

Petitioner)
v.)
SMITH COUNTY BOARD OF EDUCATION)
Respondent)

Docket No. [REDACTED]

This matter was heard on [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED] before John Hicks, Administrative Law Judge, assigned by the Secretary of State, Administrative Procedures Division pursuant to T.C.A. §49-10-606 and Rule 520-1-9-.18. Attorney [REDACTED] represented Petitioner [REDACTED]. Attorney [REDACTED] represented Respondent Smith County School System.

The subject of this proceeding, in general terms, is whether Respondent Smith County School System provided a free appropriate public education (FAPE) to Petitioner [REDACTED]

This determination is based upon the following Findings of Fact and Conclusions of Law.

¹ [REDACTED] has not been adjudicated incompetent.

Request for Due Process

The Request for Due Process (Request) alleges that:

- [REDACTED] is an [REDACTED] year old student at [REDACTED] High School;²
- [REDACTED] had a recent private evaluation the result of which found him to have a [REDACTED]
- [REDACTED] met the criteria to be certified [REDACTED]
- [REDACTED] s disability manifested itself primarily in the area [REDACTED]
- [REDACTED]
- School System refused to certify [REDACTED] as [REDACTED]
- School System made the decision to address the concerns of [REDACTED] parents by certifying [REDACTED] as ADD;
- School System failed to fully evaluate [REDACTED]
- School System failed to identify [REDACTED] as a child with a disability after being given documentation in [REDACTED] from Dr [REDACTED] an optometrist, diagnosing [REDACTED] with [REDACTED]
- [REDACTED]
- [REDACTED]
- School System denied [REDACTED] a free appropriate public education (FAPE) in that it failed to convey upon him an educational benefit and that he was not functioning at grade level;
- [REDACTED] has failed to make consistent progress and is not prepared to enter college or to take any standardized test to enter college;
- School System failed to provide [REDACTED] with a FAPE in that it failed to convey upon him any transition assessments and services needed to assist him in reaching his goal to attend college and become a veterinarian;
- [REDACTED] IEPs did not contained appropriate measurable post-secondary goals;
- School System failed to provide FAPE in that it did not fully implement [REDACTED] IEP;
- [REDACTED] has not made academic progress and there were no academic goals in the IEPs;
- Accommodations listed in [REDACTED] IEPs were not followed;
- IEPs repeatedly reflected that [REDACTED] was supposed to be tested orally;

² [REDACTED] is now [REDACTED] and has graduated from [REDACTED] High School

- School System decided to only test [REDACTED] orally if he scored below seventy percent on a test;
- An evaluation was received by the [REDACTED] at the [REDACTED];
- School System failed to follow the recommendations of the report;
- School System failed to provide FAPE in that [REDACTED] IEP was not reviewed annually as required;
- School System failed to provide FAPE in that it failed to provide progress reports for any of his IEP goals and failed to revise the IEP to address any lack of expected progress;
- School System violated the procedural safeguards of the IDEA by failing to provide written prior notices.

Relief Requested In Request for Due Process

Petitioner requests the following:

- compensatory education services including, but not limited to, courses of study, books, one-on-one tutoring, computer training, transportation and other services necessary to assist [REDACTED] in reaching his goal of graduating from college.
- an order requiring the School System to implement all recommendations made by the [REDACTED]
- an order be entered requiring the School System to certify [REDACTED] as visually impaired under the IDEA.
- to incorporate into the current IEP all pertinent recommendations by [REDACTED]
- an order requiring the School System to incorporate into the current IEP all recommendations made by education specialist [REDACTED]
- an order be entered requiring the School System to have representatives from vocational rehabilitation services and [REDACTED] present at all IEP meetings to discuss the transition process necessary for [REDACTED] to enter college.
- reimbursement for privately obtained [REDACTED] and education services and ongoing services provided by [REDACTED] and [REDACTED]
- reimbursement for the evaluation obtained by the [REDACTED]
[REDACTED]. Finally, the Request prays for reimbursement for the laptop computer, printer and software purchased by [REDACTED] family, attorney's fees, costs, and pre-judgment interest.

