

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

IN THE MATTER OF:

**PARENT, individually; and [REDACTED] a minor,
individually, by and through his Parent
and next friend, PARENT,**

Petitioners,

v.

**WILSON COUNTY BOARD
OF EDUCATION,**

Respondent.

CLOSED HEARING

FINAL ORDER COVER SHEET

**William Jay Reynolds
Administrative Judge**

FOR THE PETITIONER:

[REDACTED]

FOR THE RESPONDENT:

[REDACTED]

For purposes of confidentiality, all references to the child/ student shall be to [REDACTED]; and references to the Local Education Agency shall be to "LEA." The Recipient should tear away and destroy this cover sheet to protect the identity of the participants and redact any references that might tend to reveal the names and identification of the minor.

FINAL ORDER

THIS CONTESTED MATTER came to be heard on the [REDACTED] and [REDACTED] day of [REDACTED] 2008 before William Jay Reynolds, Administrative Judge, sitting for the Commissioner of Education. [REDACTED] Esquire, from Brentwood, Tennessee, represented the minor petitioner (hereinafter [REDACTED]). [REDACTED] Esquire, from Lebanon, Tennessee, represented the local education agency (hereinafter "LEA"). The hearing was held at the Board of Education Building in the Commissioners Conference Room.

The Subject of this hearing whether the LEA appropriately applied [REDACTED] behavioral intervention plan (BIP) in [REDACTED]

ISSUES PRESENTED

1. What special duties are owed by School Resource Officer [REDACTED] to [REDACTED]? What obligation did SRO [REDACTED] have to be familiar with the Behavior Intervention Plan of S?
2. [REDACTED]
3. What is the responsibility of a SRO in his duty to maintain the public health, safety and welfare when it conflicts with, or is not covered by, the Behavior Intervention Plan?
4. Were the terms of [REDACTED] IEP and BIP breached by the actions of SRO [REDACTED] and/or [REDACTED]?
5. Is the school system providing a free appropriate public education (FAPE) to [REDACTED]
 - (a) Does [REDACTED] placement with the LEA system, and

the program provided through his IEP, comply with the requirement that he be educated in the "least restrictive environment"?

(b) Does it comply with the requirement of "mainstreaming"?

6. Should [REDACTED] IEP be reformed to include placement at [REDACTED] [REDACTED]?

PROPOSED FINDINGS OF FACT

1. [REDACTED] was born in [REDACTED]. Parent first met him in [REDACTED], when he was [REDACTED] years old.
 2. At the time Parent met [REDACTED] he was living in a locked residential [REDACTED] setting for younger children.
 3. [REDACTED]
 - PARENT officially adopted [REDACTED] on [REDACTED]
 5. In [REDACTED], [REDACTED] and PARENT moved from [REDACTED]. In late [REDACTED] they moved from [REDACTED] to Tennessee.
 6. In August, [REDACTED], PARENT and [REDACTED] went to their home school in [REDACTED] County, Tennessee.
 7. PARENT had no complaints with the LEA complying with any statutory time requirements.
 8. [REDACTED] was first placed at Middle School in a program called PAES. After about a month, he was transferred to an Elementary School within the system.
- [REDACTED]

11. In [REDACTED] after an IEP team meeting, it was determined that [REDACTED] would attend [REDACTED] Academy in [REDACTED] Tennessee.

12. [REDACTED] continued to have behavioral problems at [REDACTED] Academy and was suspended one (1) day for attacking another child.

13. In [REDACTED] an IEP meeting was conducted. An IEP plan was developed dated [REDACTED]

14. The PARENT did not agree with the terms of the [REDACTED] IEP plan.

15. In the summer of [REDACTED], [REDACTED] was hospitalized again at a [REDACTED]

16. In [REDACTED] went to [REDACTED] in [REDACTED] Tennessee.

17. On [REDACTED] PARENT was advised by representatives of [REDACTED] that they were "looking at discharge" for [REDACTED]

18. [REDACTED] was discharged from [REDACTED] in March, [REDACTED]

19. An IEP meeting was held on [REDACTED] to begin school services.

20. An IEP and Behavior Intervention Plan were developed at the meeting on [REDACTED]

21. [REDACTED] was released from [REDACTED] on [REDACTED]. He began attending school at a Middle School in [REDACTED] County, Tennessee on the following Monday, [REDACTED]

22. When [REDACTED] came back to the LEA system on [REDACTED] his teacher was [REDACTED]

[REDACTED] There were two (2) aides to the class, [REDACTED] and [REDACTED]. There were no more than nine (9) children in the class and [REDACTED] thinks there were only six (6) students.

23. On [REDACTED] went with his class on a field trip to the [REDACTED]

[REDACTED] in [REDACTED] Tennessee. There were problems on the field trip.

25. The PARENT requested an IEP meeting which was held on [REDACTED]

26. On [REDACTED] PARENT received a telephone call from Assistant Principal [REDACTED] advising that [REDACTED] had been disruptive at school that morning and had been transported to the [REDACTED] Jail.

27. At the IEP meeting on [REDACTED] PARENT was angry and referred to the [REDACTED]

County Board of Education employees as "[REDACTED]"

28. At the [REDACTED] IEP meeting, the PARENT asked for [REDACTED] to return to [REDACTED]

that the LEA provides transportation to and from the [REDACTED]

[REDACTED] and that a one-on-one aide be provided to him at [REDACTED]

[REDACTED] The school system denied all three requests.

29. There are no regular education students at [REDACTED]

30. [REDACTED] returned to Middle School in [REDACTED] after his two day suspension was served,

to [REDACTED] class where [REDACTED] was an aide, and finished out the [REDACTED]

[REDACTED] school year at Middle School without any further incidents.

31. [REDACTED] is an Education Assistant in a Behavior Modification classroom employed by the [REDACTED] County Board of Education and has been since [REDACTED]

32. [REDACTED] provided summer services to [REDACTED] during the summer of [REDACTED]. He has a college degree in Physical Education.

33. During the [REDACTED] school year, [REDACTED] has attended High School where there has not been any incidents of physical aggression or anything that required an intervention.

