

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

IN THE MATTER OF:

**K.K., *Student*, and K.K., *Parent*,
Petitioners,**

DOCKET NO: 07.03-114953J

**K.C.K., *Student*, and K.K., *Parent*,
Petitioners,**

DOCKET NO: 07.03-114954J

v.

**METROPOLITAN NASHVILLE
PUBLIC SCHOOLS,
Respondent.**

FINAL ORDER

These contested cases were heard in Nashville, Tennessee, on February 10, 2012 and March 2, 2012, before Ann M. Johnson, Administrative Judge, assigned by the Secretary of State, Administrative Procedures Division, pursuant to Tenn. Code Ann § 49-10-606 and Tennessee State Board of Education Rule No. 0520-1-9-.08. The Petitioners¹ were represented by Ms. K. the parent, who waived legal counsel. The Respondent Metropolitan Nashville Public Schools (MNPS), which is the local education agency (LEA), was represented by Mary Johnston and Corey Harkey, both Assistant Metropolitan Attorneys.

These two cases were consolidated for the purposes of proof. Although it was originally announced that two Final Orders would be entered, it is determined that the proof is so

¹ For clarity, the parent will be referenced as "Ms. K." herein; the students will be referenced as "K.K." and "C.K."

intertwined that two separate orders are not practicable. Furthermore, the issues stated and the relief sought are exactly the same in both cases. For these reasons, the two cases are also consolidated for purposes of the Final Order. After consideration of the record and the arguments of the parties, it is determined that the Respondent MNPS has properly implemented the students' IEPs and has provided FAPE to both of the students, and therefore the requests for relief should be **denied**. This determination is based upon the following.

ISSUES PRESENTED

The Due Process Hearing Request Forms in both of these cases described the issues in the following language:

School continues not to follow IEP. Specifically IEP states pullout for time and money to be taught during math. This has not been done all year even after repeated attempts to get school to comply.

Prior to the hearing, the parties agreed that the scope of the hearing would encompass the Petitioner's assertion that the Respondent failed to properly implement the students' Individual Educational Plans (IEPs), resulting in a denial of a free and appropriate public education (FAPE).

RELIEF SOUGHT

The Due Process Hearing Request Forms ask for the following:

Metro schools to provide a full time private teacher in home for child or to pay for private school and to pay for accomadations [sic] in private school setting so that IEP goals can be monitored by parent as I cannot attend school with my children and school refuses to comply.

Accordingly, the Petitioners request financial reimbursement for one of two alternative options:

(1) a full-time private teacher in the home; or (2) private school and special education accommodations.

SUMMARY OF THE EVIDENCE

Ms. K. testified on the Petitioners' behalf, and also called the following witnesses: the student K.K., the student C.K., Patricia Ann Jones, Amanda Lee Miller, Lynn Wakefield, and Sonya Dobbs. The Respondent presented five additional witnesses: Christie Andrews, Althea Morehead, Renae Rota, Edward McKinney, and Jennifer Rheinecker.

Six exhibits were admitted into evidence:

COLLECTIVE EXHIBIT 1	Educational Records for K.K. and C.K.;
COLLECTIVE EXHIBIT 2	Planning Agendas;
EXHIBIT 3	Letter from Learning Matters, January 25, 2012;
EXHIBIT 4	Grading sheets;
EXHIBIT 5	IEP at a Glance for K.K., December 15, 2011; and
EXHIBIT 6	IEP at a Glance for C.K., December 15, 2011.

FINDINGS OF FACT

1. The students K.K. and C.K. are 13-year old twins who are enrolled in the Metropolitan Nashville Public Schools (MNPS). They are in the seventh grade and attend John F. Kennedy Middle School.

2. Both students are certified to receive special education services, and have received those services for several years.

3. Although each child is different, the two students in this case, who are twins, are remarkably similar regarding their abilities and achievements.

4. According to nationally certified school psychologist Edward McKinney, the results of the most recent comprehensive evaluations for both girls are remarkably similar: the difference in their evaluation scores is not statistically significant.

5. Both students have the ability to learn, but can be expected to have significant challenges in learning because of their low average and borderline impaired Intelligence Quotient (I.Q.) scores and their learning disabilities.