Response to Request for Due Process

Respondent filed an answer denying that FAPE had been denied to [REDACTED] and alleging that Smith County School System met all IDEA procedural safeguards for [REDACTED] at [REDACTED] High School. Further, Respondent asserts the following:

- [REDACTED] was scheduled to graduate from [REDACTED] High School at the end of the school year;
- [REDACTED]
- [REDACTED] had taken the ACT examination and scored a [REDACTED]
- [REDACTED] had made yearly progress;
- [REDACTED]
- [REDACTED]
- [REDACTED]
- An IEP was drawn pursuant to that finding and agreed upon by the parents in the Fall of [REDACTED] for the [REDACTED] school year;
- [REDACTED]
- School System then alleged bad faith on Petitioner part by presenting an evaluation at the conclusion of a meeting called to draw an IEP for [REDACTED] ADD.
- School System seeks to be determined the prevailing party in this action and requests attorney's fees from either the Petitioner or counsel for the Petitioner.
- School System states that service at the collegiate level are improper because [REDACTED] has earned a regular high school diploma.

Affirmative Defenses

1 Respondent contends that actions occurring more than two years prior to the date that the parent or public agency knew or should have known about the alleged action are barred.

2 Respondent contends that [REDACTED] received a regular high school diploma negating the necessity of FAPE and that compensatory education services at the collegiate level are not warranted.

FINDINGS OF FACT

1. Special Education Director [REDACTED] participated in the development of IEPs during [REDACTED] high school tenure at [REDACTED] High School. [REDACTED] felt positive about [REDACTED] IEP meetings. During [REDACTED] high school tenure, [REDACTED] parents signed all [REDACTED] IEPs indicating agreement with the IEP.

2. Petitioner, [REDACTED] grandmother, took charge of [REDACTED] educational program during his senior year. Petitioner hired attorneys and an education specialist to assist her and to attend IEP meetings. The attorneys attended [REDACTED] IEP meetings to assist the family and the family signed the IEPs indicating agreement.

3. [REDACTED] was scheduled to be recertified for special education services in the fall of [REDACTED] senior year. During the development of the [REDACTED] IEP, [REDACTED] disabling classification was [REDACTED]. All parties agreed that [REDACTED] disabling classification was [REDACTED]. After agreeing to [REDACTED] IEP for the [REDACTED] school year, [REDACTED] grandmother filed a request for due process. Subsequently, the School System received an email that the request for due process had been withdrawn. [REDACTED] grandmother filled a second request for due process to initiate this hearing.

4. At the first meeting of the new certification process, the parties discussed and appeared to agree on a program. Thereafter, [REDACTED] grandmother through her attorney offered a new diagnosis of dyslexia. Petitioner did not mention the new diagnosis of [REDACTED] during the IEP meeting.

5. The [REDACTED] IEP was completed beyond the one year time period because [REDACTED] grandmother provided a new diagnosis of [REDACTED] at the conclusion of one of the IEP meetings. The new diagnosis of dyslexia required additional time for School System to consider the new diagnosis. The School System's psychologist reviewed the diagnosis of [REDACTED] and the diagnosis was accepted by the School System. A new IEP was developed and agreed upon by [REDACTED] power of attorney.

