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RE: In the Matter of: B.R., the Student, and C.R. and C.R., the Student's Parents/Guardians, Petitioners v. Tennessee Department of Education, Respondents.
Docket No.

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

Administrative Procedures Division
Tennessee Department of State

/aem
Enclosure

cc: Shaundraya Hersey, Staff Attorney, Tennessee Department of Education

BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION

IN THE MATTER OF: **B.R., the Student, and** **C.R. and C.R., the Student's** **Parents/Guardians,** ***Petitioners,*** *v.* **TENNESSEE DEPARTMENT OF** **EDUCATION,** ***Respondents.***	**DOCKET NO:**

FINAL ORDER

This contested case under the Individuals with Disabilities Education Act (IDEA), Title II of the Americans with Disabilities Act (ADA), and Section 504 of the Rehabilitation Act (§ 504) was heard on before Administrative Judge Elizabeth Cambron. The Petitioners, student B.R., and his parents, C.R. and C.R., are represented by attorneys and The Respondent, the Tennessee Department of Education is represented by Assistant General Counsel At the conclusion of the hearing, by agreement of the parties, the following post-hearing filing dates were set: the transcript due to be filed by proposed Findings of Fact and Conclusions or Law to be filed by each party by and the Final Order to be issued by

The issue in this case is whether B.R. was denied a free and appropriate public education (FAPE) in the least restrictive environment (LRE) in his placement at the ( ) during the and school years due to a lack of

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[1] At the close of proof, TDOE make a Motion for Involuntary Dismissal under TENN. R. CIV. P. 41.02. That motion was taken under advisement but is rendered moot by this Final Order.

monitoring and oversight by TDOE, and if so, the appropriate remedy for this violation.[2] Based on review of the record, it is determined that any denial of FAPE in the LRE was not due to lack of oversight or monitoring by TDOE. TDOE is the prevailing party.

STIPULATIONS

At the beginning of the hearing, the parties stipulated to the following facts:

1. B.R. is a child eligible for special education under the IDEA.

2. Placement at the [REDACTED] provided B.R. with zero interaction with nondisabled peers during academic instruction, with extracurricular and nonacademic activities at the discretion of his parents.

3. The [REDACTED] is a completely separate school that Hollow-Rock Bruceton Special School District contracts with for children with disabilities.

FINDINGS OF FACT[3]

1. B.R. lives in [REDACTED] County, Tennessee, with his parents, C.R. and C.R., and his [REDACTED]

2. B.R. attended preschool in [REDACTED] prior to moving to Tennessee in [REDACTED]. He was diagnosed with [REDACTED] while living in [REDACTED] and had an Individualized Education Plan (IEP) in [REDACTED].

3. While in [REDACTED], B.R. participated in physical therapy, occupational therapy, speech therapy, and applied behavioral analysis.

4. When the family relocated to Tennessee, B.R.'s mother contacted a [REDACTED]

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[2] B.R.'s local educational agency, the Hollow Rock-Bruceton Special School District, made an Offer of Judgment pursuant to TENN. R. CIV. P. 68, which the Petitioners accepted, thereby rendering judgment against the Hollow Rock-Bruceton Special School District.

[3] In addition to the testimony and exhibits presented at the due process hearing on [REDACTED] the parties stipulated to the use of the testimony, and associated exhibits, of [REDACTED] in the related case of *L.L. v. Tennessee Department of Education*, APD No. [REDACTED]

the Special Education director for their local educational agency (LEA), the Hollow-Rock Bruceton Special School District, to make plans for B.R.'s [redacted] year.

5. At [redacted] suggestion, B.R.'s parents visited the [redacted] [redacted] ([redacted]) in [redacted]. [redacted] did not suggest a visit to or mention any other schools to B.R.'s mother in their conversation.

6. The [redacted] is a school operated by the Carroll County Board of Education. All five special school districts within Carroll County, including Hollow-Rock Bruceton, contracted with the Carroll County Board of Education to provide special education services to some of the children with disabilities in the school district.