6. The student K.K. scored an I.Q. of 77, which is in the borderline impaired range. This score indicates that the student K.K. can learn, but at a much slower pace than the average child. There will be significant challenges in the classroom, and the student will not learn in a manner consistent with the typical child of her age.

7. The student C.K. scored 81 on her I.Q. assessment, which is the low average range, or the tenth percentile for her age. Again, she can learn and understand the general educational curriculum, but she will be slower and have significant learning challenges, given her overall intellectual functioning and processing problems.

8. Both students have “working memory” scores that indicate the weakest areas in their testing and will impact their ability to remember information and skills that they were taught from day to day. They have short-term memory deficits that make it difficult to remember information long enough to process it.

9. The students K.K. and C.K., because of working memory problems, will have difficulty recalling sequences, following directions, and remembering information. This disability can seriously complicate effective learning because it impacts their ability to remember from one day to the next.

10. The verbal comprehension area was also one of the lowest scores of both students in their testing; verbal comprehension scores are closely related to general scholastic aptitude. Research indicates that the verbal comprehension factor score, more than any other area, is a good predictor of what a child will be able to accomplish in the classroom.

11. Both students scored in the very low range in the verbal comprehension area; this was among the weakest areas with both of the girls.

12. In addition to borderline and low average I.Q. scores, the students K.K. and C.K. both have severe learning disabilities in reading, further complicating their learning abilities.

13. Because of extremely low abilities in verbal comprehension and working memory, it is hard to predict whether or not either of these students can become functional readers, given the degree of their disabilities and their borderline impaired and low average I.Q. scores.

14. Psychological testing done in the fifth grade concluded that the students' below average achievement is a result of their disabilities, not from their instructional program.

15. Testing revealed that K.K. and C.K. have "double deficits" in phonological awareness and in rapid naming. Students with these double deficits have more challenges in learning to read than other children without those deficits.

16. An Individual Educational Plan (IEP) was created separately for K.K. and C.K., although both IEPs are very similar since both students have essentially the same abilities and deficits; therefore, they require almost identical services, modifications, and accommodations.

17. Each IEP identifies the student's individual education needs and outlines goals and objectives designed to address those needs.

18. The IEPs are appropriate for each child.

19. The IEP development process complied with required procedures, including meaningful parental participation.

20. Development of the IEPs first requires identification of present levels of performance in all areas, including an evaluation of all deficits.

21. Next, the IEP team develops goals and objectives to remediate those deficits.

22. The IEP team is required to begin with the specified curriculum of the student's grade level, since all students, except those with a significant cognitive disability, must be taught core or grade level standards.

23. The IEP team then modifies the core curriculum to address the particular student's educational needs. After goals for each child are determined, then objectives are formulated to achieve the identified goals.

24. Before each school year, the IEP team may look to the previous year's IEP to evaluate the student's progress under that IEP. Then the team factors in additional information from teachers and any new assessments in determining a new IEP for the coming school year. Some elements may remain the same, but others will change according to the student's progress and current needs.

25. This procedure was followed in developing IEPs for the students K.K. and C.K., both for the current school year and the previous one.

26. The parent had meaningful participation in the IEP process for the students and agreed with the educational plan set forth in the IEPs, both for the current school year and for last school year. The parent signed these IEPs and signified her consent to their implementation.

27. At the hearing, Ms. K. admitted that her concerns regarding math skills, including the subjects of both time and money, were addressed at the IEP meeting and, as a result, were incorporated into the IEPs.

28. The current IEPs for students K.K. and C.K. are very similar: math is taught in a special education setting, or "pull-out" classroom, where the students review the seventh grade curriculum. Then they have another 55 minutes of math intervention. There is also an English pull-out in reading, consisting of 90 minutes a day for reading instruction. This reading course

consists of balanced literacy, including the Wilson Reading program in which the exceptional education instructor teaches in a small group or one-on-one. For most of the other courses, the students remain in the regular classroom, where lessons are taught with modifications and accommodations.

29. The IEPs for students K.K. and C.K. have been implemented in a manner reasonably calculated to produce an educational benefit.

30. Specifically, K.K. and C.K. are in exceptional education classes for 90 minutes every day for reading, language, and writing, although the main focus is reading. These classes are held in small groups, no more than four students each, and there is some one-on-one time as well.

