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October 24, 2019

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RE: In the Matter of: L.L., the Student, and B.L. and R.L., the Student's Parents/Guardians, Petitioners v. Tennessee Department of Education, Respondent.
Docket No. 07.03-158386J

Enclosed is a *Final Order* and *Notice of Appeal Procedures* rendered in connection with the above-styled case.

Administrative Procedures Division
Tennessee Department of State

/arb
Enclosure

cc: Scott Indermuehle, Senior IDEA Complaints Investigator, TN Department of Education

BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION

IN THE MATTER OF: **L.L., the Student, and** **B.L. and R.L., the Student's** **Parents/Guardians,** **Petitioners,** **v.** **TENNESSEE DEPARTMENT OF** **EDUCATION,** **Respondent.**	**DOCKET NO: 07.03-158386J**

FINAL ORDER

This contested case under the Individuals with Disabilities Education Act (IDEA), Title II of the Americans with Disabilities Act (ADA), and Section 504 of the Rehabilitation Act (§ 504) was heard before Administrative Judge Elizabeth Cambron on September 9, 10, and 11, 2019. The Petitioners, the student, L.L, and his parents, B.L. and R.L., are represented by attorneys Jessica Salonus and Justin Gilbert. The Respondent, the Tennessee Department of Education (TDOE), is represented by Assistant General Counsel Rachel Suppé and Stella Yarbrough.

At the close of proof on September 11, 2019, post-hearing filing dates were set as follows: the transcript due to be filed on or before September 26, 2019; proposed Findings of Fact and Conclusions of Law by both sides to be filed on or before October 3, 2019; and the Final Order to be issued by October 24, 2019. Each side filed proposed Findings of Fact and Conclusions of Law on October 3, 2019, and the transcript was filed late on October 4, 2019. In addition to these filings, on October 11, 2019, TDOE filed a Response to Petitioners' Proposed Findings of Fact and Conclusions of Law. Because this filing was not contemplated by the post-hearing schedule

agreed to by the parties and announced at the end of the hearing, TDOE's October 11, 2019, pleading has not been considered, and is hereby stuck from the record.

The issue in this case is whether L.L. was denied a free and appropriate public education (FAPE) in the least restrictive environment (LRE) in his placement at the Carroll County Special Learning Center (CCSLC) during the 2016-2017 school year due to a lack of monitoring and oversight by TDOE, and if so, the appropriate remedy. Based on review of the entire record, it is determined that any denial of FAPE in the LRE to L.L. was not due to lack of oversight or monitoring by TDOE. Accordingly, no remedy is available to L.L. TDOE is the prevailing party on all issues in this matter.

STIPULATIONS

The parties stipulated to the following facts:

1. L.L. is a child eligible for special education under IDEA.

2. L.L.'s placement in the CCSLC provided him with zero interaction with nondisabled peers during the day including extracurricular and nonacademic times, placing that at the discretion of his parents.

3. The CCSLC is a completely separate school that West Carroll Special School District contracts with for children with disabilities; there are no non-disabled peers at CCSLC for children with disabilities to be educated alongside academically or socially.

FINDINGS OF FACT

1. L.L. is a nine-year-old boy who currently lives in Carroll County and is in the third grade at West Carroll Primary School.

2. B.L. and R.L. are L.L.'s mother and father, respectively.

3. L.L. has a diagnosis of Hirschsprung's disease, a disease affecting the large intestine. This diagnosis causes L.L. to need extra time in the bathroom.

4. L.L. completed his kindergarten year in a regular education classroom at Medina Primary School in Gibson County in the 2014-2015 school year.

5. L.L. began first grade in the 2016-2017 school year at West Carroll Primary School.

6. An Individualized Education Program (IEP) prepared on August 15, 2016, changed L.L.'s placement from West Carroll Primary School to a special education classroom at the CCSLC.

7. B.L. and R.L. agreed with the placement in a special education classroom at CCSLC.

8. L.L. was placed at the CCSLC for the remainder of the 2016-2017 school year.

9. At the beginning of the 2017-18 school year, L.L. was re-enrolled at West Carroll Primary School and placed in a general education classroom, where he repeated the first grade.

10. However, on August 8, 2017, West Carroll's IEP team submitted a Prior Written Notice proposing to change L.L.'s placement back to the CCSLC.

11. L.L.'s parents disagreed with the proposed change in placement back to CCSLC, and on August 23, 2017, filed a due process case against the West Carroll Special School District, thereby invoking stay put.

12. L.L. remained in first grade for the rest of the 2017-2018 school year in a regular education classroom at West Carroll Primary School.

