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**Department of State**  
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RE: In the Matter of: [REDACTED]  
Docket No. 07.03-152098J

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

Administrative Procedures Division  
Tennessee Department of State

/rer  
Enclosure

cc: Shaundraya Hersey, Tennessee Department of Education



the entire record in this matter it is determined that the Petitioners have **failed to carry their burden of proof on all aspects of their case**, and are therefore **not entitled to any reimbursement** from SCS for any costs they may have incurred. It is further determined that SCS **did not** engage in any activity that would constitute unlawful discrimination under the ADA or Section 504.

### FINDINGS OF FACT

1. SCS operates the public school system in Sumner County, Tennessee, and thus is the Local Education Agency (LEA) under the IDEA.

2. At all times relevant to this proceeding, [REDACTED] resided with [REDACTED] parents, [REDACTED] and [REDACTED] in Sumner County.

3. [REDACTED] was born prematurely on [REDACTED] at approximately 31 weeks. [REDACTED] then spent 21 days in a neonatal intensive care unit.

4. Within a few months of birth [REDACTED], the child's [REDACTED] engaged the services of the Tennessee Early Intervention System (TEIS) to provide consultation regarding [REDACTED] development. TEIS performed evaluations of [REDACTED] when [REDACTED] was approximately [REDACTED] old. In April 2013, when [REDACTED] was not quite [REDACTED] years old, [REDACTED] was diagnosed with Autism Spectrum Disorder (autism) by a psychologist at Vanderbilt University.

5. After receiving the diagnosis of autism from Vanderbilt, [REDACTED] arranged for [REDACTED] to begin receiving the services of ABA Nashville, an Applied Behavioral Analysis (ABA) provider. ABA Nashville determined that [REDACTED] had expressive and receptive language delays, and was not acquiring children's skills that are typical of [REDACTED] peer group. In addition to the ABA therapy, [REDACTED] was also receiving speech and occupational therapy through Lyttle Fox Therapy (Lyttle Fox). [REDACTED] was first referred to Lyttle Fox by [REDACTED] physician in 2011 and it has continued to work with [REDACTED] off and on during the entire time period relevant to this proceeding.

6. When a child reaches the age of three they transition from TEIS to their LEA for pre-school. In [REDACTED] as [REDACTED] reached the age of three TEIS notified SCS of this transition. In the spring of [REDACTED] [REDACTED] as well as personnel from TEIS and SCS began gathering information about [REDACTED] in preparation for an Individualized Education Program (IEP) meeting. In a note dated June 7, [REDACTED] provided SCS with a list of proposed private services that [REDACTED] wanted to be funded by the school system.<sup>1</sup> Included in [REDACTED] proposal was requested funding of 31 hours per week of one to one ABA therapy in the home, to be provided by a Board Certified Behavioral Analyst (BCBA). [REDACTED] also sought about nine additional hours of various therapies per week. An IEP meeting was held on July 15, [REDACTED] between SCS personnel and [REDACTED]. The IEP proposed by SCS offered services in a pre-school special education class. [REDACTED] did not agree to the proposed IEP because [REDACTED] did not believe the IEP was consistent with the therapy [REDACTED] was receiving privately. According to the IEP meeting notes, SCS refused the parents' request for payment for the continuation of [REDACTED] home-based private services as SCS believed that appropriate educational services could be provided in an academic setting at school.<sup>2</sup> SCS had no further contact with [REDACTED] family until 2015.

7. After the rejection of the IEP in July [REDACTED] [REDACTED] continued to receive private services from various therapy providers. [REDACTED] was also attending a church-based pre-school with age appropriate peers. In the spring of 2015 [REDACTED] began receiving ABA therapy from Hope Autism Behavioral Health (Hope). Hope is not a private or home-based school program recognized by the State of Tennessee. Hope provides therapy to children most of whom have been diagnosed with autism.

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<sup>1</sup> Exhibit 100

<sup>2</sup> Exhibit 176



8. Hunter Gast is Hope's Clinical Director. Ms. Gast first met with [REDACTED] during the first meetings with the family. Hope conducted initial evaluations using the Assessment of Basic Language and Learning Skills (ABLLS) to determine [REDACTED] level of skills. Shortly thereafter [REDACTED] began receiving 20-35 hours of ABA therapy per week from Hope primarily at home. By the summer of 2015, Sarah Micklewright became [REDACTED] primary therapist. Ms. Micklewright is a BCBA and is licensed by the State of Tennessee as a special education teacher. Throughout [REDACTED] therapy with Hope, ABLLS was the assessment measure used to monitor [REDACTED] progress. Ms. Micklewright stated Hope does not utilize core academic programs using evidence-based materials such as reading, math or writing curriculum.<sup>3</sup>

9. In June 2015, [REDACTED] took [REDACTED] to New York to be evaluated by Dr. Cecelia McCarton. Dr. McCarton has been a developmental pediatrician for 40 years and operates a clinic for children with special needs, many of whom have been diagnosed with autism. [REDACTED] underwent a comprehensive assessment including being administered the Stanford-Binet Intelligence Scale (Stanford-Binet) and the Leiter International Performance Scale (Leiter). [REDACTED] had a Full Scale IQ of 75 (5<sup>th</sup> Percentile) on the Stanford-Binet and a non-verbal IQ of 100 (50<sup>th</sup> Percentile) on the Leiter, which is designed for children with hearing or communication difficulties. Dr. McCarton concurred with the diagnosis of autism and believed [REDACTED] had average non-verbal cognitive ability. She recommended that [REDACTED] receive a 40 hour per week program using ABA techniques between home and school environments. This program should continue throughout the year. Dr. McCarton believed [REDACTED] should also receive speech/language and occupational therapies.<sup>4</sup>

10. [REDACTED] was also diagnosed with ADHD in 2015.

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<sup>3</sup> Trans. Vol. 4, p. 530, lns. 22-25, p. 531, lns. 1-7

<sup>4</sup> Exhibit 62

11. On April 10, 2015, ██████ sent a letter to Melanie Webster, then Special Education Director for SCS, to request a meeting to discuss ██████ future education.<sup>5</sup> Discussions and meetings were held in the subsequent months as plans were being made for the development of a new IEP. SCS accepted ██████ previous diagnosis of autism and ██████ eligibility for special education services was never questioned. ██████ provided SCS with material about ██████ from many sources, including Dr. McCarton's report as well as information from Hope. An IEP meeting was held on July 27, 2015. In attendance at the meeting in addition to ██████, were various personnel from SCS including Ms. Webster, Ms. Gast and Ms. Micklewright from Hope, and Dr. McCarton participating by telephone. The IEP proposed by SCS at that time included ½ day in a developmental pre-school class in SCS and ½ day receiving the continuation of services from Hope and other private providers as recommended by Dr. McCarton. Before ██████ agreed to the IEP, ██████ wanted Ms. Gast and Ms. Micklewright to observe the ½ day pre-school class that was being proposed. This observation occurred on September 2, 2015. Another IEP meeting was held on September 8, 2015, wherein SCS offered a revised placement. This proposal eliminated the ½ day therapy as recommended by Dr. McCarton and substituted a ½ day program at SCS that included ABA therapy. ██████ Ms. Gast and Ms. Micklewright observed this new proposed setting in October 2015. ██████ ultimately rejected the proposed IEP as ██████ was not satisfied that the programs proposed by SCS were consistent with the recommendations of Dr. McCarton and Hope. Neither Ms. Gast nor Ms. Micklewright believed the programs proposed by the IEP were adequate to meet ██████ needs. As a result, ██████ remained in ██████ private pre-school setting during school year 2015-2016, all the while continuing ██████ therapy from Hope and Lyttle Fox.

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<sup>5</sup> Exhibit 103

12. In August 2016, [REDACTED] was enrolled in [REDACTED] School [REDACTED] for [REDACTED] [REDACTED] is a general education school and [REDACTED] did not have an IEP. While attending [REDACTED] continued to receive ABA therapy from Hope primarily after school hours and to a more limited extent during the school day. [REDACTED] also maintained [REDACTED] therapy from Hope during breaks in the school calendar, in accord with Dr. McCarton's recommendation that [REDACTED] receive intensive ABA daily on a year round basis as much as possible.

13. In the early fall of 2016, SCS contacted [REDACTED] to inquire as to where [REDACTED] was in school as [REDACTED] was now [REDACTED] years old and was required to be enrolled in school. [REDACTED] told the SCS personnel that [REDACTED] was attending [REDACTED] and therefore was in compliance with the mandatory school attendance law.

14. In February 2017, [REDACTED] teacher, the principal and [REDACTED] all agreed that [REDACTED] was not an appropriate placement for [REDACTED] and [REDACTED] was not benefitting there. In March 2017, [REDACTED] enrollment was transferred to [REDACTED] School [REDACTED], a private school for children with special needs, in [REDACTED] Tennessee. [REDACTED] was in a [REDACTED] classroom with two other children with learning disabilities.

15. Ms. Micklewright conducted another ABLLS assessment of [REDACTED] in April and May 2017. The report generated by Hope recommended a home-based program using ABA techniques of a minimum of 25 hours per week of direct one to one instruction. Ms. Micklewright believed that [REDACTED] was not an environment in which [REDACTED] would make meaningful gains.

16. Once the 2016-2017 school year ended, [REDACTED] started a home-based program for [REDACTED] with HOPE providing ABA services and Sabrina Evans, a speech and language pathologist,

providing speech/language therapy for █████ throughout the summer months. These services were essentially the same as █████ had previously received.

17. In July 2017, █████ took █████ to New York for a comprehensive follow up evaluation with Dr. McCarton. In the report generated by Dr. McCarton,<sup>6</sup> she noted a significant regression in █████ skills since the assessment performed in 2015. █████ had a Full Scale IQ of 61 (1st Percentile) on the Stanford-Binet and a non-verbal IQ of 88 (21st Percentile) on the Leiter. Dr. McCarton believed that █████ did not make adequate progress at █████ or █████ the previous school year and the approximately 17 hours per week of one to one ABA therapy █████ was receiving from Hope outside the school setting was not enough. Dr. McCarton believed the appropriate educational placement should be a home-based one to one ABA program with additional speech/language therapy. She recommended a continuous year round home program consisting of 30 hours per week of one to one ABA therapy conducted by ABA therapists and supervised by a BCBA. She also recommended five hours per week of speech/language therapy. Dr. McCarton also recommended █████ be tested for Central Auditory Processing Disorder (CAPD). This diagnosis was confirmed by an assessment performed on September 5, 2017, by an audiologist.<sup>7</sup>

18. The 2017-2018 SCS school year commenced August 7, 2017. On September 27, 2017, █████ contacted Jessica Thurman, the principal of █████ (█████), █████ zoned school, to request an IEP meeting. █████ attached in █████ email to Ms. Thurman various assessments of █████ including Dr. McCarton's report. The following day █████ visited the SCS special education office. On September 28, 2017, Lee Anne Apple, a special education coordinator for SCS, sent an email to █████ which acknowledged █████ inquiry and provided

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<sup>6</sup> Exhibit 63

<sup>7</sup> Exhibit 32

information as to how best to get the process moving forward. Ms. Apple told [REDACTED] “[t]he first step in the process is for you to register [REDACTED] as a student at [REDACTED]”<sup>8</sup> Ms. Apple also asked [REDACTED] for some possible meeting dates and informed [REDACTED] that releases would be left at [REDACTED] for [REDACTED] to sign so SCS could access [REDACTED] previous school records.

