

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

IN THE MATTER OF:

█████ the Student, and █████ & █████, the
Student's Parents,

Petitioners,

v.

**RUTHERFORD COUNTY BOARD OF
EDUCATION and RUTHERFORD
COUNTY SCHOOLS,**

Respondents.

Docket No.: ██████████

FINAL ORDER

This matter came on to be heard before Mattielyn B. Williams, Administrative Judge, on
Petitioners' Due Process Complaint (and amendment thereto) over the course of two (2) days,

██████████ and ██████████ The Petitioners were represented by Attorney ██████████.
The Respondents were represented by Attorney ██████████.

In their Second Amended Due Process Complaint, Petitioners sought the following relief:

- (1) that Respondents provide ██████████ with a full-time aide for the entirety of the school day; and
- (2) that Respondents allow ██████████ to be tested via Portfolio testing without having his IQ tested.

Based upon the pleadings, the evidence at trial, the parties' post-trial briefs, the oral arguments of the parties' counsel, and the record in this case, it is **DETERMINED** that the relief sought by the Petitioners should be **GRANTED, IN PART** and **DENIED, IN PART**. This decision is based upon the following findings of fact and conclusions of law:

FINDINGS OF FACT

and the Nature of

1. [REDACTED] is a [REDACTED] year-old child who resides in [REDACTED] Rutherford County, Tennessee. [REDACTED] is an [REDACTED] grader at [REDACTED] Middle School in the Rutherford County School District.

2. [REDACTED] spends a significant portion of his school day in the Comprehensive Development Classroom (CDC). [REDACTED] also goes to Inclusion Science, Social Studies, and specials (including Art and Music).

3. [REDACTED] does not currently have a one-on-one aide during any portion of his school day nor has he had such an aide since the beginning of the [REDACTED] school year.

4. [REDACTED] has always taken the TCAP-Alt Portfolio ("Portfolio") testing during both his time at [REDACTED] as well as previously, during his [REDACTED] years at [REDACTED] Elementary School which is a school in the [REDACTED] School District.

5. At the beginning of the [REDACTED] school year [REDACTED] transferred from [REDACTED] Elementary School in the [REDACTED] Schools District to [REDACTED] Middle School in the Rutherford County Schools District. The transfer was made because [REDACTED] had advanced to the [REDACTED] grade, which is not included within the [REDACTED] Schools System.

6. Near the beginning of the [REDACTED] school year, an IEP meeting was convened to make necessary adjustments regarding the transfer to a different school system.

7. [REDACTED] suffers from a disease known as [REDACTED]. [REDACTED]

[REDACTED]

8. At the hearing in this matter, on [REDACTED], [REDACTED] put on as proof the video deposition of Dr. [REDACTED], a board-certified pediatric neurologist, neuroscientist, and professor at [REDACTED]. Dr. [REDACTED] is a renowned scholar, doctor, and scientist in the field of child neurology; specifically, with respect to [REDACTED]. Dr. [REDACTED] was the founder and director of the [REDACTED] Clinic at the [REDACTED], and he is the founder and director of the [REDACTED] Clinic at [REDACTED]. Over the course of his career, Dr. [REDACTED] has seen and treated hundreds of children suffering from [REDACTED]. Petitioner [REDACTED] is a patient at [REDACTED] Clinic, and Dr. [REDACTED] is [REDACTED]'s neurologist.

9. Dr. [REDACTED] addressed several topics, including, but not limited to: [REDACTED] generally; [REDACTED]'s [REDACTED] specifically and his own diagnoses, observations, and treatment of [REDACTED]'s [REDACTED]; [REDACTED]'s need for a one-on-one aide at school due to his [REDACTED]; a third-party's ability to test [REDACTED]'s IQ; and the effects of IQ and standardized testing on [REDACTED] due to his [REDACTED].