34. The PARENT believes there are actions [REDACTED] could take that would justify a police officer having to take him into custody, such as: bringing a gun, knife, or drugs to school. She would expect the SRO (School Resource Officer) to enforce the full extent of the law towards [REDACTED] just like any other student. SROs are important to the safety of a school environment.

35. There would be a set of facts that could exist that would justify a police officer, be it a School Resource Officer, or a police officer on the street, or a Metro officer called to the scene, that would justify them taking legal action and taking [REDACTED] into custody.

36. The Behavior Intervention Plan (BIP) developed as a part of the [REDACTED], [REDACTED] IEP was developed without information from [REDACTED] information which had been requested by the [REDACTED] County Special Education Department, but never received, and the PARENT did not sign a written release to get that information.

37. The "Critical Anecdotal" were discipline records of [REDACTED] at [REDACTED] Academy, the name of the school at [REDACTED] and were not available to the LEA system at the time the Behavior Intervention Plan was developed on [REDACTED]

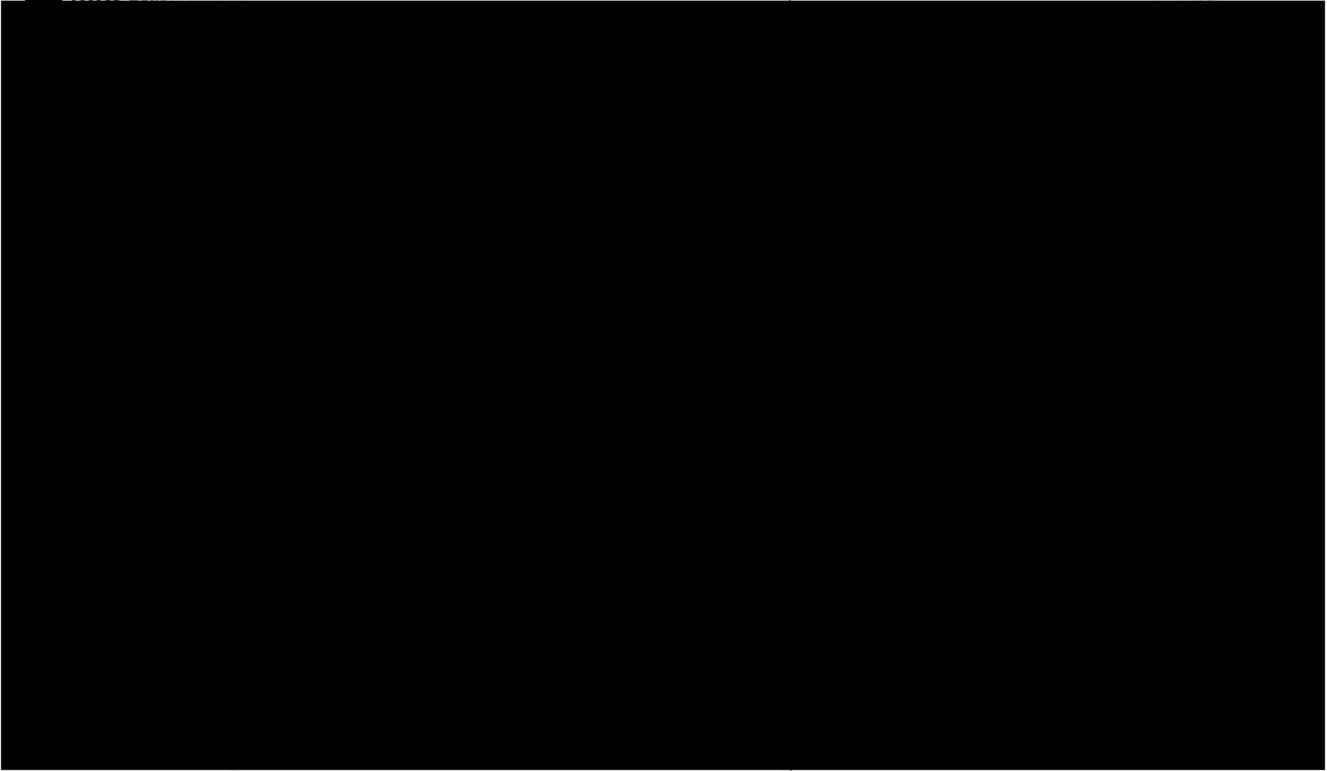
38. The Behavior Intervention Plan does not address what would happen if a student or staff member was in fear of safety of someone being harmed, be it another student, or staff member.

39. At the [REDACTED] IEP meeting, Director of Special Education [REDACTED] and others with the Special Education Department, advised PARENT that they had only had [REDACTED] with them "a couple of weeks" and they had not had enough time to implement their program and to see if it could be successful.

40. The PARENT testified that [REDACTED] was "dramatically improved" from his treatment at [REDACTED].

41. [REDACTED] has been a Teacher's Aide for two (2) years in the Behavior class at Middle School and was in his first year as the Teacher's Aide in the Behavior class at High School.

42. The LEA provided Heath Springer with specialized training prior to his working with [REDACTED]. Additionally, he was made aware of the accommodations necessary for [REDACTED] and familiarized himself with [REDACTED] IEP and his disabilities.



48. [REDACTED] asked School Resource Officer [REDACTED] what he needed to do with regard to documenting the Frist incident because he didn't want to press charges but he did want to make sure that he had documentation of what happened.

[REDACTED]

[REDACTED]

[REDACTED]

54. [REDACTED] has been trained in, and is certified in, Therapeutic Crisis Intervention and the "Handle with Care" programs.

