BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION

IN THE MATTER OF: **C. H.**,	)	
	)	
	)	
Petitioners.	)	
VS.	)	**NO. 02-06, 01-39 & 00-03**
	)	
MCNAIRY COUNTY SCHOOL SYSTEM,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION AND FINAL ORDER

JOHN W. CLEVELAND
Administrative Law Judge
TENNESSEE DEPARTMENT OF EDUCATION
120 W. Morris Street
Sweetwater, Tennessee 37874
Phone: 423/ 337-2111

August 16, 2002

MEMORANDUM OPINION
No. 02-06, 01-39 & 00-03

This cause came to be heard on March 28, 2002, before the Honorable John W. Cleveland, Administrative Law Judge for the Tennessee Department of Education, upon the Due Process Hearing Request filed by the Parents, the testimony of witnesses and the exhibits filed by the parties. The Petitioners and Respondent were present, and both were represented by counsel.

Identifying information appears on the cover page of this Opinion and on the Final Order, which incorporates this Opinion and is filed with this Opinion. To preserve the parties' privacy in compliance with the Federal Educational Right to Privacy Act ("FERPA")[1], the parties, the schools, the witnesses and other identifying information are referred to by general descriptions, *e.g.*, the or this "Student," the "School System," the "Supervisor of Special Education." Publication of the cover page of this Memorandum Opinion and Final Order, the Final Order or other identifying information violates federal law.

References to the record of the due process hearing in this matter appear in endnotes, *i.e.*, Exhibit 3, Transcript 69, which do not contain identifying information, and may be published with this Memorandum Opinion, in the user's discretion.

PROCEDURAL HISTORY

This case arises out of a due process hearing, No. 00-03, which was filed February 2, 2000, and assigned to ALJ Marilyn L. Hudson. An Order for Hearing was entered granting the Parents request for mediation, and staying the proceedings pending completion of the mediation. The case was assigned for mediation by ALJ Jay Reynolds. The School System was to implement an IEP from the resulting mediation agreement. The Parents believed that the School System did not implement and comply with this IEP, and they filed a second due process hearing.[2]

ALJ Marilyn Hudson convened a second due process hearing on June 1, 2000. Testimony began in the hearing: however, the parties reached an agreement before the hearing was concluded. The Parties' agreement was recited on the record. Counsel for the school system agreed to draft an order which reflected the agreement presented to the court.[3] That Order was mailed to the Parents for their signatures approving the Order for entry. The Parents did not approve the Order for entry, and a copy of the Order, with no signature lines for their approval, was mailed to the Parents on July 21, 2000.[4] The Order provided, among other things, that:

> IT IS FURTHER ORDERED that the homebound teacher will provide a copy of a lesson plan for the child on a weekly basis reflective of the IEP goals and objectives.

> IT IS FURTHER ORDERED that [the School System] will develop a progress report form capable of containing the detail necessary to inform the parents of the child's progress. This form will be used to report the child's progress as to the IEP goals and objectives as of the 4½ week mark of each nine week period, and will be sent to the parents at the same time progress reports for the general education population are to be sent home. These progress notes will be created so as to be compared with the IEP goals and objectives....
>
> IT IS FURTHER ORDERED that videotaping of the child will be done by the homebound teacher at the end of each nine week period to go along with the report card, for the purpose of evaluating whether the goals and objectives in the IEP are being met and to allow the parents to see whether the child is performing in accordance with what her goals and objectives are. The videotaping will include everything listed as a goal and objective on the IEP.
>
> IT IS FURTHER ORDERED that the goals and objectives referenced in this Order are those to be developed at an IEP meeting in August of 2000 for the coming year. They will focus on academics, but if the parties agree there may be some behavioral components as well.
>
> * * *
>
> IT IS FURTHER ORDERED that the school system will request that Dr. England make one unannounced visit each nine week term to observe the provision of educational services to the child ..., and that he generate a written report for the parents and the school system advising of his observations.
>
> IT IS FURTHER ORDERED that .... on the two days ... the child will ... have physical education with the eighth grade class....
>
> * * *
>
> IT IS FURTHER ORDERED that the child will be evaluated at Team Evaluation in Memphis for the purpose of providing a full scale independent evaluation and to determine, among other things, whether autism is an appropriate diagnosis.... A written report will be provided to the school system and the parents from the evaluation.[5]

