special education services would be used to address academic, behavior, social, communication, and occupational and adaptive skill deficits while still allowing three hours per day in a general education setting for I.L. to model her non-

disabled peers and generalize the skills she would be learning in special education. The three hours of general education environment would include both academic instruction and non-academic activities such as lunch, recess, art and gym. The KCS staff also proposed that I.L. would start and end each day in the general education classroom in order to help her acclimate to the environment. After much discussion and disagreement Ms. Taylor would not agree to the 3/4 split and insisted that I.L. remain in the general education classroom throughout the day minus the 20 minute special education pull out.

30. The October 29, 2014, IEP meeting ended when Ms. Taylor demanded that KCS issue a prior written notice of the proposed change in I.L.'s placement, which KCS did on November 4, 2014. Ms. Taylor and I.L. filed a due process complaint on November 17, 2014. I.L. began attending Brickey-McCloud for the first time the same day. KCS has continued the implementation of the last agreed upon IEP from August 12, 2014 at West Hills.

31. When I.L. began attending Brickey-McCloud in mid-November she was placed in the third grade general education classroom of Barbara Cunningham. Melissa Halter, a special education teacher at Brickey-McCloud, was I.L.'s case manager who oversaw and administered I.L.'s IEP. Ms. Halter worked directly with I.L. as both her teacher in the special education setting 20 minutes per day as well as with periodic visits to Ms. Cunningham's class. Ms. Halter, Ms. Cunningham and other special education teachers spent time every day modifying all of the assignments I.L. would be presented with at school. Her school work was scaffolded down to I.L.'s ability level so that she would not become frustrated. Both Ms. Halter and Ms. Cunningham observed I.L. engaging in daily episodes of misbehavior similar to what has been thoroughly described above, such as throwing objects and spitting at other students, pulling the hair of students, and hitting and kicking teachers. Both Ms. Halter and Ms. Cunningham are in

in agreement that the proposed 3/4 split for I.L. is appropriate. Ms. Halter believes that I.L.'s behavior would be much better managed in a special education setting with three teachers and eight students than in a general education classroom with one teacher, one aide and 19 students.

32. Kelton Sweet is a Certified Behavior Liaison with KCS. Mr. Sweet was assigned to assist in the development of an FBA and a BIP for I.L. Even though Ms. Taylor had granted permission for an FBA at West Hills September 12, 2014, Mr. Sweet did not have an opportunity to actually observe I.L. until December 9, 2014, due to I.L.'s absence from school and holidays. Thereafter, Mr. Sweet observed I.L. in various school settings approximately twice a week as part of his process in developing an FBA and a BIP. He continued to come to Brickey-McCloud to help the staff manage I.L.'s behavior and to provide additional training for the staff specific to her needs. In addition to his observations, Mr. Sweet spoke with Rebecca Burks, I.L.'s previous Behavior Liaison. He also reviewed data collected by both the West Hills staff and the Brickey-McCloud staff.

33. Consistent with other KCS professionals, it was Mr. Sweet's opinion that I.L.'s behavior was not caused by frustration with too difficult school work, because KCS staff eliminated almost all chances for her to become frustrated. To the contrary, Mr. Sweet believed that I.L. was seeking attention from adults. In the general education classroom, Mr. Sweet observed countless incidents of elopement away from staff, inappropriate interactions with both staff and students such as grabbing, groping or touching, as well as inappropriate language. Mr. Sweet agreed with other KCS personnel that observed that the environment of the general education classroom and the decorum required in such a classroom contributed to I.L.'s misbehavior by providing her with an audience and instant reaction from adults. Based upon these observations, Mr. Sweet prepared intervention strategies for all staff working with I.L. to

use while the FBA was being developed and the BIP potentially implemented. Mr. Sweet met with Brickey-McCloud staff working with I.L. to discuss his strategies. Mr. Sweet also received input from Ms. Taylor as he developed the FBA and BIP.

34. Despite the impasse between Ms. Taylor and KCS over the proposed 3/4 split in I.L.'s school day and the resulting due process complaint filed by Ms. Taylor on November 17, 2014, the IEP team continued to meet in an attempt to agree upon a BIP. Due to the Thanksgiving and Christmas holidays, the IEP team did not meet again until January 2015. The IEP team met four times in January and February, the last being on February 5, 2015. Mr. Sweet attended all four of these IEP meetings. During these meetings, Ms. Taylor and her advocates insisted on discussing the possibility of adopting the 13 proposed goals despite the KCS staff's belief that the new goals could not be implemented in the current stay put placement from the August 2014 West Hills IEP which had I.L. in a general education classroom all day but for 20 minutes in a special education classroom. The KCS staff continued to insist that the goals had no relation to I.L.'s behavior issues.

35. The final meeting on February 5, 2015, was extremely emotional and ended in an impasse. Both Ms. Taylor and Ms. Halter became very upset as the participants continued to disagree about the implementation of the new 13 goals. After a period of time Ms. Halter became so emotional that she left the meeting and did not return. After Ms. Halter's departure from the meeting, Dr. Stair abruptly ended the meeting despite the objections of Ms. Taylor and her advocates. Dr. Stair refused to reconvene the IEP meeting on another date because people were "too miserable" and the meeting "was not being productive." Dr. Stair testified that by that point it was apparent the parties were not going to be able to resolve their differences through further IEP meetings, "I knew somebody would come and help us to know how we're going to

handle this; what is the resolution going to look like.” Presumably the “somebody” Dr. Stair was referring to was the administrative judge who would preside over the due process hearing.