19. [REDACTED] responded the following day that [REDACTED] intended to register [REDACTED] at [REDACTED] [REDACTED] on October 2, 2017 and expressed urgency because “time was of the essence.”<sup>9</sup> However, [REDACTED] did not register that day and [REDACTED] notified SCS that [REDACTED] had already been deemed eligible in 2015 and that eligibility should still control. Further, when SCS wanted documentation from [REDACTED] and [REDACTED], [REDACTED] indicated those records would not provide an accurate picture of [REDACTED] present level of educational performance (PLEP) “...as [REDACTED] was not able to access the curriculum in either of these settings.” Instead, [REDACTED] directed SCS to contact Ms. Micklewright from Hope to obtain [REDACTED] a more accurate picture of [REDACTED] PLEP.<sup>10</sup>

20. On October 3, 2017, Julie Daniel, another special education coordinator for SCS, contacted [REDACTED] Ms. Daniel stated that as [REDACTED] was not currently enrolled in school and [REDACTED] had informed SCS that [REDACTED] and the [REDACTED] would be unable to provide any information that would be helpful in determining [REDACTED] PLEP, that it would be necessary for SCS to conduct curriculum based assessments and observations. Ms. Daniel offered to schedule the IEP at [REDACTED] [REDACTED] on October 5, 2017.<sup>11</sup>

21. Through a series of emails dated October 3 and 4, 2017, [REDACTED] expressed a number of concerns such as a perceived change in the agenda for the planned IEP meeting, an explanation of the new assessments SCS proposed, a desire to receive a list of the proposed

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<sup>8</sup> Exhibit 8

<sup>9</sup> Exhibit 8

<sup>10</sup> Exhibit 11

<sup>11</sup> Exhibit 13

assessments, and what if any involvement Ms. Micklewright was to have in the meeting. When [REDACTED] informed SCS that [REDACTED] had scheduled a work meeting after [REDACTED] believed the agenda had changed for the IEP meeting and [REDACTED] had declined to attend, the meeting was eventually rescheduled for October 18, 2017.<sup>12</sup>

22. An IEP meeting was held on October 18, 2017, the purpose of which was to obtain consent for additional assessments and possible observations of [REDACTED] to determine [REDACTED] PLEP. In attendance at the meeting were [REDACTED] parents, [REDACTED], Ms. Micklewright and various members of the SCS staff. SCS accepted all of the private assessments provided by [REDACTED] including Dr. McCarton's July 2017 report, the Hope assessments, as well as the CAPD and speech/language assessments. SCS reiterated the need to conduct additional assessments. Ms. Micklewright was present during the meeting and offered her input into [REDACTED] IEP. SCS initially offered a [REDACTED] placement for [REDACTED] but ultimately it was agreed that a [REDACTED] placement was more appropriate. It was agreed that SCS personnel would observe [REDACTED] during [REDACTED] program with Ms. Micklewright at [REDACTED] home on October 24, 2017.

23. SCS personnel offered to permit [REDACTED] to begin school the following day to begin [REDACTED] schooling while the IEP was being developed. They indicated it was not uncommon to do so. [REDACTED] declined to bring [REDACTED] to school without an IEP in place. SCS personnel first became aware during the course of the meeting that [REDACTED] was not in a home school program. It was discussed in the meeting that as [REDACTED] was not currently enrolled in any form of state sanctioned school (public, private or home school) [REDACTED] was not in compliance with the mandatory school attendance law. [REDACTED] acknowledged [REDACTED] intention to come into compliance with the law. According to [REDACTED] it was during the course of this meeting on October 18, 2017 that [REDACTED] first

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<sup>12</sup> Exhibits 14-18

became aware that [REDACTED] home-based ABA program through Hope was not in compliance with the school attendance law.

24. By the fall of 2017 Ms. Webster had transitioned from her former position as Special Education Director to the position of Attendance Supervisor for SCS. On October 20, 2017, Ms. Webster emailed [REDACTED] to provide potential options for coming into compliance with the compulsory attendance law. She informed [REDACTED] that [REDACTED] was currently not in compliance and that “[f]ailure to enroll your child can result in a Juvenile petition to the Juvenile Judge as required by Tennessee law.” Ms. Webster also attached an application for home school to assist [REDACTED] if that was [REDACTED] desire. She closed her email by stating “[t]o avoid further action from the Truancy Department, you must comply with one of the above options by the end of the day on Monday, October 23<sup>rd</sup>.”<sup>13</sup>

25. On October 21, 2017, [REDACTED] parents submitted paperwork simultaneously requesting [REDACTED] enrollment in SCS and making a referral for homebound educational services. Included in the paperwork was a letter from Dr. Allison Kucich, [REDACTED] physician, stating that [REDACTED] should not be removed from [REDACTED] current home-based ABA program until another appropriate educational plan could be developed and that doing so could result in “permanent damage to [REDACTED] growth and development.”<sup>14</sup> The request for homebound services was an attempt to select one of the options offered by Ms. Webster in her communication of the previous day as a manner in which [REDACTED] could come into compliance with the attendance law. Ms. Daniel responded that SCS’ homebound teacher was out due to a death in the family and would address this on her return. Ms. Thurman acknowledged receipt of the registration paperwork and told [REDACTED] that [REDACTED] needed to provide proof of residency.

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<sup>13</sup> Exhibit 27

<sup>14</sup> Exhibit 30

26. As agreed to at the IEP meeting, on October 24, 2017, SCS personnel observed Ms. Micklewright working with ██████ at home. In attendance for SCS were Ms. Daniel, Ms. Thurman, Rachel Nuckols, a special education resource teacher at ██████, and Debbie Abraham, an occupational therapist. Ms. Daniel thought ██████ appeared to be a pleasant child who offered no behavioral issues or unique challenges. Ms. Daniel believed ██████ presented "...no major challenges that would have concerned me behaviorally...",<sup>15</sup> and described ██████ as having "...certainly not a mild form of autism, but nothing so significant that I would be concerned that we would have to address severe behaviors or anything like that at all."<sup>16</sup> In response to the question as to whether she believed ██████ would present a challenge for SCS to work with ██████ Ms. Daniel replied "[n]ot at all."<sup>17</sup>

27. ██████ officially enrolled at ██████ on October 27, 2017. However, ██████ did not begin attendance at that time. On that date a number of curriculum based assessments were given to ██████ by Ms. Nuckols and other ██████ staff members. These assessments were to compare ██████ to other ██████ students. Prior to the administration of these assessments ██████ had expressed annoyance that SCS refused to allow ██████ to review the actual testing materials prior to the assessment. While SCS personnel had informed ██████ of the assessments to be used, they refused to show ██████ the materials themselves due to copyright laws.

28. Throughout the end of October and into the first days of November 2017, communication continued between ██████ and SCS on an almost daily basis about the request for homebound services for ██████. At the same time the parties were attempting to agree upon a date for the IEP meeting and what items would be discussed. Ms. Daniel told ██████ that homebound services would be discussed at the next IEP meeting, but ██████ continued to insist

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<sup>15</sup> Trans. Vol. XII, p.1368, lns. 21-22

<sup>16</sup> Trans. Vol. XII, p.1369, lns. 11-14

<sup>17</sup> Trans. Vol. XII, p.1369, ln. 23



that [REDACTED] current home-based program be approved as homebound services pending the IEP. [REDACTED] also stated that [REDACTED] did not wish to home school [REDACTED]. Ms. Daniel encouraged [REDACTED] to discuss attendance issues with Ms. Webster. It was finally agreed upon that the next IEP meeting would be held on November 13, 2017.

29. As [REDACTED] was still not attending school on November 8, 2017, Ms. Webster emailed [REDACTED] to remind [REDACTED] that [REDACTED] was accruing unexcused absences due to [REDACTED] lack of attendance. When [REDACTED] continued to be absent from school, Ms. Webster filed a truancy petition with the Sumner County Juvenile Court on or about November 15, 2017.

30. The IEP meeting was held on November 13, 2017. [REDACTED] parents and grandmother were in attendance, as was Ms. Micklewright and Hadassah Foster, a parent advocate who appeared by Skype. Prior to the meeting [REDACTED] had provided SCS with a list of Ms. Micklewright's suggested goals for [REDACTED], some of which were in fact included in the proposed IEP. Ultimately [REDACTED] did not sign the proposed IEP as [REDACTED] believed it failed to meet [REDACTED] needs and therefore the IEP was not implemented. During the IEP meeting SCS did not agree to homebound services for [REDACTED]. It was the position of SCS that homebound services were not the appropriate manner in which to provide meaningful educational services in the least restrictive environment. Homebound services are generally temporary in nature and require a medical reason for approval. It was the position of SCS that Dr. Kucich's letter did not provide a medical reason why homebound services were necessary.

31. After the IEP meeting concluded [REDACTED] asked the SCS staff if [REDACTED] and Ms. Micklewright could observe the classroom settings at [REDACTED] that were being proposed for D.T. On November 21, 2017, these observations occurred. Ms. Micklewright did not believe

the placements were adequate to meet [REDACTED] needs at that time as they lacked the one to one ABA therapy that [REDACTED] was receiving through [REDACTED] program with Hope.

32. [REDACTED] finally began [REDACTED] attendance at [REDACTED] on November, 27, 2017, the Monday after the Thanksgiving break. Upon learning of [REDACTED] attendance, Ms. Webster notified the Sumner County Juvenile Court and rescinded the previously filed truancy petition. [REDACTED] was unaware of the filing of this petition.

33. As no IEP had been implemented no special education services were immediately provided to [REDACTED] upon [REDACTED] entry into [REDACTED]. [REDACTED] stated that as homebound services had been denied and [REDACTED] had no desire to implement a home school program [REDACTED] had no alternative but to place [REDACTED] at [REDACTED] in order to be in compliance with the compulsory attendance law. After beginning [REDACTED] attendance at [REDACTED] on November, 27, 2017, [REDACTED] home-based ABA services from Hope were reduced from about 26 hours to two hours per week.

