



**State of Tennessee**  
**Department of State**

Administrative Procedures Division  
312 Rosa L. Parks Avenue  
8<sup>th</sup> Floor, William R. Snodgrass Tower  
Nashville, Tennessee 37243-1102  
Phone: (615) 741-7008/Fax: (615) 741-4472

**May 17, 2023**

Jessica F. Salonus, Esq.  
The Salonus Firm, PLC  
139 Stonebridge Blvd.  
Jackson, TN 38305  
Sent via email only to:  
jsalonus@salonusfirm.com

Angel McCloud, Esq.  
Arivett Law PLLC  
567 Cason Lane, Suite A  
Murfreesboro, TN 37128  
Sent via email only to: angel@arivettlaw.com

Justin S. Gilbert, Esq.  
Gilbert Law, PLC  
100 W. Martin Luther King Blvd  
Suite 501  
Chattanooga, TN 37402  
Sent via email only to:  
justin@schoolandworklaw.com

Deanna L Arivett, Esq.  
Arivett Law PLLC  
567 Cason Lane, Suite A  
Murfreesboro, TN 37128  
Sent via email only to:  
deanna@arivettlaw.com

Tricia Craig  
Tennessee Department of Education  
Andrew Johnson Tower  
710 James Robertson Parkway  
Nashville, TN 37243  
Sent via email only to: Address on File

**RE: [REDACTED], THE STUDENT, AND [REDACTED] AND [REDACTED], THE STUDENT'S PARENTS V.  
WILLIAMSON COUNTY SCHOOLS, APD Case No. 07.03-231153J**

Enclosed is a *Final Order*, including a *Notice of Appeal Procedures*, rendered in this case.

Administrative Procedures Division  
Tennessee Department of State

Enclosure(s)

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

**IN THE MATTER OF:**

█, **THE STUDENT,**  
█, **THE PARENT,**  
█, **THE PARENT,**  
*Petitioner,*

**APD Case No. 07.03-231153J**

**v.**

**WILLIAMSON COUNTY SCHOOLS,**  
*Respondent.*

**FINAL ORDER**

This matter was brought by the Petitioners, student █ and █ parents, █ and █, pursuant to the Individuals with Disabilities Educational Act (IDEA), Title II of the Americans with Disabilities Act (ADA), and Section 504 of the Rehabilitation Act (Section 504). The contested case hearing was held on May 2, 3, and 5, 2023, by Administrative Judge Rachel L. Waterhouse. By agreement, the hearing was held via WebEx videoconferencing. The Petitioners are represented by attorneys Justin Gilbert and Jessica Salonous.<sup>1</sup> The Respondent, Williamson County Schools (WCS), is represented by attorneys Deanna Arivett and Angel McCloud.

By Order Setting Hearing dated April 3, 2023, the hearing and the following post-hearing deadlines were set to comply with the applicable statutory timeframe<sup>2</sup>: the expedited transcript shall be filed on or before May 11, 2023; the parties shall file post-hearing briefs,<sup>3</sup> including

---

<sup>1</sup> Ms. Salonous did not participate in the hearing but is still an attorney of record.

<sup>2</sup> 34 C.F.R. § 300.515; Tenn. Code Ann. § 49-10-606(h).

<sup>3</sup> The parties timely filed their post-hearing briefs. However, along with their brief, the Petitioners filed a Motion for 24 Hours to insert remaining transcript citations (Motion) into their post-hearing brief. About 6.5 hours later, the Petitioners filed a Supplement to its Motion which was their post-hearing brief with complete citations. WCS did not file a response to the Motion. The transcript citations in a party's brief are for the benefit of the tribunal. No prejudice is foreseen to WCS if the Motion is granted, and WCS has not opposed the Motion. The Motion is GRANTED.

proposed findings of fact and conclusions of law, with citations to the record, on or before 10:00 a.m. on Monday, May 15, 2023; and the Final Order will be issued on or before May 17, 2023.

The issues in this case are:

- (1) Whether [REDACTED] was denied a free and appropriate public education (FAPE) in the least restrictive environment (LRE) in the 2021-2022 and 2022-2023 school years;
- (2) Whether [REDACTED]'s educational placement was predetermined by WCS for the 2021-2022 school year; and
- (3) If the answer to either issue one or two is yes, then what is the appropriate remedy?<sup>4</sup>

Based on review of the entire record, it is determined that the proof weighs in favor of WCS on the substantive issues and the Petitioners did not prove violations of law by a preponderance of the evidence. Accordingly, no relief is available to [REDACTED] WCS is the prevailing party on all issues.

The following witnesses testified, in order of appearance: (1) Andrew Hedges, general education teacher at [REDACTED] School/WCS; (2) Teri Driver, special education teacher at [REDACTED] School/WCS; (3) Kim Kredich, [REDACTED]'s education advocate; (4) [REDACTED], the student's mother; (5) Jill Justus, principal of [REDACTED] School and former principal of [REDACTED]/WCS; (6) Wendy Oliver, Ed.D., former chief education officer of [REDACTED]; (7) Jessica Thompson, WCS school psychologist; (8) Clovis Stair, Ph.D.,<sup>5</sup> psychologist, WCS's expert; and (9) Maria Griego, executive director for student support services, Williamson County Board of Education, licensed

---

<sup>4</sup> The Petitioners seek relief as follows: a revised IEP, an assessment by a neutral professional to determine compensatory education and relief thereto, reimbursement of expenses, and attorneys' fees and costs.

<sup>5</sup> Without objection, Dr. Stair was qualified and recognized as an expert in psychology, the diagnosis and treatment of mental health disabilities, the administration and interpretation of psychological assessments, and the eligibility criteria for a student with a disability in special education under emotional disturbance.

school psychologist and school administrator. [REDACTED] also provided rebuttal testimony on behalf of the Petitioners. Also, Sixty exhibits were admitted during the hearing.<sup>6</sup>

### **FINDINGS OF FACT**

1. [REDACTED] is a [REDACTED]-year-old [REDACTED] grade student for the current school year of 2022-2023.

2. For the 2021-2022 school year, [REDACTED] was in [REDACTED] grade.

3. During the relevant time period, [REDACTED] had relevant diagnoses of: Disruptive Mood Dysregulation Disorder (DMDD), Attention Deficit Hyperactivity Disorder (ADHD), post-traumatic stress disorder (PTSD), and generalized anxiety disorder; as well as specific learning disorder-written expression.

4. DMDD is characterized by severe and recurrent temper outbursts three or more times per week that are grossly out of proportion in intensity or duration to the situation. The key feature of DMDD is chronic irritability that is present in between episodes of anger or temper tantrums. Symptoms are present in at least two settings (at home, at school, or with peers) for 12 or more months, and symptoms must be severe in at least one of those settings.

### **Background Facts**

5. The earliest assessment indicating concerns with [REDACTED]'s behavior or social/emotional functioning was when [REDACTED] was three years old.

6. Throughout the years, [REDACTED]'s behaviors have included: physical aggression, hitting, kicking, throwing objects towards another individual, causing or threatening harm, breaking pencils, punching books, slapping tables, elopement from classrooms and school buildings, noncompliance, arguing, verbal outbursts, ripping or crumpling up worksheets, yelling above the

---

<sup>6</sup> The last two exhibits, 61 and 62, were marked for ID ONLY because these exhibits relate to offers of proof made by the parties.



14. In 2019, the [REDACTED] IEP team considered the target behaviors and proposed an IEP placing [REDACTED] in a therapeutic program at a different WCS elementary school ([REDACTED] that provided wraparound support and services for social/emotional behaviors. It was also called a Tier 3 program.<sup>9</sup> A therapeutic program is not an “alternative school” for students with discipline problems.

15. The Petitioners disputed the proposed IEP placing [REDACTED] at the therapeutic program and filed a due process complaint. As a result, [REDACTED] remained at [REDACTED] pursuant to the IDEA’s stay-put provision from November 2019 through March 2020.

16. Therefore, the last implemented IEP for [REDACTED] by WCS prior to 2021 was dated September 5, 2019, while [REDACTED] was attending [REDACTED]. That IEP stated that [REDACTED] was able to participate with [REDACTED] nondisabled peers in the regular classroom to the fullest extent. [REDACTED] was also able to participate in any extracurricular activities that the parents saw fit.

17. [REDACTED] also received behavioral interventions<sup>10</sup> at [REDACTED] from November 2019 through March 2020, yet [REDACTED] behaviors included physical and verbal aggression and elopement. According to the [REDACTED] principal’s testimony, [REDACTED] presented safety concerns for [REDACTED], other students, and school personnel.

18. While at [REDACTED] [REDACTED] caused physical injuries to staff members and at least one staff member took medical leave because of a mental health concern related to dealing with [REDACTED]

19. [REDACTED] attended [REDACTED] grade at [REDACTED] until COVID-19 closed the school building in March of 2020. [REDACTED] stated that [REDACTED] grade was not successful for [REDACTED]

---

<sup>9</sup>A WCS Tier 3 therapeutic program is for students who have documented social/emotional needs for exhibited behaviors at such an intense level that they are provided with a higher level of support than can be provided in a traditional school setting.

<sup>10</sup>[REDACTED] received a combination of special education and general education at Bethesda during this time.

20. Due to a settlement in a different legal proceeding, [REDACTED] was then placed on homebound with WCS providing educational services.

21. During the COVID-19 online instruction, multiple parents complained about [REDACTED]'s use of inappropriate language.

22. For [REDACTED] [REDACTED]-grade school year, [REDACTED] received educational services from the following providers in consecutive order: WCS homebound services until about October 14, 2020, [REDACTED] [REDACTED] private school, and then a virtual homeschool program with an educational consultant/special education teacher one-on-one.

23. After about a month of homebound, [REDACTED]'s parents withdrew [REDACTED] from WCS and [REDACTED] was enrolled at [REDACTED].

24. [REDACTED] represented itself as a therapeutic school with social/emotional behavior supports. [REDACTED] attended for up to three hours per day at the school building, mostly in a one-on-one setting with an adult. The school required that a parent stay at school with [REDACTED]

25. After several months at [REDACTED], [REDACTED] was moved from the school building setting to the home setting with [REDACTED] providing the educational services one-on-one.