36. Prior to the ending of the IEP meeting on February 5, 2015, a proposed BIP was presented by Mr. Sweet to the IEP team and provided to Ms. Taylor. This BIP was never agreed to and signed by Ms. Taylor. According to Ms. Taylor, it was her intention to provide the IEP team with her signed copy of the BIP at the next IEP team meeting but one was never scheduled at the direction of Dr. Stair. Despite the lack of a formal adoption and implementation of the BIP, according to Mr. Sweet many of the strategies contained in the BIP were already being used by the staff in working with I.L. to the extent possible given her placement in the general education classroom.

37. David Rostetter, Ed.D., testified as an expert on behalf of KCS. Dr. Rostetter is an expert regarding procedures in IDEA and Section 504, least restrictive environment (LRE), inclusion and inclusive practices, public policies and standards of acceptable practice and behavior. Dr. Rostetter, who is a retired professor of education at St. John Fisher College in Rochester, New York, has testified as an expert witness in numerous cases around the country, in most of those cases on behalf of parents and their children. He has also been retained as a consultant by school districts on best practices and has served as a court appointed monitor. Dr. Rostetter is currently serving as the monitor appointed by a federal judge to oversee the implementation of a consent decree involving the Los Angeles Unified School District in California.

38. As is his practice in all cases where he is approached by a litigant seeking his services as an expert, prior to determining whether or not he would testify on behalf of KCS in this case Dr. Rostetter was given an opportunity to review all relevant materials. Dr. Rostetter

worked with I.L. and he personally observed I.L. on six different occasions. Dr. Rostetter included in his analysis whether the proposed IEP was reasonably calculated to offer I.L. meaningful educational benefit.

39. In addition to his testimony, Dr. Rostetter prepared an expert report. In this report Dr. Rostetter offered four opinions relevant to the analysis of this case, the first of which is as follows:

The IEP developed on August 12, 2014 is the current operation IEP for this student. However, that IEP is deficient and does not provide a sound basis for the provision or availability of a free appropriate public education to I.L.

In support of this opinion, Dr. Rostetter believed that I.L. possessed unique characteristics making her educational experience in the school setting a challenge, most fundamentally was her lack of exposure to “normalcy” whereby children learn from each other. Dr. Rostetter noted that I.L. had not been in a traditional school since pre-school in 2008. Her only educational experience since 2008, other than a very brief period of attending school in Hamilton County in 2012, was home schooling or TNVA cyber instruction, where she was not in a classroom with her peers but with her mother as her primary teacher. This lack of exposure to other children and adults impacted I.L.’s rate of acquisition of both academic skills and her and social/emotional abilities. Not surprisingly in Dr. Rostetter’s view, I.L.’s behavior required almost immediate attention upon her arrival at West Hills in August 2014. He believed the KCS staff immediately took appropriate steps in an attempt to manage I.L.’s behavior by making accommodations and giving her support so that she could derive some educational benefit from her placement. Dr. Rostetter testified that I.L., “... was engaging in behaviors that were not only disruptive for her learning, but they were apparently disrupting the learning of others because of the distractions, and she was also engaging in behaviors that raised safety concerns.” Dr. Rostetter observed and

described I.L.'s inappropriate behavior that has been discussed extensively above, resulting in KCS staff exerting an inordinate amount of resources to merely control I.L.'s behavior. Dr. Rostetter described I.L.'s last agreed upon placement in a general education classroom, Ms. Taylor's desired "inclusion" placement, to be wholly inadequate and actually delaying and denying benefits to the child.

40. Dr. Rostetter's second opinion was as follows:

KCS' efforts to engage the family in the process of developing an IEP from which I.L. could derive benefits have yielded with meetings in which the parent and her advocates have insisted upon maintaining the current placement thereby ensuring an education placement from which this child cannot derive benefit.

In support of this opinion, Dr. Rostetter noted that prior to the proposed 3/4 placement by KCS that is the nexus of this dispute, KCS provided supplemental aids and services to support I.L.'s current educational placement while at West Hills. In his opinion, KCS has, "...exhausted all of the reasonable expectations and gone way beyond what anything in the research of literature I would say would be reasonable." Dr. Rostetter agreed that the new proposed 13 goals were a significant improvement over the six goals in the existing IEP. However a crucial aspect is the implementation of the goals in an environment where I.L. will derive some benefit, where her rate of acquisition issue and her general issues can be addressed. Dr. Rostetter believed that one must view I.L. as to her collective needs and the collection of demands from all of the goals and not one goal at a time. To meet her collective needs, of which her behavior is a primary component, Dr. Rostetter believed that I.L. will need one on one instruction in a structured environment. Dr. Rostetter believed the proposed 3/4 split of the school day to be acceptable. He testified that in the three hour general education placement, "...we can take what we are teaching her and we can test her generalization and we can test the application of those goals,

and as we see how she's addressing those in the environment, in the general education environment, we can come back and modify her special education instruction and work with her until in that three hour period, she becomes proficient, more proficient as a learner and more proficient as a member of that community, and then that period of time can be expanded and expanded and expanded just like they've done with other children with Down Syndrome..." Dr. Rostetter rejected the argument put forth by the Petitioner's expert⁴ that one can assess the viability of I.L.'s total inclusion in the general education setting by considering whether each of the 13 new goals was attainable on an individual basis. "[T]hat discussion about one at a time goal thing and a very academic abstract discussion about general education setting, a general education setting, well we're going to make it available, general education, but the idea that those goals can yield benefit in her current educational placement, I believe is absurd."

