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RE: In the Matter of: [REDACTED] the Student, and [REDACTED] the Student's Parent vs.
Rutherford County Schools
Docket No. 07.03-130752J

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

Administrative Procedures Division
Tennessee Department of State

llp
Enclosure

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.

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

IN THE MATTER OF:

█ *the Student, and
the Student's parent,
Petitioners,*

DOCKET NO: 07.03-130752J

v.

**RUTHERFORD COUNTY
SCHOOLS,
*Respondent.***

FINAL ORDER

This matter was heard in Murfreesboro, Tennessee on February 29-March 4, 2016, 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 █ student, and █ parent, were represented by attorneys Christina Daugherty and Kelli Haas. Attorneys Melinda Jacobs, Deanna Arivett and Angel McCloud represented Respondent Rutherford County Schools (RCS). This matter became ready for consideration upon the filing of proposed findings of fact and conclusions of law (May 20, 2016) and the filing of reply briefs (June 3, 2016) by the parties.

█ █ █ initiated this due process hearing on April 15, 2015, alleging that RCS failed to provide █ with a “free appropriate public education” (FAPE) as required by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.* and related State law and regulations. Petitioners are requesting past and future compensation for attending a private tutoring program, counseling services for █ reimbursement for future educational placement

and services, reimbursement for private evaluations, and attorneys' fees and costs. The central issues presented are whether RCS denied FAPE by (1) failing to properly evaluate [REDACTED] (2) failing to offer IEPs that were reasonably calculated to provide an educational benefit for [REDACTED] (3) failing to meet procedural requirements of the IDEA; and (4) failing to appropriately follow procedures regarding the August 14, 2014 law enforcement incident.

After consideration of the entire record, testimony of witnesses, and the arguments of the parties, it is determined that Respondent is in compliance with the IDEA procedures and has not committed any procedural or substantive violations of the IDEA. This determination is based upon the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. In 2003 [REDACTED] was initially identified in [REDACTED] as a student with a disability pursuant to the IDEA under the eligibility category of Developmentally Delayed.

2. In May 2006 and August 2009, [REDACTED] met criteria to receive continued special education services. [REDACTED] primary disability was determined to be Language Impairment with a secondary disability of Speech Impairment. In May 2012, [REDACTED] no longer met criteria as a student with Language Impairment and Speech Impairment and instead met the criteria for Specific Learning Disability (SLD) in math reasoning.

3. Except for a period of time during [REDACTED] grade when [REDACTED] was homeschooled, [REDACTED] consistently received special education services from RCS from [REDACTED] through the date of [REDACTED] withdrawal from RCS in the [REDACTED] grade. [REDACTED] repeated [REDACTED] but thereafter successfully matriculated from grade to grade.

4. Since entering school, [REDACTED] has had a history of behavioral difficulties, emotionality, and frustrations, although some years have been better behaviorally than others.

5. Upon returning to RCS in █ grade, █ IEP team in August 2009 re-identified █ as a student eligible for special education services and determined that both a Social-Emotional Assessment and Functional Behavior Assessment (FBA) were needed. During an IEP meeting in November 2009, the IEP team decided to add restraint to █ IEP. In an IEP addendum meeting on December 16, 2009, the team reviewed the FBA and a Behavioral Intervention Plan (BIP) was developed to address █ behavioral needs.

6. The next IEP for █ dated April 7, 2010, did not indicate a BIP existed as a method to address █ behavior but the following IEP, August 24, 2010, a BIP was indicated along with a FBA and restraint as methods to address █ behavior. An IEP addendum meeting for █ was held on April 5, 2011, which showed a BIP and restraint remained options to address behavior issues. An annual IEP meeting was held on August 31, 2011, which indicates that both a BIP and restraint remained to address █ ongoing behavioral issues.

7. █ showed significant improvement in social-emotional skills during █ █ and █ grade school year.

8. Jeanne Lund, RCS school psychologist, conducted a psycho-educational evaluation █ in May of 2012. Ms. Lund assessed █ social-emotional behavioral needs through rating scales completed by █ and █ █ grade special education teacher. Both parent and teacher ratings indicated significant difficulties with anxiety, depression, and somatization in the home and school setting; however, neither parent nor teacher indicated any difficulties with inattention or hyperactivity in either environment. Ms. Lund noted in her report that “█ has many behaviors that suggest that █ may have another disability that significantly impacts █ education, but a lack of information makes a determination difficult.” She testified that “another disability” was referring to a medical issue.

9. Ms. Lund assessed [REDACTED] cognitive and achievement skills to determine whether [REDACTED] met the requirements of a specific learning disability. Consistent with later reports (2015 testing) of [REDACTED] functioning, [REDACTED] cognitive ability fell in the low average range with a Full Scale IQ Standard Score of 87. Based on [REDACTED] cognitive and achievement testing, [REDACTED] obtained a significant discrepancy between [REDACTED] intellectual functioning and [REDACTED] achievement in math reasoning needed to meet the eligibility requirement for a SLD in math reasoning, and the team, including [REDACTED] agreed that [REDACTED] met the criteria for a student with a SLD.