26. At [REDACTED] there was an incident where [REDACTED] became physically aggressive and hit a staff member. [REDACTED] also flipped tables, ripped papers, swore, and eloped from the classroom.

27. [REDACTED] stated that the one-on-one in the home with [REDACTED] staff was not successful for many reasons. In March of 2021, [REDACTED] quit serving [REDACTED]

28. Thereafter, in the virtual homeschool setting with a one-on-one teacher/behavior support person, [REDACTED] continued to exhibit disruptive behaviors.

---

<sup>11</sup> [REDACTED] was previously known as [REDACTED].

2021-2022 School Year ( [REDACTED] grade)

29. For the 2021-2022 school year, [REDACTED] wanted [REDACTED] to return to WCS schools because [REDACTED] wanted to be with peers, and [REDACTED] felt it would be a better and more inclusive environment at the time. Having peer interaction, both disabled and non-disabled, for [REDACTED] was very important to [REDACTED] because she believes that [REDACTED] can benefit from and learn social skills, etc., in those interactions.

30. Thus, for [REDACTED] grade, [REDACTED] was enrolled at [REDACTED] School ([REDACTED] [REDACTED]), a WCS school.

31. For enrollment, WCS requested and received parental consent for supplemental assessments to obtain updated information for [REDACTED]'s present levels of performance, including updated social/emotional behavioral data.

32. WCS also attempted to obtain information from [REDACTED]'s private providers/homeschool teacher, but only limited information was provided by the Petitioners.

33. In 2021, the IEP team met on July 30, August 3, and August 6. The meetings lasted hours.

34. The 2021 core IEP team included: [REDACTED], the parent and an advocate; [REDACTED] [REDACTED], general education teacher; [REDACTED] [REDACTED], special education teacher and lead special education teacher; [REDACTED] [REDACTED], special education teacher; Jessica Thompson, WCS school psychologist; Amanda Hare, BCBA, WCS behavior specialist; Holly Dickerson, WCS school psychologist; [REDACTED] [REDACTED] principal; Maria Griego, WCS administrator, licensed school psychologist and school administrator; Stacey Northrup, WCS occupational therapist; and Kim Hurd, WCS assistive technology staff.<sup>12</sup>

---

<sup>12</sup> It is possible that other WCS staff attended the IEP meetings, as necessary.

35. The 2021 IEP team considered the following information: prior IEPs, the results of the WCS assessments, multiple outside evaluations, direct input from [REDACTED]'s educational consultant/homeschool teacher, limited performance information from [REDACTED], present levels of performance, all submitted medical information, and direct input from [REDACTED] and [REDACTED]. Specifically, reports or evaluations were reviewed from Dr. Jackie Klaver, Ph.D., Pediatric Neuropsychologist; Dr. Aimee Dukes, Ph.D., HSP, NCSP; Dr. Allison Gunne, Ph.D.; and Kimberly Schultz, LPC-MHSP.

36. For the 2021-2022 school year, [REDACTED] was given a standard writing assessment and a math placement assessment given to all rising [REDACTED]-graders. [REDACTED] was assessed by the school psychologist and given different types of universal assessments administered to all students changing grade levels for program planning purposes.

37. The assessments were given at [REDACTED].

38. The assessments were given to gain information relating to [REDACTED]'s present levels of performance.

39. The writing assessment was given because [REDACTED] had expressed concern in that specific area.

40. There were accommodations made for [REDACTED] to take the writing assessment. The writing assessment is timed and is intended to be completed in no longer than 30 minutes. [REDACTED] didn't like that the test was timed, but [REDACTED] was told not to worry about it and was given encouragement. [REDACTED] became frustrated during the assessment and needed a break. [REDACTED] tore up the paper and left the room.<sup>13</sup> Later, [REDACTED] returned to the room and completed the assessment. Ms.

---

<sup>13</sup> At the parent's request, whenever someone from [REDACTED] worked with [REDACTED], such as an assessment, [REDACTED] had a representative with [REDACTED] such as a parent, homeschool teacher, or educational consultant. When [REDACTED] left the room on this occasion, [REDACTED] spoke with [REDACTED] representative who was sitting outside the door.

Driver, who conducted the assessment, testified that ■ did great academically on the writing assessment.

41. Ms. Driver also observed the math assessment, which was conducted by a different ■ special education teacher. During the math assessment, ■ became very frustrated, broke pencils, refused to complete the assessment, left the room and the building and went outside with ■ mother and educational consultant and pushed one of them. Then, the educational consultant stated that ■ was finished for the day. ■ later completed the math assessment at home during a home visit.

42. ■ also consented to supplemental testing of ■ by WCS for the purpose of determining current levels of functioning in the social/emotional and pre-vocational areas. The testing included behavior specialist observations, parent interview, student interview and interest inventory, parent and student sensory rating scales and observations, and parent and student social/emotional rating scale. The assessments compared ■'s behaviors and executive functioning to others ■ same age.

43. The results of the supplemental testing were contained in a psychoeducational supplemental report dated June 2, 2021, by Ms. Thompson, WCS school psychologist. As reported on forms completed by ■ and ■ (■'s educational consultant/at home teacher, advocate, and an ABA therapist), ■ scored high<sup>14</sup> in the following areas: hyperactivity, aggression, anxiety, depression, somatization,<sup>15</sup> withdrawal, attention problems, adaptability, leadership,<sup>16</sup> activities of daily living,<sup>17</sup> behavior regulation,<sup>18</sup> emotional

---

<sup>14</sup> Meaning marked characteristics or difficulties of significant concern.

<sup>15</sup> The tendency to be overly sensitive to and complain about relatively minor physical problems and discomforts.

<sup>16</sup> The skills associated with accomplishing academic, social, or community goals, including the ability to work with others.

<sup>17</sup> The skills associated with performing basic, everyday tasks in an acceptable and safe manner.

<sup>18</sup> Overall ability to control and monitor behavior effectively.

regulation,<sup>19</sup> and cognitive regulation.<sup>20</sup> Cognitive regulation is not the same as someone's intellectual ability.

44. On July 10, 2021, Dr. Dukes, with Nashville Psychological Assessment and Learning Associates, performed a private (non-school) assessment of ■■■'s writing abilities at ■■■'s request. Her psychological evaluation report states that the test was timed and ■■■ was concerned about it being timed, lost ■■■ temper several times, became visibly disturbed, and was overly concerned with making mistakes. ■■■ took twice as long to complete the testing activities as ■■■ peers. At one point, ■■■ was so upset that ■■■ refused to continue and walked out of the room to ■■■ parents in the waiting room where they reassured ■■■ ■■■ was allowed to start the activity over. ■■■'s parents told Dr. Dukes that this was typical behavior when ■■■ is under duress in a timed procedure or when ■■■ perceives ■■■ has made a mistake.

45. Dr. Dukes found that ■■■ has a specific learning disorder with impairment in written expression based on low average range testing results in written expression and in the delayed range testing results in writing fluency.

46. ■■■ submitted to WCS a letter from Ms. Shultz dated July 11, 2021, which states in full:

I've been seeing [■■■] for psychotherapy since June 1, 2021. ■■■ came to me for EMDR therapy due to past trauma. [■■■] already had a diagnosis of DMDD and after evaluation I have added PTSD to ■■■ diagnosis. It is recommended that [■■■] be evaluated for ■■■ tolerance level as to whether ■■■ can be in school for a full day or if ■■■ needs a reduced day.

47. On January 13, 2020, Dr. Gunne performed an Independent Educational Evaluation (IEE) of ■■■ at WCS' request. The Woodcock Johnson Tests of Academic Achievement was given and ■■■ scored average, high average, or superior in all academic areas.

---

<sup>19</sup> Overall ability to control emotions effectively and adjust emotions to changing situations.

<sup>20</sup> Overall ability to control and manage ones thinking and to solve problems effectively.

48. Dr. Klaver's neuropsychological evaluation report was dated July 12, 2019, when [REDACTED] was [REDACTED] years old and in the [REDACTED] grade. The purpose of the report was to determine [REDACTED]'s then current level of cognitive and behavioral functioning and to aid in diagnostic clarification. Dr. Klaver made the following diagnoses: frontal lobe and executive function deficit, DMDD, and ADHD-combined type. Dr. Klaver ruled out autism spectrum disorder and noted to monitor for hypomanic or manic episodes.

49. Dr. Klaver recommended that [REDACTED] would benefit from intensive interventions that target improvements in managing distress tolerance, building interpersonal effectiveness, regulating emotions, and practicing skills to help [REDACTED] deal with issues in the present moment to prevent age-inappropriate outbursts. She also stated that, as [REDACTED] gets older, the frontal lobes of his brain will mature, which will result in improved self-regulation skills.

50. When Ms. Driver asked [REDACTED] about the "intensive interventions" Dr. Klaver recommended, [REDACTED] said that the therapies were sporadic in nature and that she had "paused" them.

51. In the 2019 report, Dr. Klaver recommended, amongst other things, that [REDACTED] would benefit from a one-on-one aide at the beginning of the school year and in certain subjects that require a higher level of writing demands. The aide should be chosen on personality type that matches [REDACTED]'s needs related to trust and security as a way to prevent escalations when [REDACTED] requires assistance.

52. [REDACTED] and an advocate were involved in the three 2021 IEP meetings and were provided with a draft IEP on which the team was working. The IEP was a working document to which changes were made as the IEP meetings progressed.

53. During the 2021 IEP meetings, [REDACTED] requested that the WCS IEP team members receive training on DMDD. In both of the school years at issue, there were multiple WCS IEP

team members with psychology or mental health backgrounds who understood [REDACTED]'s diagnoses. On September 13, 2021, the training was conducted by Dr. Klaver, who had evaluated [REDACTED]. Multiple WCS staff members of the IEP team attended the training. Ms. Driver said there was nothing provided in the DMDD training that would have changed her opinion about the IEP proposal for the 2021-2022 school year.