7. In [redacted] B.R.'s parents met with the rest of B.R.'s IEP team to develop an IEP for the [redacted] school year. No regular education teacher attended this meeting and there was no discussion of placing B.R. in any other school or in a regular education classroom with an aide or any other supports.

8. While the document developed at the [redacted] meeting contains a watermark indicating it was a draft, it clearly reflects the IEP team's initial consideration of B.R.'s educational needs and placement. This IEP contains no information in the sections for Current Descriptive Information, Program Participation, or Special Education and Related Services. The IEP contains three goals.

9. B.R.'s IEP team again met on [redacted] after B.R. had participated in speech and occupational therapy assessments. Again, there was no discussion of placing B.R. in any other school besides the [redacted] or in a regular education classroom with supports.

10. The IEP developed at the [redacted] meeting filled in the sections on Current Descriptive Information and Special Education and Related Services. The IEP contains

14 goals.

11. B.R. completed [redacted] at the [redacted] and made some progress.

12. B.R.'s IEP team met on [redacted] to develop an IEP for B.R.'s [redacted] grade year – the [redacted] school year. No regular education teacher was present for this meeting and there was no discussion of placing B.R. in any other school or in a regular education classroom with additional supports.

13. While some of the benchmarks under each goal were updated, the IEP developed for B.R.'s [redacted] grade year repeated the same 14 goals *verbatim* as from the [redacted] IEP.

14. B.R. completed his [redacted] grade year at the [redacted] and made some progress.

15. In [redacted] at the end of B.R.'s [redacted] grade year, the [redacted] closed. Therefore, B.R. was placed in his zoned school, [redacted] Elementary, for his [redacted] grade year.

16. B.R. received extended school year (ESY) services between his [redacted] and [redacted] grade years.

17. On [redacted] B.R.'s IEP team met to develop an IEP for his [redacted] grade year. A regular education teacher and a special education teacher attended this meeting. For B.R.'s [redacted] grade year, he was placed in a regular education classroom for most of the day, with an aide to assist him. He was pulled out of the regular education classroom for one hour of the day for services in the resource room.

18. The IEP for the [redacted] school year, B.R.'s [redacted] grade year, contained 12 goals. Goals 2, 3, 7, 8, 9, and 10 were identical to goals from B.R.'s first-grade IEP; goals 5 and 12 were new; goals 1 and 4 contained slightly updated wording, but no substantive changes; and goals 6 and 11 contained substantive revisions to prior goals.

19. During B.R.'s [redacted] grade year, his mother noticed significant improvement in his communication skills. As a result, when he was upset, he could tell her why he was upset instead of just having a meltdown.

20. While the schoolwork was challenging for B.R., he accomplished it through hard work and passed the [redacted] grade.

21. TDOE's monitoring and oversight of all 149 school districts for the provision of IDEA services is multi-faceted, including annual monitoring through a risk assessment by its Division of Consolidated Planning and Monitoring, the annual performance review (APR) process, professional development offerings, and a dispute resolution process. TDOE offers professional development, both as requested by LEAs and as follow up to monitoring findings. TDOE also offers fiscal incentives through grants to motivate beneficial programs and decision-making.

22. Every year, TDOE conducts a risk assessment of each district. The assessment includes 60 indicators such as the amount of funding the district receives, turnover rates for key personnel positions (including the school district superintendent and the director of special education), complaint findings, audit findings, and the number of years since a district has had an on-site monitoring review.

23. The assessment also takes into account APR indicators, which includes placement in the LRE.

24. [redacted] students placed at the [redacted] would be included in the [redacted] LEA data captured by the APR process.

25. The Office of Special Education Programs (OSEP), the division within the U.S. Department of Education that oversees special education programs, instructs that the indicators on the APR that capture the provision of FAPE in the LRE (indicators 5 and 6) are optional. However,

Tennessee includes these indicators in its APR process every year. Tennessee also puts more emphasis on these two indicators by weighing indicator five, LRE for children age six to 21, by three and indicator six, LRE for children age three to five, by two.

26. TDOE determines how each district will be further monitored based on their score on the risk assessment – the school districts that score in the highest 10% have an on-site monitoring visit from a team of TDOE personnel; the next highest 10% receive a desktop review in which the district uploads requested documentation for TDOE personnel to review; and the remaining 80% of districts complete a self-assessment.