10. RCS has consistently noted since elementary school that [REDACTED] takes medication for Attention Deficit Hyperactivity Disorder (ADHD). In 2012, RCS tried to obtain medical documentation as part of [REDACTED] reevaluation based on [REDACTED] report that [REDACTED] was taking ADHD medication. However, the school had difficulties in obtaining medical information from [REDACTED] physician. [REDACTED] failed to inform RCS that [REDACTED] had frequent medication changes that sometimes resulted in emotional and behavioral side effects.

11. [REDACTED] entered [REDACTED] ([REDACTED] as a [REDACTED] grader in August 2012. A BIP and restraint remained on the IEP as methods to address [REDACTED] behavior. During [REDACTED] grade year, [REDACTED] special education teacher, Mr. Tucker, met with [REDACTED] multiple times to discuss strategies for dealing with [REDACTED] behavior (on one occasion [REDACTED] talked about wanting to [REDACTED] and [REDACTED]), and in another instance, [REDACTED] cried during an entire class period and then rocked back and forth while curled up in a ball for a length of time).

12. During the [REDACTED] grade, [REDACTED] began displaying more significant behavioral difficulties within Ms. Janice Brown-Adams' (special education teacher and [REDACTED] grade case manager) class, including getting upset when a new task was introduced; crying; covering [REDACTED] head during math; laying on the floor; rocking back and forth; going into the hallway by the

classroom door without permission; becoming aggressive at times; making hissing sounds; and banging ■ head. When these difficulties arose, Ms. Adams consulted with RCS behavior specialist Kecia Simmons to implement a color-coded class-wide behavioral system in December of 2013 and initiated a behavior contract with ■. Drafts of the behavior contract were provided to ■ before it was finalized in January 2014 (the IEP addendum created on January 14, 2014, makes no mention of a behavior contract but the behavior contract was added to the IEP dated March 12, 2014). Both ■ and ■ signed the behavior contract. The behavior contract contains several strategies for addressing ■ disruptive behaviors. After the behavior contract was in place, some of ■ behavioral issues continued.

13. ■ had access to school counselors, whom ■ was permitted to visit on a frequent basis. The counselors were typically able to deescalate ■ and get ■ back to class.

14. During the ■ grade and the first semester of the ■ grade, ■ attended all academic courses in the extended resource setting and attended elective courses in the general education setting. In January of ■ ■ grade year, the IEP team transitioned ■ to an inclusion setting for reading, and ■ also transitioned from Ms. Adams resource setting into some of special education teacher Elizabeth Moore's resource classes. At all times during ■ transition to more general education in the ■ grade, ■ was in agreement with the team's decisions.

15. An annual IEP meeting for ■ was held on March 12, 2014. ■ academic setting is noted as follows: "■ will receive all academic instruction in the extended resource environment with the exception of elective and Reading and Language Arts ■ will receive in the inclusion setting. ■ will attend elective[s] with special education support." It was also noted that ■ had a behavioral contract for the classroom setting as a method to address ■ behavior.

The prior written notice for this IEP meeting described the action proposed by RCS to be as follows: the school proposed placement change to inclusion Language Arts as the second step to transitioning into general education; the school considered two inclusion classes (Math and Language Arts) for [REDACTED] transitioning into General Education; [REDACTED] has been in extended resource and the team decided not to overwhelm [REDACTED] with two (2) additional classes; and [REDACTED] will fully transition into inclusion classes/setting during [REDACTED] [REDACTED] Grade year. Ms. Adams testified that it was understood by the team members at the March 2014 meeting that [REDACTED] would be in all inclusion at the beginning of the [REDACTED] grade.

16. Shirley Bell, Coordinator of Special Education for RCS, testified that it is always important to have the IEP ready to be implemented; however, the IEP is not implemented until somewhere at the beginning of the school year.

17. Carlos Lopez de Victoria, [REDACTED] [REDACTED] grade case manager, introduced himself to [REDACTED] on the first day of school, checked in with [REDACTED] the mornings [REDACTED] attended school, and explained where [REDACTED] safe place (Mr. Lopez's office) was located if [REDACTED] had any difficulties or needed a cool down break.

18. Jana Pope, [REDACTED] [REDACTED] grade science teacher, documented that [REDACTED] walked out of her classroom on the first day of school. On Friday, August 8, 2014, Kurstin Luther, a Special Education Liaison for RCS, emailed the principal of [REDACTED] Cary Holman, indicating she and Shirley Bell had spoken with [REDACTED] [REDACTED] about [REDACTED] concerns that [REDACTED] IEP was not being followed, and she suggested that [REDACTED] request an IEP meeting. On Tuesday, August 12, 2014, [REDACTED] emailed Mr. Holman requesting an IEP meeting to review and revise, if necessary, [REDACTED] IEP. Mr. Holman replied that someone would be in contact with [REDACTED] to set up a meeting.