54. For the 2021 IEP process, the last FBA for [REDACTED] was dated February 26, 2019. Since there wasn't a current BIP in place for the 2021 IEP meetings, the team used the plan that had been created in 2019 from the 2019 FBA.

55. However, the IEP team wanted updated information. Therefore, WCS requested an FBA and parental consent was given in the July 30, 2021, IEP meeting.

56. During the August 3, 2021, IEP meeting, Ms. Griego provided information about therapeutic day schools, explained what they are, and spoke about the ones that WCS had contracts with at that time.

57. Ms. Griego, Ms. Driver, and Ms. Thompson were all familiar with and had been to therapeutic day schools.<sup>21</sup>

58. In the August 3, 2021, IEP meeting, Ms. Driver, the IEP team special education teacher, initially recommended that [REDACTED] at least have one-on-one support across all settings to start. By "all settings," she was referring to support in the classroom and in the academic content areas, as well as related arts (gym class, computer class, etc.) and lunch. Ms. Driver testified that she made that recommendation based on a number of factors, such as [REDACTED]'s placement in the past had a higher level of support provided, as well as that [REDACTED] always had a support person with [REDACTED] during assessments or evaluations. She explained that, if [REDACTED] needed that level of support for

---

<sup>21</sup> Prior to August 3, 2021, Ms. Griego had toured all three of the therapeutic day schools mentioned. Ms. Driver volunteered at a therapeutic day school in the past, which was not one of the three discussed herein: [REDACTED], [REDACTED], and [REDACTED]. Ms. Thompson had been to [REDACTED].

assessments, etc., then she thought [REDACTED] would need that level of support during a school day, at a minimum.

59. In the 2021 IEP meeting discussions concerning potential placement in a therapeutic day school, Ms. Driver took that to mean something similar to what is offered in a WCS Tier 3 therapeutic program that focuses more on behavior interventions while working collaboratively with WCS on [REDACTED]'s educational needs. A Tier 3 therapeutic program had been proposed for [REDACTED] in a prior grade and rejected by the parents.

60. Ms. Driver explained that she thought [REDACTED] would need one-on-one support, at a minimum, if the IEP team were to agree [REDACTED] needs could be met in a WCS school. However, after further discussions, considering [REDACTED]'s most recent placement (homeschool program with an educational consultant), and information from [REDACTED] (where [REDACTED] attended prior to homeschool) that [REDACTED] had been unsuccessful there in a one-on-one setting, she agreed that a therapeutic day school program would be a better option for [REDACTED] than a one-on-one program at [REDACTED].

61. While Ms. Driver acknowledged, in theory, that a therapeutic day school would be more restrictive than a one-on-one educational setting in a school with only adult interaction, she was not asked what was the least restrictive environment that would meet [REDACTED]'s unique circumstances and individual needs.

62. The IEP team proposed numerous supports and accommodations. [REDACTED] contended that many of the options discussed would not work for [REDACTED]

63. The 2021 IEP team considered multiple placement options but concluded that [REDACTED] could not safely be served and receive FAPE in these less restrictive alternatives because of [REDACTED] volatile behavior issues.

64. On August 3, 2021, the final proposal of an annual IEP for August 6, 2021, to August 2, 2022, was discussed.<sup>22</sup> It proposed direct special education instruction in a homebound setting with a special education teacher four times per week for two hours per session for a total of eight hours per week. This proposal was specified to be temporary—approximately three weeks.

65. After the temporary period, there was to be a transition to a therapeutic setting for which another IEP meeting would be scheduled to discuss therapeutic day schools and options.

66. The temporary placement of homebound was proposed by the WCS staff members of the IEP team to allow time for the most informed decision to be made, with the parent in agreement, and to find a therapeutic day school to provide the supports that ■■■ needed to be successful.

67. ■■■ and her advocate did not agree with the proposed IEP. ■■■ asserted that she had never heard of a therapeutic setting or day school before the August 3, 2021, IEP meeting.<sup>23</sup> Nor had she toured a therapeutic day school. In a therapeutic day school, ■■■ did not know how many students would be enrolled, what the curriculum would be, what kind of academic and behavioral supports would be offered, whether there would be non-disabled peers with ■■■, the ages of the children that would be grouped together, how far away from home the schools would be, or what kind of extracurricular activities are offered.

68. A few witnesses agreed that, as a parent's right to participate meaningfully in the IEP process, before a change of placement is made, a parent should be provided with the following information: (1) exactly where the proposed placement would be and the right to view

---

<sup>22</sup> The IEP contained five goals related to ■■■'s social/emotional and pre-vocational deficits and substantial accommodations.

<sup>23</sup> However, in 2019, ■■■ had rejected WCS' proposal to place ■■■ in a WCS Tier 3 school (■■■■■) which is similar to a therapeutic day school by providing behavioral supports.



73. Because [REDACTED] had requested additional or different eligibility categories for [REDACTED]'s IEP, WCS started a re-evaluation process.<sup>24</sup> [REDACTED] expressed that [REDACTED] had matured in the time from 2019 to 2021, which was from the ages of [REDACTED] to [REDACTED]. The lengthy re-evaluation process started after the series of IEP meetings in 2021. Delays in the process resulted from the parents not timely providing consent, placing restrictions on how the assessments and evaluation would be conducted, and not producing [REDACTED] for the re-evaluation without restrictions prompting an order to compel. The information from the re-evaluation was ultimately considered by the 2023 IEP team.<sup>25</sup>

74. In the weeks after August 4, 2021, the IEP team of WCS staff and [REDACTED] toured three therapeutic day schools: [REDACTED], and [REDACTED]. Those schools all provide behavioral supports to students who need them.<sup>26</sup>

75. After touring and learning about the three therapeutic day schools, [REDACTED] did not believe any of them would be an appropriate placement for [REDACTED] for various reasons. For instance, she did not like the schools' locations, she had concerns about whether [REDACTED] would have same-age peers, and she did not like the seclusion areas.

76. The Petitioners did not provide consent for WCS to communicate with the proposed therapeutic programs about acceptance of [REDACTED]. The IEP team did not meet again to propose a placement at a specific therapeutic day school because [REDACTED] failed to participate in the process and so placement could not be determined.

---

<sup>24</sup> A re-evaluation is required every three years, pursuant to the IDEA.

<sup>25</sup> On August 18, 2021, [REDACTED] completed the parent information for re-evaluation form. From August 18 to September 13, 2021, observation forms were completed for [REDACTED]'s other providers. On October 1, 2021, [REDACTED] gave consent for a comprehensive re-evaluation of [REDACTED] to determine continued disability and need for services. [REDACTED] made her consent contingent on the following: (1) [REDACTED] meets assessor outside of academic performance setting prior to evaluation being conducted; (2) [REDACTED] accompanied by support person that [REDACTED] is familiar and comfortable with; (3) no revealing to [REDACTED] that test is timed; and (4) secret signal/allowed to request breaks as needed.

<sup>26</sup> Not all WCS members of the IEP team were able to tour all three therapeutic day schools.

77. On October 20, 2021, WCS issued a PWN informing the Petitioners that the team could not consider a therapeutic placement, and the temporary homebound placement would be continued, pursuant to the IEP final proposal, until the parents allowed WCS to communicate with local therapeutic day schools. ■ did not like the homebound program that was proposed because she believed ■ was capable of participating in a full school-day of education and not just the two hours a day that was proposed. Also, she wanted ■ to have access to peers.<sup>27</sup>

78. However, at the end of the 2021 IEP process, ■ did not attend a WCS school.

79. A due process complaint was filed and ■ was withdrawn for the remainder of the school year.

80. After withdrawal, ■ was educated in two different online/homeschool programs and had a teacher/educational consultant to assist.

**2022-2023 School Year (■ grade)**

81. Sometime around December 2022, ■ wanted to re-enroll ■ at ■. ■ wanted ■ to be with peers and paying for his prior schooling at a private school was expensive.

82. Immediately prior to the effort to enroll ■ in WCS for 2023, ■ attended ■, a private school. ■ attended ■ for approximately three months beginning in September 2022. Prior to ■ ■ was homeschooled for a few months with an educational consultant using ■'s online program.

---

<sup>27</sup> ■ was not forbidden by WCS from attending school on campus. At any time, ■ could have attended school as a general education student, and ■ was informed of the option of refusing special education services. However, as an eligible student with a disability, ■ was entitled to FAPE in his LRE, which the WCS IEP team members had determined on August 3, 2021, was temporarily in a homebound setting.

83. At that time, [REDACTED] was new and offered a unique educational model providing a combination of hybrid and blended learning where students have a flexible format. Each student had a personalized learning model. The teaching at [REDACTED] was all online with virtual teachers. Each of the teachers held an online hour-long class once a week with the students. However, [REDACTED] would be at the school building for the virtual class, unless [REDACTED] was at home for some reason. [REDACTED] allowed flexibility for students to attend at the school building or remotely. Students did not have to attend every day. There was also flexibility in the school day. [REDACTED] would attend school from four to seven hours per day. While [REDACTED] was at [REDACTED] there were a total of five to seven students enrolled.

84. [REDACTED] reported to [REDACTED] that [REDACTED] had ADHD and dysgraphia, but she did not mention DMDD. [REDACTED] requested a copy of an IEP from a previous school because of the reported diagnoses. [REDACTED] said there wasn't a current IEP, but that she could write one. An IEP from a previous school was never provided by [REDACTED]

85. On the first or second day of school, [REDACTED] told Dr. [REDACTED] [REDACTED] Chief Education Officer, that [REDACTED] had hit an administrator at [REDACTED] previous [REDACTED] school before [REDACTED] was homeschooled. Dr. [REDACTED] met with [REDACTED] who said the hitting statement was not true and that [REDACTED] was posturing as the new kid to make himself sound cool.

86. All of the [REDACTED] students were assigned an adviser to assist one-on-one with academic support, and things like time management, goal setting, and social development skills. The advisers were not considered the classroom teachers and did not provide one-on-on tutoring. [REDACTED] was assigned different advisers who tried different strategies trying to meet [REDACTED]'s needs.