6. During the [REDACTED] IEP meeting, the parties discussed [REDACTED] option of taking more math and science to support his desire to become a veterinarian³. After [REDACTED] and his grandmother met outside the IEP meeting, his grandmother returned with instructions that [REDACTED] would remain in the transition program. The transition program allowed [REDACTED] to leave school daily at 11:00 a.m. to work the remainder of the day. Transition programs are designed for students who have passed the Gateway exams, who have completed their core course requirements, who do not plan to attend a junior college or a four year college, who do not plan to attend a vocational college and who intend to go directly to work. [REDACTED] was repeatedly advised that he needed more math and science to support his desire to become a veterinarian. [REDACTED] chose the transition program instead of taking other classes because he wanted to enjoy his [REDACTED]

7. [REDACTED] education consultant [REDACTED] conducted an assessment of [REDACTED] [REDACTED] was unaware of [REDACTED] school performance during the second semester of his [REDACTED] unaware that [REDACTED] was no longer certified as [REDACTED] and was unaware that the School System had accepted her diagnosis of [REDACTED]. [REDACTED] was aware that [REDACTED] did not want to go to college. [REDACTED] testing results of [REDACTED] overall intelligence was consistent with the School System's findings.

8. Special education teacher [REDACTED] was assigned to [REDACTED] case during high school. [REDACTED] was identified as a student in need of consultation and possible accommodations. [REDACTED] was listed as [REDACTED] pursuant to a medical doctor's statement provided by [REDACTED] parents. [REDACTED] suggested that [REDACTED] optometrist

³ Petitioner alleges that during an IEP meeting school staff laughed when the subject was raised that [REDACTED] desired to become veterinarian. [REDACTED] and [REDACTED] were recalled by Respondent and testified that there was never any laughter in any IEP meetings about [REDACTED] desires to become veterinarian. The testimony of [REDACTED] and [REDACTED] is credited.

be invited to [REDACTED] IEP meetings but she did not attend. At the time of the initial IEP meeting, [REDACTED] difficulties were in line with the diagnosis of [REDACTED] i.e., forgetting to turn in assignments, not turning in assignments, losing assignments and not being organized. [REDACTED] testified that when [REDACTED] “does what he is supposed to do assignment-wise, his grades are good.” [REDACTED] accommodations were preferential seating, providing tape materials, a Victor Vibe for use at home, keeping an assignment book, extra grade opportunities, and opportunities for extra credit, reading test aloud, and allowing the use of a calculator. All these accommodations are typical for [REDACTED]

9. School System contractor [REDACTED] conducted an occupational therapy evaluation of [REDACTED] Occupational Therapist Registered/Licensed test students in the educational environment for fine motor skills, visual-motor skills, visual-perception skills, organizational skills and social skills to determine the impact of these skills on a student’s educational performance. [REDACTED] concluded that [REDACTED] did not exhibit signs of [REDACTED] [REDACTED] was very attentive, had good eye contact, and was able to sit for extended periods of time. [REDACTED] concluded that [REDACTED] did not have difficulty with sensory processing or auditory processing. Visually [REDACTED] did not squint his eyes, did not complain about classroom lighting nor become visually distracted. [REDACTED] did not detect eye drifting. [REDACTED] perceptual processing was good, i.e. the ability to discern one object from another on a given page. All the visual-perceptual and visual motor testing was completed without [REDACTED] wearing glasses. [REDACTED] demonstrated fine body awareness, i.e. recognizing his space and others. [REDACTED] wrote with the correct degree of pressure on the pen or pencil.

10. [REDACTED] refused to participate in oral testing. Teachers were instructed to talk to [REDACTED] privately about oral testing to avoid embarrassment. Teachers suggested that [REDACTED] come

before or stay after school to be tested orally. Because [REDACTED] would not leave class for oral testing, arrangements were made to allow [REDACTED] to be tested with peers and if [REDACTED] made less than a seventy retesting after school would be allowed. During the [REDACTED] year, [REDACTED] rarely completed written notes and pretended to take written notes because classmates commented about his note taking. [REDACTED] wasted time; failed to complete homework, lost homework, and left homework in the truck. Progress reports were prepared daily to keep his parents informed. [REDACTED] performed well when he attended class, turned in homework, studied, and took tests.