19. Two [REDACTED] counselors, Braylan Binyi and Jessica Foxx, provided written documentation of an incident with [REDACTED] on Tuesday, August 12, 2014, that resulted in a family member being called with instructions that [REDACTED] would need to leave for the day. On August 12, [REDACTED] was being confrontational with School Resource Officer (SRO), Markell Draine.

20. On August 14, 2014, [REDACTED] second partial day of attendance for the 2014-2015 school year, [REDACTED] attended Christina Manley's [REDACTED] grade inclusion math class for the first time. Ms. Manley testified that she had not been informed in person by anyone that [REDACTED] had an IEP and she was only aware [REDACTED] had one when she observed a symbol beside [REDACTED] name on her roster. At the start of class on that day, [REDACTED] appeared lethargic, was looking down at [REDACTED] feet, and was not working on the morning review work. Ms. Manley prompted [REDACTED] two or three times, provided [REDACTED] with paper and pencil, and eventually asked [REDACTED] to privately talk to her so she could determine whether something was bothering [REDACTED]. Upon this request [REDACTED] got up from [REDACTED] chair, began yelling that [REDACTED] was leaving, and abruptly left the classroom without permission. At no point did [REDACTED] ask to talk to Mr. Lopez, the guidance counselors, Mr. Holman, or ask to go to [REDACTED] safe place.

21. Due to concerns about [REDACTED] safety, Ms. Manley asked Ms. Boyd, a teacher across the hallway, to call for Officer Draine. Ms. Boyd called for Officer Draine or an administrator over the hand-held radio.

22. Assistant principals Martin and Joyce, Mr. Lopez, Officer Draine, and Mr. Holman responded to the call. These school staff individually encountered [REDACTED] in the hallway, walked behind [REDACTED] at various distances, and asked [REDACTED] not to exit the building. Instead of stopping, [REDACTED] continued walking toward the front of the building, loudly cursing and using

disrespectful language towards Officer Draine such as "What are you going to do? Arrest me? Taze me? You can't do anything to me."

23. When [REDACTED] approached the front of the building, [REDACTED] exited the first set of doors, walked through the lobby, and opened the second set of doors that exit the building. Officer Draine told [REDACTED] to stop and come back into the building. [REDACTED] stopped in the threshold of the doorway with one foot outside the building, continued yelling inappropriate comments at Officer Draine, and threw [REDACTED] hand towards Officer Draine. According to Officer Draine, at this point, [REDACTED] had committed a criminal offense, disorderly conduct.

24. Approximately ten minutes after the incident began, [REDACTED] complied with Mr. Holman's request to come with him to his office and followed Mr. Holman back to his office. A few minutes later, after [REDACTED] had calmed, Mr. Holman asked some of the other staff and Officer Draine to come to his office to talk to [REDACTED]. [REDACTED] became upset and loud, began making inappropriate comments toward Officer Draine and attempted to leave the office area. After asking [REDACTED] to calm down multiple times without effect, Officer Draine informed [REDACTED] that he was going to have to arrest [REDACTED] and started to move toward [REDACTED] to arrest [REDACTED]. According to Officer Draine, [REDACTED] raised [REDACTED] fists at Officer Draine and jumped toward him, grabbing Officer Draine's thumb, kicking at Officer Draine, and attempting to bite Officer Draine's arm, resulting in both [REDACTED] and Officer Draine falling to the ground.

25. Officer Draine testified that because of [REDACTED] continued aggression, resistance to arrest, and the injuries [REDACTED] caused to Officer Draine's wrists, Officer Draine was only able to get one handcuff on [REDACTED]. After Officer Draine warned [REDACTED] that he was going to have to spray [REDACTED],

the SRO applied a one second burst of freeze+P to subdue [REDACTED]. At the time [REDACTED] was five-foot nine-inches and weighed approximately 215 pounds.

26. School counselor Bunyi assisted in calming [REDACTED] and helping Officer Draine get [REDACTED] up and onto a couch in the adjacent guidance suite. The school nurse observed and cleared [REDACTED] after [REDACTED] was sprayed with the chemical freeze agent. After the nurse had cleared [REDACTED] medically, Officer Draine transported [REDACTED] to the juvenile detention center (JVC) and charged [REDACTED] with disorderly conduct and assault.

27. During these events, Mr. Holman placed two telephone calls to [REDACTED] leaving messages on [REDACTED] voicemail each time and informing [REDACTED] in the second voicemail that [REDACTED] was being transported to JVC.