31. The primary tool for reading is the Wilson Reading System, which the students have been using for 14 months. This program is appropriate for students beyond the elementary grades who have not learned to internalize sounds and word structure. Research has shown it to be successful with students identified as learning disabled with core deficits in reading and language. Many of these students lack phonological processing skills, or understanding of the sound-symbol relationship, the fundamental building block of reading and writing.

32. The Wilson program breaks the English language into six syllable types, immersing the child in each, one at a time, to teach strategies, word recognitions, and decoding. After one syllable type is mastered, a second is begun until all six have been completed. After moving through the six syllable types, the student can functionally and fluently read and decode any word by using the same type of strategy.

33. This class is one primary method for implementing the IEP goals concerning reading.

34. One reading goal concerns use of greater vocabulary in expanding oral language through a variety of different tools. The Wilson books are used for word definitions. Then the words are used frequently in conversation and are projected on an overhead screen. There are vocabulary words each week that the students work on throughout the week.

35. One technique used with the students to increase phonemic awareness and vocabulary is to add, delete, and change targeted sounds to modify words. For example, the ending sounds are changed or a letter is added to a word to create a new word, also providing an awareness of word families.

36. Another goal is to increase reading ability by improving comprehension. This goal is implemented through creative responses to age-appropriate literature; for example, the child is asked to predict an outcome, or change the circumstances of the character and then predict how the story would then change. The students may also be asked to make inferences about a character based upon the reading. The students also tell stories from their own lives and stories they have read. At the end of the period the students take turns summarizing what has been learned, including the new words mastered.

37. A third goal is knowledge of the letter-sound correspondence or phonemic awareness. The Wilson program, used daily, includes a systematic approach with interactive and multi-sensory exercises.

38. Improving communication skills through written language is another IEP goal, implemented in a variety of different ways. Many times the students write in response to literature, first talking and brainstorming. Then the students and the instructor organize the ideas together orally before beginning to write. Next each student creates a draft, which they and their peers then correct for grammar, spelling, and punctuation, after which the student writes a

revised draft to present to the class. Oral exercises are also used in which the students read paragraphs and then pick out the topic sentence or supporting details.

39. Another activity employed to improve logical and sequential order in writing is the use of picture puzzles relating to stories. These picture books are cut apart and mixed, so that the students must look at what is happening in the pictures and arrange them in the proper sequence as the story should progress.

40. Both students are beginning to compose narratives with a beginning, middle and ending. K.C. in particular is a very good storyteller who enjoys writing stories and letters to different people. She has decided to compose a book about her learning.

41. The IEPs for the previous year contained similar goals and strategies, although they were less advanced. For example, one goal was to use and identify beginning, middle, and end sounds and move from left to right with pointing to blend words. Both students have mastered this skill. Another goal concerned recognition of sight words, which was not totally mastered and therefore is being taught again this year.

42. Other reading goals from last year included comprehension and some vocabulary, as well as increasing communication skills through writing. Specifically, the students worked on nouns and verbs, which both students essentially mastered. They also worked on correct punctuation, capitalization, and spelling of particular reading words, which the students have learned.

43. The students' reading instructor, who has taught them for the past two years, always cycles back to the old IEP goals to make sure of retention, because that is an issue with K.K. and C.K.; however, the instructor focuses primarily on the goals in this year's IEP so that the students can continue to make progress and learn according to the state standards.

44. In addition to reading goals, the math goals and objectives in the IEPs of K.K. and C.K. are being implemented through their educational program.

45. The students' math teacher plans her lessons for K.K. and C.K. in accordance with each child's IEP goals. The math instructor frequently refers to an "IEP at a glance," a short synopsis of the goals that each student is working towards in a particular area, so that the instructor is aware of their goals at all times.

46. One goal involves developing strategies in problem solving, addition, subtraction, and multiplication. Problem solving skills are taught on a daily basis. One intervention technique is the "keep sheet" which is kept by the students in their notebooks. It is a reference tool which can be used for extra help when the instructor is not available for one-on-one time.

47. Another tool used by the math teacher is a daily "bell ringer," which also incorporates the students' IEP goals and objectives. This technique is a short page of different problems used for reinforcement and review of math concepts.

48. An additional goal that is of particular concern to the parent concerns the mastery of time and money concepts. For example, in the daily review there is at least one question, two or three times each week, concerning the concepts of time and money; this area is also addressed in problem solving in the math context lesson. There are problems which require the use of the calendar and lessons regarding the number of days in a month and months in a year.