41. Dr. Rostetter offered this third opinion:

I.L. engages in behaviors that are persistently and significantly disruptive to opportunities to learn and are persistently and significantly disruptive to the opportunities of others to learn; and, these behaviors pose a harmful effect to staff and students in her current educational placement.

Dr. Rostetter believed that I.L. requires constant supervision, and she needs modeling and teaching of appropriate school behavior. I.L.'s behavior cannot be ignored and the dramatic interventions needed are simply not possible in her current placement. Dr. Rostetter stated, "She's going to be a young adult really, really quick. She needs social and emotional development and she needs teaching and modeling on what appropriate behavior is, and then she needs opportunities to practice that behavior with her non-disabled peers...behavior is the cornerstone of this case." Dr. Rostetter believed that the opportunity to teach I.L. appropriate behavior is being denied by Ms. Taylor's refusal to consider any alternative placement to the

⁴ Julie Causton, Ph.D

current one where she is currently behaving so badly. He stated that the current placement is, "...just incorrect for her. It's wrong."

42. Dr. Rostetter offered his fourth and final opinion as follows:

At all times during I.L.'s enrollment since August, 2014, she has been afforded all of the procedural safeguards required to secure her educational rights and ensure an education decision-making process consistent with public policy and acceptable practice.

In Dr. Rostetter's view, KCS met all of the requirements for procedural safeguards in every instance. Ms. Taylor was provided notice of all meetings and was permitted to bring individuals of her choice to the meetings for assistance; she was allowed to be an active participant in all meetings with the opportunity to make suggestions and recommendations; and appropriate KCS staff were present at all meetings.

43. Dr. Rostetter believed that KCS had adequate information when it proposed the change in I.L.'s placement with the IEP presented on October 29, 2014, despite the fact that I.L. had only been in school for a total of 26 days at West Hills in August and September. Dr. Rostetter noted that in addition to the information derived from the direct experience staff had with I.L. at West Hills, KCS also relied heavily upon the data produced during the previous two years which included the 2012 psychoeducational evaluation from Hamilton County that contained findings which mirrored the behavior and academic ability I.L. exhibited at West Hills.

44. Dr. Rostetter also testified that in his opinion KCS committed no Section 504 violations in this case. In his view as I.L. has not been denied access to an educational benefit there was no unlawful discrimination based upon her disability. I.L. was attending her zoned school with her peers and was placed in a general education setting. In Dr. Rostetter's view KCS was justified and compliant with Section 504 in its proposed change in placement, which only

would result in a 3/4 split of the school, day but still in I.L.'s zoned school. He does not believe any disability based discrimination is evident in this case.

45. Julie Causton Ph.D testified as an expert on behalf of the Petitioners. Dr. Causton has a Ph.D in Special Education from University of Wisconsin and is currently an associate professor in the Department of Teaching and Leadership at Syracuse University. Dr. Causton is an expert in inclusive education as well as many other areas pertaining to the education of children with disabilities especially children with Down Syndrome. She has testified as an expert witness in numerous legal proceedings related to special education and has served as a consultant to a number of school districts. As part of her review of the case, Dr. Causton reviewed educational records relating to I.L. However, Dr. Causton did not meet with or speak with anyone about the case other than counsel for the Petitioner. She did not speak with Ms. Taylor, I.L., or any of the KCS staff that worked with I.L. Dr. Causton has never actually seen I.L. in a classroom setting, her only observations of I.L are limited to videos taped by Ms. Taylor at home which showed I.L performing academic tasks with prompting from her mother.

46. In general, Dr. Causton minimized any issues of related to I.L.'s behavior and how that behavior impacted the ability of both I.L and her classmates to learn. Dr. Causton believed that an FBA and a BIP should be developed for I.L, unaware that in fact KCS was developing them with Ms. Taylor's permission and unaware that four IEP team meetings were held in January and February of 2015 primarily for the purpose of discussing the FBA created by Mr. Sweet. Dr. Causton was also unaware of the significant amount of school I.L had missed after Ms. Taylor gave her permission for the FBA and BIP on September 12, 2014, which hampered the efforts of KCS to develop these items. Dr. Causton believed that any behavior issues I.L. might be experiencing more than likely came from her frustration in attempting to

accomplish the six goals in her August 2014 IEP that were too difficult for her. Dr. Causton testified that in her view all of the new proposed 13 goals could be accomplished in the general education classroom. Dr. Causton suggested a number of modifications to I.L.'s school work as well as a checklist of supplementary aides and services that could be provided that in her view would allow I.L. to make progress toward achieving the 13 goals. However, the majority of Dr. Causton suggestions had already been implemented by KCS with little to no positive effect. Moreover, Dr. Causton analyzed each of the 13 goals in an isolated manner with a view toward whether each goal was reasonably attainable in the general education classroom. She did not appear to give adequate consideration to the reality of the situation where I.L.'s behavior is such an impediment to her academic instruction.