34. The next IEP meeting occurred on December 5, 2017. A new amended IEP was developed to address [REDACTED] concerns and to utilize updated data. The IEP proposed that [REDACTED] would receive the following services on a daily basis from a special education teacher in a special education setting: comprehensive developmental classroom (CDC) language arts 90 minutes, CDC math 45 minutes, one to one reading intervention 45 minutes and one to one math intervention 45 minutes. On a daily basis in the general education setting with a special education aide [REDACTED] would also receive 45 minutes of inclusion related arts, 30 minutes of reading inclusion and 30 minutes of math inclusion. In addition to these services provided on a daily basis, [REDACTED] was to receive two 30 minute sessions per week of training in social skills by a special education teacher in a special education setting as well as three 30 minute sessions per week with a speech/language therapist in a special education setting. Finally, [REDACTED] was to

receive two 30 minute occupational therapy sessions per month. On December 13, 2017, [REDACTED] parents reluctantly consented to the proposed IEP. [REDACTED] made clear in [REDACTED] written comments above [REDACTED] signature that [REDACTED] did not believe the IEP was adequate to meet [REDACTED] needs and [REDACTED] was agreeing to the IEP "...because [REDACTED] was forced from [REDACTED] successful 1:1 program due to threats of truancy by Sumner County School (sic) and has been without services for approximately two weeks,...". [REDACTED] asked that the services commence the following day, December 14, 2017.<sup>18</sup>

35. Janelle Bryant is currently the CDC autism consultant for SCS. Prior to coming to Sumner County approximately three years ago, she spent 11 years teaching special education in California. While in California she received specialized training in autism where she learned how to assess students with autism and develop appropriate educational services for those children. In the fall of 2017, Ms. Bryant was a CDC teacher at [REDACTED] [REDACTED] was assigned to her class and she began working with [REDACTED] as [REDACTED] case manager after the IEP was agreed to on December 13, 2017. Ms. Bryant described [REDACTED] as a pleasant child who presented no behavioral issues. The number of children in her CDC classroom would vary throughout the day as children would have different pull outs to work on specific tasks or join their non-disabled peers in the general education setting. The maximum number of students in her classroom would be six, with two to five being there the majority of the time. In addition to Ms. Bryant there would always be two aides in the classroom. Ms. Bryant utilized various ABA principles such as discrete trial training, pivotal response training, reinforcement and task analysis, in her teaching methodology with [REDACTED] [REDACTED] would be in Ms. Bryant's CDC classroom for approximately two hours and 15 minutes per day, during which time she worked one to one with [REDACTED] on academic skills for about an hour. The other time spent in her classroom [REDACTED] would be working with an aide

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<sup>18</sup> Exhibit 64

with no more than one other student. Other parts of the day [REDACTED] would be in the resource room receiving one to one instruction in math and reading intervention or in the general education classroom where [REDACTED] would be accompanied by an aide. [REDACTED] also received one to one therapy in either speech/ language or social skills on a daily basis. This is the program [REDACTED] experienced while attending [REDACTED] until [REDACTED] last day on February 1, 2018. Ms. Bryant stated that extended school year (ESY) for the winter holiday break was not included in the IEP because no data had been provided suggesting it was necessary for [REDACTED]. After data had been compiled throughout the school year a decision on ESY for the summer was to be made by May 1, 2018.

36. Megan Owens is the speech/language therapist who began working with [REDACTED] at [REDACTED] on December 15, 2017. She described [REDACTED] as having transitioned well into the school environment.

37. SCS was scheduled to be closed for winter break from December 21, 2017, until January 3, 2018. Due to snow, classes did not commence until January 8, 2018. On this date, [REDACTED] sent an email to Ms. Thurman, Ms. Bryant and Ms. Ruckols in which [REDACTED] requested a new IEP meeting and alleged serious regression in [REDACTED] academic and social skills since [REDACTED] began [REDACTED] attendance at [REDACTED] on November 27, 2017.<sup>19</sup> [REDACTED] expressed frustration with the fact that due to the scheduled winter break and snow days [REDACTED] had not received instruction for two and a half weeks due to the lack of provisions for an ESY being included in the IEP that would cover winter break. In addition to the email, in [REDACTED] trial testimony, [REDACTED] described [REDACTED] during this time period as exhibiting behaviors at home [REDACTED] had never witnessed. [REDACTED] testified that [REDACTED] stopped talking to [REDACTED] family members, was being destructive as well as throwing tantrums on the floor when asked to perform tasks.

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<sup>19</sup> Ex. 115

38. SCS responded to ██████ request for another IEP meeting and it was agreed that another meeting would be held on January 16, 2018. Unfortunately winter weather again intervened and SCS schools were closed from January 12-19, 2018, resulting in the cancellation of the scheduled IEP meeting.

39. On January 13, 2018, ██████ emailed SCS personnel complaining about the 14 unexcused absences ██████ had accrued since ██████ enrollment at ██████<sup>20</sup> In response, Ms. Webster notified ██████ that ██████ attendance record would be amended to reflect only six absences.<sup>21</sup>

40. On January 17, 2018, ██████ gave SCS a ten day notification that ██████ intended to re-commence the private therapy program as recommended by Dr. McCarton effective February 1, 2018, and would seek reimbursement for such private placement from SCS as ██████ believed that SCS was not providing FAPE to ██████ Ms. Daniel responded by a letter dated January 19, 2018, in which she expressed disagreement about the appropriateness of the current IEP and inquired about whether ██████ still wished to reschedule the IEP meeting.<sup>22</sup>

41. Throughout the last two weeks of January ██████ and SCS personnel were in almost daily email communication about scheduling a new date for the IEP meeting. Per the request of ██████, SCS sent ██████ copies of data about ██████ that had been compiled by ██████ teachers at ██████. It was finally agreed that the IEP meeting would be held on January 30, 2018. On January 29, 2018, ██████ cancelled the IEP meeting scheduled for the following day partially because SCS intended to have their attorney present for the meeting. On February 4, 2018, ██████ emailed SCS that ██████ would begin ██████ home-based services the following day. ██████ last day of school at ██████ was February 1, 2018, and ██████ did not return. As of that date,

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<sup>20</sup> Ex. 79

<sup>21</sup> Ex. 80

<sup>22</sup> Ex. 79

█████ had attended SCS a total of 29½ days, during which time █████ only received 16½ of special education and related services pursuant to an IEP.

42. According to curriculum based assessments performed by Ms. Nuckles, █████ showed improvement between October 27, 2017, and January 9, 2018.<sup>23</sup>

43. In late January 2018, █████ contacted Dr. McCarton by telephone to express █████ concerns about what █████ believed to be █████ regression since █████ had started at █████ █████ provided Dr. McCarton with data from █████ Hope program as well as anecdotal information based upon █████ observations and perceptions as well as those of therapists. Dr. McCarton produced a letter dated January 31, 2018,<sup>24</sup> in which she stated that █████ had experienced a “staggering decline in skills since █████ began █████”. She believed █████ had a “serious and significant regression in skills that █████ had previously mastered.” It was Dr. McCarton’s opinion that the child should stop attending █████ and immediately begin a “comprehensive program that provides 1:1 ABA, speech/language therapy, graphomotor therapy and opportunities for socialization from 9am to 5:30pm, five days a week.” She believed the program should comport with the recommendations contained in her evaluation of July 2017.

44. SCS continued to remind █████ that █████ was not in compliance with the compulsory school attendance law. Indeed, as far back as October 20, 2017, prior to █████ beginning █████ attendance at █████, Ms. Webster advised █████ of the various options █████ had to be in compliance with the law.<sup>25</sup> Ms. Webster advised █████ that █████ must be enrolled in an approved education program that could be in public school, a private school, a satellite home school program or an independent home school program. Ms. Thurman sent █████ an email on February 9, 2018, acknowledging receipt of the request to withdraw █████ from █████ but

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<sup>23</sup> Ex. 1

<sup>24</sup> Ex. 65

<sup>25</sup> Ex. 190

advising [REDACTED] that the school had not received a records request from [REDACTED] new school and [REDACTED] would continue to accrue absences as [REDACTED] could not officially withdraw until [REDACTED] was enrolled in another placement.<sup>26</sup>

45. On the following day [REDACTED] sent an email response in which [REDACTED] stated it was not [REDACTED] intention to withdraw [REDACTED] son from SCS, but [REDACTED] wanted to have [REDACTED] educational program to follow the recommendations of Dr. McCarton and Hope.<sup>27</sup> [REDACTED] attached Dr. McCarton's letter of January 31, 2018, referenced above. [REDACTED] also stated that [REDACTED] would be interested in attending another IEP meeting "if you plan to share new ideas that will finally deliver a FAPE for [REDACTED];".

46. On February 14, 2018, Norma Dam, Assistant Director of Schools, sent a letter to [REDACTED] attempting to clarify whether [REDACTED] was intending to withdraw [REDACTED] from SCS. [REDACTED] again stated that [REDACTED] must be enrolled in a public or non-public school and would continue to accrue absences until [REDACTED] was withdrawn from SCS and enrolled in a non-public school. Ms. Dam further indicated that while SCS was willing to schedule another IEP meeting it was the position of SCS that the current IEP was appropriate and data demonstrated that [REDACTED] had made measurable gains during [REDACTED] time at [REDACTED].<sup>28</sup>

47. Throughout February, March and April 2018, [REDACTED] would email SCS requesting excused absences for [REDACTED] as [REDACTED] was participating in home-based program with Hope and speech/language therapy which SCS refused to provide. SCS personnel responded that they could not excuse the absences.

48. After [REDACTED] departure from [REDACTED] on February 1, 2018, [REDACTED] recommenced the home-based program with Hope and other therapists that [REDACTED] had been

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<sup>26</sup> Ex. 192

<sup>27</sup> Ex. 81

<sup>28</sup> Ex. 82

receiving prior to [REDACTED] entry into school on November 27, 2017. Ms. Micklewright was again [REDACTED] primary ABA therapist through Hope. She wrote a letter dated February 22, 2018, in which she noted regression in the skills [REDACTED] had previously mastered in her program since [REDACTED] hours had been reduced to about two hours per week during the time [REDACTED] was attending [REDACTED]. She recommended [REDACTED] receive 30 hours per week of 1:1 direct instruction utilizing ABA techniques and ten hours per week of structured social skills.<sup>29</sup>

49. On March 9, 2018, Ms. Webster filed a truancy petition in Sumner County Juvenile Court. By order of December 12, 2018, [REDACTED] was adjudicated to be truant by the Sumner County Juvenile Court.<sup>30</sup> The court determined that [REDACTED] had been truant since [REDACTED] departure from [REDACTED] in February 2018. [REDACTED] participation in the program with Hope did not constitute compliance with the attendance law because:

[D]espite its educational components Hope Autism Center is not a private school, a church school, or a satellite or independent home school program.