27. This monitoring process is the process by which TDOE became aware of problems at the [redacted] During the [redacted] school year, another LEA in Carroll County, the West Carroll Special School District, scored in the highest 10% of school districts across the state. Therefore, from [redacted], to [redacted] TDOE conducted on-site monitoring of the West Carroll Special School District.

28. The on-site monitoring included document review and interviews with school district staff and parents. TDOE personnel first became concerned about whether [redacted] was the LRE for the children placed there during an interview with a West Carroll staff member during this on-site monitoring visit.

29. Because of this comment, TDOE conducted an on-site monitoring visit during the week of [redacted] focusing only on the [redacted] and whether the students placed there were receiving FAPE in the LRE.

30. On [redacted] TDOE notified Hollow-Rock Bruceton Special School District Director [redacted] that TDOE would not approve a contract for the [redacted] for the [redacted] school year. This letter, based on the [redacted] monitoring visit and review of all student

IEP files for students at the ████, made general findings of non-compliance with state and federal laws, including but not limited to, failure to conduct child find, failure to consider or offer a continuum of placements, issues with IEPs and initial eligibility, failure to teach state standards and offer a full instructional day, and issues with the determination of extended school year and related transportation. Specifically, the letter from then-TDOE Commissioner Candice McQueen provided:

> Ultimately, the responsibility of compliance with IDEA and state special education laws lies with your district. Your district staff was obligated to insure [sic] compliance and your contractual relationship provides that you will monitor the [████] to ensure that the rights and privileges available to children attending your schools shall be available to children served by the [████].
>
> ***
>
> Based on the results of the focus monitoring addressed in this letter, the department will not approve a similar contract for the ████ school year with the ████ Representatives with the Tennessee Department of Education will be available to meet with your district leadership on ████ to discuss your CAP [corrective action plan] . . .. The CAP will include a list of required actions with specific timelines. In addition, the department would like to discuss the technical assistance and support that will be provided to your district during this transition."

31. TDOE personnel met in person with representatives of the Hollow Rock-Bruceton Special School District on ████

32. In addition, TDOE through an advocacy and training partner, Support and Training for Exceptional Parents (STEP), offered training to parents of students who had been placed at the ████. STEP is a national advocacy and parent training organization funded in part by OSEP and contracted by TDOE to provide training and support to parents of children with disabilities.

33. The STEP training was advertised through each special school district and through

social media.

34. TDOE also provided a Checklist of Next Steps to each of the special school districts in Carroll County, including Hollow Rock-Bruceton. This checklist explicitly directed each school district to: (1) contact each family to provide a general update and inform them that IEP team meetings will be held over the summer; (2) provide information about the STEP organization and let parents know they can reach out to STEP or another advocacy organization; (3) conduct training for school district staff in [redacted] relating to LRE, a continuum of service options, and other topics related to the monitoring findings; (4) schedule IEP meetings for each of the students leaving the [redacted]; and (5) revise their funding applications for Fiscal Year [redacted] This checklist also provided a contact list for TDOE personnel and the subject matter area for which each person was designated to provide assistance.

35. The Petitioner's expert, Dr. [redacted] opined that: (1) a segregated placement such as [redacted] should be observed at the point of contract and in periodic on-site monitoring, and that because TDOE did not do so, it failed in guaranteeing that FAPE in the LRE was being provided at the [redacted] (2) the written instruments and data TDOE uses to monitor are insufficient in that they capture data in the aggregate; and (3) TDOE did not address or provide remedies to the students at the [redacted] once it found that the [redacted] was systemically failing them.

36. Dr. [redacted] report is flawed in two significant aspects. First, one of her underlying assumptions – that students placed at the [redacted] were not captured in the aggregate data for their respective school systems – is incorrect. Both the annual risk assessment and the APR could have included the children at the [redacted] within the data for each child's school district, just as any other child within the district could have been included. Second, because she was

provided incomplete information prior to writing her report, she was not aware that TDOE worked with a training provider and offered training to the parents of the children placed at the [redacted] or that TDOE clearly communicated to each school district that it needed to convene an IEP meeting for each student at the [redacted]

APPLICABLE LAW

1. The Petitioners bear the burden of proof to show by a preponderance of the evidence that the IEP devised by the school is inappropriate. *L.H. v. Hamilton County Department of Education*, 900 F.3d 779, 790 (2018).