28. An IEP meeting was held on August 19, 2014. [REDACTED] stated that it was [REDACTED] belief that [REDACTED] behavior on August 14th was a result of [REDACTED] having no help in the regular classes, asked why the IEP had not been followed until it could be updated, and asked why there was no inclusion teacher in the classroom. [REDACTED] provided the IEP team with medical documentation diagnosing [REDACTED] with anxiety, Sensory Processing Disorder, and ADHD. Upon obtaining this information, RCS initiated a reevaluation. Additionally, the IEP team proposed the initiation of a FBA due to [REDACTED] recent behaviors. [REDACTED] IEP team also proposed an IEP addendum, which contained the same goals, objectives, and accommodations as [REDACTED] prior agreed upon annual IEP. RCS also proposed changing the service delivery location on the IEP to the inclusion setting for all academic courses to align the IEP with the discussions at the previous IEP meeting in which it was discussed that [REDACTED] would receive instruction in the general education inclusion setting for [REDACTED] grade.

Furthermore, as part of the IEP addendum, the team drafted a revised behavior contract to provide support across all classroom settings.

29. [REDACTED] never returned to [REDACTED] after the August 14, 2014 incident. [REDACTED] withdrew [REDACTED] from RCS and enrolled [REDACTED] in a homeschool /tutoring program.

30. On August 18, 2014, [REDACTED] requested "a copy of [REDACTED] education records and [REDACTED] Report Card from last school year (2013-2014) before the IEP Meeting on Tuesday 8/19/14 @ 2:15" as well as a copy of the video of the incident on August 14, 2014. [REDACTED] was told that [REDACTED] "2013-14 Report Card and educational record" would be ready when the front office opened the next morning and that there was no video. On August 19, 2014, [REDACTED] received the requested records plus additional records. [REDACTED] made another request for [REDACTED] records on August 25, 2014. Initially, [REDACTED] requested [REDACTED] "ENTIRE records;" however, [REDACTED] later amended this request-"Please disregard my request for [REDACTED] entire records. I would like a copy of the following records: All evaluation reports and recommendation, Integrated assessment reports, Behavior reports/observations /grade reports, IEP's...2003-2009." On August 31, 2014, [REDACTED] then made a request for [REDACTED] "ENTIRE discipline records" and was told by Mr. Holman that a packet of those records would be ready any day that she wanted to stop by to complete the official withdraw paperwork for [REDACTED] On September 25, 2014, [REDACTED] signed a receipt of records form indicating that [REDACTED] received [REDACTED] special education records.

31. [REDACTED] is currently enrolled in a homeschool program under the auspices of Aaron Academy, although [REDACTED] provides all of [REDACTED] home schooling instruction. In addition to homeschooling, [REDACTED] attends a tutoring program at Anderson Center for Educational Excellence (ACEE), one day per week for five and a half hours in a 1:1 setting for writing, reading, math,

and grammar and a small group for history. ACEE is not recognized as a school by the State of Tennessee or under any state certification system and does not provide curriculum correlated with Tennessee's standards or require that its tutors have licensure/degrees in education. [REDACTED] and ACEE's tutors are using instructional materials on the 1st to 5th grade level. The owner of ACEE selected [REDACTED] instructional materials based on assessments that she administered; however, she has not earned any degrees in educational assessment. One of the assessments she administered to [REDACTED] interpreted to [REDACTED] and then used to make educational decisions for [REDACTED] was an outdated standardized assessment published more than 35 years ago.

32. When [REDACTED] was tested by Dr. D. Malcolm Spica, a Clinical Neuropsychologist, in September, 2015, [REDACTED] ranked in the low average range with an IQ of 81, had a 4th grade equivalent in Reading, performed at the 3rd grade level for Arithmetic, and at the 2nd grade level for Spelling. According to Ms. Anderson, since beginning ACEE, [REDACTED] has improved approximately two (2) grade levels in math and significantly in reading.

33. In the fall of 2014, [REDACTED] received counseling from Phil Plant. Mr. Plant is not a licensed counselor or psychologist, although he testified that he has provisional licensure, has a Master's degree in Professional Counseling, has all the clinical hours needed toward being a LPC, and is working under the supervision of a LPC.

34. The goals and objectives of [REDACTED] IEPs have aligned with grade level state standards, accommodations, and specially designed instruction. During [REDACTED] school years, RCS completed two annual IEPs and also proposed four additional IEP addendums to address needed changes. [REDACTED] signed in agreement to all of [REDACTED] IEPs prior to the August 14, 2014 incident. [REDACTED] acknowledges that [REDACTED] consistently expressed [REDACTED] opinions and gave [REDACTED] input during IEP meetings.

35. █████ showed academic progress while at █████. In █████ grade, █████ progress reports show that █████ was making "some progress" on nine of the ten applicable academic and behavioral objectives of the last reporting period (reporting period 3) of █████ █████ grade IEP. In █████ grade, █████ mastered one of █████ objectives and was making "some progress" on the other sixteen applicable academic and behavioral objectives of the last reporting period (reporting period 2) of █████ █████ grade IEP. On the last agreed upon █████ grade IEP, which had only been implemented for approximately two months, █████ had mastered three objectives and was making "some progress" on the remaining twenty-one applicable objectives by the end of █████ █████ grade year (reporting period 4). The three objectives that █████ had mastered were met with specially designed instruction provided in the general education inclusion setting.

