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STATE OF TENNESSEE
DEPARTMENT OF EDUCATION

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RE: In the Matter of: J.A., the Student, and B.P., the Student's Parent/Guardian, Petitioners
vs. Smith County School System, Respondent.
Docket No. 07.03-149403J

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

Administrative Procedures Division
Tennessee Department of State

/aem
Enclosure

cc: Steve Sparks, IDEA Complaints Investigator, TN Department of Education

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

IN THE MATTER OF:

***J.A., the Student, and
B.P., the Student's Parent/Guardian,
Petitioners,***

v.

***SMITH COUNTY SCHOOL SYSTEM,
Respondent.***

DOCKET NO: 07.03-149403J

ORDER

This matter was heard before Administrative Judge Kim Summers at the Smith County Board of Education on May 1 – 2, 2018. The Petitioners were represented by Jessica Salonus, Esq. and Justin Gilbert, Esq. Rob Wheeler represented the Respondent Smith County School System, which is the school system or local education agency (LEA).

The issue to be addressed at the hearing was whether the Individualized Education Program (IEP) proposed by the school system provides a free appropriate public education (FAPE) in the least restrictive environment (LRE) as required by the Individuals with Disabilities Education Act (IDEA).

SUMMARY OF THE EVIDENCE

Testimony was provided by the following witnesses: Wendi Cond, Pre-K teacher at New Middleton Elementary School (NMES); Alicia Talbott, Executive Director of the Down Syndrome Association; B.P., the mother of the student; Eric Swann, school Psychologist; B.A., father of the student; and Lisa Hembree, Special Education Coordinator.

Twenty-one exhibits were admitted into evidence: EXHIBIT 1, Joint Stipulations; EXHIBIT 2, Pre-K Curriculum; EXHIBIT 3, Student's first IEP; EXHIBIT 4, documentation of Student's behaviors; EXHIBIT 5, first and second Progress Reports; EXHIBIT 6, IEP Progress Report; EXHIBIT 7, IEP Meeting Notes; COLLECTIVE EXHIBIT 8, Prior Written Notice and Draft of 2nd IEP; EXHIBIT 9, final

version of 2nd IEP; EXHIBIT 10, Notes from November 20, 2017 IEP meeting; EXHIBIT 11, post-meeting notice; EXHIBIT 12, notes from December 18, 2017 Resolution Meeting; EXHIBIT 13, audio of Resolution Session on USB flash drive; EXHIBIT 14, Pre-K Handbook; EXHIBIT 15, video of conga line on USB flash drive; COLLECTIVE EXHIBIT 16, 3 color photographs; EXHIBIT 17, training roster; EXHIBIT 18, Due Process Hearing Request Form; EXHIBIT 19, Discovery Packet (Offer of Proof only); EXHIBIT 20, Early Learning Developmental Standards for Four-Year-Olds; EXHIBIT 21, Enrollment list for Kelly Martin's Pre-K class at Carthage Elementary; EXHIBIT 22, Answer to the Request for Due Process; EXHIBIT 23, Expert Disclosure and Report of Dr. Kathleen Whitbread (an Offer of Proof in lieu of testimony).

SUMMARY OF THE EVIDENCE

1. The student, JA, is a five year child with Down Syndrome.
2. JA was enrolled in Pre-K at NMES with an IEP, with a start date of May 19, 2017, that was to be reevaluated after the first nine weeks of class.
3. When school started in the Fall, JA was placed in a regular Pre-K classroom at NMES where he was pulled out as necessary to receive the special services recommended in his IEP. No special education services were provided in the regular classroom as his classroom teachers had not been specifically trained on educating children with special needs.
4. The regular Pre-K curriculum is intended to create a busy and stimulating environment for young children.
5. After the agreed upon nine weeks, school personnel determined that, based on his behaviors and academic progress, JA should be transferred to an integrated classroom at Carthage Elementary, where there would still be a mix of disabled and non-disabled children, but a much lower student to teacher ratio, and a teacher who is trained to educate children with special needs.

6. A new IEP was drafted for the remainder of the school year – from November 20, 2017 through May 19, 2018 – and a meeting was held to discuss the new IEP and the proposed transfer.

7. The integrated classroom at Carthage Elementary was inappropriately referred to as a Comprehensive Development Classroom (CDC) which typically includes only children with special needs.