13. On February 23, 2018, Dr. Charles Ihrig conducted an evaluation of L.L at the Petitioners' request. Based on his evaluation, Dr. Ihrig diagnosed L.L. with borderline intellectual functioning and a specific learning disability in the areas of math, and reading and writing.

14. On August 10, 2018, Petitioners voluntarily resolved their due process complaint against West Carroll Special School District through a Consent Decree. The Consent Decree awarded Petitioners the following:

- 175 hours of compensatory education in the form of private tutoring in a one-on-one setting through certified teachers;
- Extended school year;
- $20,000.00 for L.L.'s use and benefit;
- $5,000.00 in compensatory damages;
- Placement in a general education classroom;
- A full-time, qualified one-on-one aide;
- Math and Reading assessments conducted by qualified staff at Vanderbilt University; and
- $60,000.00 in attorney's fees.

15. In order to evaluate the 149 school districts across Tennessee, TDOE conducts an annual risk assessment of each district. The assessment includes 60 indicators such as the amount of funding the district receives, turnover rates for key personnel positions (including the school district superintendent and the director of special education), complaint findings, audit findings, and the number of years since a district has had an on-site monitoring review. The assessment also takes into account annual performance report indicators, which includes placement in the LRE.

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

17. From January 29, 2018, to February 1, 2018, TDOE conducted an on-site monitoring of West Carroll Special School District as a result of the district scoring in the top 10% on the annual risk assessment.

18. The on-site monitoring included document review and interviews with current staff and the parents of current students in the West Carroll Special School District, including the CCSLC. L.L. was not a student at CCSLC in January and February 2018.

19. TDOE personnel first became concerned about whether CCSLC was the LRE for the children placed there during the on-site monitoring visit in late January and early February 2018.

20. On May 23, 2018, TDOE notified the West Carroll Special School District that TDOE would not approve a contract for the CCSLC for the 2018-2019 school year. Therefore, the CCSLC is no longer in operation.

APPLICABLE LAW

Individual with Disabilities Education Act

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

2. 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).

3. 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).

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

5. To meet its substantive obligation under the IDEA, a school must offer an IEP that is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Endrew F. v. Douglas County Sch. Dist. RE-1*, 137 S.Ct. 988, 999 (U.S. 2017). Any review of an IEP prepared pursuant to the IDEA must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. *Id.*

6. In the Sixth Circuit, "[a] FAPE has two requirements that are relevant here: the school must prepare an 'individualized education program' (IEP) for the disabled student; and that IEP must provide the FAPE so as to educate the disabled student in the 'least restrictive environment' (LRE) possible." *L.H. v. Hamilton Cty. Dep't of Educ.*, 900 F.3d 779, 788 (6th Cir. 2018)(internal citations omitted).

7. The Sixth Circuit has also held that a school may separate a disabled student from the regular class under circumstances when: (1) the student would not benefit from regular education; (2) any regular-class benefits would be far outweighed by the benefits of special education; or (3) the student would be a disruptive force in the regular class. *L.H. v. Hamilton Cty. Dep't of Educ.*, 900 F.3d 779, 789 (6th Cir. 2018)(internal citations omitted).

8. The IDEA mandates monitoring as follows:

(a) Federal and State monitoring

(1) In general
The Secretary shall--

(A) Monitor implementation of this subchapter through--

(i) Oversight of the exercise of general supervision by the States, as required in section 1412(a)(11)of this title; and

(ii) The State performance plans, described in subsection (b);

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

(C) Require States to--

(i) Monitor implementation of this subchapter by local educational agencies; and

(ii) Enforce this subchapter in accordance with paragraph (3) and subsection (e).

(2) Focused monitoring

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

(A) Improving educational results and functional outcomes for all children with disabilities; and

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

(3) Monitoring priorities

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

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

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

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

20 U.S.C § 1416(a) (1) – (3).

9. Under the IDEA:

> A State educational agency shall use the payments that would otherwise have been available to a local educational agency or to a State agency to provide special education and related services directly to children with disabilities residing in the area served by that local educational agency, or for whom that State agency is responsible, if the State educational agency determines that the local educational agency or State agency, as the case may be—
>
> (A) has not provided the information needed to establish the eligibility of such local educational agency or State agency under this section;
> (B) is unable to establish and maintain programs of free appropriate public education that meet the requirements of subsection (a);
> (C) is unable or unwilling to be consolidated with 1 or more local educational agencies in order to establish and maintain such programs; or
> (D) has 1 or more children with disabilities who can best be served by a regional or State program or service delivery system designed to meet the needs of such children.