The foregoing Order was never entered by ALJ Hudson.[6]

In a July 27, 2000 phone conference among the Student's Mother, Counsel for the School System and ALJ Hudson, the parties agreed to modifications to the agreement, including changing from a home-bound setting supplemented with resources provided at the STAR Center, to a public school setting.[7] As a result of that conference, an Order was entered on July 27, 2000, which provided in part:

> It appearing that the verbal agreements reached by the parties during and following the due process hearing may not be able to be performed; and it further appearing that the parties need additional time to investigate the possibility of an alternate mutually agreeable arrangement and/or for the school to convene an IEP meeting;
>
> It is ORDERED that the parties reconvene for a status conference by telephone call initiated by the School on August 3 at 2:00 p.m. CDT.[8]

Following the status conference, the School System was ordered to convene an IEP meeting to attempt to resolve the parties' differences. The August 3, 2000 Order also provided that if the parties could not resolve their differences, a due process hearing would be convened on August 17, 2000.[9] No due process hearing was convened on August 17, 2000.[10] On September 28, 2000, an Order was entered dismissing the case, which stated:

> The parties having announced that the matters in controversy have been resolved between them, It is ORDERED that the above-captioned matter be and hereby is dismissed.[11]

The Parents subsequently filed suit in the United States District Court for the Middle District of Tennessee, seeking enforcement of the IEP developed in 2000. During discussions following a motion hearing, it became apparent to counsel for the Parents that if the case proceeded, the Court would entertain a motion to dismiss for failure to exhaust their administrative remedies. The Parents voluntarily non-suited their federal suit.

On June 18, 2001, the Parents requested a due process hearing to address alleged "violation[s] of the ALJ order entered from their summer of 2000 due process petition," particularly the School System's failure (a) to provide physical education, (b) to perform TCAP testing, (c) to provide special education services when teachers were absent when scheduled and (d) to provide physical therapy. On July 6, 2001, ALJ John Cleveland, was appointed to hear this due process request, No. 01-39. The due process hearing was set for September 5-6, 2001. On August 28, 2001, the attorneys for both parties requested a continuance so that they might try to negotiate a settlement of the issues, and the case was continued until November 8, 2001.

On November 5, 2001, a pre-hearing conference was convened by telephone conference, in which counsel for the parties announced the parties agreement that this case presented a "pure compliance" issue for which the appropriate procedure is an administrative complaint pursuant to *Tenn.CodeAnno.* §49-10-601(a).[12] The Parents' due process hearing request was dismissed without prejudice by order entered November 12, 2001.

On January 28, 2002, an order was entered setting aside the prior order of dismissal following a telephone conference with counsel for both parties from which it appeared that the order of dismissal had been improvidently entered. On January 23, 2002, the Parent's filed another due process request, No. 02-06, which was assigned to ALJ John Cleveland for hearing with Due Process Hearing Request No. 01-39. The due process hearing was set for March 28-29, 2002.

FINDINGS OF FACT

No evaluation of the Student was performed by Team Evaluation in Memphis for the purpose of providing a full scale independent evaluation and to determine, among other things, whether autism is an appropriate diagnosis for the Student; therefore, no written report from Team Evaluation was provided to the school system and the parents.[13]

An M-Team meeting was held on August 8, 2000, to draft an IEP to reflect the agreement read before ALJ Marilyn Hudson.[14] The IEP drafted did not require videotaping, weekly lesson plans, progress reports during the midway point in the grading period or that a progress report be provided the Parents at the conclusion of each grading period. The IEP did require occupational therapy four (4) times per week. In addition, the occupational therapist was to monitor the child's progress by visiting once a week, which was changed to consultation quarterly when the IEP reconvened on October 13, 2000. The IEP required physical therapy once a week.[15]