8. JA’s parents objected to placement of JA in a CDC and requested that he remain in his current classroom with a one-to-one aide to help address his behaviors.

9. A comparison of each proposed placement is provided below –

NMES – with a one-to-one aide	Carthage Elementary
<ul style="list-style-type: none">- Regular classroom with regular curriculum- A class size of approximately 20 students- Two educators in the classroom - a teacher trained in regular education and a teaching assistant- Predominantly non-disabled children- An aide to provide assistance to JA with his behaviors	<ul style="list-style-type: none">- Integrated classroom with regular curriculum- A class size of less than 10 students- Three educators in the classroom – a teacher trained in special education with proven results and two teaching assistants- A mix of disabled and non-disabled children- Teacher and assistants more available to JA but no specifically assigned aide

10. The school system declined to provide the one-to-aide, deeming it unnecessarily restrictive, but did agree to conduct a Functional Behavior Assessment (FBA), which was not completed because JA was disenrolled by his parents from the school system in mid-November.

11. The parents filed a request for due process with the school system on December 4, 2017. The complaint alleged that the IEP does not provide FAPE in the LRE in violation of the IDEA, and a possible violation of section 504 of the Rehabilitation Act, and requested compensatory services for educational services not received during the school year.

12. Since his removal from the school system, JA has attended Dynamic Therapy Center and a Mother’s Day Out program. The parents did not request compensation for the expenses related to these programs.

13. The Parties agreed that repeating Pre-K may be best for JA in the Fall, and the school system offered extended school year (ESY) should these service be deemed warranted.

14. The school system also agreed to additional training available from the Down Syndrome Association related to educating children with this disability.

RELEVANT LAW

1. The IDEA, 20 USC § 1400, *et seq.*, requires public school systems to provide to disabled children a free appropriate public education (FAPE).

2. Pursuant to 20 USC § 1401(9), the term “free appropriate public education” means special education and related services that –

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

3. 20 USC § 1414(d)(1)(A) provides the following requirements with respect to the Individualized Education Program (IEP) for a disabled child –

(i) In general

The term “individualized education program” or “IEP” means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes –

- (I) a statement of the child's present levels of academic achievement and functional performance, including –
 - (aa) how the child's disability affects the child's involvement and progress in the general education curriculum;
 - (bb) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities; and
 - (cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;
- (II) a statement of measurable annual goals, including academic and functional goals, designed to –

- (aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and
- (bb) meet each of the child's other educational needs that result from the child's disability;
- (III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;
- (IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child –
 - (aa) to advance appropriately toward attaining the annual goals;
 - (bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and
 - (cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;
- (V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);
- (VI)(aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 1412(a)(16)(A) of this title; and
 - (bb) if the IEP Team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why –
 - (AA) the child cannot participate in the regular assessment; and
 - (BB) the particular alternate assessment selected is appropriate for the child;
- (VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications; and
- (VIII) beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter –
 - (aa) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills;
 - (bb) the transition services (including courses of study) needed to assist the child in reaching those goals; and
 - (cc) beginning not later than 1 year before the child reaches the age of majority under State law, a statement that the child has been informed of the child's rights under this chapter, if any, that will transfer to the child on reaching the age of majority under section 1415(m) of this title.

4. Pursuant to 34 C.F.R. § 300.148 of the IDEA regulations,

(a) General. This part does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility. However, the public agency must include that child in the population whose needs are addressed consistent with §§ 300.131 through 300.144.

(1) If--

(i) At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section;

(2) If, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in § 300.503(a)(1), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or

(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

5. 34 C.F.R. § 300.114 of the IDEA regulations specifies the following with respect to LRE requirements –

(a) General.

(1) Except as provided in § 300.324(d)(2) (regarding children with disabilities in adult prisons), the State must have in effect policies and procedures to ensure that public agencies in the State meet the LRE requirements of this section and §§ 300.115 through 300.120.

(2) Each public agency must ensure that--

(i) 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 nondisabled; and

(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if 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.