11. During the [REDACTED] school year, [REDACTED] was provided tutoring three hours a week. At times [REDACTED] did not attend. [REDACTED] was instructed that if he wanted to be a veterinarian he would have to take more math and science. On some days [REDACTED] would simply say he wanted to farm, to work at the family store or that he did not want to be a veterinarian. When told how much education was necessary to become a veterinarian, [REDACTED] responded that he disliked school.

12. During the [REDACTED] year, [REDACTED] family nor [REDACTED] (over [REDACTED] years old) requested reading instruction or tutoring. The addendum for the [REDACTED] IEP called for the following:

- sight-related specialist would attend IEP meeting and service would be provided three days a week thirty minutes a day;
- evaluation by Empowering Therapies for organizational skills;
- hiring of [REDACTED] for the same purpose – organizational skills;
- psycho-educational testing would be paid for by Smith County;
- school psychologist would provide services for self esteem, thirty minutes per week;
- assistive technology provided and in-service training for [REDACTED] teachers for [REDACTED] and organizational.

13. [REDACTED] graduated from [REDACTED] High School in May [REDACTED] with a regular high school diploma. The School System is required to follow special education student who participated in a transition program for five years after graduation. After graduating, [REDACTED] has

not job shadowed, has not applied to college, has not visited any colleges, and has not completed forms for federal assistance to attend college.

14. [REDACTED] Optometrist [REDACTED] did not speak to [REDACTED] classroom teachers during the [REDACTED] school year and did not remember speaking to either Director of Special Education [REDACTED] or special education teacher [REDACTED]. [REDACTED] was unaware that [REDACTED] was scheduled to graduate or whether [REDACTED] qualified as visually impaired under the IDEA.

15. Former school psychologist [REDACTED] testified that at IEP meetings teachers expressed that when homework assignments were completed [REDACTED] made good grades and that [REDACTED] never met the numerical discrepancies on his evaluations for a reading and decoding disability diagnosis. [REDACTED] met the criteria for special education under the learning disability of [REDACTED] IEPs were developed, agreed upon by all parties and implemented to meet [REDACTED] disability of [REDACTED]

16. [REDACTED] mother expressed concern that [REDACTED] would not pass the Gateway examinations. Passage of the Gateway exams is necessary to graduate from high school with a regular diploma. [REDACTED] passed all three of the required Gateway examinations; two at the advanced level.

17. [REDACTED] High School teacher [REDACTED] holds a Masters in Special Education and a Masters in Reading. [REDACTED] tutored [REDACTED] in reading during the spring of the [REDACTED] year and the fall of the [REDACTED] year to assist [REDACTED] to study and prepare for the Gateway exams. [REDACTED] encouraged [REDACTED] to read more by providing [REDACTED] interesting reading materials. As a result, [REDACTED] passed the Gateway exams with excellent grades. [REDACTED] acknowledged that he scored in the advance category on two out of three of the Gateway Exams.

18. [REDACTED] High School teacher assistant [REDACTED] read the ACT exam to [REDACTED] alleged that [REDACTED] helped him with the answers by using voice inflection to suggest a correct answer. [REDACTED] made a score of [REDACTED] in the ACT exam. Neither [REDACTED] nor any family member challenged the ACT score. [REDACTED] credibly testified that the answers were not provided to [REDACTED] during ACT Exam.

19. [REDACTED] graduated from [REDACTED] High School in May [REDACTED] with a regular high school diploma.

20. [REDACTED] had not applied for admission to college as of June [REDACTED]

CONCLUSIONS OF LAW

1. It is CONCLUDED that Petitioner failed to meet its required burden of proof necessary to show that compensatory education services including, but not limited to, courses of study, books, one-on-one tutoring, computer training, transportation and other services necessary to assist Petitioner in reaching his goal of graduating from college is justified in this matter. Petitioner earned and received a regular high school diploma in May [REDACTED]. Respondent Smith County School System is not required to provide Petitioner with compensatory education services at the collegiate level because [REDACTED] earned and received a regular high school diploma. Respondent Smith County School System provided [REDACTED] a free appropriate public education.