The occupational therapist only met with the Student once, and that visit was during the initial assessment in August, 2000.[16] One-on-one physical therapy and occupational therapy was supposed to be provided to the Student by a School System contract employee called a "vocational trainer," unqualified as a physical therapist or an occupational therapist, in accordance with consultations with the School System physical therapist and occupational therapist.[17] On several occasions, the vocational trainer missed appointments with the occupational therapist.[18] There is little or no evidence that the Student received any services from the vocational trainer from the time school started until September 8, 2000, or that she did anything but "fun activities," that were not actual exercises, until October 13, 2000.[19]

The vocational trainer was hospitalized at the beginning of November, 2000, and did not return to school until mid-January, 2001.[20] The vocational trainer never provided the occupational therapist with any written reports of the Student's activities, the Student's progress with fine motor skills or any written reports at all. The occupational therapist did not know the extent of the student's fine motor skills, or whether the vocational trainer implemented the occupational therapist's instructions. The Student was never administered any tests to measure whether her fine motor skills improved.[21]

Physical therapy was scheduled on Friday. From November 3, 2000 through May 18, 2001, the Student was not provided one-third (only 17 out of 25 sessions provided) of her required physical therapy because Fridays when school was not in session were not rescheduled.[22] In additional, the speech therapist also missed sessions.[23]

At the beginning of the school year the Student's one-on-one teacher was not provided with a copy of the IEP.[24] The Parents did not receive any progress reports for the first two months. Then the Parents received reports only from the one the Student's one-on-one teacher, which did not include any reports from physical therapy, occupational therapy or speech therapy.[25]

CONCLUSIONS OF LAW

Introduction

The Individuals with Disabilities Education Act ("IDEA")[26] requires that Tennessee, as a recipient of federal assistance thereunder, ensure that each disabled student in the state receive a "free appropriate public education."[27] IDEA mandates that participating states provide such education for all children "regardless of the severity of their handicap."[28] In pertinent part, the Act defines a free appropriate public education as:

> special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, ... and (D) are provided in conformity with the individualized education program ....[29]

The term "related services" includes "such developmental, corrective and other supportive services ... as may be required to assist a handicapped child to benefit from special education...."[30] Such special education and related services must be tailored to the unique needs of the handicapped child by means of an Individualized Education Program (IEP).[31] The IEP consists of a detailed written statement arrived at by a multi-disciplinary team summarizing the child's abilities, outlining the goals for the child's education and specifying the services the child will receive.[32] An IEP is "more than a mere exercise in public relations;"[33] indeed, it is the "centerpiece of the statute's education delivery system for disabled children."[34]

Compliance

The only issue presented by this due process hearing is one of compliance with the parties' prior agreements and implementation of the Student's IEP. IDEA grants the parents of a child with a disability an impartial due process hearing related to evaluation of the child's disability and the provision of a free appropriate public education to the child.[35] Because the issue is compliance, this due process hearing does not present any question whether the special education and related services included in the parties' agreement and IEP provide the Student with a free appropriate public education. In concluding Due Process Hearing No. 00-03, by agreement and creating an IEP program for the Student, the School System established what it believed to be an adequate program to meet the Student's education and related needs.

The School System agreed that the Student was entitled to progress reports at the middle and end of each grading period, videotape reports at the end of each reading period, written reports by Dr. England, physical education with the eighth grad class two days each week, a written evaluation at Team Evaluation in Memphis for the purpose of providing a full scale independent evaluation and to determine, among other things, whether autism is an appropriate diagnosis. The School System's own IEP required occupational therapy, physical therapy and speech therapy.[36]

Occupational therapy, physical therapy and speech therapy were significant parts of this program. The School System cannot now contend that because it believes that the Student was not impacted by the missed physical therapy sessions that its obligation to fulfill the requirements of the IEP was somehow negated. When a School System structures a program that it believes to be adequate and for the benefit of a student, it cannot simply negate its requirements later by somehow assuming that the student was not injured by its failure to implement the program. Once an appropriate IEP has been established, it is the School System's responsibility to fulfill its obligations under the IEP, and when it does not, it is required to make up that time with compensatory services. By failing to provide the Student with the appropriate

number of physical therapy sessions as required by the School System's own IEP, the School System denied the Student an appropriate educational program.[37]