20 U.S.C. § 1413(g).

<u>Title II of the Americans with Disabilities Act and § 504 of the Rehabilitation Act</u>

10. 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. Kentucky 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 County*, 219 F.3d 555, 557 n. 3 (6th Cir. 2000)(same); *Maddox v. Univ. of Tenn.*, 62 F.3d 843, 846 n. 2 (6th Cir.1995)(same).

11. 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.

12. Section 504 of the Rehabilitation Act of 1973, codified at 29 USC § 794, provides:

> (a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined
For the purposes of this section, the term "program or activity" means all of the operations of –

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of Title 20), system of vocational education, or other school system.

13. Section 504 defines an individual with a disability as:

(20) Individual with a disability

(A) In general

Except as otherwise provided in subparagraph (B), the term "individual with a disability" means any individual who –

(i) has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment; and

(ii) can benefit in terms of an employment outcome from vocational rehabilitation services provided pursuant to subchapter I, III, or VI.

(B) Certain programs; limitations on major life activities

Subject to subparagraphs (C), (D), (E), and (F), the term "individual with a disability" means, for purposes of sections 701, 711, and 712 of this title and subchapters II, IV, V, and VII of this chapter, any person who has a disability as defined in section 12102 of Title 42.

(C) Rights and advocacy provisions

(i) In general; exclusion of individuals engaging in drug use
For purposes of subchapter V, the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use.

29 U.S.C.A. § 705(20)(A), (B), (C)(1).

14. To prevail under § 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.

ANALYSIS

Based on review of the record, the Petitioners have failed to meet their burden of proof that L.L. was denied FAPE during the 2016-2017 school year.[1] L.L.'s IEP contained goals that were reasonable and appropriately designed to enable him to make progress. For example, the IEP goals focused on learning numbers and words, retaining information that was read to him, pronunciation

[1] To the extent that the Petitioners seek recovery based on violations of the IDEA, ADA, and § 504 during the 2017-2018 school year, it is determined that since the Petitioners filed for due process, invoked stay put, and L.L. never returned to CCSLC, there was no violation of the IDEA, ADA, or § 504. Furthermore, this claim is outside the scope of the Due Process Complaint, which sought relief for "the entire periods of placement at the CCSLC." *See*, Due Process Complaint, ¶ 35, p. 10. Therefore, the 2017-2018 school year will not be discussed further.

of letters and words, following directions, staying on task, and appropriately interacting and playing games with peers. It also contained goals that he was unable to achieve but was working towards, such as producing grammatically correct sentences. Furthermore, the fourth progress report for the school year reflects that of the five goals on his IEP, L.L. met one, made progress on three, and did not make progress on only one. L.L.'s IEP was reasonably calculated to enable him to make appropriate progress in light of his circumstances, and he in fact made appropriate progress.

The Petitioners have proven that while at CCSLC, L.L. was placed in a single classroom, which contained children ranging from kindergarten to eighth grade; that he did not have textbooks until shortly before the end of the school year; that he did not consistently have homework; and that he did not get a report card. While clearly less than optimal, these problems do not prove a denial of FAPE. Moreover, they are significantly outweighed by the fact that L.L.'s IEP was appropriate and was reasonably ambitious in light of his circumstances. Accordingly, the Petitioners failed to meet their burden of proof that L.L. was not provided FAPE.

However, it is abundantly clear that CCSLC was not the LRE in which L.L. could have been educated for the 2016-2017 school year. The reason given for placing L.L. at CCSLC was the fact that he was missing too much instructional time while in the bathroom. However, there was no attempt to supplement this missed time through pre-teaching a subject, extra review of a subject, or the provision of a one-on-one aide. It is appropriate to deviate from mainstreaming a student 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. It is overwhelmingly clear from the record that L.L. would have benefitted from regular education, these benefits were not outweighed by any benefit from

being placed at CCSLC, and that L.L. was not at all disruptive in the regular education class. As explained by Dr. Ihrig, because a regular education classroom is geared to teach to the average student, those students who are below average are challenged to pull themselves up to that average. L.L. missed out on this challenge during the time he was placed at the CCSLC. Accordingly, the Petitioners have met their burden of proof that L.L. was not educated in the LRE for the 2016-2017 school year.