49. Understanding of the money system is also addressed through daily problem-solving strategies. The students are learning decimals, the foundation of the currency system. Other hands-on modeling techniques, such as tiles, are also used, in addition to actual coins.

50. The math instructor has incorporated problems regarding time and money since the beginning of the school year, although more intense work in this subject began in January of

2012. The math teacher has begun using worksheets, which she formulates specifically for K.K. and C.K. during pull-out sessions, to place more emphasis in this area.

51. Time and money instruction is not a part of the seventh grade curriculum, but is taught to these students as a part of the implementation of their IEPs, and is used to address their particular needs.

52. The students' previous social studies teacher from the sixth grade works with K.K. and C.K. this school year in the school concession stand to provide further instruction in time and money. In addition to counting money, the teacher uses the clock in the room and develops worksheets for the students to complete during times when the concession stand is not busy.

53. Last year the social studies teacher tutored K.K. and C.K. in time and money skills. By the end of last school year both students were confident in their ability to use a standard clock and to count money; however, they both require continual practice to retain and reinforce these lessons.

54. IEP goals are also taught in math intervention, a 60-minute class designed to remediate math skills.

55. The Voyager math program is used in the intervention class; it follows the seventh grade standards, but not the seventh grade pacing guide. It is used in the school district's exceptional education program to remediate skills that have not been mastered at previous grade levels. The Voyager program includes scripted, very basic lessons that guide the students through prerequisite math skills that they need in order to be successful in the seventh grade. For example, it includes basic multiplication that may be taught in second or third grade. It also includes lessons in time and money, working with decimals to add, subtract, and multiply. The

program is used in remediation for necessary skills that have not been learned at earlier grade levels.

56. In addition to special courses in reading and math that were provided to implement the IEPs in the last two years, the students K.K. and C.K. received modifications and accommodations both years, as specified in their IEPs, to tailor their educational programs to their ability levels.

57. Many different accommodations were used. For example, in social studies last year the teacher provided them with copies of her notes, even though the other students were required to take their own notes in the classroom. The notes provided to K.K. and C.K. were missing a word or two occasionally, allowing them follow along and fill in the appropriate words. The instructor also shortened their projects and tests, gave them multiple choice tests, simplified terminology, and read tests aloud to them. She also provided time for them one-on-one or in small groups, which the other students did not receive.

58. Similar modifications and accommodations, as specified in the IEPs, were provided in all classes, both in the present school year and last school year. In addition to the specific examples provided in social studies, other accommodations included the following: oral reading of text and tests; pairing with a peer who is a strong reader; preferential seating; support on assignments and projects; use of cues and prompts; use of the teacher's planning period to provide additional help with projects; repeating directions; additional time for tests and projects; and grade modification.

59. The case manager for students K.K. and C.K., Ms. Renae Rota, monitors the students' instruction to insure that the IEP is followed and that specified modifications and accommodations are made in each classroom. She talks individually with their other instructors

on a weekly basis to discuss modifications and accommodations, and how they will be implemented in actual practice. Ms. Rota also observes the students in classes throughout the school year to check that modifications and accommodations are being implemented.

60. One goal, contained only in the sixth grade IEPs, concerns cursive writing, which the students have not mastered and which is not currently a part of their instructional program. It was explained that cursive writing is an elementary goal and is usually taught in the third and fourth grades. Furthermore, the students are not penalized for printing and are not required to use cursive writing in their work.

61. Cursive writing has not been a part of the students' instruction in middle school, even though it was a stated goal in the sixth grade IEPs. Cursive writing is not a part of the students' current IEP.

62. Each week, the students K.K. and C.K. receive at least the number of service hours specified in the IEP.

63. The daily schedule for both students is essentially the same, although they each receive one-on-one time from instructors and tutors on most days. The first period of every day alternates between science and social studies. For 30 minutes of this time, three days each week, they receive extra tutoring.

64. The second period is reading and language arts class, lasting 90 minutes, in which the students work in the Wilson Reading Program. Third period is a 60-minute intensive math intervention program, primarily for remedial math work. After lunch, the students attend a resource math class. Fourth period is a 90-minute intervention group, and fifth period is a related arts class.