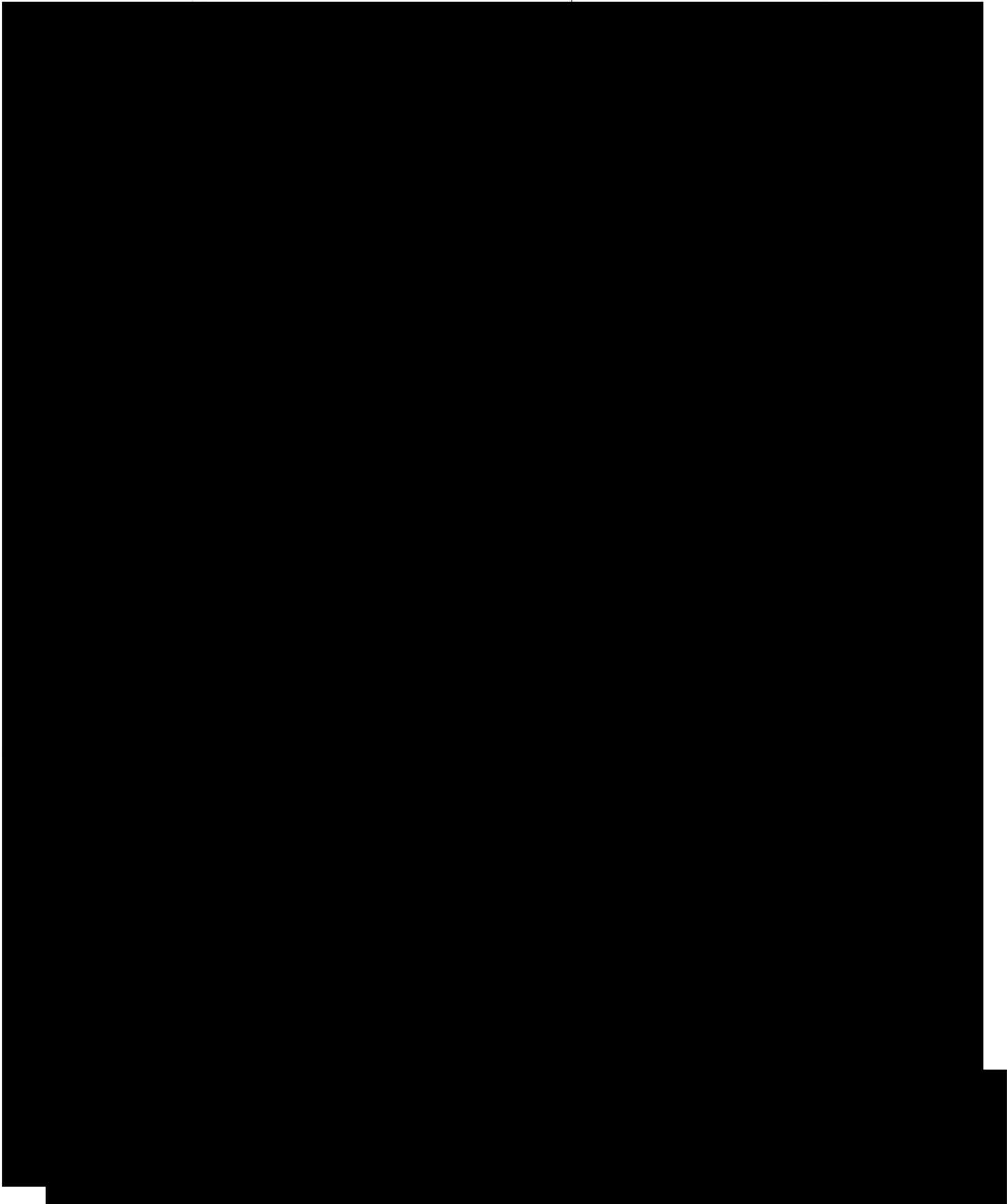
55. [REDACTED] has never been told by the LEA that he needs to have someone arrested.

56. [REDACTED] followed the Behavior Intervention Plan for [REDACTED] during the [REDACTED] and [REDACTED] incidents.

57. During school year [REDACTED] for [REDACTED] is an aide at the High School. The teacher is [REDACTED] and there are two (2) other aides, [REDACTED] and [REDACTED]. [REDACTED] spends most of his time with [REDACTED].

58. [REDACTED] has improved since [REDACTED] both in his educational and behavioral components.

59. It is essential for [REDACTED] to continue his interaction, as much as possible, with regular education students at High School; and that he learn to deal with different situations to prepare him for as much independence as is possible.



swing and hit Coach [REDACTED] and kicked [REDACTED]. At that time, SRO [REDACTED] placed [REDACTED] under arrest.

69. SRO [REDACTED] felt that for the safety and security of [REDACTED] and other students at school, the decision to take [REDACTED] into custody to get him away from the environment was the best decision under the circumstances.

70. SRO [REDACTED] works for the [REDACTED] Tennessee, not the school system, and it his responsibility, on the school grounds to which he is assigned, for whatever happens there. Nobody at the school "tells me who I can and cannot arrest".

71. After the [REDACTED] incident, SRO [REDACTED] has had no more problems with

72. [REDACTED] was a Special Education Program Coordinator for the LEA system. She has been employed by the [REDACTED] County Board of Education for [REDACTED]

73. During that period of time, she has been a Special Education teacher and a speech language therapist. She has graduate degrees from [REDACTED]

74. [REDACTED] disabilities include,

75. The provision of a one-on-one aide for [REDACTED] to be used exclusively at [REDACTED] was not prohibitively expensive for the [REDACTED] County Board of Education.

76. [REDACTED] current educational program gives him mainstreaming, in the least restrictive environment, with access to general education peers.

77. No specific decision had been made by the LEA in regard to providing a one-on-one aide at the [REDACTED] Academy prior to the [REDACTED] or [REDACTED] IEP meetings.

78. In [REDACTED] [REDACTED] years as a Special Education teacher, she has not taught emotionally disturbed children. She was not present on [REDACTED] and [REDACTED].

79. On [REDACTED] six (6) days after the act occurred, the manifestation determination was made at the IEP meeting.

80. [REDACTED] met [REDACTED] during the fall of [REDACTED]. When she first started teaching him, he was very excited, talkative, and worked in areas of behavior. Those areas included personal space, manners, and moving throughout the classroom without permission. Violent outbursts were a problem.

81. In [REDACTED] [REDACTED] never hurt or caused injury to himself or to other students.

82. [REDACTED] was in her [REDACTED] year of teaching with a certification as a Special Education teacher. She was a graduate of [REDACTED] with a double major in Education allowing her to teach K-8th grade students. She also has a Comprehensive Special Education degree that allows her to teach K-12th grade children from the spectrum of services that are involved with Special Education from mild to profound disabilities. Before teaching with the LEA system, she had prior experience with schools in [REDACTED] County, Tennessee and [REDACTED].