2. The IDEA requires that a FAPE be made available to all children between the ages of 3 and 21. 34 C.F.R. § 300.101.

3. The IDEA defines FAPE as special education and related services that:

> a) have been provided at public expense, under public supervision and direction, and without charge;
> b) meet the standards of the State educational agency;
> c) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
> d) are provided in conformity with an individualized education program that meets the requirements under section 1414(d) [of the IDEA].

20 U.S.C. § 1401(9).

4. The IDEA provides, as to LRE, that:

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5).

5. The IEP is "the centerpiece of the statute's education delivery system for disabled children." *Honig v. Doe*, 484 U.S. 305, 311 (1988).

6. In the Sixth Circuit, "[the] IEP must provide the FAPE so as to educate the disabled student in the 'least restrictive environment' (LRE) possible." *L.H. v. Hamilton County Department of Education*, 900 F.3d at 788 (internal citations omitted).

7. "The LRE is a *non-academic* restriction or control on the IEP – separate and different from the measure of substantive benefits – that facilitates the IDEA's strong 'preference for mainstreaming handicapped children." *L.H. v. Hamilton County Department of Education*, 900 F.3d at 789 (internal citations omitted).

8. But the preference is not absolute, The Sixth Circuit has held that a school may separate a disabled student from a regular education classroom when: (1) the student would not benefit from regular education; (2) any regular-class benefits would be far outweighed by the benefits of special education; or (3) the student would be a disruptive force in the regular class. *L.H. v. Hamilton County Department of Education*, 900 F.3d at 789 (internal citations omitted).

9. The formulation of the IEP requires a school district's expertise but establishing the LRE does not. Therefore, "'in some cases, a placement which may be considered better for academic reasons may not be appropriate because of the failure to provide for mainstreaming.'" *L.H. v. Hamilton County Department of Education*, 900 F.3d at 789 (internal citations omitted).

10. Mastery of the regular education curriculum is not required for mainstreaming to remain a viable option. Instead, the question is whether the child, with appropriate supplemental aids and services, can make appropriate progress toward the IEP's goals in the regular education setting, according to his or her unique circumstances. *Endrew F. v. Douglas County School*

District, 137 S.Ct. 988, 1000-1001 (2017); *L.H. v. Hamilton County Department of Education*, 900 F.3d at 793.

11. The IDEA mandates monitoring as follows:

(a) Federal and State monitoring

(1) In general
The Secretary shall--

(A) Monitor implementation of this subchapter through--
(i) Oversight of the exercise of general supervision by the States, as required in section 1412(a)(11)of this title; and
(ii) The State performance plans, described in subsection (b);

(B) Enforce this subchapter in accordance with subsection (e); and

(C) Require States to--
(i) Monitor implementation of this subchapter by local educational agencies; and
(ii) Enforce this subchapter in accordance with paragraph (3) and subsection (e).

(2) Focused monitoring

The primary focus of Federal and State monitoring activities described in paragraph (1) shall be on—

(A) Improving educational results and functional outcomes for all children with disabilities; and
(B) Ensuring that States meet the program requirements under this subchapter, with a particular emphasis on those requirements that are most closely related to improving educational results for children with disabilities.

(3) Monitoring priorities

The Secretary shall monitor the States, and shall require each State to monitor the local educational agencies located in the State (except the State exercise of general supervisory responsibility), using quantifiable indicators in each of the following priority areas, and using such qualitative indicators as are needed to adequately measure performance in the following priority areas:

(A) Provision of a free appropriate public education in the least restrictive environment.

(B) State exercise of general supervisory authority, including child find, effective monitoring, the use of resolution sessions, mediation, voluntary binding arbitration, and a system of transition services as defined in sections 1401(34) and 1437(a)(9) of this title.