Evaluation

The School System agreed that an evaluation of the Student by Team Evaluation in Memphis was necessary for the purpose of providing a full scale independent evaluation and to determine, among other things, whether autism is an appropriate diagnosis for the Student. No written report from Team Evaluation was provided to the school system and the parents.[38] The IEP team violated IDEA and denied the Student a free appropriate public education by not considering the Student's need for the evaluation, the non-existent evaluation itself or the Student's need for special education and related services appropriate to address the Student's autism, if the Student is autistic.[39]

Implementation of Related Services

The School System is very proud of the special education services provided to the Student by the teacher who was assigned as a substitute teacher to work strictly one-on-one with the Student, and rightfully so. The Student's one-on-one teacher obtained a bachelor's degree in education, endorsed for elementary school with an emphasis in special education, from Webster University in St. Louis. She did post-graduate work, including 6 years in psychology and 2 years in piano. She earned a master's degree in elementary education with extra special education courses at Vanderbilt University in Nashville.[40] She has been certified to teach in Illinois, Colorado and California.[41]

The Student's one-on-one teacher not only instructed the Student in her basic academic skills, limited as they are, but she also ended up providing the Student physical education, physical therapy and occupational therapy as well.[42] The improvement that the Student made, particularly in social skills, is directly attributable to the time the Student's one-on-one teacher spent with her beginning in January, 2001.[43] Unfortunately, the progress the Student's one-on-one teacher helped her achieve was in spite of – rather than supported by – the related services required by the IEP, which were notably missing.[44] The Student's one-on-one teacher is neither an occupational therapist, a physical therapist nor a speech therapist.

Many of the Student's occupational and physical therapy sessions were missed because the personnel responsible to provide the therapy were absent. Obviously, a denial of these services is a denial of a free appropriate public education. Even when the Student was provided therapy, the personnel who were supposed to provide occupational and physical therapy were not qualified as occupational or physical therapists.

> "Qualified Personnel" means individuals who have met State approved or recognized certification, licensure, registration, or other comparable requirements that apply to the area in which they are providing special education or related services.
>
> "Related Services" means transportation and such developmental, corrective, and other supportive services as required to assist a child eligible for special education to benefit from special education. It includes ... physical and occupational therapy, early identification and assessment of disabilities in children, ... for diagnostic or evaluation purposes. ....
>
> 5. Occupational therapy means a service provided by a qualified occupational therapist ...
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> * * *
>
> 8. Physical therapy is a service provided by a qualified physical therapist.[45]

For some handicapped children, the related services provided by IDEA serve as important facilitators of classroom learning. In *Polk v. Central Susquehanna Intermediate Unit 16*[46], the U.S. Court of Appeals for the Third Circuit discussed the importance of related services in a factual setting much like that of the Student.

Christopher Polk was severely developmentally disabled. At the age of seven months he contracted encephalopathy, a disease of the brain similar to cerebral palsy. He was also mentally retarded. At fourteen years old, Christopher had the functional and mental capacity of a toddler. All parties agreed that he required "related services" in order to learn. He was provided special education in a class for the mentally handicapped with a full-time personal classroom aide. His education consisted of learning basic life skills such as feeding himself, dressing himself and using the toilet. He had mastered sitting and kneeling, was learning to stand independently and was showing some potential for ambulation. Christopher was working on basic concepts such as "behind," "in," "on," and "under," and the identification of shapes, coins, and colors. Although he was cooperative, Christopher found such learning difficult because he had a short attention span.

At first, the defendants provided Christopher with direct physical therapy from a licensed physical therapist. Later, under a newer, so-called "consultative model", Christopher no longer received direct physical therapy from a physical therapist. Instead, a physical therapist came once a month to train Christopher's teacher in how to integrate physical therapy with Christopher's education. Although the therapist may have laid hands on Christopher in demonstrating to the teacher the correct approach, she did not provide any therapy to Christopher directly, but used such interaction to teach the teacher.