2. C.F.R. § 300.17 Free appropriate public education of the IDEA states as follows:

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 (EP) that meets the requirements of §300.320 through 300.324.

3. When determining whether a free appropriate public education has been provided to a certifiably disabled student, the inquiry under the Individuals with Disabilities Education Act (IDEA) is two-fold:

First, has the state complied with the procedure set forth in the Act; and, **Second**, is the IEP developed through the Act's procedures reasonably calculated to enable a child to receive educational benefit. Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). Once the school district has met these two requirements, the courts cannot require more. The purpose of the IDEA is to open the door to handicap children, not to educate a handicapped child to her highest potential. K.T. v. Elmhurst Community School District, 2002WL433061. Moreover, the IDEA requires the educational equivalent of a serviceable Chevrolet to every handicapped student, not a Cadillac solely for appellant's use. Doe v. Board of Education of Tullahoma City Schools, et al, 9 F.3d 455, 459, 460. "Be that as it may, we hold that the board is not required to provide a Cadillac, and that the proposed IEP is reasonably calculated to provide educational benefits to appellant and is therefore, in compliance of the IDEA." Id.

4. It is CONCLUDED that Respondent Smith County School System complied with the procedure set forth in the Act. During [REDACTED] high school career at [REDACTED] High School, the School System did not contest [REDACTED] eligibility for special education services. Upon entering high school, [REDACTED] parents presented a statement from a medical doctor to Respondent diagnosing [REDACTED] with [REDACTED]. The [REDACTED] diagnosis was the initial requirement for Respondent to provide special education services that was reasonably calculated to enable [REDACTED] to receive educational benefit. IEPs were developed, implemented and consistently agreed upon by the parents and the School System. [REDACTED] was provided special education services based on the original [REDACTED] diagnosis and the services continued until a new diagnosis was presented during

the development of the [REDACTED] IEP. After the [REDACTED] IEP was drafted, [REDACTED] power of attorney presented the School System with an assessment stating that [REDACTED] was eligible for IDEA services pursuant the new diagnosis of [REDACTED]. This was the first claim by [REDACTED] parents, lawyer or education specialist that [REDACTED] did not qualify under other health impaired condition of [REDACTED]. Respondent did not object to the [REDACTED] diagnosis. Respondent met with [REDACTED] power of attorney and her attorney to develop an IEP for [REDACTED] year based on the [REDACTED] diagnosis.

5. It is CONCLUDED that Respondent developed and implemented IEPs compliant with the Act's procedures that were reasonably calculated to enable Petitioner to receive educational benefit. [REDACTED] attained educational benefit from Respondent Smith County School System. [REDACTED] in fact earned and received a regular high school diploma in May [REDACTED] earning and receiving a regular high school diploma is uncontested.

6. C.F.R. § 300.102(a)(3)(i) of the IDEA states as follows:

The obligation to make FAPE available to all children with disabilities does not apply with respect to the following:

Children with disabilities who have graduated from high school with a regular high school diploma.

7. It is CONCLUDED that Petitioner failed to meet the required burden of proof necessary to show that Respondent Smith County School System failed to make a free appropriate public education available to Petitioner [REDACTED] lawfully graduated from [REDACTED] High School with a regular high school diploma. Smith County School System provided [REDACTED] educational benefit while attending [REDACTED] High School. [REDACTED] scored a [REDACTED] on the ACT exam. The ACT exam was orally administered by teacher assistant [REDACTED]. Although [REDACTED] claims that [REDACTED] provided assistance by voice inflection, [REDACTED]

clearly denied the allegation and the allegation is discredited. [REDACTED] passed all three of the required Gateway examinations necessary to graduate with a regular high school diploma. Two of the Gateway examinations were passed with an “advanced” score. [REDACTED] successfully fulfilled all the requirements of the State of Tennessee and the Smith County School System to receive a regular high school diploma. [REDACTED] successfully progressed through each grade.