47. Dr. Causton was highly critical of the number of paraprofessionals that worked with I.L. during her time at West Hills. In Dr. Causton's opinion, consistency is extremely important for children with intellectual disabilities, especially those with Down Syndrome. Dr. Causton believed that I.L.'s aides should have specific training in working with children with Down Syndrome.

48. As previously stated the hearing in this matter took place over a total of seven days between May 20 and June 24, 2015. Considerable evidence was presented by witnesses for both parties which described I.L.'s behavior and academic progress for the period of time well after the due process complaint was filed on November 17, 2014. Ms. Halter, Ms. Cunningham, Mr. Sweet, Dr. Reno, Dr. Stair, Dr. Rostetter and others discussed their observations of I.L. at various times throughout the 2014-2015 school year until the end of the term. The evidence was clear that the behavior I.L. continued to exhibit throughout the school year, despite the numerous modifications made to her classroom setting and curriculum, as well as behavior modification

techniques employed by the staff, was essentially identical to the behavior she exhibited in August and September 2014 at West Hills. Moreover, the behavior she continued to exhibit throughout the school year at Brickey-McCloud was quite similar to her behavior in Hamilton County in the fall of 2012, as described by the school psychologist Ms. Cooper.

CONCLUSIONS OF LAW

1. The burden of proof in an administrative hearing challenging an IEP is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (U.S. 2005). As a result, the Petitioners I.L. and Ms. Taylor have the burden of proof in this case to demonstrate that the IEP proposed by KCS is inappropriate and will not provide I.L. with FAPE in accordance with the law. This case is strictly about where I.L. will receive her educational programming. There is no significant disagreement between the parties about any aspect of the subject IEP except the proposed placement of I.L. which would result in her being in a special education setting four hours each day and in a general education setting three hours per day with an aide, as opposed to the current placement of her being in a general education classroom all day except for 20 minutes in a special education setting. It is the contention of KCS that I.L.'s behavior requires that she be placed in a special education setting for four hours per day so that her behavior can be better managed resulting in her receiving better educational benefit from her schooling. As Dr. Rostetter stated; "...behavior is the cornerstone of this case."

2. The clear intent of both federal and state law is that children with disabilities should be "mainstreamed," or educated with their non-disabled peers, to the maximum extent appropriate. 20 U.S.C.A § 1412(a)(5)(A) provides:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only

when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

See also Tenn. Code Ann. § 49-10-103 and 34 CFR 300.114.

3. However, the reviewing courts have reasoned that the preference for mainstreaming articulated in the law is not an iron clad rule and exceptions can and should be made based upon the unique facts in any given situation. "...the IDEA's mainstreaming provision establishes a presumption, not an inflexible federal mandate." *Hartmann v. Loudoun County Board of Education*, 118 F. 3d 996, 1001, (4th. Cir. 1997). Two of the most instructive cases on the question of when mainstreaming is appropriate are *Roncker v. Walter*, 700 F.2d 1058, (6th Cir. 1983) and *Oberti v. Board of Educ.*, 995 F.2d 1204, (3rd Cir. 1993). Most courts that have reviewed the question in recent years have adopted the two pronged test set forth in *Oberti* as the basis for the analysis. *P. v. Newington Board of Education*, 546 F. 3d 111 (2nd Cir. 2008). The test adopted by the court in *Oberti* is as follows:

(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of other students in the class.

If, after considering these factors, the court determines that the school district was justified in removing the child from the regular classroom and providing education in a segregated, special education class, the court must consider the second prong of the mainstreaming test whether the school has included the child in school programs with nondisabled children to the maximum extent appropriate. (*Oberti* at p.1217-1218)

4. When the *Oberti* test is applied to the facts of this case, it is clear that the proposed placement set forth in the October 29, 2014, IEP is not only appropriate for I.L. but more than meets the requirement that I.L. be included "...in school programs with nondisabled children to the maximum extent appropriate."

5. I.L. came to West Hills in August 2014 as an 11 year old who had not been in a traditional school setting for any discernable length of time since she was enrolled in a three year old Pre-K program in 2007-2008. This lack of traditional schooling would be a challenge for any 11 year old child who tried to adapt their behavior to a classroom setting with peers and a teacher, but most assuredly for a child with the unique needs exhibited by I.L. Although it is impossible to quantify the impact that her lack of experience in a traditional school has had on her behavior, it is reasonable to conclude that a significant cause of her inappropriate and disruptive behavior was the lack of exposure I.L. had to other children and adults in a classroom setting. Presumably her behavior, much of which was described as attention seeking, was the type of behavior one might expect to see demonstrated by a much younger child who was still learning how to be away from their parent in school setting. As Dr. Rostetter opined, her lack of formal schooling prior to coming to West Hills deprived her of exposure to “normalcy” whereby children learn from their peers.