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[T]here is nothing about Hope Autism Center itself that qualifies as an approved or accredited educational institution-it is not a public school; it is not a private school; it is not a church school; and it is not any variety of home school.

50. [REDACTED] did not attend SCS, or any other recognized school, for the balance of the 2017-2018 school year or in the fall of the 2018-2019 school year. On June 21, 2018, counsel for the Petitioners notified counsel for SCS of their intent to enroll [REDACTED] in [REDACTED], a private school for students with educational challenges, once [REDACTED] reached the age of [REDACTED] on July 24, 2018.<sup>31</sup> The stated purpose of the enrollment was in response to the truancy petition. However, apparently [REDACTED] did not actually enroll in [REDACTED] until December 13,

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<sup>29</sup> Ex. 86

<sup>30</sup> Ex. 122

<sup>31</sup> Ex. 121



2018, after the truancy order had been issued by the juvenile court.<sup>32</sup> [REDACTED] maintained the full-time home-based therapy with Hope and Lyttle Fox from early February to mid-December 2018. Since September 2019, [REDACTED] has been attending [REDACTED] School, which is a Category 4 non-public church related school. [REDACTED] continues [REDACTED] educational program as before with Hope at its facility, as well as speech/language therapy and occupational therapy with Lyttle Fox, but under the umbrella of [REDACTED] School. The sessions now take place at the providers' facilities and not in [REDACTED] home. [REDACTED] stated that the purpose of this placement is not home schooling but allows [REDACTED] to continue receiving the service [REDACTED] believes [REDACTED] requires while maintaining compliance with the compulsory attendance law.

51. On April 24, 2018, the Petitioners filed the due process complaint with SCS.

52. The parties were never able to agree to meet again to discuss a new IEP.

53. Dr. McCarton conducted additional evaluations of [REDACTED] on July 26 and August 9, 2018,<sup>33</sup> and October 2, 2019.<sup>34</sup> In both reports Dr. McCarton noted progress in [REDACTED] home-based program through Hope and noted regression during [REDACTED] time at [REDACTED] from November 27, 2017, through February 1, 2018. In the 2018 evaluation, [REDACTED] had a Full Scale IQ of 61 (1st Percentile) on the Stanford-Binet and a non-verbal IQ of 86 (18<sup>th</sup> Percentile) on the Leiter. In the 2019 evaluation, [REDACTED] had a Full Scale IQ of 68 (2nd Percentile) on the Stanford-Binet and a non-verbal IQ of 97 (42nd Percentile) on the Leiter. Included in the recommendations in the 2019 evaluation was the following statement:

[REDACTED] should continue to receive Applied Behavioral Analysis (ABA) 30-35 hours weekly (1:1). Historically, [REDACTED] has responded only to ABA methodology and regressed severely when placed in [REDACTED] local public school. [REDACTED] is now making good progress in all

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<sup>32</sup> The Petitioners are not seeking reimbursement from SCS for the cost of attendance at Benton Hall.

<sup>33</sup> Ex. 66

<sup>34</sup> Ex. 67

areas and should continue to attend Hope Autism and Behavioral Services for ABA instruction 30-35 hours weekly (1:1).<sup>35</sup>

54. Three expert witnesses testified in this case. Dr. McCarton testified on behalf of the Petitioners. Ronald Leaf, Ph.D. and David Rostetter, Ed.D. testified on behalf of SCS. As previously set forth above, Dr. McCarton is a developmental pediatrician with 40 years of experience working with children with special needs. She was recognized as an expert in the areas of developmental pediatrics, autism and educational therapies for children with autism. Dr. McCarton's evaluations of [REDACTED] and her recommendations as to [REDACTED] future educational needs have been thoroughly discussed throughout this Order.

55. Dr. Leaf was recognized as an expert witness in psychology, child development, psychoeducational assessments, behavioral treatment of autism and ABA. Dr. Leaf holds two master's degrees, one in behavior modification and one in psychology, and a Ph.D. in psychology with a focus on learning and behavior. Dr. Leaf is considered to be one of the top experts on autism and ABA research. He currently maintains a private practice in psychology and teaches at Cal State, Long Beach in the psychology department. He is the director of Autism Partnership Foundation in California which specializes in research and developmental of methodologies for working with children with autism. Dr. Leaf has also served as a consultant to numerous school districts throughout the country.

56. Dr. Rostetter was recognized as an expert witness in IDEA compliance and the standards and public policy and acceptable practice in that area. Dr. Rostetter has both a master's and a doctorate in education administration. Dr. Rostetter started his professional career working with the federal government on new regulations for the laws now known as the

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<sup>35</sup> Ex. 67 p. 10

IDEA and Section 504. After ten years with the federal government, Dr. Rostetter has spent most of his career as a consultant for states, including Tennessee, and local school districts with the development and application of special education regulations. He has also served as a court appointed monitor for local school districts. He has been recognized as an expert witness in both federal court and administrative proceedings and has testified on behalf of both families and school districts in numerous cases throughout the country. The U.S. Sixth Circuit Court of Appeals has recognized him as an expert in compliance with the requirements of the IDEA.

57. Dr. McCarton's evaluations and opinions are almost exclusively derived from assessments performed by various professionals in her clinic and from Hope, as well as anecdotal information from [REDACTED], but they do not include consideration or understanding of the educational programs [REDACTED] had experienced in schools or what was being proposed by SCS. Dr. McCarton never consulted with anyone from the previous private schools [REDACTED] [REDACTED] that [REDACTED] attended, never observed [REDACTED] in those settings, and never reviewed any records from those schools. In answer to the question whether she had reviewed or consulted with anyone at [REDACTED] about [REDACTED] educational programming, Dr. McCarton answered "[n]o, I did not."<sup>36</sup> As a result, she had no knowledge about the type of programming or interventions that were being implemented at either program.

58. Likewise, she did not consult with anyone from SCS, did not conduct observations of SCS programs, did not observe [REDACTED] while [REDACTED] attended [REDACTED], did not review IEPs, meeting notes, or any other educational records regarding [REDACTED], and did not listen to recordings of IEP meetings. Moreover, she had no knowledge regarding the level of education and/or training the SCS personnel assigned to work with [REDACTED] had regarding ABA principles. Dr. McCarton was unaware that [REDACTED] only attended [REDACTED] for 29½ days and was unaware

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<sup>36</sup> Trans. Vol. VI, p. 696, ln. 17.

of the specific services that were provided for in the IEPs. Furthermore, she never observed [REDACTED] in [REDACTED] programs with Hope Autism.<sup>37</sup> Dr. McCarton testified that she based her opinions regarding [REDACTED] regression during attendance at [REDACTED] upon data that was received from Hope and narrative information from the speech/language pathologist and B.H.T. She did not consider any data that was collected by SCS.

59. In contrast to Dr. McCarton, Dr. Leaf and Dr. Rostetter did review data and documentation from SCS and the involvement of [REDACTED] and [REDACTED] parents with the school system. They met with teachers at [REDACTED] that had worked with [REDACTED]. Dr. Leaf visited [REDACTED] and observed both a general education and a special education classroom. He reviewed various documents, assessments, correspondence as well as the IEP. Dr. Leaf also reviewed videos of Hope therapy sessions involving [REDACTED]. On October 18, 2018, he observed [REDACTED] for one hour at Hope while [REDACTED] was working with in a small room with a BCBA.

60. Dr. Leaf was critical of the ABA techniques used at Hope. Describing his observation of October 18, 2018, Dr. Leaf stated:

I was dismayed what I saw. It's—absolutely reflects a rigid, traditional approach of applied behavioral analysis, the kind of approach that does not result in best outcomes whatsoever, the kind of approach that results in children's lives being compromised forever, and that was what I was first hit with.<sup>38</sup>

Upon observing a video of Ms. Micklewright working with [REDACTED] he described her style as "...very rigid, poor discrete trial teaching."<sup>39</sup> Overall, Dr. Leaf believed the program at Hope was "...highly, highly formulaic approach, very overly structured, overly rigid, which has the

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<sup>37</sup> Trans. Vol. VI, pp. 698-704.

<sup>38</sup> Trans. Vol. VIII, p. 818, lns 1-7.

<sup>39</sup> Trans. Vol. VIII, p. 872, ln 2.

result of not having generalization, not transferring skills, not learning naturally.”<sup>40</sup> Dr. Leaf believed that the approach utilized by Hope did not allow for [REDACTED] to “learn how to learn” and [REDACTED] was unable to generalize [REDACTED] skills outside of the formulaic setting. Dr. Leaf was very critical of the repetitive reinforcement system Hope was still using with [REDACTED] after all the years they had been working with [REDACTED]

Your goal was to get rid of that artificial system because you want children to be able to perform, adolescents, adults, without having an artificial system.

So the fact that [REDACTED] got this system in place still is a concern to me. The thing that made it an even bigger concern, [REDACTED] was on a continuous reinforcement schedule, meaning for every response [REDACTED] gave, [REDACTED] got feedback. We know from 70 years of research on reinforcement, that you never want to use a continuous reinforcement system for that long because it extinguishes, it’s not natural in the real world. And if you put someone in that system, the minute you deviate from that, they’re going to fall apart. And it’s not the child’s fault, it’s the system’s fault.<sup>41</sup>

61. In the report Dr. Leaf prepared he wrote:

While [REDACTED] is reported to have made steady progress in [REDACTED] in-home ABA program, this progress appears to be limited to the formal structure of [REDACTED] in-home treatment, [REDACTED] has yet to generalize to other environments (e.g. preschool, speech therapy, classrooms.)

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Unfortunately, it does not appear that [REDACTED] programming over the past 3½ years has successfully achieved generalized use of skills outside of a highly structured therapy setting.<sup>42</sup>

62. Dr. Leaf did not believe the data demonstrated a regression in [REDACTED] in the goals [REDACTED] was working on at [REDACTED], but rather any regression that may have occurred was only in the skills being taught at Hope and that was a reflection of the poor techniques being utilized by the therapists. [REDACTED] time at [REDACTED] was “...too short of a slice of time to make any conclusion

<sup>40</sup> Trans. Vol. VIII, p. 821, lns 7-12.

<sup>41</sup> Trans. Vol. VIII, p. 823, lns 15-25, p. 824 lns 1-6.

<sup>42</sup> Ex. 71, pp. 9, 10

about a child.”<sup>43</sup> Dr. Leaf opined that even if there was regression it would not reflect on SCS’s instruction, but on Hope Autism’s instruction. “[R]egression is highlighted if you [are] taught in a very structured way that’s not very natural...”<sup>44</sup> Dr. Leaf also believed that ABLLS, the measurement test used by Dr. McCarton and Hope to determine regression, is invalid. While at ██████████ ██████ was receiving instruction on ██████ IEP goals, not Hope’s treatment plan where the regression was supposedly identified. He noted that Hope does not use standardized testing measures to look at progress.