(C) Disproportionate representation of racial and ethnic groups in special education and related services, to the extent the representation is the result of inappropriate identification.

20 U.S.C § 1416(a) (1) – (3).

12. Under the IDEA:

A State educational agency shall use the payments that would otherwise have been available to a local educational agency or to a State agency to provide special education and related services directly to children with disabilities residing in the area served by that local educational agency, or for whom that State agency is responsible, if the State educational agency determines that the local educational agency or State agency, as the case may be—

(A) has not provided the information needed to establish the eligibility of such local educational agency or State agency under this section;

(B) is unable to establish and maintain programs of free appropriate public education that meet the requirements of subsection (a);

(C) is unable or unwilling to be consolidated with 1 or more local educational agencies in order to establish and maintain such programs; or

(D) has 1 or more children with disabilities who can best be served by a regional or State program or service delivery system designed to meet the needs of such children.

20 U.S.C. § 1413(g).

Title II of the Americans with Disabilities Act and § 504 of the Rehabilitation Act

13. When the LRE has been found lacking under the IDEA, claims brought under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act are

pretermitted. *L.H. v. Hamilton County Department of Education*, 900 F.3d at 784, ftnt. 1; *J.A., et al. v. Smith County School District*, 364 F.Supp.3d 803, at ftnt. 4 (M.D. Tenn. 2019).

ANALYSIS

Provision of FAPE

The Petitioners have met their burden of proof by a preponderance of the evidence that B.R. was denied FAPE for the [REDACTED] and [REDACTED] school years. In order to provide FAPE, a child's educational program "must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives." *Endrew F. v. Douglas County School District,* 137 S.Ct. at 1000. Thus, goals that are repeated year to year with only minor increases in objectives simply perpetuate an ineffective educational plan. Here, the goals of B.R.'s IEP were repeated *verbatim* from the [REDACTED] IEP to the [REDACTED] IEP.

Further, parental involvement is crucial in crafting an appropriate IEP. While B.R.'s parents were technically sitting at the table, the failure to have a regular education teacher present denied them any *meaningful* opportunity to fully consider the full range of options available for B.R.'s education. This made it impossible to determine whether B.R.'s placement was correct and whether FAPE was appropriately delivered. B.R.'s parents were not given sufficient information to allow them to have any meaningful level of participation in formulating B.R.'s IEPs. *See, L.H. v. Hamilton County Department of Education*, 900 F.3d at 790. Because B.R.'s IEP continued the exact same goals year to year with only minimal progress and because there was not a regular education teacher present for several IEP meetings, B.R. was denied FAPE during the [REDACTED] and [REDACTED] school years.

Placement in the LRE

The IDEA's strong preference in favor of mainstreaming is well-recognized, but not absolute. Therefore, following the binding Sixth Circuit precedent established by *L.H. v. Hamilton County Department of Education*, the analysis centers on three questions, identifying categories of students for whom mainstreaming would not be appropriate. They are: (1) where the child would not receive a benefit from mainstreaming; (2) where any marginal benefits of mainstreaming would be far outweighed by the benefits of a separate setting that could not feasibly be provided in a non-segregated setting; or (3) where the child would be a disruptive force in the non-segregated setting. *L.H. v. Hamilton County Department of Education*, 900 F.3d at 789.

Here, B.R.'s IEP team gave no consideration to placing B.R. in a regular education classroom, or to the supports that might be needed to make that possible. From B.R.'s mother's very first conversation with an LEA representative, it was suggested that she visit [redacted] No other school was mentioned in this first conversation, the first IEP team meeting, or any other IEP team meeting until the closure of the [redacted]. Without any other option being presented to B.R.'s parents – crucial members of B.R.'s IEP team – there could be no consideration of a range of placement options for B.R.'s placement. B.R.'s mother relied on the expertise of the educators who worked with B.R. They presented her with only one option, thus precluding all others from any discussion or consideration. This was further exacerbated by the lack of a regular education teacher's attendance at most of the IEP meetings through kindergarten and first grade.

