

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

IN THE MATTER OF:

**O.J., *Student*, and T.E.,
Parent/Guardian.
Petitioners,**

DOCKET NO: 07.03-116643J

v.

**UNION COUNTY SCHOOL
SYSTEM,
Respondent.**

FINAL ORDER

This matter was heard in Knoxville, Tennessee on September 20-21, 2012 before Leonard Pogue, 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, Rules of State Board of Education. Petitioner O.J., student, and T.E., parent were represented by attorneys Theresa Vay Smith and Lenny Croce. Attorney Melinda Jacobs represented Respondent Union County School System (U.C.). This matter became ready for consideration upon the filing of proposed findings and conclusions of law, Petitioners (October 31, 2012) and Respondent (October 30, 2012).

The subject of this proceeding, in general terms, is whether a free appropriate public education (FAPE) will be provided to O.J. under the proposed IEP. The specific issue is centered on a change in speech therapy services. O.J.'s mother, T.E., initiated this due process hearing on April 17, 2012, to contest U.C.'s proposal (IEP of 4/3/12-4/3/13) to discontinue the provision of private speech therapy to O.J. in lieu of providing speech therapy by a speech-language pathologist who is employed by U.C.

After consideration of the entire record, testimony of witnesses, and the arguments of the parties, it is **DETERMINED** that Respondent is in compliance with the Individuals with Disabilities Act (IDEA) and providing O.J FAPE. This determination is based upon the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. O.J. is an eight-year-old third grader who has been diagnosed with Childhood Apraxia of Speech (CAS), a rare neurological impairment. O.J.'s CAS impairs her ability to plan motor speech, affecting her expressive and receptive abilities, and as a result, prohibits her from generating spontaneous and articulated oral speech.

2. In 2006, the University of Tennessee Hearing & Speech Center concluded that O.J. has delays in expressive language, speech sound production, and receptive language. It was recommended that O.J. enroll in speech and language intervention. In January 2007, O.J. was referred to and evaluated by the Tennessee Early Intervention System.

3. O.J. began receiving special education and related services from U.C. in March of 2007. From March of 2007 through May of 2009, O.J. received speech/language therapy from U.C. that was provided by Deborah L. Curlee Communication Consultants, Inc. (CCC). O.J.'s TennCare coverage allows CCC to work with O.J. at no out-of-pocket cost to O.J. or U.C.

4. O.J. was diagnosed with severe apraxia in October of 2008 while being evaluated at the University of Tennessee Children's Hospital. Sandra Price, Supervisor for Special Education for U.C., referred O.J. to Parent-Child Services Group, Inc. (PCSG) for an evaluation in 2009. PCSG is a company that specializes in speech-language therapy. Susan Hock at PCSG evaluated O.J. on March 11, 2009. Based on Ms. Hock's evaluation, O.J. was diagnosed with severe CAS and Ms. Hock recommended speech therapy from PCSG 2-4 hours per week.

5. In 2009, U.C. proposed an IEP that included related services provided by Ms. Hock. O.J. has received four hours per week of speech language therapy from Ms. Hock (including summer sessions) since May, 2009 through the present. During this time, O.J. was also receiving speech therapy services from CCC at her school (initially 2.5 hours, then 1.5 during the 2011-2012 school year). The cost for PCSG services in 2010-2011 was \$28,976.

6. According to the Tennessee Comptroller, U.C. exceeded its special education budget by \$2,368 in 2011. However, Ms. Price noted that the budget technically balanced and that the special education budget was not a problem that year. Ms. Price testified that money was not a factor in making the new IEP proposal for 2012-2013.

7. Prior to the 2011 IEP meeting, T.E. received a phone call from Ms. Price. T.E. alleges Ms. Price told her that changes needed to be made for O.J., that U.C. was paying over \$30,000 and that U.C. could no longer continue paying out that amount of money for O.J. since O.J. was not making enough progress at PCGS.

8. In March of 2012, Ms. Price encountered O.J. in the hallway of O.J.'s school and observed her attempting to communicate with a special education assistant who had worked with O.J. since preschool. Ms. Price became "panicked" when she observed that O.J. made no attempt at verbal communication, but instead used gestures and pantomime. Based on this encounter, Ms. Price interviewed school staff and administrators to inquire about O.J.'s verbal communication at school. Ms. Price discovered that O.J. was not engaging in verbal communication at school.