10. Approximately 1 in 6,000 people are born with [REDACTED]. One of the most common manifestations of [REDACTED]. Up to 90 percent of all patients with [REDACTED] will have [REDACTED]

Another very common manifestation of [REDACTED] is developmental issues and disorders, including [REDACTED]

[REDACTED] While some children are diagnosed with [REDACTED] before they are born, the typical [REDACTED] patient is diagnosed within the first year of life after suffering from [REDACTED]

11. Dr. [REDACTED] described the spectrum of severity of [REDACTED]. He stated that a person with the most severe form of [REDACTED]

[REDACTED] A person on the opposite end of the spectrum may not even know he or she has [REDACTED]
[REDACTED]

12. Dr. [REDACTED] testified that, in the spectrum of severity of [REDACTED], [REDACTED] [REDACTED] is on the more severe side of the spectrum.

13. Dr. [REDACTED] described the types of events that trigger [REDACTED] in patients with [REDACTED]. Such events include, but are not limited to: [REDACTED]
[REDACTED]

14. The daily life and activities of a child with a more severe form of [REDACTED] are detrimentally impacted in numerous ways, including, but not limited to: suffering from [REDACTED]
[REDACTED]

15. In the educational/school setting, Dr. [REDACTED] testified that children with severe [REDACTED] are impacted in many ways, including, but not limited to: [REDACTED]
[REDACTED]

[REDACTED] Based on the numerous problems facing a child with severe [REDACTED] in the educational setting, Dr. [REDACTED] continued that having another person (other than the classroom teacher) aiding and assisting the child during the day in the classroom provides a strong educational benefit, including, but not limited to: assisting the child in focusing his or her attention in class, to learn and retain information, and to communicate in the classroom.

Dr. [REDACTED] testified that, without such individualized aide and assistance, a child with severe [REDACTED] like A.M., simply lacks the attention and focus to attend class and learn.

History and Manifestations of [REDACTED]

16. [REDACTED]'s disease manifested itself at a very early age. [REDACTED] was diagnosed with [REDACTED] when he was [REDACTED] and was put on [REDACTED] medication due to the fact that he was suffering [REDACTED]

17. When [REDACTED] suffers a [REDACTED]

[REDACTED]

18. Dr. [REDACTED] began seeing [REDACTED] as a patient in the [REDACTED] Clinic in [REDACTED] when [REDACTED] was [REDACTED] years old. Dr. [REDACTED] sees [REDACTED] for regularly scheduled visits at least once a year in [REDACTED] Clinic, but often more than once per year. Dr. [REDACTED] sees (and has seen) [REDACTED] during [REDACTED] hospitalizations at [REDACTED] Medical Center and also during informal talks and phone calls with [REDACTED] parents. Dr. [REDACTED] has read and studied [REDACTED] EEG and brain wave studies over the years and has intimate knowledge of [REDACTED]'s [REDACTED] and the issues and conditions from which he suffers.

19. Dr. [REDACTED] diagnosed [REDACTED] with [REDACTED]

[REDACTED]

20. With respect to [REDACTED] disorder, per Dr. [REDACTED], [REDACTED] is always at

[REDACTED]

[REDACTED]

22. [REDACTED]'s [REDACTED] significantly affects and obstructs his ability to learn and process information and his memory and attention; [REDACTED]'s [REDACTED] significantly impairs his ability to communicate. Specifically, as mentioned above, [REDACTED] suffers from [REDACTED]

[REDACTED]

23. Based on the severity of [REDACTED] faces a number of dangers on a daily basis both at home and at school, including, but not limited to: [REDACTED]

[REDACTED]

[REDACTED]

Does [REDACTED] Need a One-on-One Aide at School the Full Day?

24. Based upon the severity of [REDACTED]'s [REDACTED], it is necessary for [REDACTED] to have a one-on-one aide at school, per Dr. [REDACTED]. Specifically, Dr. [REDACTED] testified that "having someone to really be closely monitoring [REDACTED] for early signs of [REDACTED] would help keep him out of trouble, could identify the beginning of a long [REDACTED] [and could] seek appropriate medical care sooner rather than later." Dr. [REDACTED] testified that, from an educational perspective, [REDACTED] would benefit from having a one-on-one aide, in that [REDACTED]

[REDACTED] all those interventions that [an] aide can provide to help him maximize his learning potential would be incredibly helpful long term."