83. [REDACTED] worked with [REDACTED] one-on-one, during the summer of [REDACTED] extended school year. She had one (1) physical altercation with him at that time.

84. On [REDACTED] while on the field trip to the [REDACTED] got very upset, trying to touch paintings and statues. [REDACTED] and her aides, attempted to deescalate the situation consistent with the terms of the Behavior Intervention Plan.

85. Before the bus left the [REDACTED], [REDACTED] and [REDACTED] did deescalate [REDACTED]

[REDACTED]

87. [REDACTED] and [REDACTED] complied with the Behavior Intervention Plan when dealing with [REDACTED] on [REDACTED] [REDACTED] behavior did escalate and go beyond the boundaries considered in the Behavior Intervention Plan. The interventions used in the [REDACTED] incident did not work.

[REDACTED]

89. Daily goal sheets are prepared by [REDACTED] for each student, including [REDACTED]. After [REDACTED] returned, from out-of-school suspension on [REDACTED]; and an absence on [REDACTED] he met his goal every day from [REDACTED] through [REDACTED]. During the month [REDACTED] his goals were increased from 60% to 70%.

90. After [REDACTED], when [REDACTED] met his goals substantially, he had unexcused absences 8 out of the next 10 days.

91. [REDACTED] was present in the LEA system during school year [REDACTED] for [REDACTED] days and was absent approximately [REDACTED] of that time.

92. [REDACTED] was the Supervisor of Special Education for the LEA, having served in that capacity for [REDACTED] years. She has worked for the LEA system for [REDACTED]. She obtained a Master's Degree as an Educational Specialist as a School Psychologist and was subsequently employed by the [REDACTED] County Board of Education as a School Psychologist in [REDACTED].

93. [REDACTED] actions on [REDACTED] were a manifestation of his disabilities.

94. School Resource Officers are not ordinarily included as a person with a "need to know," as designed by the provisions of the IDEA, because of the confidential information related to each child.

95. The [REDACTED] IEP and BIP did not distinguish between in-school interventions and initiating juvenile proceedings; the [REDACTED] revision of the BIP, revised with the input of [REDACTED] of [REDACTED], who prepared a functional assessment report dated [REDACTED] likewise does not include any attempt at making the dichotomy.

96. [REDACTED] in her experience, had not seen an IEP that included such a definition or threshold.

97. The LEA had several behavior intervention classes in the County, at the elementary, middle school and high school. The LEA had a variety of services available to avoid contracting with private agencies, to wit they have no control.

98. The "least restrictive environment" is a requirement of the IDEA. A child is to be educated in the least restrictive environment preferably with their same age peers in their zoned home school in a public education.

99. The most restrictive environment is a private placement outside of the zoned school.

100. A Functional Assessment Report was prepared by [REDACTED] of [REDACTED]. [REDACTED] She was requested to provide assistance in developing [REDACTED] education and behavior intervention plan. The report reveals the Behavior Intervention Plan was developed on [REDACTED]. It was based on observations made in mid-to-late [REDACTED] a Parent interview, and documentation from previous placements. Prior to [REDACTED] arrival at school, the Middle School was not authorized to receive behavior management information from the residential treatment program. The absence of information made it difficult for school personnel to develop an effective behavior intervention plan.

101. The Functional Assessment Report noted that the BIP recommended a placement in a behavior intervention classroom with the school making further modifications to the learning environment by adding a ground level room with a one-on-one staffing to be [REDACTED] level plan. The room would double as a quad room when [REDACTED] needs a less stimulating environment to work on his assignments.

102. The Functional Assessment Report of [REDACTED] makes eight "additional recommendations" for [REDACTED] education. The LEA system is complying with each of these recommendations.

103. [REDACTED] teachers this year at High School are [REDACTED] in his Behavior Intervention class, and [REDACTED] is the teacher that does the other CDC class.

104. When the school system did send [REDACTED] to the [REDACTED] Academy, the school system first offered the Middle School services, but the PARENT wanted [REDACTED] placed at [REDACTED]. The LEA knew [REDACTED] was fragile and they determined to work with him and to

try this until [REDACTED] could get stabilized. The plan was, when [REDACTED] became stabilized, he would be brought back to [REDACTED] County to be educated at Middle School.

105. [REDACTED] condition is different from that point.

106. No one from [REDACTED] testified for the Petitioners that

[REDACTED] can provide a better program than [REDACTED] County or that

[REDACTED] County's program is not appropriate for [REDACTED]

107. [REDACTED] is a teacher in the LEA system and has been for [REDACTED] years. She received her Special Education degree from [REDACTED]

[REDACTED]

[REDACTED]

110. [REDACTED] was satisfied that [REDACTED] was progressing toward his IEP goals for school year [REDACTED]

111. In [REDACTED] classroom, [REDACTED] has interaction every day with regular education students in a class called "Nature and Needs". He interacts with peer tutors that come in during the four classes every day and they interact with model behavior and activities and help the students with their work.

112. [REDACTED] believed the program being provided for [REDACTED] was appropriate

for him and recommended he continue on the LEA program.

114. [REDACTED] was the behavior teacher at High School. This was the first year she had been in that position. She had taught for [REDACTED]. The other year she taught was at the [REDACTED] in Nashville, Tennessee.

115. [REDACTED] had a Bachelors Degree in Therapeutic Recreation and was obtaining her Masters Degree in Special Education.

117. Her classroom, as well as that of [REDACTED], was age appropriate for

S.

118. [REDACTED] first met [REDACTED] at the "[REDACTED]" Day Camp [REDACTED] years ago.

In her class, S had made progress.

119. As opposed to two years ago, [REDACTED] social skills were developing well and he talked appropriately.

120. [REDACTED] was doing wonderful in her class this year. She had not had any big incidents with him and has had no incidents of aggression. There were no major problems with [REDACTED]

121. While she has three (3) aides in her classroom, [REDACTED] spends most of his time with [REDACTED]

122. [REDACTED] has had training in both Therapeutic Crisis Intervention and "Handle with Care."

123. [REDACTED] uses the "Handle with Care" program which involves two hours of training the first time; and three hours the second time.