65. Math, reading, and intervention are pull-out classes in which all the students work from an IEP. These classes are taught by teachers who are certified in special education.

66. For science, social studies, band and related arts, the students attend general education classrooms, with modifications and accommodations formulated for their particular needs.

67. The students are also provided with one-on-one reading tutoring for 90 minutes each week. The school system has contracted with Learning Matters, a non-profit organization, to provide this support in reading, which is in addition to the reading instruction the students receive in the classroom. In these sessions the students work with the Wilson Reading System, reinforcing the lessons in class.

68. Several of these Learning Matters tutoring sessions were missed, in part because the parent was unsure if she wanted to continue with the organization and so a tutor was unable to be scheduled until later in the fall. Also, the regular tutor had personal issues and had to miss some of the sessions. However, any missed sessions have been or will be made up.

69. Because of both students' disabilities, they were scheduled for after-school tutoring. However, Ms. K. believes that the children should receive sufficient instruction during regular school hours so that they should not have to stay after school for tutoring. At the hearing, Ms. K. stated the following:

I also object to the part that they should even have to go to after school tutoring at all because I feel like they should be taught during the seven hours they're at school, and when you are putting them into classes that they cannot understand, and you're not modifying it for them, you are absolutely wasting their time. It shouldn't be happening. They should not have to spend extra hours. They're kids. You are ruining their life because they're not being able to be kids. . . . They are 13 years old, almost 14, and they have not been allowed a childhood because they spend every summer in school and every afternoon in tutoring, and it's absurd.

70. The student K.K. stated that she does not understand math and that there were insufficient modifications to allow her to understand the subject. She also stated that she does not understand science and social studies; again, she believes that she receives insufficient accommodations and that she doesn't feel there is enough one-on-one time so that she can understand.

71. The student K.K. also is embarrassed because she is unable to read much of the material and does not want her classmates to know she cannot read at grade level. She stated that her inability to perform makes her feel like a third grade student.

72. The student C.K. stated that she does not understand all of her math work, but that she can do some of it because the instructor "does it slowly."

73. The student C.K. also stated that she does not understand social studies and science and does "pretty much nothing" in both classes.

74. Both K.K. and C.K. have made progress toward their IEP goals and have received an educational benefit in the past two years.

75. In the area of mathematics, the students have progressed both in the general seventh grade curriculum and in the remedial Voyager program.

76. Similarly, in reading the students began a review of book one in the Wilson program in the sixth grade. They have now progressed to book four. Working with the Learning Matters tutor, both students have remained very close together in their progress, which has been slow but very evident.

77. In social studies, a general education class, the students were unable to grasp everything in the curriculum, but they both were able to receive an educational benefit. The students K.K. and C.K. improved particularly in their confidence level; they were nervous

around the other students at the beginning of the year, but toward the end of the school year they could answer questions verbally, volunteer answers in class, and work in small groups with classmates.

78. General academic testing, including standardized tests given to all students, reveals overall progress with both students.

79. As preparation for the TCAP test, given to every student in grades three through eight, students are given the DEA or Think Link test three times each year. This test primarily covers reading, language arts, and math; the same test is given to the general education and the exceptional education students.

80. In January of 2011, the student K.K. completed the DEA test for sixth grade level skills; then in September of 2011, she was given the DEA test covering seventh grade level skills. Even though the material was more difficult, K.K. correctly answered two more questions in math and one more question in reading on the later, more advanced test. This performance shows academic progress.

81. On these same two tests, C.K. showed even more improvement in her scores, correctly answering two additional questions in math and four additional questions in reading. C.K. moved from below basic reading level up to basic level reading.

82. Scores on the Woodcock Johnson Achievement test also showed improvement. In 2009, both students tested at the first grade reading level. When tested again in February of 2011, they had both advanced to the third grade reading level.

RELEVANT LAW

1. The Petitioners have the burden of proof in this matter, to show by a preponderance of the evidence that the relief they seek is warranted under state and federal law. *Schaffer v. Weast*, 546 U.S. 49, 62 126 S.Ct. 428, 163 L.Ed.2d 387 (2005).

2. Each LEA is required to provide a “free appropriate public education (“FAPE”)” to “all children with disabilities.” 34 CFR § 300.101; Rule 0520-01-09-.05, TENN. COMP. R. & REGS.