36. █████ grades and advancement from grade to grade show academic growth. For example, in █████ grade, █████ obtained all B's for █████ final grades and a cumulative GPA of 3.22. At the end of █████ grade, █████ class rank was 455 out of 1032.

37. Overall, █████ standardized individual achievement assessments show academic progress. █████ reading comprehension standard scores have continued to increase each time assessed. █████ math reasoning standard scores have remained within three standard score points over a six-year period.

38. The IEP's of 5/6/2013 - 5/6/2014 and 1/14/2014 - 5/6/2014 allowed participation in extracurricular activities "that are accessible." In the 3/12/2014 - 3/12/2015 IEP, participation in extracurricular activities was those "in which █████ qualifies for." Ms. Adams explained that "that are accessible" and "in which █████ qualifies for" essentially meant the same thing and further explained that some activities for all students require qualifying such as certain sports.

39. Dr. David Rostetter was tendered and accepted as an expert in acceptable standards of public policy and practice in the areas of compliance monitoring for the IDEA (procedural protection, assessment, evaluation, development and implementation of IEPs, development and implementation of FBAs, placement in the least restrictive environment, and the availability of FAPE). Dr. Rostetter reviewed [REDACTED] educational records, depositions, and visited RCS for two days. He generally opined the following: 1) [REDACTED] IEPs addressed [REDACTED] individual needs, and the instruction, accommodations, and modifications provided [REDACTED] an appropriate education and meaningful benefit; 2) [REDACTED] was afforded procedural protections; 3) [REDACTED] services supported [REDACTED] emotional and behavioral needs; 4) The SRO and RCS acted appropriately during the incident of August 14, 2014; 5) [REDACTED] current services at home and at ACEE are not reasonably calculated for [REDACTED] to derive benefit.

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. The Individuals with Disabilities Education Act (IDEA) requires RCS 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. IDEA, 20 U.S.C. §1400 *et seq.*

I. Identification/Evaluations

3. Under the 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.

6. [REDACTED] was identified as a "student with a disability" under the IDEA from [REDACTED] through [REDACTED] withdrawal from RCS in August of 2014 and consistently received special education and related services. The evidence shows that RCS conducted comprehensive evaluations to determine eligibility for a secondary disability (in addition to evaluating to

determine whether [REDACTED] continued to have a primary disability of Language Impaired). In the [REDACTED] grade an evaluation determined that, despite [REDACTED] reported medical diagnosis of ADHD, [REDACTED] did not meet the IDEA's eligibility criteria for Other Health Impairment (OHI). Petitioners argue that the Lund testing should have warranted further follow-up by RCS since Ms. Lund noted the possibility of another disability. However, Ms. Lund explained that "another disability" was referring to a medical issue. [REDACTED] failed to provide the medical documentation required to support an OHI certification. Further, the information later received from [REDACTED] and [REDACTED] doctor did not indicate any other diagnoses or medical treatment other than that for ADHD, and there was no indication that [REDACTED] ADHD was causing an adverse impact educationally. Upon obtaining information regarding additional medical diagnoses after [REDACTED] arrest in August of 2014, RCS immediately agreed to initiate an early reevaluation. RCS met its child find obligation under IDEA by evaluating [REDACTED] for suspected disabilities.

II. IEPs

7. The IDEA and Tennessee law require RCS to provide a FAPE to [REDACTED] 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. 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).

8. 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.

9. 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).

10. 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 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). The argument that [a student] should not experience declining percentile scores may be an unrealistic goal, and it is a goal not mandated by the IDEA. Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000).

A. Educational Benefit

11. █████ IEPs addressed █████ academic and behavioral needs through goals and objectives and provided accommodations to address █████ academic needs and reduce frustration with academic tasks. Petitioners argue that █████ behavior and academic goals were repeated in successive IEPs. However, many of these successive IEPs were only addendums held to address changes unrelated to █████ IEP goals. School districts are not required to amend every present level and IEP goal each time the team meets although █████ IEP team did frequently amend █████ IEPs to meet █████ changing needs. Significantly, █████ signed in agreement to all of █████ IEPs prior to the August 14, 2014 incident.

12. The proof established that █████ made meaningful academic progress while enrolled in RCS. The final progress reports for █████ █████ grade IEP and █████ grade IEP

showed that, out of twenty-seven total objectives, [REDACTED] mastered one objective and was making progress on twenty-five objectives. Performance data for the [REDACTED] grade IEP shows that, in approximately two months time, [REDACTED] had mastered three objectives and was making progress on the remaining twenty-one applicable objectives.

13. Achievement scores for [REDACTED] were below [REDACTED] peers and [REDACTED] is clearly not on grade level. However, as noted by Dr. Rostetter, [REDACTED] will always have lower achievement scores than [REDACTED] peers (Dr. Rostetter also cautioned heavy reliance on TCAP scores because of instances of [REDACTED] not trying all of the time). [REDACTED] development should be measured not by [REDACTED] relation to the rest of the class, but rather with respect to the individual student. Each year, [REDACTED] made almost a year's growth or more in both math reasoning and reading comprehension. According to Dr. Rostetter, research shows that students with learning disabilities typically only make 60% progress compared to typical peers. Thus, the evidence supports RCS' assertion that [REDACTED] made meaningful educational progress while attending RCS schools.