9. As a result of the March, 2012 encounter, Ms. Price decided she needed to "put together a program that would facilitate [O.J.] being able to speak at school." This decision was based on Ms. Price's belief that O.J.'s program wasn't working because O.J. was not verbally communicating and that O.J. was the same as she was when she was in preschool. Ms. Price

believed that after three years of receiving speech therapy from Ms. Hock and CCC O.J. should have made more progress, and that it was U.C.'s responsibility to find a program that does work. To that end, Ms. Price researched the 2007 ASHA Position Statement on Apraxia, talked to colleagues, and talked with T.E. Ms. Price did not request that O.J. be re-evaluated and did not consult with anyone outside the school district concerning O.J.'s services.

10. A few weeks before O.J.'s scheduled IEP Annual Review (April 3, 2012), Ms. Price called T.E. to inform her that U.C. was considering making some changes to O.J.'s speech therapy program. Ms. Price asked T.E. to speak with the mother of another child in the school district who was diagnosed with apraxia and had received speech therapy for approximately four years from Katie Holland, a full-time speech-language pathologist employed by U.C. T.E. spoke with the mother of the other child with apraxia on the morning of O.J.'s IEP meeting.

11. O.J.'s IEP meeting was convened on April 3, 2012, and T.E. was accompanied by her neighbor and advocate, Brandi McLemore. The IEP team discussed U.C.'s proposal to discontinue speech therapy with PCSG/Susan Hock and CCC. Instead, the IEP team proposed providing speech therapy within the school district by Ms. Holland. T.E. was angry and upset after the U.C. staff explained their proposal. T.E. didn't say a lot in response to U.C.'s proposal, but the rest of the IEP team expressed their concerns over O.J.'s lack of progress. Ms. McLemore questioned U.C.'s assertion that O.J. had failed to make progress with Ms. Hock and asked about Ms. Holland's qualifications. T.E. voiced several times that she did not agree with U.C.'s proposal but said very little in the meeting. T.E. thought the meeting was rushed but did not ask for another IEP meeting.

12. A Prior Written Notice was mailed to T.E. after the IEP meeting which detailed U.C.'s proposal to discontinue the provision of speech therapy with PCSG/Susan Hock and

CCC, and to provide 30 minutes per day of direct speech therapy by Ms. Holland. The Notice further provided that O.J. will receive 50 minutes per day of enriched academics, an hour-and-a-half per day of inclusion services, occupational and physical therapy, and the continuation of extended school year services in the summer.

13. The explanation for these proposed changes within the Notice were: (1) O.J. was missing class time by going to PCSG; (2) Ms. Holland and Ms. Hock have the same credentials; and (3) O.J. was making limited progress under the current plan. To remedy U.C.'s concerns that O.J. was missing too much class time by traveling to PCSG, T.E. and Ms. Hock agreed to conduct O.J.'s sessions after school.

14. O.J.'s IEP Progress Reports track her progress towards the goals and objectives of her IEP. O.J.'s most recent annual goal statuses show that O.J. is anticipated to meet her IEP goals in every measured category of her 2011-2012 IEP. This is based on information supplied by CCC to U.C. In addition, O.J.'s last reporting period (RP 5) for the 2011-2012 school year shows that O.J. made progress in every measured short-term objective. Out of the twenty-eight short-term objectives, only two objectives indicated that O.J. needs more time due to little progress.

15. T.E. believes O.J. has made progress in her speech production over the last year and wishes for Ms. Hock to continue to provide speech therapy to O.J. T.E. usually watches Ms. Hock's sessions with O.J. and then discusses with Ms. Hock what T.E. and O.J. can work on at home. Ms. Hock has told T.E. that O.J. will talk one day.

16. T.E. is also concerned that U.C.'s proposed plan would stifle O.J.'s progress and that O.J. might regress because the one-to-one therapy hours are being reduced. T.E. does not

object to Ms. Holland providing speech therapy to O.J. as long as Ms. Hock also continues to do so. Ms. Holland's qualifications are not questioned by T.E.