8. It is CONCLUDED that Petitioner received a regular high school diploma negating the necessity of FAPE.

9. C.F.R. § 300.507 under the IDEA states as follows:

(a) general.

(1) a parent or public agency may file a due process complaint on any of the matters described in Section 200.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child).

(2) the due process complaint must allege a violation that occurred not more than two years before the date the parent of public agency knew or should have known about the alleged action that forms the basis for the due process complaint or, if the state has an explicit time limitation for filing a due process complaint under this part in the time allowed by that state law, except that the exceptions to the time line described in Section 300.511(f) apply to the timeline in this Section.

10. Section 300.511(e) and (f) sets out a two-year time period for filing a due process complaint unless the local educational agency knowing misrepresented the issues to Petitioner or withheld information from the Petitioner.

11. It is CONCLUDED that Respondent did not violate Section 300.511(e) and (f). Petitioner failed meet its burden to show that Respondent knowing made misrepresentations to or withheld information from Petitioner.

12. It is CONCLUDED that because Petitioner failed to meet the requirements of Sections 300.507 and 300.511(e) and (f) it is necessary to only consider the last two years of [REDACTED] high school career at [REDACTED] High School.

13. It is CONCLUDED that the appropriate required services for [REDACTED] was tutoring and monitoring by special education specialists. [REDACTED] passed all three of the required Gateway examinations necessary to graduate high school. Two of the Gateway examinations were passed with an “advanced” score. [REDACTED] fulfilled all the requirements of the State of Tennessee and the Smith County School System necessary to receive a regular high school diploma. Although [REDACTED] desired to go to college and become a veterinarian, the record is clear that [REDACTED] also wanted to take advantage of the transition program at [REDACTED] High School and leave school at 11:00 a.m. daily to work the remainder of the school day. [REDACTED] wanted to “enjoy my senior year.” [REDACTED] was encouraged to take additional science and math to enhance his prospects of a college education and the pursuit of a degree as a veterinarian. [REDACTED] parents agreed to [REDACTED] participation in the transition program. [REDACTED] power of attorney/grandmother was amenable to the suggestion of more science and math until she and [REDACTED] stepped outside the meeting and return to announced that [REDACTED] would be in the transition program.

14. 20 USCA 1415(I) (3) (B) which states as follows:

Award of attorney’s fees

(i) in general any action or proceeding brought under this section, the court, in its discretion, may award a reasonable attorney’s fees as part of the costs –

(II) to a prevailing party, who is a State educational agency or local educational agency against the attorney of a parent who files a complaint or a subsequent cause of action which is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(III) to a prevailing State educational agency or local educational agency against the attorney of a parent or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

15. It is CONCLUDED that awarding of attorney's fees in this case is left to the discretion of a court, not to an administrative law judge.

16. It is CONCLUDED that that Respondent Smith County School System provided FAPE to Petitioner.

17. It is CONCLUDED that that Petitioner earned and received a regular high school diploma from Respondent Smith County School System in May [REDACTED]

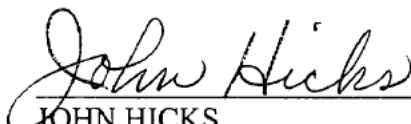
18. It is CONCLUDED that Respondent Smith County School System is not required to provide compensatory educational services to Petitioner at the collegiate level based on [REDACTED] earning a regular high school diploma at Smith County High School in May [REDACTED]

19. IT IS ORDERED that Respondent Smith County School System is the prevailing party in this matter

20. IT IS ORDERED that Respondent Smith County School System is not required to provide Petitioner compensatory education services at the collegiate level based on of Petitioner earning and receiving a regular high school diploma.

21. IT IS ORDERED that this matter is DISMISSED.

Entered this the 3rd day of December, 2008.



JOHN HICKS
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE

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.