124. While teaching at the [REDACTED] during the [REDACTED] school year, [REDACTED] personally observed the Metropolitan Nashville Police Department being called to [REDACTED] on three (3) specific times, two of which were for her class.

125. One of those incidents at [REDACTED] involved a male student punching [REDACTED] assistant in the face.

126. The programs being provided at [REDACTED] High School for [REDACTED] were appropriate.

127. [REDACTED] was responding favorably in the Wilson County program and progressing.

[REDACTED]

129. Students eligible for services at [REDACTED] for the most part, were students who had emotional or behavioral issues that prohibited them from being successful in a less restrictive setting, e.g. a public school resource room or regular education classroom.

130. [REDACTED] did not have a law enforcement officer, or SRO, on site but, if needed, they would call the Metro Nashville Police Department. Examples of calls were because illegal contraband had been found in a student's possession and a student had deliberately assaulted or hit another student.

131. That could happen two or three times per year at [REDACTED]. The police would be called to deal with a specific incident which has escalated above and beyond the child's behavior intervention plan.

132. A one-on-one individual hired specifically to work with a student at [REDACTED]

[REDACTED] is more the exception than the rule.

CONCLUSIONS OF LAW

The Court considered the following legal authorities and precedents in making a determination in this cause:

The United States Supreme Court has recently reaffirmed that the "burden of proof, in an administrative hearing challenging an IEP, is properly placed upon the party seeking relief". Schaffer v. Weast, 546 U.S. 49, 44 IDELR 150 (2005). A party challenging an IEP or compliance with the IDEA has the burden of proving by a preponderance of the evidence that the IEP devised by the school district is inappropriate or is otherwise non-compliant. *Kings Local Sch. Dist. Bd. of Educ. v. Zelzany*, 325 F.3d 724, 729 (6th Cir. 2003); *Burilovich ex rel. Burilovich v. Bd. of Educ. of the Lincoln Consol. Schs.*, 208 F.3d 560, 567 (6th Cir. 2000); *Dong ex rel. Dong v. Bd. of Educ. of the Rochester Community Schs.*, 197 F.3d 793, 799 (6th Cir. 1999); *Johnson v. Metro*

Davidson County Sch. Syst., 108 F.Supp.2d 906, 914 (M.D. Tenn. 2000). Thus the burden of proof at all times in this matter remained on the Petitioners.

Assessing a school district's liability under the IDEA involves a two-pronged procedural/substantive inquiry: First, whether the school district complied with the procedures set forth in the IDEA? *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982); *McLaughlin v. Holt Pub. Sch. Bd. of Educ.*, 320 F.3d 663, 669 (6th Cir. 2003); *Burilovich*, 208 F.3d at 565. When considering procedural matters, a reviewing authority "should 'strictly review technical deviations for procedural compliance.'" *Johnson*, 108 F.Supp.2d at 913 (quoting *Burilovich*, 208 F.3d at 565).

Second, has the school district fulfilled its duty to provide the special education student with a FAPE? *Rowley*, 458 U.S. at 206-07; *McLaughlin*, 320 F.3d at 669; *Burilovich*, 208 F.3d at 565. If a school district violates a procedural requirement under the first inquiry, the violation must nonetheless result in substantive harm—and thus constitute denial of a FAPE—under the second prong for liability to attach. *Rowley*, 458 U.S. at 208; *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 854, 859 (6th Cir. 2005) (citing *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 764 (6th Cir. 2001), *reh'g en banc denied*, April 5, 2005); *see Babb v. Knox County Sch. Sys.*, 965 F.2d 104, 109 (6th Cir. 1992) (procedural violations that deprive an eligible student of an individualized education program or result in the loss of educational opportunity constitute a denial of FAPE). When the sufficiency of or compliance with the terms of an IEP do not implicate procedural violations, reviewing authorities advance directly to the second, substantive inquiry. *Johnson*, 208 S.Supp.2d at 913.

1. What special duties are owed by School Resource Officer [REDACTED] to [REDACTED] What obligation did SRO [REDACTED] have to be familiar with the Behavioral Intervention Plan of [REDACTED]

[REDACTED] was the School Resource Officer serving at the Middle School during the events of [REDACTED] and [REDACTED]. *Tennessee Code Annotated*, § 49-6-4202 (6) defines a School Resource Officer as a "law enforcement officer, as defined under Section 39-11-106, who is in compliance with all laws, rules and regulations of the Peace Officers Standards and Training Commission and who has been assigned to a school in accordance with a Memorandum of Understanding between the Chief of the appropriate law enforcement agency and the LEA".

[REDACTED] testified that he was assigned to the Middle School pursuant to an agreement between the LEA system and the [REDACTED]. He further testified that he was "post-certified" and in compliance with all laws, rules and regulations of that organization.

"Law enforcement officer" is defined at *Tennessee Code Annotated*, § 39-11-106 (21) as "an officer, employee or agent of government who has a duty imposed by law to: (A) maintain public order; or (B) make arrests for offenses, whether that duty extends to all offenses or limited to specific offenses; and (C) investigate the commission or suspected commission of offenses.

The definition of "law enforcement officer" clearly states that the officer has a "duty imposed by law". One of his duties is to "maintain public order" and it does not differentiate between regular education students or special education students. Likewise, the definition of "School Resource Officer" makes no differentiation between the two.

Clearly, the "law enforcement officer" and by definition, a "School Resource Officer" has a duty, not discretion, to enforce the law. If the SRO has been appropriately placed at the school by an appropriate Memorandum of Understanding as defined in *Tennessee Code Annotated*, §38-8-120, and has met the employment standards for School Resource Officers as defined in *Tennessee Code Annotated*, §49-6-4217, he may enter upon his duties, which include to "maintain public order", "make arrests for offenses", and "investigate the commission or suspected commission of offenses".

Tennessee law does not seem to impose any special duties upon School Resource Officers dealing with special education students.

On May 28, 2008, Governor Bredesen signed into law Public Chapter No. 1063 titled "Special Education Isolation and Restraint Modernization and Positive Behavioral Supports Act". This act is codified at *Tennessee Code Annotated*, §49-10-1301, et seq. Except for the provisions which require the promulgation of rules and regulations, the act shall become effective January 1, 2009. Therefore, the act was not in place, and could not be applicable to, the events of [REDACTED] and [REDACTED].