17. According to T.E., O.J. can say part of the alphabet and can count almost to 20. T.E. noted that O.J. says words that T.E. understands but others may not. O.J. also communicates with gestures and signs.

18. During the 2011-2012 school year, Chezlie Davis, a speech pathologist with CCC, worked with O.J. at the school in two, 30 minutes sessions. Another speech pathologist with CCC also worked with O.J. Ms. Davis believes O.J.'s CAS is severe. Ms. Davis consulted with O.J.'s classroom teachers regarding Ms Davis' therapy sessions so the teachers could use the skills learned in therapy in the classroom. O.J. made minimal progress in reaching the short term goals Ms. Davis established for O.J. but O.J.'s prognosis was good for continued improvement.

19. According to Ms. Davis, O.J. communicates by using gestures, eye contact, pictures, and grunt vocalizations. O.J. can verbalize some intelligible words but Ms. Davis has not observed her in a verbal conversation with others. Ms. Davis believes that at the end of the last school year O.J. had little to know functional expressive speech and that O.J. did not communicate effectively with peers or teachers.

20. Ms. Davis noted that CAS is "somewhat controversial in the speech world" in terms of diagnosis and that not much research had been done regarding CAS. She thinks that all speech pathologists are qualified to treat a child with CAS. Ms. Davis believes that U.C.'s proposed IEP is a change but she "feels confident in it."

21. Ms. Holland has never provided speech therapy to O.J. but has participated in O.J.'s IEP meetings. Ms. Holland holds a Master's Degree in Speech Pathology, and a certificate in CAS. In working with O.J., Ms. Holland would focus her direct speech therapy session on

speech motor drill practice, incorporating O.J.'s academic goals into the speech therapy. In addition, Ms. Holland would maintain daily communication with O.J.'s teachers to ensure that O.J. has multiple opportunities throughout her school day to practice speech production. Ms. Holland also would communicate regularly with T.E. and provide practice homework. Ms. Holland also plans to use an augmentative communication device with O.J. although the augmentative communication device was not listed in the IEP. Therapy sessions with Ms. Holland would continue in June but not during the remainder of the summer break or others school holidays.

22. Ms. Holland believes that O.J. is making very minimal progress toward her IEP goals. She has never observed O.J. verbally communicate with anyone at school. Ms. Holland has worked with another child with apraxia. This child had been originally diagnosed with severe apraxia, had received speech therapy for approximately four years from Ms. Holland, and now is diagnosed as mild apraxia. After working with Ms. Holland, this child has progressed from little speech to very intelligible conversations with teachers, parents, and friends. The student currently receives 2 hours per week of speech therapy. Ms. Holland feels that she can enable O.J. to be more intelligible.

23. Under O.J.'s current plan with Ms. Hock, Integral Stimulation is the primary method used to address O.J.'s CAS, and Ms. Hock provides randomized, intensive one-on-one speech-language therapy sessions addressing all of O.J.'s underlying impairments. Ms. Hock approves of providing O.J. an augmentative alternative communicator as long as it doesn't speak for O.J. Ms. Hock has not communicated with the CCC therapists or O.J.'s teachers. She provides a report once a year to U.C.

24. The evaluation reports provided each year to U.C. by Ms. Hock showed that O.J. was making slow progress in her therapy goals. According to Ms. Hock, O.J. has increased in her expressive vocabulary but this includes word approximations that may not be understood by those who do not know O.J. O.J. continues to try and is engaged in their therapy sessions. However, O.J. does not have functional speech in the traditional sense but has a system of communication that functions for her. Ms. Hock believes O.J. has made some improvement in her speech since their therapy sessions began. Also, O.J. can spell a few words but, as Ms. Hock noted, O.J. has a long way to go. As of March, 2012, O.J. was unable to sustain beyond one or more verbal exchanges.

25. Ms. Hock is of the opinion that the more intense O.J.'s therapy is the better are her chances of improving faster. Ms. Hock's questions whether the proposed IEP is doable and can be carried out on a consistent basis but acknowledges that someone else could be an effective therapist for O.J. A certain amount of regression is typical of children with O.J.'s level of CAS.