However, the ABLLS is not a standardized assessment. Rather, the ABLLS simply measures progress on a specific curriculum. Moreover, ██████ curriculum is based upon the ABLLS, therefore, ██████ is being taught to the test, which makes it impossible to determine ██████ overall skill level.<sup>45</sup>

63. Dr. Leaf summarized his recommendations as follows:

It is imperative that ██████ be transitioned from Hope to a school-based program. Hope does not provide ██████ the social opportunities that are so critical for ██████ functioning and development. Unfortunately, it sabotages ██████ ability to learn under more natural conditions, thereby inhibiting the generalization of skills learned. Therefore, it is essential that ██████ be educated in a more natural setting to provide ██████ with the opportunity to learn in groups (sic) settings and reduce the dependency that often occurs with more individual instruction.

My observation at ██████████ revealed that the educational interventions utilized are based upon Applied Behavioral Analysis. Additionally, individual instruction is provided throughout the day based upon the learning style and need of the individual students. The terminal objective of [a] student’s education is to generalize the skills taught so that students learn in more natural situations.<sup>46</sup>

64. Despite what Dr. Leaf stated in his report, he conceded in his testimony that ██████ would need a period of transition prior to entering a school-based program. This transition

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<sup>43</sup> Trans. Vol VIII, p. 852, lns 11-13.

<sup>44</sup> Trans. Vol. VIII, p. 853, lns 13-15.

<sup>45</sup> Ex. 71, pp. 15-16

<sup>46</sup> Ex. 71, p. 22.

period could be as long as three months during which time personnel from both the school and Hope would work together to revise the home-based program so that █████ would be comfortable in the school setting. The school personnel would need to be trained as well. “My preference wouldn’t be to just take him from Hope, next day into the school system. I don’t think that’s ultimately right for █████ to do.”<sup>47</sup>

65. Dr. Rostetter focused his analysis primarily on whether SCS had offered appropriate services to █████, the manner in which SCS developed the proposed IEP, whether SCS had complied with all procedural requirements, whether the parents of █████ were given the opportunity for meaningful participation in the process and whether SCS had engaged in harassment or intimidation in its conduct with the family. In his report, Dr. Rostetter developed four opinions that he summarized as follows.

One: The assertion that SCS endeavored to intimidate or harass █████ parents is unfounded and lacks any basis in public policy or acceptable practice concerning school attendance or the assessment and evaluation of students with disabilities.

Two: At all times SCS fulfilled its obligation to identify, locate, and evaluate █████ while within the jurisdiction of the school district.

Three: SCS fulfilled and exceeded its obligations to make available an IEP that would appropriately serve █████ and provided all procedural safeguards and an opportunity for █████ parents to participate as equal partners in the decision making process.

Four: SCS fulfilled its obligation to maintain █████ in environments which afforded █████ the opportunity to be educated with █████ non-disabled peers to the maximum extent appropriate. This allows for invaluable peer interaction and modeling of appropriate behaviors by same aged children, behavioral supports, and interventions provided consistently and effectively.<sup>48</sup>

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<sup>47</sup> Trans. Vol. IX, p. 951, lns. 2-4.

<sup>48</sup> Ex. 194, p. 2, par 5.

66. In developing the first opinion about the parents' allegation of intimidation and harassment, Dr. Rostetter believed this is primarily derived from the disagreement over the truancy issue as well as [REDACTED] demand to see the assessment materials being used by SCS before they were administered to D.T. Dr. Rostetter opined that SCS was correct in not allowing [REDACTED] to review the materials prior to testing both because of copyright law but it would also have rendered the results invalid. Dr. Rostetter stated in his report "SCS was fully transparent about the types of assessments to be administered and their purpose. This occurred throughout all interactions with [REDACTED] parents."<sup>49</sup> As to the issue of truancy, Dr. Rostetter believed that SCS was merely following its legal obligation and [REDACTED] parents refused to comply.

Notwithstanding the explicit description of what would constitute compliance with the compulsory school age laws of Tennessee repeatedly provided by school district officials, [REDACTED] parents refused to enroll [REDACTED] in any acceptable program.

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The decision to flout these requirements calls into question any commitment to ensure the opportunity for [REDACTED] to receive an appropriate education.

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The determination to not comply with the compulsory school age requirements is even more questionable when the decision relies, in large measure, on recommendations from a developmental pediatrician who practices in New York City and has never participated with any educators in Tennessee to develop an appropriate program of services and relies on data collected by personnel who are not under the developmental pediatrician's direct supervision. These recommendations from a medical professional lack a sound basis and educational expertise and, frankly, reflect an arrogance that unfortunately frequently characterizes medical oversight in such matters.

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Based upon the above explanations, the student was legitimately declared truant and the parents' responsibility for this was clearly identified. The parent acted with full knowledge of what was actually required to comply with the compulsory school age laws. [REDACTED] refused to do so. However, SCS staff continued to work with the parents and after enrollment on November 27, the previous truancy charge was dropped. This is a

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<sup>49</sup> Ex. 194, p.7, par 27.



demonstration of good faith. And clearly indicates that SCS was working hard to get this student enrolled and avoid continuing needless confrontation with the parents.<sup>50</sup>

67. In Dr. Rostetter's second opinion contained in his report, he concluded that SCS fulfilled its Child Find obligations by identifying and evaluating [REDACTED] while [REDACTED] was in their jurisdiction. [REDACTED] was identified and assessed upon reaching preschool age in July [REDACTED] and in July 2015 [REDACTED] was again evaluated and determined eligible for special education services. [REDACTED] declined to agree to the proposed IEP and did not enroll [REDACTED] in public school. In September 2016, SCS located [REDACTED] and was advised by [REDACTED] that [REDACTED] was attending a private school. In October 2017, SCS learned that [REDACTED] was no longer attending private school upon being contacted by [REDACTED] that [REDACTED] wished to enroll [REDACTED] in public school and requested an IEP meeting. Dr. Rostetter testified:

And so during the entire time [REDACTED], it was interaction, there was correspondence, there were meetings, there were assessments taken up by the school district, all of which were rejected as offers and the parent exercised [REDACTED] choice to have [REDACTED] enrolled elsewhere.

So the Child Find requirement, which is basically that the district know who it has in its jurisdiction and who they should be offering services to was fulfilled during the entire time. [REDACTED] was identified, [REDACTED] was – we certainly knew where [REDACTED] was, and [REDACTED] was evaluated during that period of time as well. So clearly, Sumner County was on its game in terms of knowing this youngster and [REDACTED] whereabouts and working with the parent to try and come up with a program.<sup>51</sup>

68. In his third opinion, Dr. Rostetter believed that SCS had fulfilled its obligations to develop an appropriate IEP for [REDACTED] and to provide a full opportunity for [REDACTED] parents to participate in the process.

<sup>50</sup> Ex. 194, p. 8, pars. 31, 32, 34. p. 9, par 36.

<sup>51</sup> Trans, Vol. XVII, p. 2000, lns. 7-23.

...I do this for a living. I can't find the violation of any of the notice requirements, any of the district's efforts to make sure that it had meetings, to collect data, to allow the parent to talk in the meeting, make recommendations, ask questions at the meetings and subsequent to the meetings.<sup>52</sup>

Dr. Rostetter testified he would be surprised:

...[I]f we can find three consecutive days from September 27th until the decision by the parents to have [REDACTED] stop attending school on February 1st where this district was not interacting with [REDACTED] to try to secure meetings, answer email questions almost every day about what was going on in meetings, and assessments and the rest of it...<sup>53</sup>

In his report Dr. Rostetter stated:

In my view, at no time did SCS personnel do anything except attempt to accommodate and answer the many questions raised by the parent. My analysis of all of these emails in the behavior of the participants, leads me to conclude that the parent was seeking to identify any type of problem that might allow [REDACTED] to continue the self-selected program for [REDACTED].<sup>54</sup>

69. As to the IEP itself, Dr. Rostetter believed it to be appropriate and certainly included many modifications based upon parental input.

On November 13, 2017, an IEP meeting was convened to consider the available information provided by [REDACTED] service providers and the developmental pediatrician from New York, as well as information collected by SCS staff.

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The parents were permitted to bring persons of their choice to the meeting as well as the meeting conducted on December 5, 2017. These persons and parents were provided the opportunity to make suggestions, make recommendations, and ask questions concerning the IEP and placement determination. SCS staff was present at the meeting, including related service providers and the student's teachers.

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Copies of all IEPs, evaluation materials, supporting materials and literature made available to the parents allowed for a thorough discussion of [REDACTED] educational needs.<sup>55</sup>

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<sup>52</sup> Trans, Vol XVII, p. 2007, lns. 14-20.

<sup>53</sup> Trans, Vol XVII, p. 2001, lns. 16-23.

<sup>54</sup> Ex. 194, p. 11, par. 49

<sup>55</sup> Ex. 194, p. 12, pars. 51, 53, and 55.

Dr. Rostetter testified at length to the steps SCS took to modify the IEP to address parental concerns:

[SCS] considered outside data, they considered the data they collected themselves, the listened to the parent, they made modifications between November 13<sup>th</sup> and the October (sic) 5<sup>th</sup> IEP, they added a statement about one-on-one instruction, they added one-on-one professional – paraprofessional assistance, they rearranged the schedule in that school to make sure that █████ could have reading and math academics by certified teachers,...one of the special education teachers...provided the parent with a description of ABA and discrete trial process that she used in the classrooms so that the parent could feel more comfortable. So I believe they listened, and they changed and they offered and they ended up with a program that the district firmly believed █████ could derive benefit from. And the data on implementation of that IEP after the fact during January when █████ was enrolled for that brief period of time, █████ was attaining emerging progress.<sup>56</sup>

70. In his fourth and final opinion, Dr. Rostetter believed that the IEP developed by SCS afforded █████ the best opportunity for an appropriate education in the least restrictive environment with █████ non-disabled peers.

█████ must have the opportunity to be educated in natural settings. █████ needs as a child with autism absolutely demand this. One of the characteristics of autism is the inability to generalize skills in natural settings. Access to such environments is critical to learning. It is actually critical to learning for all of us. The best preparation for life is integrated schooling. However, for children with the challenges that autism brings, it is absolutely critical. Other experts in the field confirm this. It is repeated constantly in the literature.