This act defines "school personnel" as an individual employed on a full time or part time basis by a public school. [REDACTED] was not "school personnel" in his capacity as a SRO, as he was employed at all times by the [REDACTED] [REDACTED] acting under the supervision of [REDACTED] He was assigned to [REDACTED] Middle School by the [REDACTED]

Public Chapter No. 1063, at *Tennessee Code Annotated*, §49-10-1304 (b) (3) (C) codifies what appears to have been the law at all times prior to the adoption of this act:

"A School Resource Officer (SRO) may, upon witnessing an

offense, take the student into custody; however, this option is available only if the SRO was a Deputy Sheriff or police officer fully compensated by a law enforcement agency and not a school official."

This law does not change the existing law. However, it does attempt to provide more specific instruction, and speak to an issue upon which the law is silent, by giving "school personnel" direction about when they may report a suspected crime and when they may file a juvenile petition.

Tennessee Code Annotated, § 49-10-1304(b) (3) (A) gives school personnel the right to report a suspected crime by calling a law enforcement official and at part (B) states school personnel "may file a juvenile petition against a student receiving special education, only after conducting a manifestation determination that results in a determination that the behavior that resulted in the act requiring disciplinary action was not caused by the student's disability".

This portion of the law, which was not effective until January 1, 2009, attempted to clarify the school personnel's options with regard to reporting a suspected crime or filing a juvenile petition. There was no such law in effect on [REDACTED] or [REDACTED] of [REDACTED] and the actions of Special Education Assistant [REDACTED] violated no State or Federal law. In fact, portions of that law, only confirm what is contained at *Tennessee Code Annotated*, § 49-6-4301(a) which provides that "every teacher observing or otherwise having knowledge of an assault or battery or vandalism endangering life, health or safety committed by a student on school property shall report such action immediately to the principal of such school". It goes on to require the principal to report

this information to the municipal or Metropolitan Police Department or Sheriff's Department having jurisdiction.

The action taken by SRO [REDACTED] to advise [REDACTED] of his right to take a charge, or fill out a report, was consistent with State law. That is, [REDACTED] did what was legally authorized.

Finally, nothing in the IDEA, or the subsequent regulations, prohibits reporting a crime or law enforcement exercising their responsibilities. In fact, at 34 CFR § 300.535(a), we find the following:

"Nothing in this part prohibits an agency from reporting a crime committed by a child with a disability to appropriate authorities, or prevents State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State laws to crimes committed by a child with a disability".

If a student with a disability commits a crime, a school district may be permitted to summon law enforcement authorities without providing procedural safeguards. Section 615(k) (6) of the 2004 *Individuals with Disabilities Education Act* (IDEA) states:

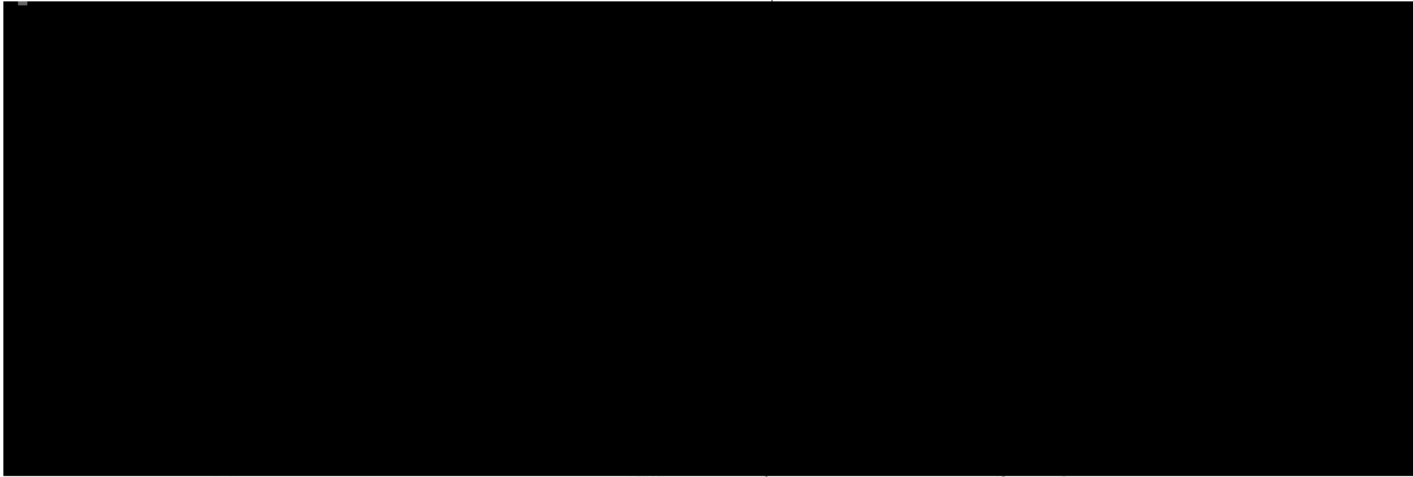
"Nothing in (part B) shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities".

This is consistent with the holding of the hearing officer in *Northside Independent School District*, 28 IDELR 1118 (SEA TX 1998). In that case, a sixteen year old student with a learning disability, an emotional disturbance and other health impairment, cut

another student with a knife during a confrontation after school on or near the campus in the bus area. School officials called the law enforcement authorities and the student was detained by juvenile authorities. He was held in detention from October 29, 1997 to November 19, 1997.