In the consultation model relied upon by the school system in *Polk v. Central Susquehanna*, the therapist interacted with the classroom teacher and/or other educators who dealt with the child on a regular and consistent basis and who were ultimately responsible for the child's educational performance. The therapist, as a consultant, increased the teacher's awareness of a handicapped child's need. The therapist instructed the teacher on appropriate methods and strategies to attain both physical therapy/occupational therapy goals and enhance the child's ability to benefit from classroom educational experiences. This is the same model used to provide occupational and physical therapy to the Student in this case.[47]

Christopher's parents argued that, to meet Christopher's individual needs, the consultative method must include direct ("hands on") physical therapy by a qualified physical therapist. The Court considered this argument and held as follows:

> Plaintiffs acknowledge that the school program has benefitted Christopher to some degree, but argue that his educational program is not appropriate because it is not individually tailored to his specific needs, as the EHA requires. Moreover, throughout all of the administrative and judicial proceedings that we now describe, plaintiffs have maintained that to comply with the EHA the defendants must provide, as part of Christopher's "free appropriate public education," one session a week with licensed physical therapist.
>
> In *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984), the Supreme Court unanimously held that the EHA (predecessor to IDEA) required the provision of in-school intermittent catheterization services to a child with spina bifida so that she could attend a regular public school class. The Court distinguished between the types of related services contemplated by the EHA and the medical care that requires a doctor. In so doing, the Court explicitly acknowledged the importance of related services to the scheme of the EHA: "Congress plainly required schools to hire various specially trained personnel to help handicapped children, such as 'trained occupational therapists,'" *Id. at* 893 (quoting S. Rep. No. 94-168, p. 38 (1975).

For children like Christopher with severe disabilities, related services serve a dual purpose. First, because these children have extensive physical difficulties that often interfere with development in other areas, physical therapy is an essential prerequisite to education. For example, development of motor abilities is often the first step in overall educational development. [Citation omitted.]. As we explained in *Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269, 275 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981), in discussing children with severe emotional disturbances:

> Where basic self-help and social skills such as toilet training, dressing, feeding and communication are lacking, formal education begins at that point. If the child masters these fundamentals, the education moves on to more difficult but still very basic language, social and arithmetic skills, such as counting, making change, and identifying simple words.

Id. at 275.

> Second, the physical therapy itself may form the core of a severely disabled child's special education. This court has recognized that "[t]he educational program of a handicapped child, particularly a severely and profoundly handicapped child ... is very different from that of a non-handicapped child. The program may consist largely of 'related services' such as physical, occupational, or speech therapy." *DeLeon v. Susquehanna Community School Dist.*, 747 F.2d 149, 153 (3d Cir. 1984). In Christopher's case, physical therapy is not merely a conduit to his education but constitutes, in and of itself, a major portion of his special education, teaching him basic skills such as toileting, feeding, ambulation, et alia. physical therapy, as discussed above in Sections I and III, is an integral part of what Congress intended by "appropriate education" as defined in EHA, and it is an essential part of Christopher's education. For example, physical therapy is cited as an example of the type of related services available under the Act. *See* 20 U.S.C. 1401(17). Moreover, federal regulations implementing EHA specifically define physical therapy as "services provided by a qualified physical therapist." 34 C.F.R. 300.13 (1987). *Cf. T.G. v. Bd. of Educ. of Piscataway*, 576 F. Supp. 420, 423-24 (D.N.J. 1983) (distinguishing "extraordinary sign language services" of Rowley from psychological services that are specifically set out in EHA and regulations), *aff'd*, 738 F.2d 425 (3d Cir.), *cert. denied*, 469 U.S. 1086 (1984).
>
> Finally, because of the severity of Christopher's disabilities and their qualitative difference from those of Amy Rowley, it is difficult to apply Rowley here. Christopher's progress cannot be measured by advancement in grade or acquisition of academic skill. His needs are drastically different, but no less important. *See DeLeon v. Susquehanna Community School Dist.*, 747 F.2d 149, 153 (3d Cir. 1984); *see also*