B. Behavior

14. Under the IDEA, when a student's behavior impedes [REDACTED] learning or the learning of others, the law requires that a district "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 20 U.S.C. § 1414(d)(3)(B)(i). RCS developed and implemented several behavior intervention strategies to address [REDACTED] disruptive behaviors at school. In addition to addressing such behaviors through [REDACTED] IEP goals, RCS considered the use of, and further implemented, positive behavioral interventions and other supports for [REDACTED] behavior when it consulted Ms. Simmons and initiated a behavior contract and classroom behavioral system in Ms. Adams' class.

15. Petitioners allege that RCS violated the IDEA by failing to conduct a FBA and BIP to address [REDACTED] behavioral needs. Although there were multiple discussions about a FBA and BIP, the IDEA does not require school districts to conduct a FBA and BIP for a student unless there is a disciplinary “change of placement” exceeding 10 school days. *See* 20 U.S.C. § 1415(k)(1)(D)(ii). After [REDACTED] was arrested on August 14, 2014, [REDACTED] IEP team proposed a FBA. [REDACTED] withdrew [REDACTED] from RCS a few days after the IEP meeting and before a FBA could be conducted.

16. [REDACTED] behavior was appropriately managed and addressed when problems emerged. The behavioral data collected by [REDACTED] [REDACTED] grade teachers showed behavioral improvements. By the second semester of [REDACTED] grade, [REDACTED] behavior was consistently reported as appropriate in Ms. Moore’s resource class and Ms. Smith-Eady’s general education inclusion class. Importantly, no behavioral incidents were documented in any setting in the [REDACTED] grade after the end of March 2014. As opined by Dr. Rostetter, by managing [REDACTED] behaviors, [REDACTED] was able to make academic progress and advance from grade to grade. It is determined that [REDACTED] IEPs addressed [REDACTED] academic and behavioral needs.

C. March 20, 2014 IEP

17. Petitioners argue that there was a change in placement at the beginning of the [REDACTED] grade year that altered the March 20, 2014 IEP and Petitioners were not notified of the change. The March 20, 2014 IEP provided that [REDACTED] would receive all academic instruction in the extended resource environment with the exception of elective and Reading and Language Arts which [REDACTED] would receive in the inclusion setting. However, the prior written notice for the IEP noted that [REDACTED] would fully transition into inclusion classes/setting during the [REDACTED] grade year and Ms. Adams testified that it was understood by the team members at the March, 2014 meeting that

████ would be in all inclusion at the beginning of the █████ grade. █████ was assigned to four regular academic education classes to begin the █████ grade school year. █████ was concerned about the inclusion setting and on August 8, 2014 requested an IEP meeting which was held on August 19, 2014.

18. RCS contend that the change in service delivery to all inclusion classes in August of 2014 was not a "change in educational placement" pursuant to the IDEA. The IDEA does not define an "educational placement," making it difficult to determine when a change of placement requiring procedural protections occurs. *See J. R. v. Mars Area Sch. Dist.* 318 F. App'x 113, 119 (3d Cir. 2009). Ultimately, an educational change of placement occurs when the change is "likely to affect in some significant way the child's learning experience." *Id.* A change in a student's schedule from a resource classroom to an inclusion classroom was not an educational change in placement, as it did not affect the student's learning experience in any significant way. *Id.* RCS argue that all of █████ IEP goals and objectives could be implemented in the inclusion setting, and the transition to general education/inclusion classes was clearly contemplated at the end of the previous school year.

19. Whether or not all inclusion classes at the beginning of the school is or is not a change in educational placement, it is determined that this action was not a procedural violation. The prior written notice indicated that all inclusion would take place during the █████ grade year. When █████ had some concerns about all inclusion, █████ requested an IEP meeting on August 8 and that was ultimately held. In the interim the incident with the SRO happened. Petitioners essentially allege that the incident with the SRO would not have occurred but for the fact that █████ was in an inclusion class. As discussed below, that argument is without merit. Further, even

if all inclusion classes were found to be a procedural violation, it did not cause substantive harm since an IEP was held a few days later to address [REDACTED] concerns.