25. According to Dr. [REDACTED] having a one-on-one aide would help [REDACTED] to better communicate in the educational setting in that the aide would help reduce [REDACTED]'s [REDACTED] encourage and assist [REDACTED] in communicating on this own, and would also assist others to better understand what [REDACTED] is trying to communicate at school. Dr. [REDACTED] further testified that if [REDACTED] is placed in an inclusion classroom at school without a one-on-one aide, due to his [REDACTED]

[REDACTED] that classroom would be negatively impacted. Dr. [REDACTED] continued that, based on [REDACTED]'s [REDACTED] and other conditions, having a one-on-one aide in the classroom with him would enhance [REDACTED]'s educational experience, enhance his ability to communicate with teachers and other students, and enhance his ability to receive instruction from teachers.

26. However, Dr. [REDACTED] was not familiar with the staffing patterns at [REDACTED] Middle School. Dr. [REDACTED] admitted he did not know where [REDACTED] attended school and was not familiar with the staffing in the classroom or the training provided to school personnel regarding [REDACTED] medical condition. Dr. [REDACTED] commonly makes recommendations for one-on-one assistants for his patients with [REDACTED]. The recommendation was made, here, without any knowledge of the educational setting [REDACTED] was in currently.

27. Respondent put on proof as to how [REDACTED]'s [REDACTED] are quickly recognized and responded to by [REDACTED] staff. School officials testified regarding the specific protocols that are in place for students with [REDACTED]. The protocols are developed after consulting multiple medical resources such as the National Association of School Nurse Guidelines and position papers, Tennessee Association of School Nurses and the American Academy of Pediatrics. The protocols are updated annually and communicated to each school nurse.

28. [REDACTED], the school nursing supervisor, testified that the protocol is written with a focus on managing [REDACTED] and requires calling for help, calling the code blue team to get first responders on the scene, clearing the room of any other people, assisting the student to the floor if necessary, protecting the airway and calling 911 if [REDACTED] lasts more than five minutes.

29. First responders are a group of staff who are trained in American Heart Association first aid and CPR, AED and Epipen use.

30. The school nurse prepares a health plan for students with medical conditions. The health plan for [REDACTED] complies with the applicable protocol and is provided to all school personnel who work with [REDACTED].

31. Nurse [REDACTED] determined from a phone call with Dr. [REDACTED] that his stated reasons for why [REDACTED] needed a one-on-one aide (as specified in a letter Dr. [REDACTED] sent the Petitioner) were insufficient to provide [REDACTED] such an aide.

32. Nurse [REDACTED] did admit that the vast minority of the [REDACTED] students in the Rutherford County School District who have [REDACTED] have not suffered the kinds of [REDACTED] that [REDACTED] has suffered.

33. Testimony from [REDACTED]'s classroom teacher, [REDACTED], revealed that [REDACTED] father was invited to the school to provide additional training regarding [REDACTED] medical conditions and [REDACTED] to relevant staff.

34. [REDACTED] described the size of her classroom, the amount of assistants, and the number of students. She also testified the staff in the classroom move around the classroom during instruction time.

35. [REDACTED] provided a description of [REDACTED] schedule for the typical school day: breakfast, whole group language instruction with the teacher, two educational assistants and sixteen students, inclusion with three students and an educational assistant, whole group lunch, math instruction with the teacher and one other student, PAES lab with five to six students and an educational assistant, inclusion with eight to nine students and an educational assistant. Testimony from Rutherford County Schools' personnel regarding [REDACTED] daily schedule confirms he is receiving both small group instruction and one-on-one instruction.

36. [REDACTED], school principal, felt there was appropriate staff available to handle the seizures and keep the student safe.

37. [REDACTED] indicated that [REDACTED] grader [REDACTED] was making progress toward his IEP goals while at [REDACTED] Middle School. Specifically, he was on a [REDACTED] grade level for word recognition, but below the [REDACTED] grade level for reading comprehension, vocabulary and math.