6. 20 U.S.C. § 1415(j) specifies the following with respect to maintaining a child's educational placement –

Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

7. The burden is on the party requesting relief to establish whether or not there has been a violation of the IDEA.¹

8. A violation of Section 504 of the Rehabilitation Act requires proof that the failure to provide a free appropriate public education was *discriminatory*, which requires the Petitioners to prove either bad faith or gross misjudgment.²

ANALYSIS and CONCLUSIONS of LAW

1. There is no dispute that JA has a disability that entitles him to special education services pursuant to the IDEA.

2. There is no dispute that JA is entitled to a FAPE in the most appropriate least restrictive environment.

3. The school system determined, after the nine week evaluation period, that a smaller integrated classroom with a special education teacher would be better for JA's educational progress as well as controlling his behaviors and would not be as restrictive as the one-to-one aide in the regular classroom since the integrated classroom includes both disabled and non-disabled children.

4. This contested case arose because the Petitioners did not agree that the alternative placement would provide a less restrictive environment than the regular classroom at NMES with a one-to-one aide.

5. A comparison of the advantages and disadvantages of each proposed placement is provided below –

¹ *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56, (2005).

² *Id.*

	NMES with one-to-one Aide	Carthage Elementary
Advantages	<p>JA would be in a regular classroom with mostly non-disabled children.</p> <p>An aide would be available to address behaviors.</p>	<p>Regular curriculum with some non-disabled children.</p> <p>Special education teacher with proven results.</p> <p>Much smaller student-to-teacher ratio so teacher and assistants would have more time to devote to JA without singling him out with the presence of specially-assigned aide.</p> <p>Fewer children and more teachers provides a more controlled environment.</p>
Disadvantages	<p>No special education teachers in the classroom.</p> <p>Activity level and number of children in the classroom may exacerbate JA's behaviors.</p> <p>The constant presence of a one-to one aide may be restrictive to JA and may inhibit his ability to blend and connect with the other children.</p>	<p>JA would be in an integrated classroom with predominantly other disabled children.</p>

6. Both the one-to-one aide in the regular classroom and the integrated classroom with the lower student-to-teacher ratio would provide additional assistance with JA's behaviors. Both alternatives are more restrictive than the prior placement at NMES without the one-to-one aide.

7. The proposed placement at Carthage Elementary would still allow JA to interact with non-disabled children while also receiving instruction from teachers trained to educate children with special needs

8. Although the one-to-one aide would help manage JA's behaviors in the regular classroom, it would not provide any additional educational benefit, and the stimulation he receives in that environment could be exacerbating his behaviors.

9. Notwithstanding the objection from JA's parents, it cannot be concluded that the proposed placement at Carthage Elementary in the integrated classroom was not a reasonable alternative to the regular classroom at NMES with the requested one-to-one aide or in violation of the IDEA.

10. The school system based its proposed new placement on the information that it had available after only 3 months of schooling and was willing to undertake additional evaluation of JA's behaviors but was unable to do so when he was disenrolled.

11. JA may have remained at NMES during this additional evaluation, as the parents preferred, had JA remained enrolled and taken advantage of the "stay put" provisions of 20 U.S.C. § 1415(j).

12. Because the IEP was within 17 days of expiration at the time of the hearing, relief for the disputed IEP is limited to completion of the FBA, agreed to be the school system, as soon as practicable so that a proper placement for JA can be determined for the upcoming school year.

13. Because a clear violation of the IDEA was not established, and the Parties have agreed to either ESY or a repeat of Pre-K, as appropriate, additional compensatory education services are not justified.

14. The Petitioners made no claim for reimbursement of any educational expenses incurred following his disenrollment from the school system so such relief has not been considered.

15. A possible violation of Section 504 of the Rehabilitation Act was alleged in the complaint but was not specifically addressed during the hearing or substantiated by any evidence of discrimination as required by law.

For the reasons stated above, it is hereby **ORDERED** that, upon JA's reenrollment in the school system, an FBA shall be completed as soon as practicable and a proper placement be determined for the upcoming school year. The school system is also **ORDERED** to participate in the training offered by the Down Syndrome Association.

This FINAL ORDER entered and effective this the 16TH day of MAY 2018.



KIM SUMMERS
ADMINISTRATIVE JUDGE
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE

Filed in the Administrative Procedures Division, Office of the Secretary of State, this the 16TH day of MAY 2018.



J. RICHARD COLLIER, DIRECTOR
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE

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.