87. While attending [REDACTED] [REDACTED] had behavior challenges with the other students; [REDACTED] struggled being socially appropriate and making friends. At times, [REDACTED] had to be removed from

lunch and other social activities where there were other students. However, [REDACTED] was never suspended or expelled from [REDACTED] for being too violent.

88. [REDACTED] also had trouble staying focused and had meltdowns. Dr. [REDACTED] testified that [REDACTED] would get very, very angry, have very negative self-talk, and express suicidal ideations at times. There were times [REDACTED] would get frustrated and just yell. An adviser was needed to sit with [REDACTED] for him to get any work done. [REDACTED] did not offer behavioral supports for students.

89. Dr. [REDACTED] met with [REDACTED]'s parents several times<sup>28</sup> about [REDACTED]'s behaviors and, specifically, the suicidal comments and violent drawings. The parents were not concerned, and said [REDACTED] plays violent video games, but that [REDACTED] did not have access to weapons. Even though [REDACTED] had attended [REDACTED] for only a few months, Dr. [REDACTED] gave [REDACTED] parents a 30-day deadline to have [REDACTED] evaluated by an ABA specialist because the administration believed [REDACTED] needed behavioral therapy to interact with other students and staff. However, the school never received the requested information and [REDACTED] was then withdrawn from [REDACTED]

90. [REDACTED] denied personal knowledge or being told by someone else that [REDACTED] had threatened to kill himself.

91. Dr. Klaver's 2019 neuropsychology report recommended another comprehensive neuropsychology evaluation in three years to monitor [REDACTED]'s cognitive and behavioral progress and to provide additional recommendations to maximize success. However, [REDACTED] parents have not had [REDACTED] re-evaluated as recommended.

92. [REDACTED] removed [REDACTED] from [REDACTED] because she was unhappy with several aspects of it, including that all the students were older than [REDACTED], so [REDACTED] had no same-age peers or another student in [REDACTED] grade. Also, there was no direct instruction for [REDACTED] since the teachers were remote.

---

<sup>28</sup> She also had regular email communication with [REDACTED]

93. For enrollment in 2023, WCS requested that [REDACTED] provide [REDACTED]'s previous school information, transcripts, and records. However, the parents restricted information from [REDACTED] and only a type of unofficial transcript was received by WCS. It appears to be an Excel spreadsheet showing units being taught with corresponding percent complete and grades. The spreadsheet showed incomplete progress in all areas, but no explanation was provided to WCS as to why it was incomplete. An official school transcript was never provided.

94. In 2023, the IEP team met on January 10, January 24, February 7, and February 15. The meetings lasted hours.

95. The 2023 core IEP team included: [REDACTED], the parent and an advocate; either [REDACTED] or another general education teacher; [REDACTED], special education teacher and lead special education teacher; [REDACTED], special education teacher; Jessica Thompson, WCS school psychologist; Paula Waits, [REDACTED] principal; Sara Bruce, WCS behavior specialist; Kellie Powers, WCS occupational therapist; Kim Hurd, WCS assistive technology staff; and Maria Griego, WCS administrator, licensed school psychologist, and school administrator.<sup>29</sup>

96. The 2023 IEP team considered the following information: direct input from [REDACTED], direct input from [REDACTED]'s educational consultants, all submitted medical information, previous evaluation results, previous IEPs, direct observation from IEP team members, some previous school records, and the December 14, 2021, comprehensive re-evaluation report.<sup>30</sup> The team reviewed a December 2021 FBA completed by a board-certified behavior analyst (BCBA).

---

<sup>29</sup> It is possible that other WCS staff attended the IEP meetings, as necessary.

<sup>30</sup> During the re-evaluation sessions, two ended prematurely because [REDACTED] refused to complete the work and one of those instances involved [REDACTED] eloping from the testing location and school property. [REDACTED] engaged in outbursts across multiple days, including throwing items, banging on the table/window, punching an examiner's materials, yelling loudly, and using profanity. [REDACTED]'s outbursts were intense. Behavioral accommodations were made for [REDACTED] during the entire re-evaluation process.

97. █████ attended and brought an advocate (sometimes different ones) to all the 2023 IEP meetings.

98. As to █████'s behavior while attending █████ (█████ most recent prior educational placement), █████ did not provide details to the WCS IEP team, other than there had been an incident with an older student or students. It was also said by either █████ or the advocate that █████ was immature compared to █████ peers at █████. No behavior records for █████ from █████ were submitted to the IEP team.

99. As to the reason why █████ was no longer attending █████, █████ only told the IEP team that it was expensive, and it didn't provide the direct teaching support she thought █████ needed.

100. Outside of the classroom setting, at this time, █████ participated in extracurricular activities of swim team, horseback riding, and drum lessons. █████ would also visit with friends █████ age.

101. The 2023 IEP team requested, but █████'s parents did not provide, information of academic performance and behaviors at all █████ previous placements, such as transcripts, notes or observations, or attendance. This type of information is critical to an IEP team considering placement in the least restrictive environment in terms of present levels of performance and behaviors.

102. In the February 15, 2023, IEP meeting, a BIP was reviewed.

103. In 2023, █████ told the IEP team that she believed █████'s behaviors no longer required the level of supports that this BIP identified. █████ said that █████ had matured and outgrown some behaviors associated with DMDD, such as elopement, hitting, and swearing; however, she provided no support for the alleged changes.

104. Ms. Driver found it confusing that, in 2021, █████ had emphasized █████'s DMDD diagnosis throughout the IEP meetings, even requesting staff training on it but, in 2023, █████<sup>31</sup> did not want DMDD considered. Instead, █████ only asked the team to consider █████'s executive functioning deficits, ADHD, and anxiety disorder.

105. █████ and her advocate didn't want the IEP team to focus on █████'s past behaviors because they were of the view that they were not █████ present behaviors due to █████ maturity and progress.

106. Kim Kredich,<sup>32</sup> one of the education advocates, testified that, as far as she and █████ knew, █████'s behaviors at █████ (█████ most recent schooling experience) did not include cursing, eloping, breaking pencils, etc. However, Dr. █████ testified to the contrary about concerning and disruptive behaviors at █████ that prompted the school to demand that █████ be evaluated by an ABA specialist within 30 days.

107. The IEP team agreed that a new BIP was needed going forward but because █████ had not yet begun school at WCS at that time, a BIP had not yet been implemented.

108. On February 15, 2023, a BIP based upon a 2021 FBA was also proposed by the IEP team.

109. Rachel Hopp, a WCS behavior specialist and board-certified behavior analyst (BCBA), performed the December 9, 2021, FBA leading to this proposed BIP. The FBA was discussed during the 2023 IEP meetings.

---

<sup>31</sup> In the 2023 IEP meetings, an advocate attended with █████. Where there are references to information provided by █████, it can also be read as information being provided by an advocate on █████'s behalf.

<sup>32</sup> Ms. Kredich was never a special education teacher; she had worked as a music teacher. Ms. Kredich doesn't have any credentials in psychology or behavior analysis. Ms. Kredich has advocated for her own son and hundreds of other students in IEP meetings. Ms. Kredich did not attend any of █████'s IEP meetings in 2021. Ms. Kredich has never met █████ or observed █████ in any sort of school setting or community setting.

110. The FBA was completed during [REDACTED]'s [REDACTED] grade school year and conducted over numerous settings, including [REDACTED] homeschool environment, and during assessments at [REDACTED]. It showed that even with a one-on-one home setting, [REDACTED] engaged in negative vocalizations, noncompliance, grunts, groans, shouting, throwing writing tools, and aggression toward [REDACTED] teacher. Similar behaviors also occurred in the school setting.

111. A home setting allows complete control over the physical environment, thus limiting distractions and demands.

112. In the 2023 IEP meetings, [REDACTED] and the advocate suggested a plan that would allow [REDACTED] time around other nondisabled peers, more than just during transitions. However, the WCS IEP team was suggesting a plan where [REDACTED] would have no time around nondisabled peers, except for transitions.

113. The 2023 IEP team discussed [REDACTED]'s placement in the least restrictive environment but were concerned about the lack of information of [REDACTED]'s present levels of performance and behaviors. The information from [REDACTED] showed that [REDACTED] did not master the first semester of [REDACTED]-grade curriculum and there was no information provided to WCS of [REDACTED]'s behaviors in [REDACTED] setting with only a handful of students. WCS knew that [REDACTED]'s attendance at [REDACTED] was on a flexible schedule that did not include a full school day consistently. The IEP team considered that [REDACTED] had not been in a typical school classroom for several years.

114. In contrast to what the team generally knew about [REDACTED]'s educational placements in the several years prior to January 2023, the IEP team had concerns about [REDACTED] endurance to attend a full school day in a typical classroom that may have 30 or more students of mixed ability. [REDACTED] wanted [REDACTED] in a typical classroom. However, with [REDACTED]'s anxiety disorder, the WCS IEP team had concerns about the amount of pressure that might be placed on [REDACTED] in that setting, without a transition period.

115. A proposed annual IEP was written for February 21, 2023, to February 6, 2024.

116. [REDACTED] and her advocate in 2023, Ms. Kredich, agreed with the four goals, the list of accommodations, and the mandated tests [REDACTED] must take specified in the February 2023 proposed IEP. The four goals all related to social/emotional and pre-vocational deficits.

117. The 2023 proposed IEP states, in part: “[REDACTED] will receive [REDACTED] education in the special education setting in an independent work space [at [REDACTED]] for a shortened school day of four hours during a transition period.” A paraprofessional and a special education teacher would provide alternating one-on-one supports. For extracurricular and non-academic activities, it was proposed that [REDACTED] could participate with non-disabled peers in activities for [REDACTED] was qualifies.

118. The above-referenced setting was proposed for a short time period, i.e. approximately four weeks, and then the IEP team would meet again to review [REDACTED]’s progress and make adjustments as appropriate/needed.

119. The partial school day and initial period of approximately four weeks was proposed as a transition for [REDACTED] back into the public-school setting, which [REDACTED] hadn’t attended in years.