> *Rowley*, 458 U.S. at 202 ("It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between."). Indeed, the needs of children like Christopher were paramount in the eyes of the EHA sponsors. The EHA provides that the most severely handicapped children be served first. *See* 20 U.S.C. 1412(3). That Christopher may never achieve the goals set in a traditional classroom does not undermine the fact that his brand of education (training in basic life skills) is an essential part of EHA's mandate.[48]

The Court found that the physical therapy provided by Christopher's teacher was akin to a sophisticated gym class, where Christopher practiced bouncing a ball and other physical activities. In this case, the Student engaged in fun activities that were not actual exercises. The Court held that such guidance, though helpful to Christopher, could not substitute for direct physical therapy by a licensed physical therapist, which involves professional monitoring of discrete muscle behavior and frequent adjustments in response to improvement by the student.[49] The consultative model might be appropriate for physical therapy for some highly motivated individuals with less severe disabilities, but it is clear on the record of this case that this Student was conferred virtually no benefit at all from consultative physical therapy. While consultative therapy might be appropriate for a broader range of disabled students for occupational therapy, it is doubtful that consultative therapy alone can ever satisfy IDEA.[50] The direct, hands-on provision of occupational therapy and physical therapy to the Student in this case by personnel not qualified as an occupational therapist and physical therapist, respectfully, as required by *Tenn.Comp.R.&Regs.* 0520-1-9-.01, denies the Student a free appropriate public education.

Compensatory Education

The primary purpose of IDEA is to provide a free appropriate public education to eligible students with disabilities.[51] As defined by IDEA, a free appropriate public education – or FAPE – includes both instruction designed to meet the needs of the disabled child and related services "as may be required to assist a child with a disability to benefit from special education."[52] In short, educational services for disabled students are the essence of IDEA.

The judicial recognition of compensatory education as an equitable remedy available under IDEA began in 1985 with *Burlington*[53]. In *Burlington*, arguing that the services provided by the school were inappropriate, the parents placed the student at their own expense in a private school. The parents then sought reimbursement for the two years of education they funded that should have hen provided at no cost by the public school. In determining that reimbursement was appropriate under IDEA, the Supreme Court looked at the broad language of the Act allowing the judiciary to "grant such relief as the court determines is appropriate."[54] Of course, the Court recognized that its discretion was limited to remedies "appropriate" in light of the purpose of IDEA. That purpose, pure and simple, is FAPE. "Absent other reference, the only possible interpretation is that the relief is to be 'appropriate' in light of the purpose of the Act. As already noted, this is principally to provide handicapped children with 'a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.'"[55] The U.S. Supreme Court determined that reimbursement was thus appropriate.

"A final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed. In the meantime, the parents, who disagree with the proposed IEP, are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement. If they choose the latter course, which conscientious parents who have adequate means and who are reasonably confident of their assessment normally
would, it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials. If that were the case, the child's right to a *free* appropriate public education the parents' right to fully participate in developing a proper IEP, and all of the procedural safeguards would be less than complete. Because Congress undoubtedly did not intend this result, we are confident that by empowering the court to grant 'appropriate' relief Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case."[56]

The Court curtly dismissed the school's argument that awarding reimbursement was no different from damages. In language very instructive for later analysis of compensatory education issues, the Supreme Court wrote "Reimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP."[57]

The next year, *Meiner v. State of Missouri*,[58] took *Burlington's* award of reimbursement a step further, creating the authority for compensatory education as a remedy. The parent in *Meiner* argued that even though he did not fund an educational placement for his daughter (he could not afford to do so, and consequently placed her in a youth center), she was still deprived of educational services by the school, and ought to be able to recover those services. In other words, why should the school benefit from the parent's poverty? The Eighth Circuit agreed. "Here, as in *Burlington*, recovery is necessary to secure the child's right to a free appropriate public education. We are confident that Congress did not intend the child's entitlement to a *free* education to turn upon her parent's ability to 'front' its costs."[59] The Eighth Circuit found additional support for its holding in the language of *Smith v. Robinson*.[60] *Smith* determined that general damages were not available under the EHA [predecessor to IDEA]. Congress didn't want money damages, the Supreme Court surmised in *Smith* because Congress' apparent goal "was to relieve the providers of education for handicapped children of such burdens in order to 'make every resource, or as much as possible, available to the direct activities and the direct programs that are going to benefit the handicapped.'"[61] In other words, Congress wanted schools to focus on services. Compensatory education awards do just that.[62]