The hearing officer concluded that:

"IDEA does not curtail the authority of law enforcement authorities to arrest and detain a child determined to have committed a crime. IDEA does not prohibit a public school district from reporting a crime committed by a child with disabilities to law enforcement authorities. 20 U.S.C. 1415 (k)(9)(A) It is not necessary for school officials to comply with IDEA's procedural safeguards, including notice and ARD Committee deliberation, before reporting criminal activity committed by a student with a disability. This is so regardless of the child's eligibility classification and regardless of whether the school discipline options were modified in the child's IEP. Making a report that leads to the child's detention by juvenile authorities does not constitute a cessation of services, in the nature of an expulsion, because IDEA requires States to provide appropriate Special Education to all eligible children regardless of their location, including children in State custody. 20 U.S.C. 1412"



3. **What is the responsibility of a SRO in his duty to maintain the public health, safety and welfare when it conflicts with, or is not covered by, the Behavior Intervention Plan?**

When a crisis situation occurs, such has happened here on both [REDACTED] at the [REDACTED], and [REDACTED] in the classroom, every effort should be made to comply with the Behavior Intervention Plan. Clearly, from the testimony presented, every effort was made to comply. The Behavior Intervention Plan in place on [REDACTED] [REDACTED] allowed for "physical interventions when a danger to self/others".

Likewise, on [REDACTED] [REDACTED] and [REDACTED] attempted to comply with the Behavior Intervention Plan but, when unsuccessful, SRO [REDACTED] performed his lawful duty. Interestingly, the Behavior Intervention Plan does not address what should happen when physical interventions by the staff are unsuccessful in resolving a crisis situation.

In Orange County (FL) School District, 101 LRP 1151, the Office of Civil Rights for the Southern Division in Atlanta responded on January 1, 2000 to a complaint alleging that the school district was failing to provide students in the severely emotionally disabled (SED) program a free appropriate public education because it was criminally prosecuting them for behaviors that are a manifestation of their disability.

The Office of Civil Rights, in their ruling, found the district officials stated that the teachers are attempting every intervention they can until a student's behavior escalates to the point of becoming dangerous, threatening or completely out of hand. They utilize behavior specialists, the time management center, calling Parents, etc. The SRO is then called when the student's behavior is criminal and cannot be controlled by the district staff.

The OCR found that the Orange County District had 13 SED students arrested on campus for committing what is listed in the code as a crime such as "battery on a school official/employee". The letter concludes that:

"Based upon the above factual findings, OCR has determined that the evidence is insufficient to indicate that the District is failing to provide SED students an appropriate education by having them criminally prosecuted".

No one can argue that a Behavior Intervention Plan can be designed to cover every conceivable set of facts. Neither can anyone dispute that there are certain instances when the intervention of, and action by, law enforcement officials is appropriate. The Parent testified that there would be specific instances where law enforcement action would be appropriate, both for the safety of teachers and staff, and for her child as a student.

In a crisis situation, every effort must be made to comply with the Behavior Intervention Plan. When the plan does not address the specific facts presented in the crisis situation, and the actions contained in the plan are not successful, then law enforcement must have the right to, and has a duty to, enforce the law.

In *Chester Upland(PA) School District*, 24 IDELR 79, an Office of Civil Rights decision from the Eastern Division of Philadelphia, Pennsylvania dated November 9, 1995, the OCR was presented with a set of facts in which a student was involved in a verbal and physical altercation with another student in the shop area at the school. As a result of the fight, both students involved suffered "bloody" lips. The allegation before the OCR was that the District mistreated the student in its enforcement of disciplinary procedures by failing to implement a behavior management component contained in his Individualized Education Program (IEP).

In concluding that the evidence did not show that the student was discriminated against on the basis of disability, the OCR finds:

"That the actions by school officials in contacting local police did not violate the Section 504 or ADA regulations. Moreover, this action did not violate the letter or spirit of the student's IEP or any behavior

management component to his educational placement in light of the violence and danger in the situation. School officials have a clear and unconditional duty to protect the health and safety of its students and employees and OCR will not disturb that responsibility absent overwhelming and significant evidence of dereliction of duty or subterfuge. Such evidence does not appear in this case."

4. Were the terms of [REDACTED] IEP and BIP breached by the actions of SRO [REDACTED] and/or [REDACTED]?

The BIP included as a part of the [REDACTED] IEP did not address procedure and protocol encompassing the severity of the situations presented on [REDACTED] to [REDACTED] and [REDACTED]; then again, on [REDACTED] to SRO [REDACTED] [REDACTED] and [REDACTED].

The actions taken by those individuals were not in "non-compliance" with the BIP; rather, they were the most reasonable actions that could be taken under the circumstances consistent with the intent of the BIP (on [REDACTED] incident) and with State law and the duty placed upon SRO [REDACTED] (on [REDACTED]).

5. Is the school system providing a free appropriate public education (FAPE) to [REDACTED]?

In the leading case of *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 553 IDELR 656 (1982), the Court determined that the State has a requirement under the EHA, now IDEA, to provide a handicapped child with a "free appropriate public education" (FAPE). The Court went on to hold that the school district would satisfy this requirement "by providing personalized instruction with

sufficient support services to permit the child to benefit educationally from that instruction".

States are not required, under IDEA, to "maximize" the potential of disabled students. *Daugherty v. Hamilton County Schools*, 21 F.Supp.2d 765 (E. D. TN 1998). The U.S. District Court in the *Daugherty* case reaffirms that the "IDEA provides a basic floor of opportunity, consisting of access to specialized institutions and related services individually designed to provided educational benefit to a disabled student, and the standard is satisfied by personalized instruction with sufficient support services to permit the student to benefit educationally therefrom".

The Parent bears the burden of proving by preponderance of the evidence that the IEP devised by the LEA system is inappropriate under the IDEA. See *McLaughlin v. Holt Public Schools Board of Education*, 320 F.3d 663 (6th Cir. 2003).

The Parent did not carry the burden of proof to show the LEA was not providing a free appropriate public education. The only proof put forward by Parent was a preference for [REDACTED] Academy because of the fear the LEA will again bring charges against [REDACTED] by juvenile petition; and the risk of being so charged at [REDACTED] Academy in [REDACTED] Tennessee was much less. Neither is correct. Since [REDACTED] the proof has shown that [REDACTED] has been an exemplary student. While Parent did not produce any proof to support her assertion that [REDACTED] Academy is better for [REDACTED] the deposition of [REDACTED] Executive Director of [REDACTED] Academy, clearly shows that the Metropolitan Police Department was called to the school two or three times a year to deal with assaults or illegal contraband. He testified that, if a child

had struck another child or had an altercation unprovoked, that a juvenile petition would be filed, depending on the case.