38. Trial Exhibit [REDACTED] did not include the progress reports for [REDACTED] for the [REDACTED] school year. Oral testimony from [REDACTED] was that there were multiple goals where [REDACTED] was making some progress, some goals that had already been met, and that others he was anticipated to meet by the end of the IEP.

39. [REDACTED] testified [REDACTED] had a vocabulary of approximately 100 to 200 words and these words included all words he needed to communicate his needs during the school day.

40. [REDACTED] continued that [REDACTED] is in an inclusion environment for a period of the school day with one assistant and several other students. During this time, the assistant remains in close physical proximity to the students.

41. [REDACTED] assists in providing the assistant with modified work for [REDACTED] while in the inclusion setting. [REDACTED] testified that [REDACTED] has not had behavior issues at [REDACTED] Middle School.

42. It is **DETERMINED** that the testimony of all school system witnesses, both [REDACTED] and Rutherford County Schools, is consistent regarding [REDACTED] making academic progress towards meeting IEP goals. Their testimony is consistent regarding behavior issues.

43. [REDACTED] testimony that [REDACTED] is improving in math is contradicted by [REDACTED] testimony that, at [REDACTED] Elementary, [REDACTED] was doing much more than the number recognition and correspondence that he is currently doing. [REDACTED] testified that, at [REDACTED] Elementary, [REDACTED]

was already recognizing coins and doing simple subtraction. Trial Exhibit [REDACTED] documents [REDACTED] progress towards recognizing coins and other mathematical goals at [REDACTED] Elementary.

44. [REDACTED] testified [REDACTED] had regressed while at [REDACTED] Middle School and was not meeting his IEP goals. [REDACTED] testified to the great strides in learning and socialization that [REDACTED] was making with an aide in the [REDACTED] School District versus his educational stagnation since entering the Rutherford County School District. Specifically, [REDACTED] testified that [REDACTED] Elementary provided [REDACTED] an aide who walked with him to and from his inclusion classes (Science and Social Studies) and provided individualized instruction to [REDACTED] during such classes during the [REDACTED] school year.

45. The written progress reports from the [REDACTED] school year were not provided the Undersigned.

46. It is **DETERMINED** that [REDACTED] testimony regarding lack of progress and actual regression stands alone. On the other hand, it is unclear why Rutherford County Schools did not produce written progress reports on [REDACTED] to corroborate [REDACTED] testimony. In the absence of such written reports, it is **DETERMINED** that [REDACTED] testimony can not be dismissed.

47. The testimony from all witnesses, with the exception of [REDACTED] and Dr. [REDACTED] indicates the amount of staffing is appropriate to maintain [REDACTED] safety. Although [REDACTED] was concerned about safety, it is **DETERMINED** that [REDACTED] primary concern was about academic progress. Dr. [REDACTED] was not familiar with the staffing patterns or health protocols in the Rutherford County system; therefore Dr. [REDACTED] concern about safety is viewed in that light.

48. It is **DETERMINED** that a specific aide need not be assigned to [REDACTED] for safety reasons.

49. There is no doubt that providing [REDACTED] a one-on-one aide all day would “enhance” his educational experience. However, it is **DETERMINED** that [REDACTED] is entitled to FAPE, not an enhanced experience.

50. Testimony from [REDACTED] personnel indicated [REDACTED] was never assigned a one-on-one assistant while attending in their system. [REDACTED] part-time aide during the [REDACTED] school year. [REDACTED], sat next to [REDACTED] in the inclusion classroom and assisted [REDACTED] individually with his work. [REDACTED] also accompanied [REDACTED] to lunch, recess and specials. Thus, even in [REDACTED], [REDACTED] did not have a full-time aide; the aide only assisted him during his time in the inclusion classroom and in lunch, recess, and specials.

51. Petitioners contend that [REDACTED] made significant strides in his learning and in interacting with his peers due, in large part, to having such an aide prior to starting in the Rutherford County School District in [REDACTED].

52. [REDACTED] testified that [REDACTED] had improved significantly in his communication skills, describing him as coming “out of his shell,” and his reading skills during the [REDACTED] school year. [REDACTED] also testified that [REDACTED] needed her in the inclusion classroom in order for him to achieve his IEP goals. Ms. [REDACTED] testimony is **CREDIBLE**.