6. As previously stated, the *Oberti* test has two prongs, the first of which has three factors. The first factor is whether KCS made reasonable attempts to accommodate I.L. in the regular classroom at West Hills. The evidence is overwhelming that it did. The record is replete with steps KCS took to accommodate I.L. at West Hills. I.L. was assigned to the classroom of Ms. Mathews, an experienced third grade teacher who had a child with Down Syndrome in her class the previous year; significant modifications were made to I.L.’s class work; numerous changes were made to I.L.’s seating arrangement in an attempt to both improve her behavior and lessen the impact that behavior was having on other students; Ms. Smith, the special education teacher, supervised and trained the aides who worked with I.L. and she met daily with the aides and Ms. Mathews to ensure consistency in their interactions with I.L.; Ms. Smith and Ms.

teacher, supervised and trained the aides who worked with I.L. and she met daily with the aides and Ms. Mathews to ensure consistency in their interactions with I.L.; Ms. Smith and Ms. Mathews had frequent conversations with Ms. Taylor about I.L.'s behavior; numerous members of the KCS professional staff including Dr. Stair, a clinical psychologist and the Psychological Services Supervisor for KCS and Ms. Burks, a Behavior Liaison, worked with I.L. and assisted in Ms. Mathews' classroom; Dr. Stair, Ms. Burks and other professionals made numerous observations of I.L. in an attempt to ascertain the causes of her behaviors and how best to respond to them. In addition to all of these attempted accommodations made by the KCS staff, Ms. Burks employed other strategies in an attempt to improve or modify I.L.'s behavior. I.L.'s transitions were changed to be ahead of other students so that she would be less distracted; her classroom supplies were placed in bins accessible to the paraprofessionals so that tasks could be easily adapted or changed; I.L. was given frequent movement breaks; I.L. had constant practice with her social skills including defined expectations of safe hands and safe feet; she had structured play on the playground. Despite all of the accommodations made for I.L. at West Hills and later at Brickey-McCloud, there was no appreciable improvement in I.L.'s behavior. As Dr. Rostetter stated, KCS had, "...exhausted all of the reasonable expectations and gone way beyond what anything in the research of literature I would say would be reasonable."

7. The second factor of the *Oberti* test is a comparison of the educational benefits available to a child in a general education classroom, with appropriate aides and supports, to the benefits available in a special education setting. The evidence establishes that the benefits to I.L. of being in a special education setting four hours per day clearly outweigh the benefits she has gained from being in the general education classroom all day except for 20 minutes as is the current practice. As has been exhaustively discussed above, I.L. is getting almost no education

benefit from her current placement. She made little if any educational progress, to a large extent because the KCS staff was required to spend an inordinate amount of time and energy managing her behavior rather than providing academic instruction. In the opinion of Dr. Rostetter, her current placement in the general education classroom is, "...just incorrect for her. It's wrong. She spent a year in this program with no movement, no benefit." In contrast, the benefits I.L. would receive in a special education setting four hours per day would be extensive. It is much more likely that I.L. could make meaningful progress on the 13 new goals in the proposed IEP in a special education setting rather than in a general education classroom. The goals could be better implemented by direct special education services. As previously stated, so much of the time of I.L.'s teachers and aides was spent on managing her behavior that it had a negative impact on their ability to provide academic instruction. The evidence supports the conclusion of the KCS staff that I.L.'s behavior is primarily attention seeking. If that is the case, their belief that the best way to address the behavior is to ignore it would appear to be reasonable. It is also reasonable to presume as does the KCS staff that it would be much easier to ignore I.L.'s disruptive behavior in a special education setting with fewer children than in a general education setting where other students are being distracted. The proposed four hours per day of direct special education services would be used to address all of I.L.'s needs, both academic and behavioral, while still allowing three hours per day in a general education setting for I.L. to model her non-disabled peers and to generalize the skills she is hopefully learning in special education. In the view of Dr. Rostetter, "...we can take what we are teaching her [in special education] and we can test her generalization and we can test the application of those goals, and as we see how she's addressing those in the environment, in the general education environment, we can come back and modify her special education instruction and work with her until in that

member of that community, and then that period of time can be expanded and expanded and expanded just like they've done with other children with Down Syndrome...”.

8. The third and final factor contained in the initial prong of the analysis set forth in *Oberti* is the potential negative impact on the educational opportunities for the other students in the class if the child with a disability is mainstreamed. The record in this case is with replete with persuasive evidence of the disruptive nature of I.L.’s behavior and the impact it has on other students. I.L. has repeatedly kicked, grabbed, pulled hair and spit on her classmates. Even if she doesn’t strike one of the students, her yelling inappropriate words or striking at her teachers or aides causes a distraction in the classroom. Because of I.L.’s behavior, it was often necessary for KCS to have extra personnel in the classroom. At West Hills, there were sometimes as many as four staff members in the classroom so that the other students in the class could receive appropriate instruction while I.L.’s behavior was being managed. Parents of other students requested that their children be moved to another class because of I.L.’s behavior. There is no doubt that I.L.’s behavior was so disruptive in the classroom that it negatively impacted the educational opportunity for other students.

9. The second prong of the *Oberti* test is if, using the above analysis, it is determined that a school district is justified in removing a child from the regular classroom, the question then becomes whether the district has included the child in school activities with nondisabled children to the maximum extent appropriate. Again, the record in this case clearly establishes that the IEP proposed by KCS will include I.L. in school activities with her nondisabled peers to the maximum extent appropriate. Unlike the child in *Oberti* who was sent to a school in a different district, in this case I.L. is attending her zoned school and would be in the regular classroom with her nondisabled peers for 3 hours per day, or approximately 43% of the school day. When one

considers all of the behavioral challenges I.L. presents it must be concluded without question that KCS has proposed to include her in school activities with nondisabled children to the maximum extent **appropriate**.