120. Even though the placement was different from what was proposed in 2021 and in a less restrictive setting, [REDACTED] and her advocate did not agree with the proposed education plan. [REDACTED] said that [REDACTED] could attend a full day of school at [REDACTED] and that there was no need for [REDACTED] to be on a modified or shortened day at [REDACTED]. Also, [REDACTED] and Ms. Kredich wanted [REDACTED] to have access to nondisabled peers at school. They did not think that [REDACTED] needed to be in a special education setting.

121. Ms. Kredich and [REDACTED] preferred an educational setting of a supported classroom where [REDACTED] would be given supports that [REDACTED] needed in a general education setting. [REDACTED] also described it as a co-taught classroom with a general education teacher and either a special

education teacher or support staff aiding [REDACTED] Ms. Kredich and [REDACTED] also thought paraprofessional support should be used for transitions from class to class.

122. A BIP based on the 2021 FBA was also proposed as part of the IEP, as discussed *infra*.

123. A PWN dated February 15, 2023,<sup>33</sup> was given from WCS to the parents. This document reflects the disagreement between the parents and WCS relating to [REDACTED]'s placement for 2022-2023.

124. The February 15, 2023, PWN rejected the parents' proposal for placement and supports of a seven-hour full school day for [REDACTED] with no time spent in a special education setting, inclusion support in [REDACTED] four academic classes, and two hours of transition support by a special education provider, and no supports during any related arts or lunch periods.

125. That the WCS IEP team rejected the parents' proposal does not mean that WCS was proposing no special education at all for [REDACTED]. The IEP proposal for special education services for [REDACTED] in 2022-2023 is set forth above.

126. At the end of the 2023 IEP process, this due process complaint was filed, and [REDACTED] did not attend a WCS school.

### **Expert Testimony**

127. Dr. Clovis Stair, Ph.D., was the only expert witness to testify and did so on behalf of WCS.<sup>34</sup>

128. Dr. Stair has worked in private practice as a Tennessee-licensed counseling psychologist and is presently a school psychologist employed by Knox County Schools where she works with children with social and emotional dysregulation in the classroom. She has

---

<sup>33</sup> The document indicates it was sent to [REDACTED]'s parents on February 27, 2023.

<sup>34</sup> The Petitioners did not object to Dr. Stair's expert status.

supervised the psychological services for Knox County Schools, including supervising 39 psychologists and three psychological assistants.

129. From her 29 consecutive years working with schools in the special education arena, Dr. Stair is intimately familiar with IEPs and the concept of least restrictive environment for special education students. However, Dr. Stair was not offered as an expert in the area of inclusion or LRE.

130. Dr. Stair reviewed all the relevant available information about ■■■, including ■■■ entire educational and medical history, and interviewed WCS staff who had worked with ■■■ and staff at two of the therapeutic day schools the IEP team considered for ■■■'s placement-- ■■■ and ■■■.

131. It is Dr. Stair's expert opinion that the IEP teams' proposed placements in both 2021 and 2023 were appropriate and in the least restrictive environment for ■■■. She also said behavioral supports were included in the proposals appropriate to meet ■■■'s individual needs.

132. Dr. Stair opined that the IEP team relied on all relevant information to make the placement proposals in both 2021 and 2023.

133. Dr. Stair opined that Dr. Klaver's 2019 neuropsychological evaluation of ■■■ was relevant to the IEP meetings in both 2021 and 2023. ■■■'s behaviors had been documented to be ongoing and whether WCS could safely educate ■■■ and in what setting was still the issue. Nothing in the records indicated that ■■■'s behavior had changed, whether due to maturity or medication, in a way that ■■■ should have been viewed differently than he was in 2019 when Dr. Klaver's neuropsychological evaluation was conducted. ■■■ was still reacting inappropriately just as strongly to minor stimuli, across all settings.

134. Safety was a significant concern for Dr. Stair in considering placing ■■■ with peers in a regular general education classroom. She reviewed all his evaluations and information

relating to his behaviors in different settings. Since [REDACTED] was still having inappropriate outbursts in [REDACTED] prior small educational settings, she concluded that WCS couldn't guarantee his or others' safety in a public-school classroom with 25 or more students and the stress that goes along with that type of setting.

135. The strategies recommended by Dr. Klaver were the same strategies that WCS had tried and also proposed implementing in the IEPs. [REDACTED] had rejected WCS' 2019 placement proposal for a therapeutic placement in a Tier 3 program at another WCS school, [REDACTED]. Dr. Stair personally investigated and went to the school with the Tier 3 program and thought that it "was absolutely ... it was as if it were designed for children with DMDD."

136. Dr. Stair noted that a less restrictive environment for [REDACTED] had been attempted and failed when [REDACTED] was under stay-put at [REDACTED] a WCS school. [REDACTED] was so highly dysregulated at that time that the entire school was impacted by [REDACTED] behaviors. Other students were afraid of [REDACTED] and staff were hurt.

137. For 2023, Dr. Stair opined that the IEP teams' temporary placement proposal was appropriate, given [REDACTED]'s ongoing behaviors and the multiple educational settings that had been tried from 2021 to 2023. Also, [REDACTED] had not been in a public-school setting in years. She explained it this way:

I like that it was a short-term placement [proposal], that we were saying give us four weeks to see how is [REDACTED] going to do. Rather than placing [REDACTED] outside of [REDACTED] zoned school, let's bring [REDACTED] to [REDACTED] zoned school and collect real-life data right now to see how is [REDACTED] doing, and if [REDACTED] doing as well as the parent thinks [REDACTED] doing, in four weeks we write a better IEP than this one. And if the parent is not accurate in how [REDACTED] able to handle it, at least we had [REDACTED] in an environment where [REDACTED] and those around [REDACTED] could be safe.

138. Dr. Stair opined that the IEP teams' approach to requesting FBAs and BIPs was appropriate and needed. Along with the use of the school counselor as a component of the approach, her opinion was that WCS responded to the total child behaviorally and emotionally.

### ANALYSIS

When enacting the IDEA, Congress clearly conferred jurisdiction of a student's IDEA claims upon hearing officers, also known as administrative law judges. 20 U.S.C. § 1415(f)(3)(A). Therefore, administrative judges are to determine whether a student received an appropriate education under the IDEA. 20 U.S.C. § 1415(f)(3)(E). In Tennessee, the Office of the Secretary of State, Division of Administrative Procedures, has jurisdiction over the subject matter and the parties of this proceeding and the undersigned Administrative Law Judge has the authority to issue final orders. *See* State Board of Education Rules, Special Education Programs and Services, 0520-01-09-.18; *see also* Tenn. Code Ann. § 49-10-101.

The U.S. Supreme Court held in *Schaffer v. Weast*, that the burden of proof is on the party "seeking relief." 546 U.S. 49, 51 (2005). Thus, when a parent files a request for a due process hearing, the parent bears the burden of proof, or burden of persuasion in the due process hearing. *Id.* at 56; *see also*, *Cordrey v. Euckert*, 917 F.2d 1460, 1469 (6<sup>th</sup> Cir. 1990) (the party challenging the IEP bears the burden of proof in an IDEA action). Similarly, the parents bear the burden of proof for their ADA and Section 504 claims. *Doe v. Sumner Cnty. Bd. of Educ.*, No. 3:19-CV-01172, 2020 WL 5797980, at \*2 (M.D. Tenn. Sept. 29, 2020) (citing *S.S. v. E. Ky. Univ.*, 532 F.3d 445, 452-53 (6<sup>th</sup> Cir. 2008)).

Thus, the Petitioners in this case have the burden to introduce evidence that would, by a preponderance of the evidence, prove the issues alleged in the due process complaint should be resolved in their favor.

## Mixed Messages

Before applying the facts to the law, the testimony should be characterized. Several noteworthy contradictions are identified in [REDACTED]'s testimony. [REDACTED] testified that she did not know what a therapeutic setting was. However, Ms. Griego testified that there had been many conversations over the years regarding [REDACTED]'s refusal to allow [REDACTED] to attend the Tier 3 therapeutic program at WCS' [REDACTED] which was proposed in [REDACTED]'s [REDACTED] grade year. Also, the December 14, 2021, comprehensive psychoeducational evaluation report identified the program at [REDACTED] as a "therapeutic day treatment program." Further, [REDACTED] had attended [REDACTED], which represented itself as a therapeutic school with social/emotional behavior supports.

[REDACTED] testified that she never personally heard or was told by anyone else that [REDACTED] had suicidal ideation. However, Dr. [REDACTED] testified that, within the first few days of [REDACTED] attending [REDACTED] she met with [REDACTED] about [REDACTED]'s violent drawings and comments, including about self-harming and suicide. [REDACTED] testified that [REDACTED] could have continued attendance at [REDACTED] second semester, but Dr. [REDACTED] testified that [REDACTED] required an ABA evaluation of [REDACTED] be done within 30 days. Since an evaluation was never submitted to [REDACTED] it's not certain that [REDACTED] could have continued attending the school.

[REDACTED] testified inconsistently about her statement in an IEP meeting whether she gave informed consent for an FBA on August 6, 2021. During testimony, she was insistent that she had not revoked consent for an FBA. However, in the recording of the IEP meeting, [REDACTED] stated to the team that she may have given consent, but she doesn't know if it was "informed consent."

[REDACTED] testified that she never said in the 2023 IEP meetings that [REDACTED] no longer had DMDD. However, in the IEP meeting recording, [REDACTED] told the IEP team that [REDACTED] primarily had ADHD and [REDACTED] does "or did" have DMDD. Obviously, current diagnoses are a very important data point

for an IEP team that is attempting to create and design goals, accommodations, and approaches to individualized education for a student with a disability.

█ testified inconsistently about whether an FBA and BIP had been developed for █ as of August 2021. The evidence was clear that both had been developed by that time.

The significance of █'s contradictions and inconsistencies at hearing is that the IEP team relied on what she was saying at the time as the parent of the student who knows █ best. It is unknown whether █ just had lapses of memory due to so many events occurring over the course of three years or whether she was intentionally misleading the IEP team. Either way, █'s comments listed above led to the IEP team being confused or misled about █'s behaviors at prior placements, █ current diagnoses, █'s knowledge of therapeutic day schools, her knowledge of when FBAs and BIPs were completed, and whether the team could move forward with an FBA because █ questioned whether she had given WCS informed consent. In sum, █ gave WCS mixed messages, at best, throughout the IEP process in both school years.