The Parent presented no proof to dispute the IEP of [REDACTED] does not provide an educational benefit to her son. The testimony of [REDACTED] from her limited time with [REDACTED] from [REDACTED] to the end of school; the testimony of [REDACTED] as an aide from [REDACTED] to the end of the [REDACTED] school year, the extended school summer services that he provided and the services as an aide to [REDACTED] at High School during the current school year; the testimony of Educational Specialist [REDACTED], Special Education Director [REDACTED] and current teachers [REDACTED] and [REDACTED] all show that [REDACTED] is: receiving an educational benefit and is reaching, or within reach, of his educational goals described in the IEP, is being served in an age appropriate classroom, and is being served in a small classroom [REDACTED] with a teacher and three aides.

The Parent attempted to show a procedural violation of [REDACTED] IEP. Both [REDACTED] and [REDACTED] testified the decision was made in the IEP meeting, with input from Parent. They did discuss options outside the meeting, and this is not prohibited as shown in the case of *N.L. v. Knox County Schools*, 38 IDELR 62 (6th Cir. 2003). There, the 6th Circuit Court found no harm to the Parent resulting from the discussion between the various district experts concerning the child's assessment report. The Court there, as occurred here, found the mother took an active role in the IEP meeting. The Court found that evaluators may prepare reports and come to the meeting with opinions regarding the best course of action for the child, "as long as they are willing to listen to the Parents and the Parents have the opportunity to make objections and suggestions". The holding in

this Knox County Schools case is on point with the set of facts presented to this hearing officer. The Parent did have input into the preparation of each of the IEPs for [REDACTED] County Special Education personnel committed no procedural violation. That is to say, if there were a procedural violation then there was no harm to either the Parent or student.

(a) Does [REDACTED] placement with the LEA system, and the program provided through his IEP, comply with the requirement that he be educated in the "least restrictive environment"?

(b) Does it comply with the requirement of "mainstreaming"?

These issues will be considered together, as it is difficult to address one without the other.

The IDEA mandates educational services are to be provided to students with disabilities in the least restrictive environment under the circumstances. 34 CFR §300.552(d)

And, as the Court notes in the *McLaughlin* case, 220 F.3d 663 (6th Cir. 2003), the requirement that the school system provide a disabled child with the least restrictive environment is a mandate favoring mainstreaming, that is, the education of disabled children alongside non-disabled children to the maximum extent appropriate for the individual child.

From the proof presented, from both sides, the educational program being provided to [REDACTED] by the LEA met the requirements of the IDEA that: 1) to the maximum extent appropriate, the disabled child was educated with children who were not disabled; and 2) [REDACTED] was educated in the least restrictive environment. [REDACTED] and [REDACTED]

██████ testified about the regular education students who come into their classroom to assist special education students. This interaction brings together the able and non disabled to mutually learn one about the other. They testified about the progress being made by ██████ and his relationship with the regular education students. Coach ██████ testified about ██████ advancement in his social skills through his relationships with regular education students. ██████ who taught at ██████ before teaching with the LEA, testified the "peer tutoring" at ██████ consisted of children coming out of other special needs classrooms to tutor the CDC class with the "fragile kids." The description did not appear to be any more appropriate than that offered by the LEA..

6. Should ██████ IEP be reformed to include placement at ██████
██████?

From the proof presented, ██████ was making educational progress under his IEP and placement at High School as a ██████ grade student in the classes of ██████ and ██████. He was placed in the "least restrictive environment" and mainstreamed, as much as possible, with regular education students, both in the educational setting, and in his social skills. He was in an age appropriate classroom, with a smaller student: teacher ratio than offered at the ██████.

There was no proof ██████ would provide a better program than the LEA. It was very clear the Parent wanted ██████ to attend ██████ because she fears ██████ will be arrested again at the behest of the LEA. This is a viable concern, however, it is futile for this tribunal to place a limitation, by Order, to limit a legal right in the maintenance of discipline. There was no persuasive proof

provided that a program at [REDACTED] would be either appropriate or in the best interest of [REDACTED]. At one time, by agreement of the parties, placement for a closed period at the [REDACTED] was appropriate. However, the proof showed [REDACTED] was responding favorably and was progressing in the program at High School. Controls should remain in place wherein [REDACTED] is not a threat of harm to himself or others.

CONCLUSION

Based upon the entire record and the foregoing, it is concluded the Petitioner has failed to carry the burden of proof; and this administrative judge finds in favor of the LEA on the issues presented; and declares the LEA as the prevailing party. Further, it is concluded the LEA shall continue to provide the services of a fully trained aide to assist [REDACTED] in all aspects of his school day, both academic and behavioral; and the LEA shall immediately perform a Functional Behavioral Assessment (FBA) regarding [REDACTED]. The parties are herein ordered to cooperate, release and furnish all documentation, pertinent to [REDACTED] which would conceivably assist in the preparation of the FBA. After the evaluation is complete, the IEP team should convene and modify, adjust, and develop an appropriate and suitable IEP for [REDACTED]. The IEP should include the BIP. The team should anticipate and develop a BIP which encourages implementations of interventions short of police reports and arrest.

DECISION

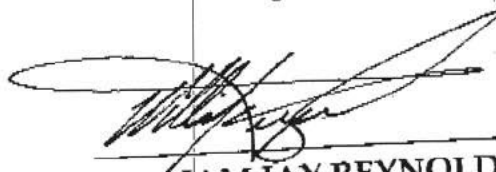
In consideration of the foregoing, the Administrative Judge now issues the following Orders:

1. The Parent's request for placement of [REDACTED] at the [REDACTED] is denied.
2. The LEA shall arrange and pay for a Functional Behavioral Assessment to address the problem behaviors of [REDACTED]
3. On receipt of the assessment, the IEP team shall convene to complete a suitable and appropriate IEP for [REDACTED]
4. The LEA is determined to be the prevailing party.

All other Motions, Petitions, or requests not specifically addressed herein are hereby deemed denied.

ALL OF WHICH IS HEREBY ORDERED, ADJUDGED, AND DECREED.

ORDERED AND ENTERED this 1st day of May 2009.



WILLIAM JAY REYNOLDS
ADMINISTRATIVE JUDGE

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.