Analysis of the three factors laid out by the Sixth Circuit in *L.H.* confirms this conclusion. For the first factor, when B.R. was placed in a regular education classroom in [redacted] grade, his mother saw marked improvement in his communication and therefore, his ability to express his feelings. He clearly benefited from mainstreaming. While the schoolwork was challenging, B.R.

was able to complete it successfully with hard work. As to the second factor – whether any marginal benefit of mainstreaming would be far outweighed by the benefits of a separate setting – there is no proof that there was any benefit to B.R. being educated in a separate setting, much less a benefit that was not feasible to provide in a non-segregated setting. While B.R. made some progress in his separate setting at [redacted], he made far more progress when he was actually placed in a regular education classroom. Finally, the third factor also leads to the conclusion that mainstreaming is appropriate for B.R. – he has no behaviors that would make him disruptive to a non-segregated classroom. Accordingly, it is clear that [redacted] was not the least restrictive setting that was appropriate for B.R.'s education.

TDOE Responsibility

However, the issue remains of whether TDOE is responsible, and therefore, legally liable for the fact that the LEA failed to provide FAPE in the LRE to B.R. It is well-settled under the IDEA that the state educational agency (SEA), here, TDOE, may be legally responsible when it fails to monitor or correct deficiencies in the LEA's delivery of services under the IDEA. However, in this case, the Petitioners have failed to meet their burden of proof that TDOE's monitoring and oversight of the IDEA is insufficient to make it legally liable to B.R.

The Petitioners largely rely on the expert report of Dr. [redacted] However, Dr. [redacted] report does not establish the standard for legal liability. She opines that (1) TDOE should have visited the [redacted] at the time the contract was entered into and periodically thereafter; (2) TDOE's use of aggregate data is insufficient to capture whether an LEA is meeting its obligations to provide FAPE in the LRE; and (3) TDOE failed to clearly communicate to the LEAs that they needed to hold IEP meetings for each of the children involved. This third opinion – that TDOE only vaguely communicated to the LEAs that they needed to hold IEP meetings – is rebutted

by the proof in this case. Dr. [redacted] was unaware that TDOE personnel met face-to-face with each LEA to explain the follow up that was expected in the wake of [redacted] closure. In addition, TDOE prepared an specific checklist, which it provided to Hollow Rock-Bruceton, and all the other special school districts in Carroll County, that explicitly set out TDOE's expectations for follow up by each of the LEAs involved. Most importantly, an IEP meeting was held for B.R. at which his IEP team decided what he needed as a result of his placement at the [redacted].

Dr. [redacted] second opinion – that the written instruments and data TDOE uses to monitor are ineffective – overlooks key components of TDOE's overall monitoring. First, TDOE does capture data related to placement in the LRE in the APR data every year. In addition, the IDEA requires TDOE to monitor LEAs using "quantifiable indicators and such qualitative indicators as are needed to adequately measure performance" in the areas of (1) provision of FAPE in the LRE; (2) general supervision including child find, effective monitoring, use of resolution meetings and mediation, and services to transition from early intervention services to preschool and school, and from school to post-graduation services; and (3) disproportionate representation of racial and ethnic groups in special education and related services. 34 C.F.R. § 300.600. TDOE uses the quantifiable indicators captured by the aggregate data in the risk assessment and the annual APR process, and it also uses qualitative indicators used in on-site monitoring visits, such as individual student record review and interviews with school district personnel and parents.

Finally, Dr. [redacted] opinion that TDOE should visit segregated facilities at the time of contracting, goes beyond the requirements that a state must meet to have a legally sufficient monitoring system under the IDEA. In all, given the fact that [redacted] was provided incomplete information on which to base her expert opinions and that she relies on an opinion that is not the legal standard for a sufficient monitoring system, her report and the opinions it includes

have been given only minimal weight.

The IDEA requires that each State:

> [M]onitor the local educational agencies located in the State (except the State exercise of general supervisory responsibility), using quantifiable indicators in each of the following priority areas, and using such qualitative indicators as are needed to adequately measure performance in the following priority areas:
>
> (D) Provision of a free appropriate public education in the least restrictive environment.
>
> (E) State exercise of general supervisory authority, including child find, effective monitoring, the use of resolution sessions, mediation, voluntary binding arbitration, and a system of transition services as defined in sections 1401(34) and 1437(a)(9) of this title.
>
> (F) Disproportionate representation of racial and ethnic groups in special education and related services, to the extent the representation is the result of inappropriate identification.