10. It is clear that when the *Oberti* analysis is applied to the facts of this case that the proposed placement contained in the October 29, 2014, IEP wherein I.L. is to be in a special education setting four hours per day and a general education setting three hours per day, is appropriate.

11. The Petitioners contended that the aspects of the August 2014 IEP that the parties agreed upon, namely a BIP and the 13 new goals, should have been implemented even if the issue of placement remained in dispute. While this is legally correct, *See* 20 U.S.C § 1415(j), in this instance it was not a realistic option. As has been discussed throughout this Order, the evidence is persuasive that to implement the 13 goals in the current placement with I.L.'s behavior was not possible. As to the BIP, it must first be noted that Mr. Sweet was not able to even begin his observations of I.L. until early December 2014, primarily because of I.L.'s absence from school. Four IEP meetings were held in January and February 2015 in an attempt to reach an agreement on the BIP and other aspects of the IEP but were unsuccessful. The evidence supports the position of KCS that while certain aspects of the BIP have in fact been implemented in I.L.'s instructional program, much of it cannot be successfully implemented in the current placement. Perhaps most important of the portions of the BIP that KCS believes cannot be implemented in the current placement is the plan to ignore I.L.'s inappropriate behavior so as not to reward her with the attention she seeks. As previously stated, the staff cannot ignore the behavior in the current placement when it is disruptive or dangerous to other students in the classroom. As Dr. Rostetter opined, I.L.'s educational program must be viewed in its totality,

classroom. As Dr. Rostetter opined, I.L.'s educational program must be viewed in its totality, which includes getting her behavior under control which can only be done in a special education setting, "...the idea that those [new 13] goals can yield benefit in her current educational setting, I believe is absurd."

12. The Petitioners contend that in addition to the proposed IEP being in violation of the LRE requirement found in the IDEA, the proposed placement violates the ADA and Section 504. However, a Section 504 issue has not been presented in this case. Section 504 provides in pertinent part at 29 U.S.C. § 794(a) that no person with a disability "...shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance..." The case of *N.L. ex. rel. Mrs. C. v. Knox County Schools*, 315 F. 3d 688, 695-696 (6th Cir. 2003) contains an excellent discussion of the interplay between Section 504 and the IDEA.

In order to establish a violation of section 504, a disabled individual must establish that he was subjected to prohibited discrimination, which means he was denied an opportunity to participate in or benefit from the aid, benefit, or service because of a disability. 34 C.F.R. § 104.4(b). In the context of education services, the Supreme Court held in *Smith v. Robinson* (citations omitted), that section 504 does not require affirmative efforts to overcome the disabilities caused by handicaps, but instead "simply prevents discrimination on the basis of handicap." The Supreme Court further held that nothing in section 504 adds anything to the substantive right to a free appropriate public education. To prove discrimination in the education context, courts have that something more than a simple failure to provide a free appropriate public education must be shown. See *Monahan v. Nebraska*; *Lunceford v. D.C. Bd. Of Educ.* (citations omitted).

In the instant case, regardless of whether one agrees or disagrees with I.L.'s placement as proposed in the IEP, she certainly has not been "excluded from the participation in" or been "denied the benefits of" an education in a general education setting, nor has she been "subjected to discrimination" because of her disability. KCS is not denying an education to I.L., nor is it

attending her zoned school with her peers. At her zoned school, KCS is not proposing that I.L. be placed in a segregated special education classroom for the entire school day, but rather has proposed that she be placed in the general education classroom for three hours out of a seven hour day, or 43% of the school day. The proposed IEP does not deny I.L. access to an educational benefit or program nor is there any evidence of disability based discrimination in violation of Section 504. This case centers around whether FAPE is being provided to I.L. in the least restrictive environment, which as stated by the court in *N.L. ex. rel. Mrs. C. v. Knox County Schools*, does not present a Section 504 issue.

Second Due Process Complaint

As previously noted, the Petitioners filed a Motion For Summary Judgment pursuant to Rule 56 of the Tennessee Rules of Civil Procedure. As the material facts are not in dispute and the Petitioners are entitled to judgment as a matter of law, the motion was orally granted on during a telephone conference on October 30, 2015. The following portion of this Order addresses the Motion For Summary Judgment.

FINDINGS OF FACT⁵

49. I.L. began the fourth grade at Brickey-McCloud on August 10, 2015. KCS and I.L. were still operating under the stay put IEP from August 12, 2014. She attended school from August 10-14, 2015.