20. Petitioners also allege that scheduling [REDACTED] for inclusion classes at the beginning of the [REDACTED] grade school year denied [REDACTED] right to receive IEP services in the least restrictive environment (LRE). The IDEA requires that students receive special education services in the LRE with nondisabled children to the “maximum extent appropriate.” 34 C.F.R. § 300.114(a)(2)(i). Students should only participate in special classes, such as resource classes, when the “nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 34 C.F.R. § 300.114(a)(2)(ii). Consistent with the LRE mandate, in the spring of 2014, [REDACTED] IEP team discussed [REDACTED] transition from the resource setting with some inclusion classes to full inclusion. The documentation of [REDACTED] academic and behavioral performance once [REDACTED] had started transitioning into more inclusion classes showed that [REDACTED] was successful with supplementary aids and services. The evidence does not suggest that [REDACTED] had behavioral difficulties in [REDACTED] general education electives during the [REDACTED] grade or in either of the general education inclusion classes that [REDACTED] attended during the second semester of [REDACTED] grade. All the proof supports that [REDACTED] was provided FAPE in the inclusion setting, suggesting that the general education setting was [REDACTED] LRE.

21. Petitioners foremost allegation is that the March, 2014 IEP was not properly implemented which led to the August 14, 2014 incident with the SRO. Specifically, a behavior contract was not in place and/or provided to the teacher, an aide was not in the classroom, and [REDACTED] was being educated in an inclusion class.

22. RCS argue that [REDACTED] behavior contract did not apply to Ms. Manley's [REDACTED] grade math class, and that the behavior contract was developed in the fall of 2013 to address behavioral concerns in Ms. Adams class. At the time the behavior contract was signed, [REDACTED] was attending electives and inclusion reading in the general education setting; however, the contract did not mention any of those classroom teachers or strategies for behavior in those classes. [REDACTED] was not having difficulties in [REDACTED] inclusion classes or Ms. Moore's resource class and did not need a behavior plan for those classes. The behavior contract was intended for use solely for Ms. Adams classroom, was implemented specifically in that setting, and never at any time during [REDACTED] [REDACTED] grade year was used in another setting. The March 14, 2014 IEP noted that [REDACTED] had a behavioral contract for the classroom setting as a method to address [REDACTED] behavior although it was never updated upon transition into [REDACTED] grade.

23. Ms. Manley did not have a copy of [REDACTED] IEP on August 14, 2014 but knew [REDACTED] was a special education student and provided [REDACTED] assistance consistent with [REDACTED] accommodations even though [REDACTED] was only in her room for approximately 5-10 minutes. [REDACTED] behavior contract did not address a procedure for dealing with behaviors that rose to the level of those presented by [REDACTED] on August 14, 2014; however, consistent with the spirit of [REDACTED] behavior contract, [REDACTED] staff allowed [REDACTED] the opportunity to speak to an administrator and the guidance counselors to calm down. None of the actions taken by [REDACTED] staff were inappropriate or violated [REDACTED] IEP or support services. Further, the behavioral contract did not allow [REDACTED] to leave class without permission or attempt to leave the school building.

24. In terms of an aide being present in the inclusion class, [REDACTED] IEP and prior written notice discussing the transition to inclusion in [REDACTED] grade did not specify the number of hours that an inclusion special education support person would be available in [REDACTED] math

inclusion class. According to Mr. Holman, in general an inclusion class has an additional support person “as needed, as often as possible.” More important, there is no indication that having a second person in the classroom would have made a difference on August 14, 2014.

25. As to [REDACTED] presence in the inclusion class, other than the incident of August 12, there was never any manifestation that [REDACTED] had more behavioral difficulties in the inclusion setting. Thus, there was never a pattern of behavior to infer that the “inclusion setting” was the trigger that caused [REDACTED] to become verbally and physically aggressive on August 14, 2014.

26. There is simply no proof that [REDACTED] behavior in the classroom, leaving the classroom, and the incident with the SRO occurred because [REDACTED] was in math inclusion class, or because an aide was not present or because the teacher wasn’t aware of a behavior contract. RCS met both the substantive and procedural requirements of the IDEA with regard to [REDACTED] March 20, 2014 IEP and all other prior IEPs.

D. August 19, 2014, Proposed IEP

27. The IEP changes proposed on August 19, 2014 were reasonably calculated to provide [REDACTED] an educational benefit. [REDACTED] IEP goals, objectives, and accommodations remained the same as [REDACTED] prior annual IEP, in which there was documented progress. As previously noted, the IEP team drafted a revised behavior contract and obtained consent for a FBA to address the concerns regarding [REDACTED] elevated behaviors at the beginning of [REDACTED] [REDACTED] grade year and to provide support across all classroom settings. [REDACTED] knew [REDACTED] had a right to convene a follow-up IEP meeting to discuss [REDACTED] concerns but chose not to do so. Instead, [REDACTED] withdrew [REDACTED] from RCS to homeschool [REDACTED]. Because [REDACTED] never returned to [REDACTED] after the

August 19, 2014 IEP meeting, RCS never had the opportunity to implement the proposed IEP addendum, including the development of a FBA and BIP for [REDACTED]

III. Educational Records

28. 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).