20 U.S.C § 1416(a)(3). The law is clear that a SEA is not simply a pass-through for funds. "[T]he state's role amounts to more than creating and publishing some procedures and then waiting for the phone to ring." *Cordero v. Pennsylvania Department of Education*, 795 F. Supp 1352, 1362 (M.D. Penn. 1992). In *Cordero*, the Pennsylvania Department of Education had been well aware of a significant lack of appropriate placements for disabled students, had agreed to do a needs assessment but failed to follow through, and overall took "only slight corrective action." *Cordero*, 795 F. Supp. at 1362. In Pennsylvania, the administrative complaint due process procedures, with a few small exceptions, constituted "the length and breadth of Defendants' scheme of information gathering and correcting errors in placement." *Cordero*, 795 F. Supp. at 1361.

Likewise, very recently in *J.N. v. Oregon Department of Education*, Case No. 6:19-cv-00096AA, 2020 WL 5209846, *5 (D. Ore. Sept. 1, 2020), the Oregon equivalent of TDOE was alleged to have "known for years that many Oregon public schools have 'unnecessarily and unlawfully shortened the school day' for children with disability-related behaviors." The State of

Oregon allegedly (1) lacks policies and procedures to systematically monitor school districts' compliance with federal and state statutes, instead relying solely on haphazard administrative complaints to identify noncompliant districts and correct violations, (2) fails to provide adequate resources, technical assistance, and training to school districts, and (3) has an education funding formula that rewards school districts that impose shortened school days. *J.N. v. Oregon Department of Education*, 2020 WL 5209846 at *9. In reviewing a challenge to standing, the Oregon District Court found "although school districts formulate and implement IEPs, the State has an affirmative statutory duty to monitor, investigate, and enforce the IDEA requirements and to assist the districts to ensure that they comply with state and federal law. *J.N. v. Oregon Department of Education*, 2020 WL 5209846 at *10.

By contrast to these cases, the TDOE takes active, affirmative steps to monitor LEAs and correct problems. TDOE annually monitors every LEA in Tennessee using a risk assessment and APR. The risk assessment contains 60 indicators to determine an overall performance level for the district. The APR contains 14 indicators, of which two specifically review placement in the LRE; these two indicators are the most heavily weighted of all of the APR indicators. In addition to collecting data, TDOE requires follow up with all of the LEAs annually – the level of intensity of follow up depending on the level of performance of the LEA on the risk assessment and APR. TDOE performs on-site monitoring of LEAs that score in the highest 10% of the risk assessment and APR, which means they are most at risk of operating below an acceptable level of performance. The next highest scoring 10% of LEAs are "desktop" monitored, meaning that they are required to submit certain documentation to TDOE for review by personnel in TDOE's central office. The remaining 80% of LEAs perform a self-assessment, which is also submitted to TDOE. In addition to these monitoring activities, TDOE provides a variety of training and professional

development opportunities to educators across the state and has fiscal incentives in place through grants to incentivize beneficial programs and decision-making at the local level.

Moreover, it is this monitoring process through which the problems at the were discovered. As a result of poor performance of the West Carroll Special School District, another LEA in Carroll County, TDOE personnel made an on-site monitoring visit to West Carroll in During this visit, the special education director for West Carroll commented during her interview that she had concerns about the As a result of these comments, TDOE personnel visited the for an on-site visit in They, too, determined that the situation at the should be examined more closely. Therefore, in a monitoring team from TDOE returned to Carroll County for a monitoring visit focused on the This monitoring uncovered the breadth and depth of the problems at the resulting in TDOE notifying all five special school districts in Carroll County that no further contracts with the Carroll County Board of Education for operation of the would be approved, effectively closing the at the end of the school year. Thus, TDOE ensured the closure of the less than four months after it became aware of the problems.