50. Between August 11-14, 2015, I.L. was removed from the classroom on 21 separate occasions due to disruptive behavior. Upon removal from the classroom, KCS personnel would take her into the hall and place her on a chair in an alcove or “indention” in the wall at the end of the hallway in front of the door to an empty classroom. A blue folding gym

⁵ As both of the Petitioners’ due process complaints are being disposed of by this Final Order for sake of clarity the numbering of the findings of fact and conclusions of law will continue sequentially from the first portion of the order.

mat was placed around the area where I.L. was seated, blocking her exit from the enclosed space. The gym mat was 48 inches high, 72 inches long and 1.5 inches thick. The classroom door was on one side of the enclosure, the wall was another side, with the gym mat completing the enclosure. The area in which I.L. was confined was approximately four feet by four feet, or 16 square feet. Although I.L. was not visible to a passerby while in the enclosure, she was always visible to members of the KCS staff who would be standing outside the gym mat looking over the mat at her. The staff members would talk to I.L. while she was in the enclosure. The length of time I.L. was actually removed from the classroom varied significantly on each occasion. While 11 of the 21 occurrences were less than 10 minutes in duration, on August 13, 2015, at approximately 10:00 a.m., she was out of the classroom for a total of 44 minutes. Other occasions of 10 minutes duration or more were: 10 minutes, 11 (twice), 14 (twice), 15, 16, 18 and 19 minutes. The time calculated out of the classroom on each occasion included time in the enclosed area as well as the time it took to walk I.L. to and from the classroom. The amount of time I.L. was out of the classroom between August 11 and 14, 2015, being escorted back and forth to the enclosed space and seated therein totaled 240 minutes or four hours.

51. The use of the gym mat was recommended by Mr. Sweet. Dr. Stair and the principal of the school Robbie Norman were not only aware of the practice but actually observed I.L. while she was in the enclosure.

52. The placement of I.L. in the enclosed space was not in I.L.'s IEP nor was her mother informed of the practice prior to its implementation. In fact, Ms. Taylor was unaware of the practice until she was informed by the parent of another student, apparently after the 21 occurrences had already taken place.

53. Mr. Sweet, who devised the idea of placing I.L. in the enclosure, considered the episodes to be a “time in” rather than a “time out.” He conceded that it was not a “grand idea,” was not a “behavior treatment procedure,” and the “results were not good.”

54. The practice was utilized not in an emergency situation but rather when I.L.’s behavior became too disruptive to remain in the regular classroom. Mr. Sweet said often I.L. would be laughing and talking while going to and being in the enclosed area. Mr. Sweet stated that the gym mat was used to protect staff from I.L.’s kicking and so she would remain in the chair until her behavior improved. He believed this practice was better than having a staff member put their hands on I.L. to prevent her from striking out at someone or leaving the chair placed in the alcove. Mr. Sweet stated that I.L. would remain in the enclosure until she said, “I’m ready,” apparently meaning that she was ready to behave and return to the classroom.

55. After Ms. Taylor learned of what was occurring at Brickey-McCloud, she removed I.L. from school and she has not returned as of the time of this Order. An IEP meeting was held on August 20, 2015, for the purpose of discussing the practice of placing I.L. in the enclosed area. KCS staff informed Ms. Taylor that the the placement of I.L. in the enclosed area was discontinued after August 14, 2015, and it would not resume in the future.

CONCLUSIONS OF LAW

13. Tenn. Code Ann. § 49-10-1305(e)(1) prohibits the use of isolation as a means of “coercion, punishment, convenience or retaliation on any student receiving special education services...”. Tenn. Code Ann. § 49-10-1305(f) provides: “[t]he use of a locked door, or any physical structure, mechanism, or device that substantially accomplishes the function of locking a student in a room, structure of area, is prohibited.” Tenn. Code Ann. § 49-10-1304 provides that a student may be placed in isolation **only** if isolation is provided for in the child’s IEP or in

emergency situations. Therefore the analysis in this instance is to determine whether the placement of I.L., a “student receiving special education services” in the enclosed area constitutes “isolation” as defined by statute, and if so, whether such isolation was permissible.

“Isolation” as defined by Tenn. Code Ann. § 49-10-1303(4):

(A) Means the confinement of a student alone in a room with or without a door, or other enclosed area or structure pursuant to § 49-10-1305(g) where the student is physically prevented from leaving; and

(B) Does not include time-out, a behavior management procedure in which the opportunity for positive reinforcement is withheld, contingent upon the demonstration of undesired behavior; provided, that time-out may involve the voluntary separation of an individual student from others;

14. It is apparent that I.L. was placed in isolation by the KCS staff as that term is defined by Tenn. Code Ann. § 49-10-1303(4). Placing her in an alcove in the hall surrounded by walls and a gym mat “confined” her in an “enclosed area” in which she was “physically prevented leaving.” The placement of I.L. in this enclosed area was not a “time-out” which is permitted under the statute. Mr. Sweet, the Behavior Liaison who devised the procedure, stated that this was not a “time-out” and was not a “behavior management procedure.” Merely calling an activity a “time-out” after the fact as KCS does in response to the Motion For Summary Judgment, especially when Mr. Sweet specifically stated in the IEP meeting of August 20, 2015, that this was not a “time-out” but was a “time-in,” does not transform the act into a permissible activity when it otherwise clearly meets the definition of isolation. The term “time-out,” which is an exception to the prohibition against isolation, cannot be interpreted in such a way as to do away with the prohibition itself. Otherwise no practice would be prohibited as long as it was termed a “time-out” by school personnel.