3. A free appropriate public education (“FAPE”) is defined in 34 CFR § 300.17:

Free appropriate public education or FAPE means special education and related services that –

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA, including the requirements of this part;
- (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 (IEP) that meets the requirements of §§ 300.320 through 300.324.

4. The IEP must be “reasonably calculated to confer education benefit” to the student. *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982). According to the Court in *Rowley*, “If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.” *Rowley* at 207. The law does not require the LEA to maximize the student’s educational benefits, or to guarantee that the student reaches a specific level of academic achievement. *Rowley* at 107.

5. The Sixth Circuit has held that federal law does not “require public schools to maximize the potential of disabled students commensurate with the opportunities provided to other children.” *Renner v. Board of Education of the Public Schools of City of Ann Arbor*, 185 F.3d 635, 644 (6th Cir. 1999). See also, *Doe v. Tullahoma City Schools*, 9 F.3rd 455 (6th Cir. 1993).

6. According to 34 CFR § 300.324, an individualized education program (IEP) must contain the following elements: (1) a statement of the child’s present performance levels; (2) a statement of measurable annual goals; (3) a description of progress toward meeting those goals; (4) a statement of the special education, related services, and supplementary aids and services needed; (5) an explanation of the extent to which the child will not participate with non-disabled peers; (6) a statement of any necessary appropriate accommodations; and (7) the date the services will begin, as well as the frequency, location, and duration of those services.

7. The Sixth Circuit stated that the mandatory IEP elements “are requirements by which the adequacy of an IEP is to be judged, although minor technical violations may be excused.” *Cleveland Heights-University Heights City School District v. Boss*, 144 F3d 391, 398 (6th Cir. 1998).

8. In *Rowley*, the Supreme Court developed a two-prong test for determining the sufficiency of a proposed IEP. First, it must be substantively appropriate by offering goals and objectives that are “reasonably calculated to provide education benefit” to the child. Second, the procedural safeguards of the IDEA must be provided to parents, including the right to participate in the development of the IEP and to receive notification and explanation of their rights.

9. Although the educational benefits accruing to the child must be “meaningful,” there is no requirement that the program provide the maximum benefit or the best available program. *Rowley* at 200-201.

10. Federal rules contain requirements for reimbursement of tuition when FAPE is at issue in 34 CFR § 300.148, the relevant portions of which read as follows:

(a) General. This part does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility. . . .

(b) Disagreements about FAPE. Disagreements between the parents and a public agency regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to the due process procedures in §§ 300.504 through 300.520.

(c) Reimbursement for private school placement. If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate.

11. According to 34 CFR § 300.114(a), a student who qualifies for special education and related services must be placed in the least restrictive learning environment:

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

(2) Each public agency must ensure that -

(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes

with the use of supplementary aids and services cannot be achieved satisfactorily.

See also TENN. CODE ANN. § 49-10-103(c).

12. The IDEA contains procedural due process safeguards for parents and children. 34 CFR §§ 300.500 et seq. Some of these include the opportunity to examine records and to participate in educational meetings (34 CFR § 300.501); to obtain an independent educational evaluation in certain circumstances (34 CFR § 300.502); notice in specified instances (34 CFR §§ 300.503 through 300.505); and procedures to resolve disputes (34 CFR §§ 300.506 through 300.517).

ANALYSIS

The Petitioners in this case asserted that the students K.K. and C.K. failed to receive a free appropriate public education (FAPE) because the Metropolitan Nashville Public Schools failed to implement the students' IEPs in several respects. First, as a preliminary matter, the Petitioners argued that the school district failed to adequately address the parent's concerns in formulating the IEPs, since there were drafts presented to her at the beginning of the meetings. The proof does not support this allegation. Ms. K. even acknowledged that the IEPs were modified to include her concerns, such as the subjects of money and time. The evidence also shows that the parent received required notices and that the district was responsive to her telephone calls and other communications. There are no identified procedural violations.

The Petitioner alleged multiple substantive violations, resulting, she claimed, in a denial of FAPE. As indicated above, one primary alleged issue concerned instruction for the students on the subjects of time and money, areas that were included in their IEPs. The Petitioner stated that the students are not proficient in these subjects because the school system did not provide instruction in them. The Petitioner presented no proof to support this bare allegation. Although

instruction in time and money is not a part of the regular seventh grade curriculum, these subjects were added to the IEPs at the parent's request. The proof showed that instruction in money and time has occurred since the first of the school year. After Ms. K. expressed concern to the school, the teaching has become more intense, with work sheets and the opportunity for the students to work with their teacher in the concession stand at school.