Unless a school district can demonstrate that █████ cannot be educated in natural settings it must provide this opportunity. This is [in] █████ educational interest and also complies with the legal standards governing placement. █████ programming selected by the parent already suffers from a lack of such opportunities. And, this lack of opportunity has led the developmental pediatrician in this matter to decide █████ cannot be educated with █████ peers. This is a denial of █████ rights and is also a very poor educational decision.<sup>57</sup>

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<sup>56</sup> Trans. Vol. XVII, p. 2008, lns. 4-25, p. 2009, ln. 1

<sup>57</sup> Ex. 194, pp. 16-17, pars. 73 and 74.

Dr. Rostetter did not believe that [REDACTED] needs were so extraordinary as to render SCS unable to accommodate [REDACTED]. In fact, the program offered by SCS was essential for [REDACTED] to benefit educationally.

Reports from the teachers who implemented this IEP-and I asked both of them this very, very specifically-was that [REDACTED] was very, very cooperative and learning and [REDACTED] was accessible, and [REDACTED] didn't engage in behaviors that would necessitate [REDACTED] being pulled out and receiving intensive ABA services to control [REDACTED] behavior. That stuff was under control with [REDACTED]. [REDACTED] not a child with autism that we hear about who needs this kind of high-end intensive ABA just to render [REDACTED] instructionally or undistinguishable. [REDACTED] was already a student who could be in a classroom and learn and was quite cooperative as a learner. So everything about this says to me that, you know, to secure [REDACTED] rights educationally, substantively, [REDACTED] should have been receiving instruction in a classroom in a public school.<sup>58</sup>

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...[REDACTED] needed to be in school, or at least be schooled with children who are not disabled. The notion of [REDACTED] being in an educational environment receiving ABA with the curtain closed and all the rest of that stuff in isolation from the normal interactions with non-disabled peers I believe is virtually fruitless for [REDACTED] and, in fact, damaging over the long run. So, substantively, I believe that was important. And just as a basic matter of the civil rights that we afford children to free association and no deprivation of liberty that is removed from educational settings with non-disabled peers, I believe on both counts [REDACTED] should be in a program that gives [REDACTED] access to non-disabled peers.<sup>59</sup>

### CONCLUSIONS OF LAW AND ANALYSIS

1. As previously stated the Petitioners seek reimbursement for the costs of their private programming, therapies and assessments since the fall of 2017 (not including the cost of tuition at [REDACTED]) as well as compensatory education since the beginning of the 2017-2018 school year. The Petitioners contend that as they were denied FAPE by SCS, they were entitled to educate [REDACTED] in a private placement that would more appropriately meet [REDACTED] needs and are thus entitled to reimbursement for their costs as well as compensatory education for the period of time

<sup>58</sup> Trans. Vol. XVII. p. 2010, lns. 15-25, p. 2011, lns. 1-6

<sup>59</sup> Trans. Vol. XVII. p. 2013, lns. 24-25, p. 2014, lns. 1-13.

they were denied FAPE. The Petitioners also claim they were subjected to harassment and retaliation from SCS because of their pursuit of their rights under the IDEA and that constituted discrimination in violation of 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.*

2. The U.S. Supreme Court held in *Schaffer v. Weast*, 546 U.S. 49 (2005), that the burden of proof in a due process hearing brought pursuant to the IDEA is on the party “seeking relief.” Thus, when a parent files a due process complaint, the parent bears the burden of proof, or burden of persuasion, in the due process hearing. Specifically, “the party challenging the IEP...[bears] the burden of proving by a preponderance of the evidence that the IEP devised by the school is inappropriate.” *L.H. v. Hamilton Cty. Dep’t of Educ.*, 900 F.3d 779, 790 (6th Cir. 2018). In the instant case, the Petitioners clearly bear the burden of proof. [REDACTED] and [REDACTED] the parents of [REDACTED], filed due process claiming that SCS failed to offer appropriate special education services and failed to abide by the procedural requirements of the IDEA. The Petitioners’ also bear the burden of proving that SCS’s IEPs denied [REDACTED] FAPE in [REDACTED] LRE and that their unilateral private program is appropriate within the meaning of the IDEA. See *Sch. Comm. of Burlington v. Dept. of Educ.*, 471 U.S. 359, (1985) and *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, (1993).

3. The first issue to be addressed is whether SCS offered FAPE to [REDACTED] and complied with all procedural requirements in the development of the IEP of December 13, 2017. The Petitioners have failed to carry their burden of proof on either of these allegations.

4. Pursuant to 34 C.F.R. § 300.111, an LEA is required to “child find”, or to identify, locate and evaluate all students in its jurisdiction who are in need of special education and related services. SCS clearly met its obligation in this regard with [REDACTED] [REDACTED] was first

brought to the attention of SCS in July [REDACTED] as [REDACTED] was transitioning from TEIS. An IEP was developed at that time for a pre-school program but it was not implemented due to disagreement by the parents. In July 2015 another IEP meeting was held. [REDACTED] diagnosis of autism was accepted by SCS and [REDACTED] eligibility for special education was never in question. Discussions between SCS and [REDACTED] parents continued through October 2015 and again no agreement could be reached as to an IEP. In the early fall of 2016, by which time [REDACTED] had reached the age of [REDACTED] and was thus required to attend school in compliance with the mandatory attendance law, SCS contacted [REDACTED] to determine his whereabouts as [REDACTED] was not enrolled in SCS. [REDACTED] told SCS that [REDACTED] was attending [REDACTED] a private school. In September 2017, [REDACTED] again contacted SCS for the purpose of developing an IEP. Again, [REDACTED] diagnosis of autism was accepted and [REDACTED] eligibility for services not questioned. Negotiations about the IEP continued until December 13, 2017. As Dr. Rostetter stated:

[REDACTED] was identified, [REDACTED] was – we certainly knew where [REDACTED] was, and [REDACTED] was evaluated during that period of time as well. So clearly, Sumner County was on its game in terms of knowing this youngster and [REDACTED] whereabouts and working with the parent to try and come up with a program. (Finding of Fact No. 66)

5. The Petitioners' contention that they were somehow prevented from meaningful participation in the IEP process is not borne out by the facts. The number of emails exchanges between [REDACTED] and SCS staff from September 2017 to February 2018 are almost too numerous to count. These emails addressed the scheduling and re-scheduling of IEP meetings, who would be in attendance at the meetings, what materials offered by [REDACTED] would be considered, what types of additional evaluations, observations and assessments SCS wished to perform, if and when these tasks would occur, whether [REDACTED] would be permitted to be present during the assessments and whether [REDACTED] could review the testing materials prior to administration. SCS

provided timely invitations before every scheduled meeting and provided the parents with their procedural safeguards. As Dr. Rostetter opined:

I can't find the violation of any of the notice requirements, any of the district's efforts to make sure that it had meetings, to collect data, to allow the parent to talk in the meeting, make recommendations, ask questions at the meetings and subsequent to the meetings.

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In my view, at no time did SCS personnel do anything except attempt to accommodate and answer the many questions raised by the parent. (Finding of Fact No. 67)

6. The Petitioners' also claim the refusal of SCS to provide them with the testing materials prior to the administration of the tests to [REDACTED] was a violation of their procedural rights. This claim too is without merit. As explained by both SCS staff and Dr. Rostetter, to allow the parent to review test materials prior to the assessment would not only violate copyright law but could invalidate the test results. In *McKnight v. Lyon Cty. Sch. Dist.*, No. 315CV00614MMDVPC, 2017 WL 3567519, (D. Nev. Aug. 17, 2017), the court upheld the school district's refusal to provide copies of a test and the results to a parent in order to comply with copyright protections and FERPA regulations.

7. The Petitioners contend that SCS did not provide them with input into the IEP, and therefore the resulting IEP was inadequate, primarily because the IEP did not include the recommendations of Dr. McCarton. 34 C.F.R. § 300.502(c)(1) requires that an independent evaluation submitted by a parent, "[m]ust be **considered** by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child." (Emphasis added.) While an LEA must consider outside information provided by a parent, it is not required to adopt all, if any, of the material. In *K.B. by McFarland v. Racine Unified Sch. Dist.*, No. 19-CV-28-JPS, 2019 WL 6219485, (E.D.Wis. Nov. 21, 2019), the court stated ruled that an LEA is

not required to incorporate all of a parent's requests in an IEP. In *Brad K. v. Bd. of Educ. Of City of Chicago*, 787 F. Supp 2d 734, 744 (N.D. Ill. 2011) the court opined:

The IEP does not need to conform to the parents' wishes in order to be deemed sufficient or appropriate. In fact, "IDEA mandates individualized appropriate education for disabled children, it does not require a school district to provide a child with a specific educational placement that [her] parents prefer." [ Citations omitted] In other words, even though the district did not agree to provide the programming and placement of Keshet as advocated by Jessica's parents, Mr. and Mrs. K. had a more than ample opportunity to participate in the IEP formulation process in a meaningful way, as the IEP team considered parent suggestions and even incorporated some of them.

8. In this case the record is replete with evidence that SCS not only considered, but incorporated numerous suggestions and recommendations made by [REDACTED] private providers. At the initial IEP meeting on October 18, 2017, SCS accepted all the private assessments including the recommendations of Dr. McCarton, recommendations and testing materials from HOPE and the speech/language therapists. Ms. Micklewright was present and provided input. On October 24, 2017, SCS staff observed Ms. Micklewright during her home-based therapy with [REDACTED]. During the IEP meeting on November 13, 2017, the proposed IEP included some of the goals recommended by Ms. Micklewright. Even after the IEP was ultimately agreed to on December 13, 2017, SCS was open to scheduling a meeting in January 2018 to discuss modifications to the IEP. SCS and [REDACTED] continued to discuss scheduling a meeting for a new IEP until the summer of 2018 when SCS was notified of the intention to enroll [REDACTED] in [REDACTED]. Dr. Rostetter summarized the efforts SCS made to consider the Petitioners' recommendations which resulted in modifications to the IEP:

On November 13, 2017, an IEP meeting was convened to consider the available information provided by his service providers and the developmental pediatrician from New York, as well as information collected by SCS staff.

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The parents were permitted to bring persons of their choice to the meeting as well as the meeting conducted on December 5, 2017. These persons and parents were provided the



opportunity to make suggestions, make recommendations, and ask questions concerning the IEP and placement determination.