However, the ultimate question in this case is whether the IDEA violation of not being educated in the LRE is due to a failure on the part of TDOE. Under the IDEA, the state educational agency (SEA) – here, the TDOE – is required to provide oversight and monitoring to ensure that the LEAs across the state are meeting their obligation to provide FAPE. Specifically, the IDEA requires States to:

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

20 U.S.C. § 1416(a)(3).

TDOE's monitoring of LEA's across the state met these requirements. TDOE employs a 60-indicator risk assessment to assess all 149 school districts in the state, which includes indicators looking at LRE. Based on the level of risk, TDOE conducts on-site monitoring, desktop

monitoring, or requires the district to conduct a self-assessment. TDOE's monitoring meets its obligations under the IDEA.

Furthermore, while Dr. Ihrig opined that L.L. needs 175 hours of compensatory education in addition to the hours he already obtained through settlement with the West Carroll Special School District, this is not due to any failure on the part of TDOE. Moreover, L.L. had already been assessed by Dr. Ihrig at the time the Petitioners settled the due process complaint with West Carroll Special School District. The Petitioners either had or could have easily obtained Dr. Ihrig's assessment of the total amount of compensatory education L.L. needed before they settled with West Carroll Special School District.

The SEA monitoring and oversight responsibilities prescribed by the IDEA do not require that TDOE discover any *individual* child who may be deprived of FAPE or access to the LRE. The obligation to find and remedy an *individual* denial of FAPE or LRE falls to each child's IEP team. That process worked for L.L. and his parents when they disagreed with his proposed return to CCSLC early in the 2017-2018 school year and filed a due process complaint against the West Carroll Special Scholl District. While there was an IDEA violation in that L.L. was not placed in the LRE, the Petitioners have failed to meet their burden of proof that such violation was due to any failure on the part of TDOE.

As to the Petitioners ADA and § 504 claims, there is no proof whatsoever of discrimination against L.L. Accordingly, these claims fail.

CONCLUSIONS OF LAW

1. L.L. is a child entitled to the protections of the IDEA, ADA, and § 504 due to his diagnoses of Hirschsprung's disease, borderline intellectual functioning, and a learning disability.

2. The Petitioners have shown by a preponderance of the evidence that L.L. was not educated in the LRE during the 2016-2017 school year.

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

4. The Petitioners have failed to meet their burden of proof that L.L. was discriminated against in violation of Title II of the Americans with Disabilities Act and § 504 of the Rehabilitation Act.

5. TDOE is the prevailing party on all issues in this matter.

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

It is so ORDERED.

Entered and effective this the 24th day of October, 2019.

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

Filed in the Administrative Procedures Division, Office of the Secretary of State, this the 24th day of October, 2019.

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

IN THE MATTER OF: **APD CASE No.** 07.03-158386J

L.L., the Student, and B.L. and R.L., the Student's Parents/Guardians, Petitioners v. Tennessee Department of Education, Respondent.

NOTICE OF APPEAL PROCEDURES

REVIEW OF FINAL ORDER

Attached is the Administrative Judge's decision in your case in front of the **Tennessee Department of Education**, called a Final Order, with an entry date of **October 24, 2019**. If you disagree with this decision, you may take the following actions:

1. **File a Petition for Reconsideration:** You may ask the Administrative Judge to reconsider the decision by filing a Petition for Reconsideration. Mail to the Administrative Procedures Division (APD) a document that includes your name and the above APD case number, and states the specific reasons why you think the decision is incorrect. The APD must **receive** your written Petition no later than 15 days after entry of the Final Order, which is **November 8, 2019**.

   The Administrative Judge has 20 days from receipt of your Petition to grant, deny, or take no action on your Petition for Reconsideration. If the Petition is granted, you will be notified about further proceedings, and the timeline for appealing (as discussed in paragraph (2), below) will be adjusted. If no action is taken within 20 days, the Petition is deemed denied. As discussed below, if the Petition is denied, you may file an appeal no later than **December 23, 2019**. *See* TENN. CODE ANN. §§ 4-5-317 and 4-5-322.

2. **File an Appeal:** You may appeal the decision in federal or state court within 60 days of the date of entry of the Final Order, which is no later than **December 23, 2019** by:

   (a) filing a Petition for Review "in the Chancery Court nearest to the place of residence of the person contesting the agency action or alternatively, at the person's discretion, in the chancery court nearest to the place where the cause of action arose, or in the Chancery Court of Davidson County," TENN. CODE ANN. § 4-5-322; or
   (b) bringing a civil action in the United States District Court for the district in which the school system is located, 20 U.S.C. § 1415.

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

STAY

In addition to the above actions, you may file a Petition asking the Administrative Judge for a stay that will delay the effectiveness of the Final Order. A Petition for stay must be **received** by the APD within 7 days of the date of entry of the Final Order, which is no later than **October 31, 2019**. *See* TENN. CODE ANN. § 4-5-316.

FILING

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

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