29. Petitioners contend that RCS did not provide [REDACTED] with all records of [REDACTED] as [REDACTED] requested on August 18, 2014, as well as, failed to provide a copy of the video of any recording pertaining to the incident of August 14, 2014. On August 25, [REDACTED] amended [REDACTED] prior request to specific records. Petitioners have not established that RCS did not provide the records from the previous school year as requested on August 14 (receipt signed for by [REDACTED] or the specific records listed on August 25. As to any video, according to Mr. Holman, there was no surveillance camera where the spray and arrest incident occurred. Any video footage of the main hallway was never viewed by Mr. Holman, and he advised [REDACTED] that [REDACTED] would have to contact the school board office to determine if [REDACTED] could view any video footage from August 14, 2014. No procedural violation regarding educational records is found.

IV. T.C.A. § 49-10-1301 et. seq.

30. T.C.A. § 49-10-1301 is known as the Tennessee Special Education Behavioral Supports Act. It provides that a student receiving special education services may be restrained or isolated only in emergency situations. T.C.A. § 49-10-1304(a). Administering a noxious substance to a student receiving special education services is prohibited. T.C.A. § 49-10-13045(b). A “noxious substance” means a substance released in proximity to the student’s face or sensitive area of the body for the purpose of limiting a student’s freedom of movement or

action, including but not limited to Mace and other defense sprays. State Board of Education Rule 0520-01-09-.23(1)(c). The application of this law, while not explicitly stated, is directed at school personnel, not law enforcement. The law explicitly defines "school personnel" as "individual[s] employed on a full-time or part-time basis by a public school." T.C.A. § 49-10-1303(10).

31. The only person to restrain [REDACTED] or deploy a chemical agent on [REDACTED] was Officer Draine. Officer Draine is not an RCS employee but is employed by the Rutherford County Sheriff's Department (RCSD). Officer Draine is assigned by the RCSD to [REDACTED] in his role as an SRO. Since Officer Draine is not an employee of RCS, he is not "school personnel" within the meaning of the Behavioral Supports Act. Because no RCS employee (i.e., "school personnel" under the Behavioral Supports Act) restrained or deployed a noxious substance on [REDACTED] RCS had no obligations, limitations, or responsibilities under the Behavioral Supports Act related to this incident, including the obligation, under certain circumstances to contact a parent to report a restraint or to call an IEP meeting. *See* Tenn. Code Ann. § 49-10-1304(d)(1)-(2).

32. No RCS employee filed a juvenile petition against [REDACTED] Officer Draine filed the charges against [REDACTED] at his own instigation, with no request to do so by any RCS employee. Therefore, RCS had no obligation to conduct a manifestation determination (MD) review. Although the Behavioral Supports Act states that school personnel must conduct a MD review before they can file a juvenile petition against a student receiving special education, Tenn. Code Ann. § 49-10-1304(d)(3)(B), the statute clearly differentiates the actions of an SRO from those of school personnel in the next section of the statute - "A school resource officer (SRO)...may, upon witnessing an offense, take the student into custody." Tenn. Code Ann. § 49-10-1304(d)(3)(C). There are no limiting clauses to an SRO's authority as it relates to

arresting a student receiving special education. In this case, Officer Draine personally witnessed an offense, took [REDACTED] into custody, and filed a juvenile petition, as allowed under the statute. Since no RCS employee restrained or deployed a freeze spray on [REDACTED] or filed a juvenile petition against [REDACTED], RCS was not bound by the Tennessee Behavioral Supports Act.

V. Section 504/ADA

33. Petitioners' claim that RCS excluded [REDACTED] from participation in school activities solely by reason of [REDACTED] disability in violation of Section 504 and Title II of the ADA. This allegation is based on [REDACTED] IEPs of May 6, 2013 and January 14, 2014 which listed participation in extracurricular activities that are "accessible." In the March 12, 2014 IEP, participation in extracurricular activities was listed as those "in which [REDACTED] qualifies for." Ms. Adams explained the terms "accessible" and "in which [REDACTED] qualifies for" on various IEPs meant the same thing. She clarified that extracurricular and non-academic activities that are "accessible" meant those that "are available to [REDACTED]." She further explained that if [REDACTED] wanted to play basketball, football, or track, [REDACTED] would have to qualify for the team.

34. Neither Section 504 nor Title II of the ADA requires school districts to allow every student with a disability the right to participate in every possible extracurricular activity. The laws simply mean that [REDACTED] cannot be barred from trying out for competitive activities, or participating in open activities, solely because [REDACTED] is a "student with a disability." Petitioners have failed to prove that RCS ever denied [REDACTED] access to an extracurricular activity or that any alleged discrimination was solely due to [REDACTED] disability.

It is **Determined** that Respondent is in compliance with the IDEA, has not committed any procedural or substantive violations of the IDEA, and did provide [REDACTED] with a free appropriate public education. It is **ORDERED** that the remedies and relief sought by Petitioners are **denied**. Respondent is the prevailing party in this matter.

Entered this the 29th day of June, 2016.



LEONARD POGUE
ADMINISTRATIVE JUDGE

Filed in the Administrative Procedures Division, Office of the Secretary of State, this _____ day of June, 2016.



Richard C. Collier, Director
Administrative Procedures Division