26. Dr. Martha Burns was designated as an expert in speech-language pathology with a specialty in apraxia. She reviewed reports from O.J.'s doctors, U.C., CCC, and PCSG, two videos of O.J. from PCSG as well as audio tapes of O.J., and two videos of O.J. from Respondent's expert, Dr. Denise Gibbs. Dr. Burns authored her expert report and formed her opinions without having met O.J. or T.E., and without meeting or observing Ms. Holland or CCC therapists. Dr. Burns considered Dr. Gibbs' report and evaluation to be excellent although she does not consider Dr. Gibbs to be a CAS specialist.

27. Based on her review, Dr. Burns was able to conclude that O.J. has made progress since 2009, that O.J. is sometimes producing speech spontaneously, and that O.J. has a good prognosis for continued development of speech praxis and oral language development. Dr. Burns

believes that O.J. is at a turning point and that next year is important for her. Dr. Burns opined that O.J. could probably start speaking in sentences and use them as her primary mode of communication within about a year although she is unlikely to ever be able to habilitate into an articulate and intelligible oral speech communicator.

28. In regard to U.C.'s proposed IEP, Dr. Burns feels that 2 ½ hours per week of speech language therapy is not adequate for O.J. at this time. She further opined that O.J. could regress if she doesn't receive enough therapy. Dr. Burns also noted that changing therapists would entail a learning curve for the new therapist. She feels that U.C.'s plans to involve O.J.'s teachers throughout the day will be difficult to implement without training the teachers. In regard to an augmentative device, Dr. Burns is not opposed to this concept as long as it is not a substitute for teaching O.J. to speak.

29. Dr. Denise Gibbs was designated as an expert in speech-language pathology with experience in childhood apraxia of speech, literacy and augmentative alternative communication. Dr. Gibbs conducted a comprehensive speech-language and literacy evaluation of O.J. over two days at O.J.'s school, observed Ms. Holland conducting speech therapy sessions with students, interviewed/observed O.J.'s teachers and reviewed videos of O.J. working with Ms. Hock.

30. Based on her review, Dr. Gibbs concluded that O.J. has made minimal gains in speech working with Ms. Hock, and that the gains are not an acceptable amount of progress and would not result in O.J. ever having understandable speech. Dr. Gibbs opined that O.J.'s language deficit has actually increased during O.J.'s time with Ms. Hock. Dr. Gibbs noted that O.J. is in a critical developmental period.

31. In regard to the proposed IEP, Dr. Gibbs feels that 30 minutes a day of therapy is sufficient for O.J., and Ms. Holland working with O.J.'s teachers distributes coordinated speech

practice for O.J. throughout the entire day. According to Dr. Gibbs, O.J. needs to practice her speech during the school day and the proposed plan achieves this better than O. J. simply working with Ms. Hock. Dr. Gibbs considers Ms. Holland an excellent speech-language pathologist and is fully capable of providing O. J. with the necessary therapy to effect a meaningful gain. She recommends providing O.J. with an augmentative device.

CONCLUSIONS OF LAW

1. Petitioners in this case have the burden to introduce evidence that would by a preponderance of the evidence prove the issues should be resolved in Petitioners' favor. Rule 1360-4-1-.02, Uniform Rules of Procedure for Hearing Contested Cases before State Administrative agencies; Schaffer v. Weast, 126 S. Ct. 528, 546 U.S. 49 (2005).

2. The IDEA provides that children with disabilities be provided FAPE (free appropriate public education). Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176 (1982). As part of providing FAPE, school districts are required to establish an IEP (individual education plan) for each child with a disability. Id.

3. Under the IDEA, "related services" means transportation, and such developmental, corrective, and other supportive services as may be required to assist a child with a disability to benefit from special education. Cedar Rapids Community School District v. Garret F., et al., 526 U.S. 66 (1999). Special education instruction can take place, "in the classroom, in the home, and in other settings." IDEA, 20 U.S.C. § 1401(a)(29)(a).