15. KCS also argues that I.L. was not placed in isolation because she was visible to a staff member at all times. This is irrelevant. As previously stated, Tenn. Code Ann. § 49-10-

1304 permits the use of isolation if provided for in the child's IEP or in emergency situations. Tenn. Code Ann. § 49-10-1305(g) sets forth what is required for any space that is being used for isolation when permitted. Subsection (5) requires "...school personnel [to be] in continuous visual contact with the student at all times." Therefore, the mere fact that KCS personnel remained in visual contact with I.L. when she was in the enclosed area does not mean therefore that the practice was not isolation, as the statute actually **requires** visual contact during the course of a permissible isolation of a student.

16. As it has been concluded that KCS placed I.L. in isolation, the second step in the analysis is to determine whether it was permitted under Tenn. Code Ann. § 49-10-1304. As previously stated, that statutory provision permits a student to be placed in isolation **only** in an emergency **or** if such practice was included in the student's IEP. Placing I.L. in an enclosed area surrounded by a gym mat is not in her IEP nor was there any evidence that there was an emergent situation that required such action. Consequently, the placement of I.L. in isolation by KCS on 21 different occasions was in violation of Tenn. Code Ann. §§ 49-10-1304 and 1305.

17. Even if it could be determined that the placement of I.L. in the enclosed area was somehow permissible under the above statutes, the practice would still run afoul of the provisions of Tenn. Code Ann. §§ 49-10-1303(5) and 1305(g)(6). A permissible "isolation room" must meet certain requirements, including that it be "[a]t least forty square feet (40 sq. ft.);" in total space. The enclosure where I.L. was placed was approximately four feet by four feet, or about 16 square feet in total area.

18. The Tennessee State Board of Education promulgated Rule 0520-01-09-.23(1)(a) which defines **extended isolation** as "...isolation which lasts longer than one (1) minute per year of the student's age or isolation that lasts longer than the time provided in the child's

individualized education program (IEP). As I.L. was 11 years old in August of 2015, KCS subjected her to extended isolation on seven different occasions.

19. During the four day period of August 11-14, 2015, I.L. was placed in isolation 21 times for a total of four hours. On seven of these occasions she was subjected to extended isolation as defined by Rule 0520-01-09-.23(1)(a), for a total of 140 minutes or two hours and 20 minutes. As a result of this practice, I.L. received no educational benefit from the school days of August 11-14, 2014.

20. Despite the obvious violation by KCS of the statute prohibiting isolation, the actions did not constitute a violation of Section 504. While the placement of I.L. in an enclosed area behind a blue gym mat was clearly inappropriate, when viewed in the context of this entire case there is no evidence that KCS was discriminating against I.L. because of her disability.

CONCLUSION AND REMEDIES

This case is unfortunately illustrative of a situation where adults sometimes, with the best of intentions, are motivated by personal beliefs or emotions and lose focus on what is best for the child involved. It would appear that Ms. Taylor by constantly searching for “inclusion” for her daughter has perhaps harmed her educational development. Moving her from school to school and keeping her at home between 2008 and 2014 left I.L. ill prepared for the traditional school setting of West Hills in August 2014. When I.L. immediately began to exhibit inappropriate behaviors at West Hills, Ms. Taylor removed her from school, switched schools to Brickey-McCloud, and ultimately refused to agree to the reasonable and appropriate IEP suggested by KCS. As a result of Ms. Taylor’s refusal to consider any placement short of almost full inclusion in the general education classroom, despite the overwhelming evidence that such a placement was inappropriate, I.L. essentially lost a full year of educational opportunity. As Dr. Rostetter

stated, “She spent a year in this program with no movement, no benefit.” As for the placement of I.L. in isolation, KCS personnel were more than likely also motivated by mistaken beliefs rather than any ill will toward I.L. After attempting to control I.L.’s behavior with little success for the entire school year of 2014-2015, Mr. Sweet and the KCS staff apparently thought of starting the new school year with a new approach for dealing with her behavior. Not only was the practice developed by Mr. Sweet unsuccessful by his own admission, it was unlawful. It must be noted, however, that I.L.’s behavior which prompted this action by KCS was the same behavior she had exhibited all of the previous school year and was still exhibiting at the beginning of the current school year during her **inappropriate** placement in the general education classroom.

Based upon the foregoing the following determinations are made:

1. The IEP proposed by KCS on October 29, 2104, is appropriate, provides FAPE to I.L. in the least restrictive environment, and shall be **immediately implemented**.
2. The BIP developed by Mr. Sweet shall be implemented as soon possible.
3. For all aspects of the **first due process complaint** filed November 17, 2014, KCS is determined to be the **prevailing party**.
4. KCS shall immediately discontinue the use of the isolation practice described in this Order. No future isolation or restraint of I.L. shall be performed unless such practice is specifically authorized in a future IEP or is consented to by Ms. Taylor.
5. Kelton Sweet **shall have no further direct contact with I.L.**
6. KCS shall provide I.L. with **four days** of compensatory education to compensate for the four days of educational benefit I.L. lost from August 11-14, 2015. KCS shall determine how the four days of compensatory educational time will be implemented.

7. For all aspects of the **second due process complaint** filed August 20, 2015, the Petitioners are determined to be the **prevailing parties**.

It is so **ORDERED**.

This Final Order entered and effective this 6th day of November, 2015.



Thomas G. Stovall
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 6th day of November, 2015.



J. Richard Collier, Director
Administrative Procedures Division

Notice

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

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