The Petitioners further contend that after closure of the TDOE's steps to remedy the harm caused by the were insufficient. The Petitioners assert that TDOE should have provided an assessment to each child that had been placed at the and then provide them with compensatory education, if necessary. The IDEA specifies situations in which a SEA is to provide direct services to children:

> A State educational agency shall use the payments that would otherwise have been available to a local educational agency or to a State agency to provide special education and related services directly to children with disabilities residing in the area served by that local educational agency, or for whom that State agency is responsible, if the State educational agency

> determines that the local educational agency or State agency, as the case may be—
>
> (A) has not provided the information needed to establish the eligibility of such local educational agency or State agency under this section;
>
> (B) is unable to establish and maintain programs of free appropriate public education that meet the requirements of subsection (a);
>
> (C) is unable or unwilling to be consolidated with 1 or more local educational agencies in order to establish and maintain such programs; or
>
> (D) has 1 or more children with disabilities who can best be served by a regional or State program or service delivery system designed to meet the needs of such children.

20 U.S.C. § 1413(g).

None of the four situations described in 20 U.S.C. § 1413(g) are present here. The Petitioners make much of the statement in the LEA's offer of judgement that "at no time did TDOE instruct Hollow Rock-Bruceton to evaluate Br.R. for, or provide to Br.R., any compensatory education or remedy for past harm due to the years he spent at the [redacted]." While this statement is not proof, it is actually true. TDOE personnel were very clear that they did not direct the LEA to provide any specific service to any *individual* child. Instead, TDOE appropriately directed the LEA to hold an IEP team meeting for *every* child that had been placed at the [redacted] to determine what each *individual* child needed to rectify any harm from that placement. Every IEP meeting includes an assessment of the child's present levels of performance and is the appropriate venue to determine any needed remedy.

B.R. had an IEP team meeting on [redacted] and his IEP team decided that he needed ESY services, which he received. Further, the Petitioners presented no evidence that these ESY services did not fully compensate B.R. for any of loss of educational benefit because of his placement at the [redacted] In sum, the Petitioners have failed to meet their burden of proof that

TDOE's monitoring and oversight were deficient under the standards established by the IDEA.

CONCLUSIONS OF LAW

1. B.R. is a child entitled to the protections of the IDEA, ADA, and § 504 due to his diagnosis of autism.

2. The Petitioners have shown by a preponderance of the evidence that B.R. was not provided FAPE in his LRE during the [redacted] and [redacted] school years while he was placed at the [redacted]

3. The Petitioners have failed to meet their burden of proof that this violation of the IDEA was due to a lack of oversight or monitoring by TDOE.

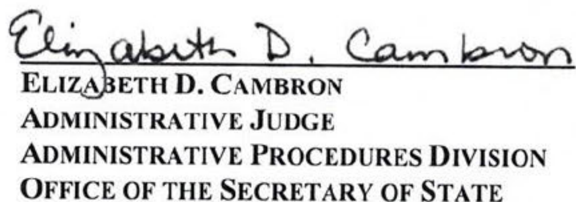
4. The Petitioners claims under the ADA and § 504 are pretermitted.

5. TDOE is the prevailing party.

The policy reason for this decision is to uphold the federal laws pertaining to the education of children with disabilities.

It is so ORDERED.

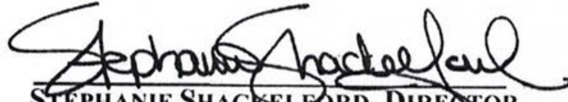
Entered and effective this the 2nd day of October, 2020.



ELIZABETH D. CAMBRON
ADMINISTRATIVE JUDGE
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE

Filed in the Administrative Procedures Division, Office of the Secretary of State, this the

__2nd__ day of ____October____, 2020.



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

IN THE MATTER OF: **APD CASE No.** [redacted]
B.R., the Student and
C.R. and C.R., the Student's
Parents/Guardians,
Petitioners

v.

TENNESSEE DEPARTMENT OF
EDUCATION,
Respondents.

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 **October 2, 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 **October 19, 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 **December 1, 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 **December 1, 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 **October 9, 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, 8th Floor
Nashville, TN 37243-1102
Fax: (615) 741-4472