#### **FAPE and LRE**

The IDEA requires that a free and appropriate public education (FAPE) be made available to all children between the ages of 3 and 21. 34 C.F.R. § 300.101.

The IDEA ensures that “all children with disabilities have available to them FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C. § 1400(d)(1)(A).

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).

To provide FAPE in compliance with the IDEA, a state educational agency receiving federal funds must evaluate a student, determine whether that student is eligible for special education and services, conduct and implement an IEP, and determine an appropriate educational placement of the student. 20 U.S.C. § 1414.

The IEP is “the centerpiece of the statute’s education delivery system for disabled children.” *Honig v. Doe*, 484 U.S. 305, 311 (1988). “An IEP need not be the best possible one, nor does it entitle a disabled child to a program that maximizes the child’s potential.” *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 396 (5<sup>th</sup> Cir. 2012) (citing *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247-48 (5<sup>th</sup> Cir. 1997)). “Nevertheless, a school district must provide the student with a meaningful educational benefit.” *Klein*, 690 F.3d at 396 (citing *Hous. Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5<sup>th</sup> Cir. 2009)).

A determination of whether a student received FAPE must be based on substantive grounds. 34 C.F.R. § 300.513(1). Parents are not entitled to relief for minor procedural violations alone. Technical procedural violations do not render an IEP invalid. *Dong v. Bd. of Educ. of Rochester Community Schs.*, 197 F.3d 793, 800 (6<sup>th</sup> Cir. 1999).

When a procedural violation is alleged, an administrative law judge can only find a FAPE violation if a procedural violation: (1) impeded the child’s right to FAPE; (2) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of FAPE to the parent’s child; or (3) caused a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(2).

Only procedural violations that result in substantive harm constitute a denial of FAPE and justify relief. *See Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 764 (6<sup>th</sup> Cir. 2001) (procedural violations must cause substantive harm and constitute denial of FAPE to be actionable); *see also Bd. of Educ. of Fayette Cnty., Ky. v. L.M.*, 478 F.3d 307, 313 (6<sup>th</sup> Cir. 2007).

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)

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 Cnty. Dep’t of Educ.*, 900 F.3d 779, 788 (6<sup>th</sup> Cir. 2018)(internal citations omitted).

A core tenet of the IDEA is to “mainstream” the student into the general education setting. 20 U.S.C. § 1412(a)(5)(A) (“To the maximum extent appropriate, children with disabilities, . . . [must be] educated with children who are not disabled,” and separated “only when the nature or severity of the disability . . . is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”); *See also* 34 C.F.R. § 300.114(a)(i); Tenn. Code Ann. § 49-10-102(1).

“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.*, 900 F.3d at 789 (internal citations omitted).

But the preference is not absolute, the Sixth Circuit having held that a school may separate a disabled student from the regular class 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. *Id.* (internal citations omitted).

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." *Id.* (internal citations omitted).

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. *Andrew F. v. Douglas Cnty. Sch. Dist.*, 137 S.Ct. 988, 999-1001 (2017); *L.H.*, 900 F.3d at 793.

### **The IEP Process Followed for Both School Years**

The Petitioners allege that the IEP process followed for both school years at issue was flawed in several aspects. However, the proof does not support that contention.

For both school years, the IEP team members were qualified and experienced in the IEP process. The WCS staff members on the IEP team were relevant and appropriate to the process and decision-making required. IEP meetings were timely commenced and involved multiple meetings timely held.

### **Meaningful Parent Participation**

The parents were invited to all the IEP meetings. [REDACTED] and an education advocate actively participated in each meeting. [REDACTED] and an advocate asked questions, made proposals, and engaged in two-way discussions with the rest of the IEP team. The IEP meetings sometimes lasted hours.

During the series of IEP meetings, data and information was reviewed and shared amongst the IEP team members. While the WCS team members said more data would have been helpful, they requested more data, and made proposals which were supported by the relevant and established data available.

The IEP team considered the IEP to be a draft document undergoing changes as discussions progressed. In fact, the IEP team made changes based on the parent's concerns.

While the Petitioners argue that more recent data should have been relied upon, based upon Dr. Stair's testimony, there was a significant amount of data available to the team upon which it relied, and that data was still relevant in the school years in question. This is because there was no documentation that [REDACTED] had any significant behavior changes to view [REDACTED] differently at that time than when the evaluations were completed.

### **Mainstreaming**

In the recent case of *Knox Cnty., Tenn. v. M.Q.*, 62 F.4<sup>th</sup> 978 (6<sup>th</sup> Cir. March 17, 2023), the court analyzed the issue of LRE for a student with autism and found that the school's proposed IEP was not the LRE, based on the framework set forth in *L.H.*, *supra*. In *M.Q.*, the parties agreed that only the second *L.H.* factor (or question) was at issue. *L.H.*, 900 F.3d at 789. While the *M.Q.* court's reasoning and analysis of the LRE issue is informative here, the facts and weight of the proof submitted in *M.Q.* are significantly different than the instant matter.

Turning to *L.H.*'s three-question analysis of when mainstreaming a student would not be appropriate, i.e. exceptions, the majority of the proof related to question number three. The three questions are: (1) would the student benefit from regular education; (2) would any regular-class

benefits be far outweighed by the benefits of special education; or (3) would the student be a disruptive force in the regular class. *Id.*

Taking up question number three first (would ■■■ be a disruptive force in a non-segregated setting), there was extensive proof from evaluation reports and testimony of ■■■'s significantly disruptive and violent behaviors. Despite ■■■'s unsupported comments that maturity and medications had helped to alleviate some of ■■■'s DMDD behaviors, Dr. Stair disagreed that there was any reliable information in that regard. According to Dr. Stair's expert opinion, ■■■ had not shown improvement in the severity of ■■■ behaviors such that ■■■ would not disrupt a regular classroom. WCS did not simply "assume" that ■■■ couldn't be safely placed in a mainstream environment, it relied on relevant and compelling data.

Safety is a main concern for the WCS educators, psychologist, and administrators, as well as for Dr. Stair. While one-on-one support can be provided in a WCS regular classroom, that is not practical for ■■■, given his demonstrated ongoing violent and unpredictable behavior. The behavioral supports and services that WCS offers for ■■■'s deficits do not solve the problem of mainstreaming ■■■ when ■■■ would be a disruptive force in a general education classroom. The mainstreaming exception of disruptive force provides a legitimate, and in this case real-life, basis in support of WCS' placement proposals.

WCS' position is not that it would be too difficult or challenging to mainstream ■■■ but that it can't be done in a way to keep ■■■ and others safe based on the results of evaluations and Dr. Stair's expert opinion. Also, WCS did not fail to consider ■■■'s placement preferences in the series of IEP meetings held in both ■■■ and ■■■ grades. Just the opposite. The IEP team took hours and held multiple meetings discussing placement options for ■■■ Yet, despite supplemental aids or services, ■■■ would be a disruptive force in a regular class.

A case on point illustrates when a student meets the disruptive force exception to mainstreaming. The court in *I.L. v. Knox Cnty. Bd. Of Educ.*, 257 F.Supp.3d 946, 989-90 (E.D. Tenn. 2017), found the student to be a disruptive force and, therefore, in need of a more restrictive placement. The parent claimed that the school district violated the student's substantive rights under the IDEA to a FAPE in the LRE because the school should have tried more behavioral supports, as well as other options. However, the court did not find an IDEA violation because the student's known behaviors were so disruptive in the regular class that the school was justified in removing the student from it. The court found that the student was a constant distraction in class; posed a danger to herself, her classmates, and staff; forced parents to pull their children from class; and made her classmates feel so unsafe that they sought counseling. The court held that special education would be more beneficial "largely because the techniques that improve I.L.'s behavior are incompatible with the regular-class environment." *Id.* at 986-988.

Nor can it be said that WCS lacked creativity in its placement proposals. No authority was cited prohibiting an IEP placement proposal from using several different phases to adequately address the individualized needs of the student and to gather relevant current data. Since there is no legal authority prohibiting it, a single IEP may contain a placement proposal containing several phases. In both 2021-2022 and 2022-2023, WCS offered a two-phase placement in response to the parents' concerns and in an attempt to meet the student where ■ was. Because ■ had not been enrolled in WCS since fifth grade, WCS wanted more data about ■'s current academic and behavior needs than the parents were willing to provide. WCS wanted and needed independent data or observational data relating to those areas that were critical to ■'s goals. The two-phase placement proposals would allow time to gather that information. The first phase of the placement proposals for both years was indeed short-term or

temporary—approximately four weeks. However, it appears that the parent attempted to obtain her desired placements by denying WCS relevant current data that she either had or had access to.

Relating to the first question of whether [REDACTED] would receive a benefit from mainstreaming, no proof was submitted sufficient to hold that [REDACTED] would. The last time [REDACTED] spent any part of a public-school day in a general education classroom setting was in [REDACTED] grade. And, since [REDACTED] grade, the private schools [REDACTED] attended only had a few students in a classroom with [REDACTED] [REDACTED] did not consistently attend for a full school day, and [REDACTED] most often had one-on-one attention. Yet, [REDACTED]'s behaviors were still disruptive in those settings.

It is undisputed that [REDACTED] has strong cognitive abilities; [REDACTED] was described as being bright and creative. However, the Petitioners' argument that just because [REDACTED] has strong cognitive abilities means that [REDACTED] can *ipso facto* benefit from being fully integrated into a regular education classroom defies the IDEA's underpinning purpose of looking at the individual student and his or her unique circumstances. The Petitioners' contention on this element is only supported by generalized presumptions and not the reliable facts and data upon which WCS's argument and the expert's opinion are based. The evidence weighs in favor that [REDACTED] would not benefit from regular education at this time.

Regarding the second question of whether 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, there is insufficient proof of what benefits of mainstreaming [REDACTED] would gain, given [REDACTED] individual deficits and unique circumstances. On the other hand, there was proof that a therapeutic day school would provide benefits for [REDACTED]. In addition to the WCS' witness testimony about the benefits of such a placement, Dr. Stair's expert opinion was in favor of a therapeutic placement for the 2021-2022 school year.