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[SCS] considered outside data, they considered the data they collected themselves, they listened to the parent, they made modifications between November 13<sup>th</sup> and the October (sic) 5<sup>th</sup> IEP, they added a statement about one-on-one instruction, they added one-on-one professional – paraprofessional assistance, they rearranged the schedule in that school to make sure that █████ could have reading and math academics by certified teachers,...one of the special education teachers...provided the parent with a description of ABA and discrete trial process that █████ used in the classrooms so that the parent could feel more comfortable. So I believe they listened, and they changed and they offered and they ended up with a program that the district firmly believed █████ could derive benefit from. (Finding of Fact No. 69)

9. The Petitioners' contend that the IEP was deficient because it did not include provisions for ESY over the winter holiday break and a transition plan. However, SCS had no data suggesting that █████ would require ESY over the holiday break. The IEP did provide that a decision on ESY for the summer would be made no later than May 1, 2018. As to a transition plan, again no data was provided to SCS which suggested it would be necessary. To the contrary, all evidence suggested that transitioning was not a problem for █████ The previous school year █████ had been at █████ with no reported transition problems. The information from Hope suggested █████ could transition from task to task without difficulty. Perhaps most importantly, the teachers who worked with █████ at █████ testified that █████ was pleasant, cooperative and seemed to be adapting well to █████ new environment.

10. The Petitioners' contend that Dr. Leaf's testimony that █████ believed █████ would need a transition period of up to three months before entering school is proof that the IEP was deficient in not including a transition plan. However, Dr. Leaf was responding to the question of what his opinion was as to how █████ should be moved from █████ home-based program to a school setting **at the present time**. Although he was not asked this question, it is fair to speculate

whether his opinion as to what was best for ██████ in 2017 would be the same. In the fall of 2017, ██████ was ██████ years old, had been in a school setting the previous school year and was to be entering ██████. At the time of Dr. Leaf's testimony, ██████ was ██████ years old, ██████ had not been in a school setting for two years and ██████ would presumably be entering school at a higher grade level with a more structured and challenging curriculum. Consequently, Dr. Leaf's answer on the topic of transition at the time of his testimony has little weight relative to the 2017 IEP.

11. As previously stated, pursuant to *Burlington* and *Carter*, the threshold issue in determining whether the Petitioners are entitled to reimbursement for the cost of private services is whether SCS offered FAPE to ██████. The Petitioners have failed to establish that SCS did not meet its obligation in this regard. In *Endrew F. v. Douglas County School Dist.*, 580 U.S. \_\_\_\_, 137 S.Ct. 988, 999, 1000. (2017), the Supreme Court clarified the definition of FAPE. "The IEP must aim to enable the child to make progress." The educational program proposed by the school district be "appropriately ambitious in light of his circumstances" and "markedly more demanding than the 'merely more than de minimis' test." The IEP of December 13, 2017, certainly complied with the dictates of *Endrew F.* As thoroughly discussed above, the IEP ultimately adopted was the product of numerous meetings, evaluations, observations and the inclusion of many recommendations made by ██████ private therapists. The primary complaint of the Petitioners would appear to be that the IEP did not adopt **all** the private recommendations, most importantly those made by Dr. McCarton. ██████ wanted a continuation of the home-based one to one ABA therapy and nothing else would suffice. Dr. Leaf and Dr. Rostetter both believed the IEP was appropriately ambitious to meet the individual needs of ██████. Dr. Leaf, an expert in instructional methods for teaching children with autism, and who has spent his career researching and refining ABA teaching methods, believed the teachers at ██████ were

experienced with ABA and were utilizing many ABA techniques in working with D.T. Ms. Bryant, the CDC teacher at [REDACTED] who worked with [REDACTED] had years of experience both in California and Tennessee in working with children with autism. She testified that [REDACTED] always got individual attention from the staff, when [REDACTED] was not receiving one to one instruction in the CDC classroom [REDACTED] would be working with an aide and no more than one other student. [REDACTED] received one to one instruction with the speech/language therapists. When [REDACTED] was in the general education classroom [REDACTED] was always accompanied by an aide. Clearly [REDACTED] program was designed to address [REDACTED] specific "circumstances." Moreover, the staff at [REDACTED] and Dr. Rostetter all noted that [REDACTED] was making progress in meeting the IEP goals during [REDACTED] time at [REDACTED].

12. One critical aspect of the IDEA which escaped in depth discussion by the Petitioners is the requirement that education be provided in the Least Restrictive Environment.

20 U.S.C. § 1412(a)(5) Least Restrictive Environment provides:

(A). In General. To the maximum extent appropriate, children with disabilities...are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from their 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.

It is without question that the IEP offered education in the LRE to [REDACTED], certainly in comparison to the home-bound one to one therapy [REDACTED] received (and continues to receive) from Hope. While the IEP team considered many placement options for [REDACTED] during the course of the numerous IEP meetings that took place, ultimately it was determined that [REDACTED] LRE was a combination of special education settings (CDC for reading and math, social skills intervention, and language therapy) and general education settings (reading and math). Home bound services for [REDACTED] were rejected by SCS as there was no medical reason for such as a placement. While at [REDACTED],

█████ spent the entire school day with both disabled and non-disabled peers. The SCS staff who worked with █████ all testified that █████ presented no unique challenges at school and was doing well at █████. █████ presented no behavioral issues and was working well with █████ teachers. Ms. Daniel described █████ as having "...no major challenges that would have concerned me behaviorally...", █████ had a "...certainly not a mild form of autism, but nothing so significant that I would be concerned that we would have to address severe behaviors or anything like that at all." When asked whether she believed █████ would present a unique challenge for the school system to work with █████, Ms. Daniel replied "[n]ot at all." (Finding of Fact No. 26).

13. Both Dr. Leaf and Dr. Rostetter were highly critical of the closed environment in which █████ was receiving instruction from HOPE and both emphasized the critical need to have █████ attend school in a more normal environment. Dr. Leaf stated:

It is imperative that █████ be transitioned from Hope to a school-based program. Hope does not provide █████ the social opportunities that are so critical for █████ functioning and development. Unfortunately, it sabotages █████ ability to learn under more natural conditions, thereby inhibiting the generalization of skills learned. Therefore, it is essential that █████ be educated in a more natural setting to provide █████ with the opportunity to learn in groups (sic) settings and reduce the dependency that often occurs with more individual instruction.

My observation at █████ revealed that the educational interventions utilized are based upon Applied Behavioral Analysis. Additionally, individual instruction is provided throughout the day based upon the learning style and need of the individual students. The terminal objective of student's education is to generalize the skills taught so that students learn in more natural situations. (Finding of Fact No. 62)

Dr. Rostetter concurred with Dr. Leaf:

█████ must have the opportunity to be educated in natural settings. █████ needs as a child with autism absolutely demand this. One of the characteristics of autism is the inability to generalize skills in natural settings. Access to such environments is critical to learning. It is actually critical to learning for all of us. The best preparation for life is integrated schooling. However, for children with the challenges that autism brings, it is absolutely critical. Other experts in the field confirm this. It is repeated constantly in the literature.

Unless a school district can demonstrate that [REDACTED] cannot be educated in natural settings it must provide this opportunity. This is [in] [REDACTED] educational interest and also complies with the legal standards governing placement. [REDACTED] programming selected by the parent already suffers from a lack of such opportunities. And, this lack of opportunity has led the developmental pediatrician in this matter to decide [REDACTED] cannot be educated with [REDACTED] peers. This is a denial of [REDACTED] rights and is also a very poor educational decision. (Finding of Fact 69)

14. In contrast to the testimony offered by SCS, the Petitioners offered little compelling evidence as to why [REDACTED] could not be educated in a school setting. Dr. McCarton and Ms. Micklewright testified as to significant regression as a result of [REDACTED] attendance at both [REDACTED] as well as at [REDACTED] in the 2016-2017 school year. However, their opinions were based upon the data produced from Hope, primarily from the ABLLS assessments. As discussed by Dr. Leaf, the ABLLS only showed possible regression in the strict ABA therapy skills D.T. was supposedly learning through Hope, not any academic or social skills [REDACTED] was acquiring through [REDACTED] IEP at [REDACTED]. Dr. McCarton conceded that she had not reviewed any school data from [REDACTED] or [REDACTED]. She had not even reviewed the IEP. Much like [REDACTED] (who admittedly was forming [REDACTED] opinions to a large degree upon Dr. McCarton's recommendations), Dr. McCarton believed the only appropriate learning environment for [REDACTED] was the **most** restrictive available, home-based one to one therapy with no interaction with [REDACTED] peers. The record in this case simply does not support this view. Clearly the LRE most appropriate for [REDACTED] was the one contained in the IEP adopted in December 2017.

15. As previously analyzed, the first prong in the test set forth in *Burlington and Carter*, in determining whether the Petitioners are entitled to reimbursement for the cost of private services is whether SCS offered FAPE to [REDACTED]. The Petitioners have failed to establish that the IEP implemented in December 2017 did not offer FAPE to [REDACTED]. Had they met their

burden of proof on this threshold issue, according to *Burlington* and *Carter* the Petitioners would then have to establish that the private services they opted for are appropriate for [REDACTED] under the IDEA. Here too the Petitioners have failed to carry their burden of proof.

16. It is not necessary to repeat the well-founded criticisms articulated by Dr. Leaf and Dr. Rostetter of the home-based therapy [REDACTED] has been receiving from Hope over the years. Dr. Leaf is a nationally, if not internationally, respected expert in his field. Dr. Rostetter has years of experience in the field of compliance with the IDEA. Their analysis of the deficiencies of the Hope program and the recommendations offered by Dr. McCarton, clearly carries more weight than the narrow view offered by Dr. McCarton. In *L.H. v. Hamilton Cnty. Dept. of Educ.*, 900 F.3d 779, 791 (6<sup>th</sup> Cir. 2018), the court determined that a private placement must satisfy the substantive IEP requirement, *i.e.*, it must be "...reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances." The court further held that a private placement is not appropriate for reimbursement under the IDEA "...when it does not, at a minimum, provide some element of special education services in which the public school placement was deficient."

17. Moreover, while clearly not dispositive of the issue as to the appropriateness of the Hope program, one must keep in mind the statements made by the juvenile court judge in his ruling on truancy.

[T]here is nothing about Hope Autism Center itself that qualifies as an approved or accredited educational institution-it is not a public school; it is not a private school; it is not a church school; and it is not any variety of home school. (Finding of Fact No. 49)

*Carter* stands for the proposition that a parent is eligible for LEA reimbursement for the costs associated with a unilateral placement of a child in a private school even if the private school does not meet the educational standards of a state's educational agency. However, the private

school where the child was placed in *Carter* was a school, it just was not on the list of state approved private schools because of certain deficiencies. In contrast, not only does Hope not meet any of the broad definitions of a school under Tennessee law it does not even hold itself out as a school. So, if Hope is not a school, what is it? It would appear to be a highly robotic, intensive ABA therapy program with little if any educational content. Ms. Micklewright conceded that Hope has no program which utilizes an evidence-based curriculum for the core academic subjects of math, reading and writing. (Finding of Fact No. 8) Additionally, the program offered by Hope provides [REDACTED] with almost no interaction with [REDACTED] peers, therefore further inhibiting [REDACTED] ability to develop the appropriate social skills which are critical to functioning not only in future schooling but in all aspects of life itself. In sum, nothing about Hope meets guidelines set forth in *L.H. v. Hamilton Cnty.* Hope does not provide a program “...reasonably calculated to enable [REDACTED] to make progress appropriate in light of [REDACTED] circumstances.” Nor does it “...at a minimum, provide some element of special education services in which the public school placement was deficient.”