4. The inquiry of the courts regarding the provision of FAPE is twofold: 1) has the school district complied with the procedures set forth in the Act? and, 2) is the IEP developed

through the Act's procedures reasonably calculated to enable the child to receive educational benefits? Rowley at 206-207.

5. With regard to procedural matters, a court should "strictly review an IEP for procedural compliance," although technical deviations will not render an IEP invalid. Deal v. Hamilton County Board of Education, 392 F.3d 840, 853 (6th Cir. 2004) *citing* Dong ex rel. Dong v. Bd. of Educ. of the Rochester Cmty. Sch., 197 F.3d 793, 800 (6th Cir. 1999). A finding of procedural violations does not necessarily entitle Petitioners to relief. Id. The procedural violation must cause substantive harm, and thus constitute a denial of FAPE, for relief to be granted. Id. In the instant case, Petitioners do not argue in their Proposed Findings of Fact and Conclusions of Law that any procedural violations occurred. In the Due Process Complaint, as well as a limited amount of testimony at the hearing, there is reference to the time of and short length of the IEP meeting. T. E. attended the meeting with an advocate and was invited to participate in the discussions. T.E. said little in response to U.C.'s proposal. There simply is not proof of U.C. predetermining O.J.'s placement or T.E. being deprived of the opportunity to meaningfully participate in the IEP process. It is determined that there are no procedural violations.

6. States and school districts should be afforded discretion in determining what type of program is appropriate based on the individual needs of a disabled child. McLaughlin v. Holt Public Schools Board of Education, 320 F.3d 663 (6th Cir. 2003). The IDEA does not compel school districts to provide special education and related services that are preferred by a child's parent. Tucker v. Calloway County Board of Education, 136 F.3d 495, 505 (6th Cir. 1998). The burden of proof is on the parent to prove by a preponderance of the evidence that the IEP proposed by the school violates the IDEA. McLaughlin.

7. In developing an IEP, related services must provide a meaningful educational benefit gauged in relation to the potential of the child at issue. Deal at 862. While the educational benefits accruing to the child must be “meaningful,” there is no requirement that the program provide the maximum benefit or the best available program. Rowley at 200-201.

8. Petitioners argue that the proposed IEP would significantly and suddenly alter any progress O.J. has made under her treatment plan with Ms. Hock, resulting in a denial of FAPE. O.J.’s IEP Progress Reports indicate that she is on track to meet her goals although Ms. Holland noted that O.J. is making very minimal progress toward those goals. Ms. Hock’s written evaluation reports show O.J. making slow progress in her therapy goals. Dr. Burns opined that O.J. has progressed since 2009 while Dr. Gibbs believes the progress is minimal and unacceptable. Based on all the proof, it appears there has been slight progress. T.E. fears O.J. will regress without therapy from Ms. Hock and Dr. Burns opined that there could be regression. This possibility of regression alone is not enough to establish that O.J.’s slight progress will be so significantly altered that O. J. will be denied FAPE under U.C.’s proposed IEP.

9. Ms. Price indicated that the basis for the change in the new IEP was her feeling that O.J. was not progressing enough with Ms. Hock’s therapy. Petitioners have suggested that finances were a factor in the decision to change therapists. There is insufficient proof to support this allegation and this argument is without merit.

10. It is contended by Petitioners that the proposed IEP would result in a denial of FAPE because the one-on-one therapy hours are reduced from 5.5 hours to 2.5 hours and the plan relies, in part, on O.J.’s teachers to provide therapy in the classroom. Five speech pathologists testified in this matter. Two of the five were designated experts but all of them were well credentialed, knowledgeable of O.J.’s background and seemingly very competent. Despite