Dr. Stair also supported the proposed placement for the 2022-2023 school year: a shortened school day of four hours in a special education setting in an independent workspace at [REDACTED] with a paraprofessional and special education teacher providing alternating one-on-one supports on a temporary basis, i.e. approximately four weeks. After the temporary period, the IEP team would meet again to review [REDACTED]'s progress and make adjustments as needed. For extracurricular and non-academic activities, it was proposed that [REDACTED] could participate with non-disabled peers in activities for which [REDACTED] was qualified. The partial school day and initial period of approximately four weeks was proposed as a transition for [REDACTED] back into the public-school setting, which [REDACTED] hadn't attended in years.

As Dr. Stair said:

I like that it was a short-term placement [proposal], that we were saying give us four weeks to see how is [REDACTED] going to do. Rather than placing [REDACTED] outside of [REDACTED] zoned school, let's bring [REDACTED] to [REDACTED] zoned school and collect real-life data right now to see how is [REDACTED] doing, and if [REDACTED] doing as well as the parent thinks [REDACTED] doing, in four weeks we write a better IEP than this one. And if the parent is not accurate in how [REDACTED] able to handle it, at least we had [REDACTED] in an environment where [REDACTED] and those around [REDACTED] could be safe.

In both [REDACTED]'s [REDACTED] and [REDACTED] grades, IEPs were proposed with goals designed to meet [REDACTED]'s individual education needs relating to the functional deficit areas of social/emotional and prevocational. No proof was offered that [REDACTED] had made measurable progress on [REDACTED] IEP goals agreed to by [REDACTED] and the rest of the IEP team in any setting over the years.

WCS staff testified that the services [REDACTED] needs to make appropriate progress could not be provided in the general education classroom with [REDACTED] attending full-time at this time. The balance of evidence shows that [REDACTED] requires too much support to be integrated into a typical public regular education classroom at this time.

In conclusion, ■ falls within the categories of students for whom the exception to mainstreaming is appropriate. Therefore, WCS's proposed placements for ■'s ■ and ■ grade years were well-considered and the least restrictive environment.

WCS provided FAPE in compliance with the IDEA by evaluating ■, determining that ■ was eligible for special education and services conducting and proposing to implement an IEP, and determining an appropriate educational placement for ■ 20 U.S.C. § 1414. ■'s parents were not impeded in their opportunity to participate in the decision-making process regarding the provision of FAPE. It is **DETERMINED** that ■'s parents were able to meaningfully participate in the IEP process.

WCS did not violate the IDEA's strong preference for mainstreaming special education students because ■ fit into the exception for mainstreaming as set for in *L.H., supra*. Students with disabilities may be separated from students who are not disabled when the nature or severity of the disability is such that education in regular classes with the use of supplementary aides and services cannot be achieved satisfactorily. 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i). As set forth in *Andrew and L.H., supra*, 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. It is **DETERMINED** that ■'s unique circumstances prevent ■ from the ability to make appropriate progress toward ■ IEP's goals in the regular education setting, even with appropriate supplemental aids and services.

Based on the entire record, the weight of the proof is in favor of WCS on the issue of FAPE and LRE. The Petitioners did not prove by a preponderance of the evidence procedural or substantive violations of the IDEA. The Petitioners did not prove by a preponderance of the

evidence that ■ was denied FAPE in the LRE under the IDEA for either the 2021-2022 or 2022-2023 school years. 20 U.S.C. § 1415(f)(3)(E)(ii).

It is **DETERMINED** that ■ was provided FAPE in the LRE under the IDEA for the 2021-2022 and 2022-2023 school years.

### **PREDETERMINATION**

The Petitioners' due process complaint alleges that WCS predetermined ■'s educational placement for the 2021-2022 school year. However, their post-hearing findings of fact and conclusions of law seems to argue that placement was predetermined for the 2022-2023 school year as well.

The Petitioners' contend that WCS violated the IDEA's procedural requirements by predetermining ■'s placements. A primary focus and concern of courts has been schools allowing adequate parental involvement and participation in formulating the IEP. *D.S. v. Knox Cnty., Tenn.*, 2021 WL 6496726, \* (E.D. Tenn. June 21, 2021).

The *D.S.* court explained why there is a high bar to find predetermination:

If courts were quick to hold that a school's actions are predetermination, it could encourage schools to come to IEP meetings with no plan at all, creating an incentive for inadequate preparation. In the alternative, it may encourage schools to create ill-fitting plans so they could make some 'concessions' to avoid a finding of predetermination. To avoid these extremes, a court should be slow to hold that a plan is predetermined, but it should still ensure that the IEP is individualized and made with adequate parental participation.

*D.S.* at \*7.<sup>35</sup>

The Sixth Circuit has clearly established that (1) predetermination is a procedural violation and (2) a school district's failure to comply with the procedural requirements of the

---

<sup>35</sup> The *D.S.* court did not find predetermination by the school. The school accepted some parent suggestions for the IEP and there was no official policy in place which established that children with Down Syndrome had to be educated separately, thereby preordaining the result. *D.S.* at \*8.

IDEA (including predetermination) will only constitute a denial of FAPE if such violation causes substantive harm to the child or his parent's ability to meaningfully participate in the IEP process. *Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 857 (6th Cir. 2004); see 34 C.F.R. §§ 300.322 and 300.513(a)(2).

In *Deal*, the Sixth Circuit found: (1) that the school district had an unofficial policy of refusing to consider certain programs regardless of the child's needs; (2) the district's main concern was financial; (3) the parents were not even allowed to ask questions during the IEP meetings. *Id.* at 855–59; see also *Nack v. Orange City Sch. Dist.*, 454 F.3d 504, 610–11 (6th Cir. 2006), quoting *Winkelman v. Parma City Sch. Dist.*, 411 F.Supp.2d 722, 728–29 (N.D. Ohio 2005) (citing *Deal*, 392 F.3d at 855–59).

A recent federal decision considered the issue of predetermination and is compelling. In *G.A. v. Williamson Cnty. Bd. of Education*, the federal District Court did not find that WCS had predetermined the student's placement. It explained:

Predetermination occurs where a school district makes premature placement decisions to which it adheres “regardless of any evidence concerning [the child's] individual needs.” *Deal v. Hamilton Cty. Bd. Of Educ.*, 392 F.3d 840, 857 (6th Cir. 2004). It also occurs “when the state makes educational decisions too early in the planning process, in a way that deprives the parents of a meaningful opportunity to fully participate as equal members of the IEP team.” *R.L. v. Miami-Dade Cty. Sch. Bd.*, 757 F.3d 1173, 1188 (11th Cir. 2014); *Nack ex rel. Nack v. Orange City Sch. Dist.*, 454 F.3d 604, 610 (6th Cir. 2006) (discussing predetermination). “This is not to say that a state may not have any pre-formed opinions about what is appropriate for a child's education.” *R.L.*, 757 F.3d at 1188. “But any pre-formed opinion the state might have must not obstruct the parents’ participation in the planning process.” *Id.*

*G.A. v. Williamson Cnty. Bd. of Education*, 594 F.Supp.3d 979, 989 (M.D. Tenn. 2022).

“Predetermination is not synonymous with preparation.” *Nack*, 454 F.3d at 610. The school district members must come to IEP meetings with open minds and be willing to listen to

the parent's preferences. The *G.A.* court found that the school did that, but that placement was still disputed between the parties. Although the school prepared some of its IEP documents ahead of the IEP meetings, that did not mean that school unlawfully predetermined placement when the evidence showed that the parent participated substantively in the IEP meetings and the school took her input seriously. The court found that the school was attempting to respect the parent's wishes, and the parent's participation in the planning process was not obstructed. *G.A.*, 594 F.Supp.3d at 989-991.

In contrast to *G.A.*, in *D.S.*, *supra*, the court found that the school denied the student's parents a meaningful opportunity to participate in the IEP process by essentially closing the door in their faces. The school never seriously considered any of the parents' concerns about aspects of the student's experience, such as pull-out time. Also, the school refused to provide information the parents wanted about placement. *D.S.* at \*8-10.

In contrast to the facts in *D.S.*, the instant case shows that the 2021 WCS IEP team spent many hours with the parent, explained therapeutic day schools, provided time for research and gathering of facts relating to them, and listened to the parent's and advocate's concerns. Time for the research and fact-gathering was built into the placement proposal, which then allowed for additional meetings of the IEP team. ■■■ had the opportunity and did tour the therapeutic day schools discussed.<sup>36</sup> The WCS members of the IEP team also toured the schools. However, the IEP team was prevented from meeting further about the placement proposal because ■■■ refused to participate in the process. Further, in 2023, the IEP team made some changes to its placement proposal based on the parent's concerns. However, ■■■ stopped participating in the IEP process, which had two phases, and didn't meet with the team again.

---

<sup>36</sup> It is noted that the WCS IEP team did not propose a specific school but proposed the few with which WCS had contracts as options to meet ■■■ individualized needs.

The Petitioners cite the case of *J.A. v. Smith Cnty. Sch. Dist.*, 364 F.Supp.3d 803 (M.D. Tenn. 2019) on the issue of predetermination of placement. The proposition that the Petitioners assert from the decision is that an FBA and BIP must be conducted first and then that data used to make the placement determination. But, that interpretation of the holding is misplaced because one must look to the facts underlying the holding. For several reasons, the decision of *J.A.* does not apply to the instant matter, and it is easily distinguishable on the facts. In *J.A.*, the child was five years old and in pre-school when the due process complaint was filed. *J.A.* was making progress on her IEP goals. The school did not have any data or evaluations upon which to rely in making a placement decision for pre-school. The school was not willing to conduct an FBA and BIP before the placement decision was made. These facts are in glaring contrast to the facts here. In the instant matter, ■■■ is ■■ years old, in the ■■■■ grade, and WCS has a plethora of data from ■■■ educational and behavioral history and how ■■■ has responded to behavior interventions. There is no proof in the record to indicate that ■■■ was making progress on ■■■ IEP goals. WCS had available to it prior FBAs and BIPs for ■■■ WCS requested and is willing to conduct an FBA. Based on these core facts, *J.A.* is not applicable to this matter as persuasive authority on the proposition for which the Petitioners put forward.