Another primary area of concern for the parent was the contention that the students should not have received instruction in accordance with the regular seventh grade program, but that the students should have been taught at their own level of achievement and ability. It was established that, at least in part, math is cumulative, in that certain basic concepts must be mastered before some of the higher levels of mathematics can be understood. Ms. K. also felt that the students should not be placed in the general education classrooms where they were unable to understand much of the material. Furthermore, Ms. K. does not believe that the students should receive after-school tutoring, but that the instruction during school hours should be sufficient to insure their learning, if the instructional program is adequate.

The Petitioners failed to show that the implementation of the IEPs, to which the parent assented, resulted in a denial of FAPE. On the contrary, the evidence showed that the students received both remedial and grade-level teaching which provided an educational benefit to them. The seventh grade curriculum, as with other grades, is mandated by state standards, although the pace of learning was modified for these students. At the hearing, multiple teachers explained at length about the modifications and accommodations that were put into practice as specified in the IEPs. The instruction was provided in the least restrictive appropriate environment, as required by federal law. Standardized test scores from the past two school years showed a

definite improvement for both students, and evidenced the educational benefits both received from their IEPs.

The Petitioners failed to present any actual proof to support the allegations; there was no specific factual evidence to demonstrate any insufficiency of the part of the Respondent. The Petitioner argued that the students' lack of progress, both in math and reading, proves that the instruction they received was deficient and failed to provide FAPE. This contention is without merit. A school system cannot guarantee a positive outcome and may not achieve optimum results even though the individualized educational program is designed to provide the student with an educational benefit. In this case, the evidence shows that both children have severe learning disabilities; it is these deficits, not the type of educational program, which inhibits learning.

In short, the Petitioners failed to show that the students in this matter were denied a free appropriate public education. To the contrary, the Respondent presented proof to compel the opposite conclusion.

Since the Petitioners were unable to demonstrate a denial of FAPE, there is no basis under which to order private school placement. According to federal law, private school reimbursement requires two elements: "a court or a hearing officer may require the agency to reimburse the parents for the cost of [private schooling] if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate." 34 CFR § 300.148(c). Neither element is satisfied in this case. First, it has been determined that the school system made FAPE available to the children; second, there was a total absence of any proof from the Petitioners to show that a

private school or home schooling program had been identified or that placement in any such program would be appropriate.

It is understandable that the parent in this case wants the best for her children, and it was clear that she is sincere in her belief that they could show more progress with improved instruction. However, she presented no specific proof to show any significant failure on the part of the school. It is clear from the record that these children have severe learning disabilities and will have difficulty processing and retaining information, even with the best of teaching. The record also clearly shows that the school system properly developed and implemented the children's IEPs and that both students obtained an education benefit from their educational programs.

CONCLUSIONS OF LAW

It is concluded that the Respondent has provided FAPE to both K.K. and C.K.

It is concluded that both Petitioners have received an educational benefit through their IEPs, and that their educational placement satisfied requirements under state and federal law.

It is concluded that the Petitioners have been accorded the procedural safeguards specified under the IDEA, including proper notice and meaningful parental participation in the IEP process.

It is concluded that the Respondent is the prevailing party on all issues in this matter.

Accordingly, based upon the foregoing, it is **ordered** that the Petitioners' request for reimbursement for private school tuition, or, in the alternative, a full-time private teacher in the home, is hereby **denied**.

This Final Order entered and effective this 6th day of June 2012.


Ann M. Johnson
Administrative Judge

6th Filed in the Administrative Procedures Division, Office of the Secretary of State, this
day of June 2012.


Thomas G. Stovall, Director
Administrative Procedures Division

Notice

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee or the Chancery Court in the county in which the petitioner resides or may seek review in the United States District Court for the district in which the school system is located. Such appeal or review must be sought within sixty (60) days of the date of the entry of a Final Order. In appropriate cases, the reviewing court may order that this Final Order be stayed pending further hearing in the cause.

If a determination of a hearing officer is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the Chancery or Circuit Court, under provisions of Section 49-10-601 of the Tennessee Code Annotated.