their collective knowledge, there was not complete agreement regarding the treatment options and proposed IEP for O.J. Ms. Davis noted that she felt confident with U.C.'s proposed IEP. Ms. Holland authored much of the IEP and believes she can enable O.J. to be more intelligible. Ms. Holland would provide 30 minutes per day of speech-language therapy. In addition, she would communicate daily with O.J.'s teachers and assistants to ensure that O.J. has multiple opportunities throughout her school day to practice speech production. Ms. Hock believes more intense therapy is best for O.J but admits that someone else could be an effective therapist for O.J. Ms. Hock questions whether the proposed IEP can be consistently performed. The two designated experts simply disagree as to whether or not the proposed plan is proper for O.J. Dr. Burns is of the opinion that 2 ½ hours a week of one-on-one therapy is insufficient for O.J. She also doubts whether U.C. will be able to involve O.J.'s teachers as planned since they are not specially trained. Dr. Gibbs believes the combination of 30 minutes a day of therapy with Ms. Holland and Ms. Holland working with O.J.'s teachers, by providing additional speech practice for O.J. throughout the day, is the appropriate IEP for O.J. She observed the teachers working with O.J. and thinks they can continue to do so with additional guidance from Ms. Holland.

11. Dr. Burns prefers the current plan wherein the gains have been slight. She questions reduced one-on-one therapist hours. However, as noted by Dr. Burns, there is limited research on interventions for CAS; thus, research is not a reason to find the new plan is insufficient to meet O.J.'s individual needs. Although one-to-one therapist time would be reduced under the new IEP, O. J. arguably will receive more total hours of interventions and support with the integrated and coordinated speech practice and language work within her academic program throughout the day. Dr. Burns doubts U.C.'s ability to implement a plan where non-therapists are involved but has not observed or interviewed the teachers. Other than

the skepticism of Dr. Burns and Ms. Hock, there is no other basis to find that the proposed IEP will not provide a meaningful educational benefit for O.J. Petitioners assertion that the proposed IEP plan would result in a denial of FAPE because the one-on-one therapy hours are reduced from 5.5 hours to 2.5 hours and because the plan relies, in part, on O.J.'s teachers to provide therapy in the classroom is rejected.

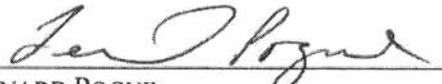
12. Petitioners allege that Ms. Holland is less qualified than Ms. Hock to provide speech-language therapy to O.J., resulting in a denial of FAPE. Specifically, Petitioners claim that Ms. Holland failed to initially diagnose O.J. with CAS, has never provided therapy to O.J., and has less experience treating children with CAS. T.E. does not question Ms. Holland's qualifications. Both Ms. Holland and Ms. Hock have Master's Degrees in Speech Pathology, are licensed by the state of Tennessee, and each holds a Certificate of Clinical Competence. Ms. Holland has been working for approximately four years with another student with a diagnosis of apraxia who has made good progress. There were indications from both experts that the diagnosis of CAS is less important than the degree of therapy provided. Dr. Burns, who has not observed Ms. Holland, questions the learning curve for a new therapist as well as Ms. Holland's familiarity with severe cases of CAS. Dr. Gibbs evaluated O.J. and observed Ms. Holland providing speech therapy to several students. She is of the opinion that Ms. Holland is an excellent speech-pathologist and capable of providing O.J. therapy to effectuate meaningful gain for O.J. The evidence does not preponderate that Ms. Holland is unqualified to provide speech-language therapy for O.J.

13. The proof has demonstrated that U.C. has proposed an IEP based on the unique needs of O.J. and that will enable O.J. to receive a meaningful educational benefit. Petitioners

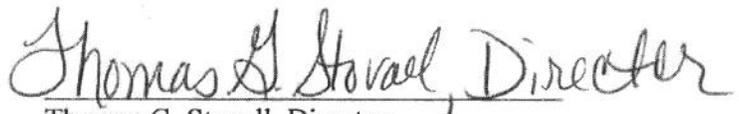
have alleged, but have failed to prove, that U.C.'s proposed IEP for the 2012-2013 school year would deny the provision of a "free appropriate public education" to O.J.

It is **Determined** that Respondent is in compliance with IDEA procedures, has not committed any procedural or substantive violations of IDEA, and Respondent's proposed IEP will provide O.J. FAPE. It is **ORDERED** that the remedies and relief sought by Petitioners are denied. Respondent is the prevailing party in this matter.

Entered this 29th day of November, 2012.


LEONARD POGUE
ADMINISTRATIVE JUDGE

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 29 day of November, 2012.


Thomas G. Stovall, Director
Administrative Procedures Division