53. [REDACTED]s current teacher, [REDACTED], acknowledges that [REDACTED] reading and math skills are on a sub-[REDACTED] grade level.

54. Upon leaving [REDACTED] Elementary, [REDACTED] was reading on [REDACTED] grade level, but now, his reading has diminished. One wonders whether or not the course of [REDACTED] disease has caused this decline or is it the absence of a part-time aide. Since neither party presented evidence of physical decline by [REDACTED], it is **DETERMINED** that [REDACTED] regression is due to the lack of a part-time aide.

55. [REDACTED] need for a one-on-one aide was also suggested by the [REDACTED]

[REDACTED] in a [REDACTED] Assessment in which [REDACTED] of the [REDACTED] recommended that:

"[REDACTED] is in need of intensive individualized instruction if he is to be successful in the academic setting . . . Some level of one to one instruction is recommended to address further his strengths and weaknesses. Small group instruction would also be appropriate if coupled with individual reteaching or reinforcement."

Isolated Incident

56. [REDACTED] and other witnesses testified about a [REDACTED] incident at [REDACTED] in which [REDACTED] suffered a [REDACTED] while standing on the playground at recess. [REDACTED] did not have an aide with him at the time. [REDACTED] Middle School contacted [REDACTED] about the [REDACTED], and [REDACTED] came to the school and saw [REDACTED] in the nurse's office. Prior to that time, no one at [REDACTED], including the nurse, had diagnosed or otherwise taken note of any physical problem with [REDACTED] other than the [REDACTED]. Upon seeing [REDACTED] and spending a very short time with him, [REDACTED] discovered in the nurse's office that [REDACTED] arm was hurting. [REDACTED] expressed to the nurse that she believed [REDACTED] had [REDACTED]

57. It is **DETERMINED** that [REDACTED] lack of attention to [REDACTED] signs and symptoms during this one, isolated incident do not establish that [REDACTED] is receiving substandard safety care.

**Should [REDACTED] be Allowed to Take the Portfolio Test
Without Being Subjected to an IQ Test?**

58. [REDACTED] has been taking the Portfolio testing since [REDACTED] when he started out as a student in the [REDACTED] School district.

59. [REDACTED] was previously given Portfolio testing because of the severity of his needs, specifically because he is a non-verbal child and because his IEP teams at [REDACTED] deemed the Portfolio testing to be the most appropriate way of testing [REDACTED]

60. At an [REDACTED] IEP team meeting at [REDACTED], the school psychologist told [REDACTED] for the first time, that in order to be eligible for Portfolio testing, [REDACTED] would have to take an IQ test.

61. The "Participation Guidelines" section of [REDACTED] IEP specifically state, "[t]he decision for TCAP-Alt PA participation is an IEP Team decision based on the needs of the student. IT IS NOT AN ADMINISTRATIVE DECISION."

62. The IEP team has refused to allow [REDACTED] to take the Portfolio testing, even though the remainder of the IEP team all agreed that [REDACTED] should be taking such testing, due to this IQ testing issue.

63. [REDACTED] is concerned that putting [REDACTED] through the stress of IQ testing could bring about [REDACTED]. Dr. [REDACTED] shares this concern. Although the testing would be more like playing with blocks, as opposed to a standardized exam, it seems that parental stress over the exam would likely be communicated to [REDACTED], directly or indirectly, risking [REDACTED]

64. Dr. [REDACTED] believes that, due to the severity of [REDACTED]'s [REDACTED] and his significant challenges in communicating, it is unlikely that any IQ tests would reveal [REDACTED]'s actual level of intelligence.

65. [REDACTED], [REDACTED] advocate from the ARC of Davidson County, testified that other school districts in the state of Tennessee, including Davidson County, Williamson County, Sumner County and Wilson County, do not require their students to take an IQ test to qualify for Portfolio testing.

66. Witness [REDACTED], of the Tennessee Department of Education, admitted that no federal statute requires an IQ test for alternative testing qualification.