WCS IEP team members brought their past experiences and knowledge of different schools and different school settings to the IEP meetings in both 2021 and 2023. This includes a WCS Tier 3 school and therapeutic day schools. The evidence demonstrates that the WCS IEP team members came to the series of IEP meetings with open minds, discussed the issues with ■■■ and her advocates, and were willing to listen to their preferences. From all accounts, except the parents' side, WCS IEP team members took ■■■'s input seriously. It cannot be determined from the evidence that the WCS IEP team members had any pre-formed opinions about placement prior to the 2021 and 2023 IEP meetings or that their placement proposals were pre-

ordained. Like the facts in *G.A.*, the IEP team in this matter heard extensively from [REDACTED] and her advocates. Here, the IEP team members did not automatically rule out the parent's preferences for [REDACTED]'s placement and they did not predetermine [REDACTED]'s placement in [REDACTED] [REDACTED] and [REDACTED] grade years. Not only were [REDACTED]'s parents allowed participation, that participation was meaningful.

Based on the entire record, the weight of the proof is in favor of WCS on the issue of predetermination. It has already been determined that [REDACTED]'s parents had the ability to and did meaningfully participate in the IEP process. WCS did not fail to comply with the procedural requirements of the IDEA, including predetermination, and there was no denial of FAPE. *Deal, supra*. The Petitioners did not prove by a preponderance of the evidence that WCS predetermined placement for [REDACTED] in either the 2021-2022 or 2022-2023 school years.

It is **DETERMINED** that [REDACTED]'s placement was not predetermined by WCS for the 2021-2022 and 2022-2023 school years.

#### **STAY PUT**

The Petitioners contend that [REDACTED] was entitled to remain in stay put<sup>37</sup> pursuant to the last agreed upon IEP, which they say was September 5, 2019. That IEP provides that [REDACTED] was able to participate with [REDACTED] nondisabled peers in the regular classroom at [REDACTED] to the fullest extent. [REDACTED] was also able to participate in any extracurricular activities that the parents saw fit. However, that IEP was agreed to pursuant to a settlement agreement during a previous due process proceeding.

WCS argues that the last agreed-upon placement is homebound and then a transition to a therapeutic day setting. This is because that was the parties' agreement for the start of [REDACTED]'s [REDACTED] grade year. Therefore, there was no agreed-upon current educational placement in effect at the

---

<sup>37</sup> 20 U.S.C. § 1415(j); 34 C.F.R. § 518(a).

time of ■■■'s enrollment (and placement dispute) with WCS in the last two years (■■■ or ■■■ grade).

Stay put was at issue in 2019 during an prior due process proceeding. But, in this due process proceeding, the Petitioners did not raise stay put as an issue in the due process complaint, nor in their pre-hearing brief. The Petitioners raised stay put for the first time at the contested case hearing. Thus, WCS argues that it was not on notice of such a claim.

The IDEA allows a student involved in a due process complaint to “remain in his or her current educational placement” during the pendency of due process. The stay put or pendent placement provision is included in the IDEA to protect handicapped children and their parents from being unilaterally stripped of their current agreed upon placement while a proposed placement is being challenged through due process. *Honig v. Doe*, 484 U.S. 305, 323 (1988). When determining placement for the purposes of stay put, the Sixth Circuit has held that the definition of “placement” requires the school district to approve the educational setting at some point. *N.W. v. Boone Cnty. Bd. of Educ.*, 763.F.3d 611, 617 (6th Cir. 2014).

This poses an interesting issue since ■■■ has not been enrolled at WCS since 2019. In 2019, ■■■ was in ■■■ school and ■■■ has since progressed to ■■■ school. Nor has ■■■ been in a classroom setting or under an IEP since that time, rather, ■■■ has been in smaller, mostly one-on-one, educational settings unilaterally chosen by ■■■ parents outside of the WCS.

It is illogical to argue that the September 5, 2019, IEP placement should apply here since that IEP included an agreed upon placement at ■■■ and ■■■ is now in ■■■ school. Therefore, that argument is rejected.

Further, ■■■'s parents unilaterally placed ■■■ in a private school, ■■■ immediately prior to re-enrolling ■■■ with WCS. Thus, ■■■ entered WCS as a unilaterally placed private

school student without an IEP in place. Therefore, the parents waived the IDEA's stay put provision by unilaterally placing █████ in private school without an IEP.

Lastly, this Final Order rules in favor of WCS. As such, WCS is the prevailing party in this matter and stay put is moot. *Patrick G. v. Harrison School*, 40 F.4<sup>th</sup> 1186, 1213-1215 ( 10<sup>th</sup> Cir. 2022). It is **DETERMINED** that any issue relating to the IDEA's stay put provision is not viable.

#### **ADA and SECTION 504**

The Petitioners also allege violations of the ADA and Section 504 based on discrimination against individuals with disabilities. Because of the similarity of the statutes, claims under Section 504 and Title II can be resolved under one analysis. *See S.S. v. E. Ky. Univ.*, 532 F.3d 445, 453 (6th Cir. 2008)(analyzing Plaintiff's Section 504 and ADA claims together as they offer same rights, remedies, and procedures); *see also, Thompson v. Williamson Cnty., Tenn.*, 219 F.3d 555, 557 n. 3 (6th Cir. 2000); *Maddox v. Univ. of Tenn.*, 62 F.3d 843, 846 n. 2 (6th Cir.1995).

Title II of the Americans with Disabilities Act provides:

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

To prevail under either the ADA or Section 504, a plaintiff must show the following:

(1) The plaintiff is a "handicapped person" under the Act; (2) The plaintiff is "otherwise qualified" for participation in the program; (3) The plaintiff is being excluded from participation in, or being denied the benefits of, or being subjected to discrimination under the program solely by reason of his handicap; and (4) The relevant program or activity is receiving Federal financial assistance.

29 U.S.C. § 794(a); *G.C. v. Owensboro Pub. Schs.*, 711 F.3d 623, 635 (6th Cir. 2013) (quoting *Campbell v. Bd. of Educ. of Centerline Sch. Dist.*, 58 F. App'x 162, 165 (6th Cir. 2003)).

As recognized by the *M.Q.* court, relevant here is that both the ADA and Section 504 contain provisions that echo the IDEA's LRE requirement. *M.Q.*, 62 F.4<sup>th</sup> at 999. Also, as in *M.Q.*, the parties dispute only the third element stated above. As explained by *M.Q.*:

[T]his prong asks whether a public entity discriminated against an individual on the basis of his disability. In the education context, a showing of discrimination requires evidence of something more than a school district's failure to provide a FAPE. . A plaintiff may allege disability discrimination under two available theories: intentional discrimination and failure to reasonably accommodate. . An intentional discrimination claim lies where the defendant treated someone less favorably on account of his disability; “[p]roof of discriminatory motive is critical.” To prevail in a failure-to-accommodate claim, the plaintiff must show that the defendant reasonably could have accommodated his disability but refused to do so, and that this failure to accommodate “imped[ed] [his] ability to participate in, or benefit from, the subject program.” The plaintiff must establish both that his preferred accommodation was reasonable, *and* that the accommodation provided to him was unreasonable. Courts are mindful of school administrators’ educational expertise in reviewing the reasonableness of their selected accommodations.

*M.Q.*, 62 F.4<sup>th</sup> at 1000 (internal citations omitted).

No proof was submitted that ■■■ was discriminated against by WCS on the basis of ■■■ disability. Therefore, it is **DETERMINED** that there are no violations of the ADA or Section 504.

### **CONCLUSIONS OF LAW**

1. The Petitioners did not prove by a preponderance of the evidence procedural or substantive violations of the IDEA.

2. The Petitioners did not prove by a preponderance of the evidence that ■■■ was denied FAPE in the LRE under the IDEA for either the 2021-2022 or 2022-2023 school years.

3. The Petitioners did not prove by a preponderance of the evidence that WCS predetermined placement for ■■■ in either the 2021-2022 or 2022-2023 school years.

4. The Petitioners did not prove a violation of either the ADA or Section 504 for either the 2021-2022 or 2022-2023 school years.

5. WCS is the prevailing party on all claims.

6. The Petitioners are not entitled to any requested relief.

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

It is so **ORDERED**.

This FINAL ORDER entered and effective this the **17th day of May, 2023**.

  
**RACHEL L. WATERHOUSE**  
**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 **17th day of May, 2023**.

█, THE STUDENT, AND █ AND █, THE  
STUDENT'S PARENTS V. WILLIAMSON  
COUNTY SCHOOLS

**NOTICE OF APPEAL PROCEDURES**

**REVIEW OF FINAL ORDER**

The Administrative Judge's decision in your case in front of the **Tennessee Department of Education**, called a Final Order, was entered on **May 17, 2023**. 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 with the Administrative Procedures Division (APD). A Petition for Reconsideration should include your name and the above APD case number and should state the specific reasons why you think the decision is incorrect. APD must **receive** your written Petition no later than 15 days after entry of the Final Order, which is no later than **June 1, 2023**.

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 **July 17, 2023**. *See* TENN. CODE ANN. §§ 4-5-317 and 4-5-322.

2. **File an Appeal:** You may file an 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 **July 17, 2023**, 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.

**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 APD within 7 days of the date of entry of the Final Order, which is no later than **May 24, 2023**. *See* TENN. CODE ANN. § 4-5-316. 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.

IN THE MATTER OF:

APD CASE No. 07.03-231153J

█, THE STUDENT, AND █ AND █, THE  
STUDENT'S PARENTS V. WILLIAMSON  
COUNTY SCHOOLS

**NOTICE OF APPEAL PROCEDURES**

**FILING**

Documents should be filed with the Administrative Procedures Division by email *or* fax:

Email: [APD.Filings@tn.gov](mailto:APD.Filings@tn.gov)

Fax: 615-741-4472

In the event you do not have access to email or fax, you may mail or deliver documents to:

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