18. The Petitioners contend that the actions of SCS constitute discrimination based upon a disability in violation of the Americans with Disabilities Act and Section 504. 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 (6<sup>th</sup> 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 held 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 [REDACTED] IEP, [REDACTED] certainly has not been “excluded from the participation in” or been “denied the benefits of” an education nor has [REDACTED] been “subjected to discrimination” because of [REDACTED] disability. SCS is not denying an education to [REDACTED], in fact it provided [REDACTED] the opportunity to attend [REDACTED] zoned school with [REDACTED] peers. The IEP does not deny [REDACTED] access to an educational benefit or program nor is there any evidence of disability based discrimination in violation of Section 504.

19. The Petitioners contend that the efforts of SCS to force compliance with the compulsory attendance law which ultimately led to the finding of truancy by the Sumner County Juvenile Court constituted harassment and retaliation in response to their assertion of their rights under the IDEA. The Petitioners contend that harassment and retaliation would constitute unlawful discrimination under Section 504. While that assertion may be accurate, in this case the facts fail to establish that SCS engaged in harassment or retaliation in its efforts to force [REDACTED] into compliance with the attendance law. Tenn. Code Ann. § 49-6-3001(c)(1) requires all children to attend school upon reaching the age of six. Tenn. Code Ann. § 49-6-3006 requires all school districts to have an attendance supervisor who shall assist the district in “...enforcement of compulsory attendance laws.” Each school district is required to maintain a list of children in its jurisdiction, and working with the non-public schools within its jurisdiction, ensure that all children are in compliance with the attendance law. [REDACTED] became [REDACTED] years old on July 24, [REDACTED]



and thus was required to be in school during the [REDACTED] school year. In the early fall of 2016, when [REDACTED] was not enrolled in SCS and the district had not received notification that [REDACTED] was attending a non-public school, SCS contacted [REDACTED] to inquire as to where [REDACTED] was in school as it was required to do. Upon learning that [REDACTED] was enrolled in school at [REDACTED] SCS had fulfilled its obligation to ensure compliance with the mandatory school attendance law. [REDACTED] remained in compliance throughout the 2016-2017 school year by attending first [REDACTED] and then [REDACTED]. In the fall of 2017, SCS learned that [REDACTED] was not attending a private school upon being contacted by [REDACTED] when [REDACTED] expressed interest in having an IEP meeting as [REDACTED] intended to enroll [REDACTED] in SCS that school year. On October 20, 2017, Ms. Webster notified [REDACTED] that [REDACTED] was required to be in school and provided [REDACTED] with several options whereby [REDACTED] would be in compliance with the law. This began a dialogue between SCS officials and [REDACTED] that continued through the spring of 2018 which ultimately led to Ms. Webster filing a truancy petition which resulted in the Sumner County Juvenile Court finding of truancy in December 2018. Dr. Rostetter summarized the issue as follows:

Notwithstanding the explicit description of what would constitute compliance with the compulsory school age laws of Tennessee repeatedly provided by school district officials, [REDACTED] parents refused to enroll [REDACTED] in any acceptable program.

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Based upon the above explanations, the student was legitimately declared truant and the parents' responsibility for this was clearly identified. The parent acted with full knowledge of what was actually required to comply with the compulsory school age laws. [REDACTED] refused to do so. However, SCS staff continued to work with the parents and after enrollment on November 27, the previous truancy charge was dropped. This is a demonstration of good faith. And clearly indicates that SCS was working hard to get this student enrolled and avoid continuing needless confrontation with the parents. (Finding of Fact No. 66)

At all times SCS personnel, specifically Ms. Webster, were attempting to fulfill their legal obligation to ensure that [REDACTED] was attending school in compliance with the law and ultimately to

to suggest that the actions of SCS in this regard were based upon intentional harassment or retaliation against the Petitioners.

20. The Petitioners seek an award of compensatory education back to August 1, 2017. Compensatory education can be awarded to a student to compensate for the educational time lost during the period of time when an LEA did not provide FAPE. In this instance as it has been determined that at no time did SCS deny FAPE to [REDACTED], compensatory education is not warranted.

21. The Petitioners' seek reimbursement for the costs of all of the private evaluations done at their expense, including the cost of Dr. McCarton's services. They also seek reimbursement for the costs associated with various therapies [REDACTED] received through Lyttle Fox and speech therapists. 34 C.F.R. § 300.502 establishes a procedure for parents to request an independent educational evaluation (IEE) at public expense if the parents disagree with the public school's evaluation. This allows a district to first conduct their own evaluation prior to paying for an IEE at public expense. If the district agrees to offer an IEE at public expense, it is allowed to ensure that the IEE comports with IDEA's evaluation requirements and that the evaluator is qualified. However, the Petitioners never requested that SCS provide an independent evaluation for [REDACTED] at public expense. As such, SCS was unaware of the components of the evaluations or the qualifications of the evaluators until after the evaluations were completed. Furthermore, SCS had no opportunity to set reasonable cost limitations on the evaluations. There simply is no basis for SCS to reimburse the Petitioners for the costs of any private evaluations they may have undertaken over the years. There is also no basis for reimbursement for the speech/language or occupational therapies [REDACTED] received privately, services that were being provided by SCS pursuant to the IEP.

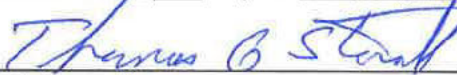
## CONCLUSION

This case revolves around a determination of whether SCS offered [REDACTED] an IEP that was reasonably calculated to enable [REDACTED] to make progress appropriate in light of [REDACTED] circumstances, and if not, whether the home-based therapy program the Petitioners have chosen is an appropriate placement for [REDACTED] and therefore they are entitled to reimbursement for the costs they have incurred in the pursuit and implementation of the program. As has been exhaustively discussed throughout this order, SCS has provided FAPE to [REDACTED] and it is not obligated to pay for an inappropriate private placement in order to accommodate the Petitioners' demands, demands that do not provide FAPE in the LRE. The Petitioners never provided SCS with a reasonable opportunity to educate [REDACTED]. Instead the Petitioners insisted that the only appropriate placement for [REDACTED] was the home-based program recommended by Hope and Dr. McCarton. No one questions the sincerity of the Petitioners in their pursuit of what they believe to be the best educational opportunity for [REDACTED]. They are of course free to educate [REDACTED] in the private program of their choosing, as long as that program is in compliance with the mandatory school attendance law. However, they are not free to expect SCS to reimburse them for the costs of that program or related evaluations and therapies under the circumstances presented in this case.

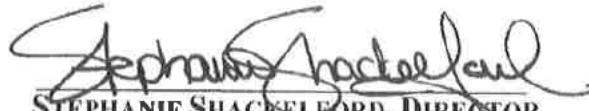
It is determined that the Petitioners have failed to carry their burden of proof on all issues in this case. SCS is declared to be the prevailing party in all aspects of this proceeding.

It is so **ORDERED**.

This Final Order entered and effective this 29<sup>th</sup> day of June, 2020.

  
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Thomas G. Stovall  
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this the  
29<sup>TH</sup> day of June, 2020.

  
STEPHANIE SHACKELFORD, DIRECTOR  
ADMINISTRATIVE PROCEDURES DIVISION  
OFFICE OF THE SECRETARY OF STATE

## **NOTICE OF FILING PROCEDURES**

Due to the COVID-19 pandemic, APD has changed its filing procedures. Until further notice, filings should be made by **email** to [APD.Filings@tn.gov](mailto:APD.Filings@tn.gov) or by **fax** to 615-741-4472. Paper filings should only be made by mail if a litigant has no access to either email or facsimile. If you are filing by email, documents should be saved in PDF format prior to filing. Each document to be filed must be a separate PDF. Only one filing method should be used. Please name PDFs for filing in the following format:

**“APD CASE NUMBER YOUR NAME ABBREVIATED NAME OF DOCUMENT BEING FILED AGENCY NAME”**

**NOTICE OF APPEAL PROCEDURES****REVIEW OF FINAL ORDER**

Attached is the Administrative Judge's decision in your case in front of the **Tennessee Department of Education**, called a Final Order, with an entry date of **June 29, 2020**. If you disagree with this decision, you may take the following actions:

1. **File a Petition for Reconsideration:** You may ask the Administrative Judge to reconsider the decision by filing a Petition for Reconsideration. Mail to the Administrative Procedures Division (APD) a document that includes your name and the above APD case number, and states the specific reasons why you think the decision is incorrect. The APD must **receive** your written Petition no later than 15 days after entry of the Final Order, which is **July 14, 2020**.

The Administrative Judge has 20 days from receipt of your Petition to grant, deny, or take no action on your Petition for Reconsideration. If the Petition is granted, you will be notified about further proceedings, and the timeline for appealing (as discussed in paragraph (2), below) will be adjusted. If no action is taken within 20 days, the Petition is deemed denied. As discussed below, if the Petition is denied, you may file an appeal no later than **August 28, 2020**. See TENN. CODE ANN. §§ 4-5-317 and 4-5-322.

2. **File an Appeal:** You may appeal the decision in federal or state court within 60 days of the date of entry of the Final Order, which is no later than **August 28, 2020** by:

(a) filing a Petition for Review "in the Chancery Court nearest to the place of residence of the person contesting the agency action or alternatively, at the person's discretion, in the chancery court nearest to the place where the cause of action arose, or in the Chancery Court of Davidson County," TENN. CODE ANN. § 4-5-322; or

(b) bringing a civil action in the United States District Court for the district in which the school system is located, 20 U.S.C. § 1415.

The filing of a Petition for Reconsideration is not required before appealing. See TENN. CODE ANN. § 4-5-317. A reviewing court also may order a stay of the Final Order upon appropriate terms. See TENN. CODE ANN. §§ 4-5-322 and 4-5-317.

**STAY**

In addition to the above actions, you may file a Petition asking the Administrative Judge for a stay that will delay the effectiveness of the Final Order. A Petition for stay must be **received** by the APD within 7 days of the date of entry of the Final Order, which is no later than **July 6, 2020**. See TENN. CODE ANN. § 4-5-316.

**FILING**

To file documents with the Administrative Procedures Division, use this address:

Secretary of State  
Administrative Procedures Division  
William R. Snodgrass Tower  
312 Rosa L. Parks Avenue, 8<sup>th</sup> Floor  
Nashville, TN 37243-1102  
Fax: (615) 741-4472