67. [REDACTED] agreed that the IEP specifies that the the question of eligibility for Portfolio testing is an IEP team decision.

CONCLUSIONS OF LAW

1. In order to prevail, the plaintiffs must show, by a preponderance of the evidence, that a one-on-one aide, the full day, and permitting [REDACTED] to take the Portfolio testing without an IQ test are necessary for [REDACTED] to receive FAPE, a free and adequate public education. The standard for appropriateness has been set forth in Board of Education of the Henry Hudson School District v. Rowley 485 U.S. 176 (1982) where the United States Supreme Court determined it was clear Congress had not intended to mean a potential-maximizing education when referring to an appropriate education.

2. It is **CONCLUDED** that the proof does not establish that [REDACTED] needs a one-on-one aide to provide assistance to him throughout the entire school day. [REDACTED] has never had an aide with him the entire school day. With the small class sizes and availability of aides in the classroom, [REDACTED] receives adequate safety protection. Those same aides are available to give [REDACTED] one-on-one instruction.

3. In the past, at [REDACTED] Elementary, [REDACTED] had an aide assigned to him for his inclusion classes, lunch, and specials. [REDACTED] is now in the [REDACTED] grade — [REDACTED]'s reading and math skills are far below grade level. Undoubtedly, [REDACTED] is making some progress toward his IEP goals, without an aide assigned to him. Yet, having an aide for inclusion classes, lunch, and specials seemed to accelerate his progress and not allow regression.

4. Under the Individuals with Disability Education Act ("IDEA"), states must provide disabled children with a free appropriate public education ("FAPE").

5. The second of the two-part inquiry of the FAPE analysis¹ is whether the IEP developed pursuant to the IDEA procedures is "reasonably calculated to enable the child to receive educational benefits."

6. It is **CONCLUDED** that without an educational aide for his inclusion classes and specials, the Respondent has not provided [REDACTED] an IEP that either provides [REDACTED] an educational benefit or is reasonably calculated to do so.

7. Given the large gap between [REDACTED]'s reading and mathematical level and grade level, it is **CONCLUDED** that it is not excessive to require Respondents to provide [REDACTED] an assigned aide for his inclusion classes and specials, rather provision of such is essential for [REDACTED] to achieve FAPE.

8. It is also specifically **CONCLUDED** that having an aide for lunch is not necessary.

9. Without such an aide, [REDACTED] will not only continue to suffer pedagogically and socially, [REDACTED] will not receive an educational benefit.

¹ The first part relates to procedural compliance with IDEA.

10. The Respondent is not allowed to refuse to provide an educational aide due to the costs of such an aide, when Petitioners have demonstrated that [REDACTED] needs a one-on-one aide for inclusion and specials to get an educational benefit from them and, thus, obtain a free appropriate public education.

11. The proof establishes that [REDACTED] should not be subjected to an IQ test in order to determine his eligibility for Portfolio testing for the following reasons:

- a. There is no statutory authority that [REDACTED] must be given an IQ test to so qualify;
- b. [REDACTED]'s IEP team agrees that [REDACTED] should be taking the Portfolio test;
- c. The IEP itself provides that such a decision is an IEP team decision;
- d. Such an IQ test would be unreliable and could cause [REDACTED] to have [REDACTED] and
- e. [REDACTED] does not have the cognitive ability to take the TCAP regardless of the outcome of any IQ test.

12. Based on the all of the above, it is hereby **ORDERED**:

- A. That Respondent provide [REDACTED] with a one-on-one aide for his inclusion classes and specials;
- B. That Respondent not be allowed to test [REDACTED]'s IQ for purposes of determining whether he is eligible for Portfolio testing; and
- C. That Respondent may administer Portfolio testing to [REDACTED] without [REDACTED] first having to take an IQ test.

This Final Order entered and effective this 3rd day of December, 2013.

Mattielyn B. Williams
Mattielyn B. Williams
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State,
this 3rd day of December, 2013.

J. Richard Collier by MBW
J. Richard Collier, 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.