The Sixth Circuit agrees. In *Hall v. Knott County Board of Education*,[63] a student with vision problems caused by congenital cataracts was provided instruction at home (pursuant to a doctor's request) through the student's twenty-first birthday and the next school year. At age twenty-two, the student graduated from high school ranked 19 of 192 in her class. She was denied the opportunity to participate in graduation exercises, and the student sued in federal court. She alleged that the last four years of her education were deficient because the school made no effort to educate her with nondisabled peers, ignored procedural protection, and had failed to teach her sighted reading with the aid of specialized equipment. The student sought a money judgment covering lost earning potential due to the inferior education and the cost of appropriate compensatory education. Finding that lost earnings are not actionable under IDEA, the Court held that compensatory education could be available pursuant to *Burlington* and *Meiner*.

CONCLUSION

Once the School System agreed that the Student needed an evaluation by Team Evaluation in Memphis for a full scale independent evaluation to determine, among other things. whether autism is an appropriate diagnosis for the Student, its failure to obtain that evaluation and consider the evaluation in creating its IEP, violated IDEA. Further, its failure to provide direct, hands-on occupational therapy and physical therapy by therapists qualified under *Tenn.Comp.R.&Regs.* 0520-1-9-.01, denied the Student a free appropriate public education. Based on the foregoing findings of fact and conclusions of law, the Student, who is the prevailing party in this due process hearing. is entitled to compensatory education to remedy these violations of IDEA.

_____

JOHN W. CLEVELAND
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Memorandum Opinion and Final Order filed in this case were served upon all adverse parties at interest in this case or their counsel of record by placing a true copy of same in the United States Mail, addressed to said parties or their counsel at their offices, with sufficient postage thereon to carry the same to its destination, *to-wit*: Stephen Craig Kennedy, Attorney at Law. P. O. Box 647, Selmer, Tennessee 38375-0647, and Danny R. Ellis, Attorney at Law, P. O. Box 98, Jackson, Tennessee 38302, on August 19, 2002.

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JOHN W. CLEVELAND
Administrative Law Judge

ENDNOTES

No. 02-06, 01-39 & 00-03

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1. 20 U.S.C. §1232(g).
2. Transcript 11-12.
3. Exhibit 2; Transcript 12-13.
4. Transcript 67-68.
5. Exhibit 2-3.
6. Exhibit 3.
7. Transcript 69-71.
8. Exhibit 4.
9. Exhibit 5.
10. Transcript 37.
11. Exhibit 6.
12. *Tenn.CodeAnno.* §49-10-601(a) provides in pertinent part, that "[a] child, or such child's parent or guardian, may obtain review of an action or omission by state or local authorities on the ground that the child has been or is about to be: (1) Denied entry or continuance in a program of special education appropriate to the child's condition and needs; (2) Placed in a special education program which is inappropriate to such child's condition and needs; . . . (4) Provided with special education or other education which is insufficient in quantity to satisfy the requirements of law."
13. Transcript 82.
14. Transcript 13.
15. Exhibit 7.
16. Transcript 193.
17. Transcript 235.
18. Exhibit 15; 194-95.
19. Transcript 209.
20. Exhibit 15; Transcript 316.

21. Transcript 193.

22. Transcript 215-218.

23. Transcript 148.

24. Transcript 136.

25. Transcript 122.

26. *The Act has been amended and reauthorized since its initial enactment in 1970. This Opinion refers to the original Education of the Handicapped Act, 20 U.S.C. §§ 1400-1485 and all of its amendment, as well as the re-authorization as the Individuals with Disabilities Education Act (IDEA-97), as IDEA.*

27. 20 U.S.C. §1412(1).

28. 20 U.S.C. §1412(2)(C).

29. 20 U.S.C. § 1401(18).

30. 20 U.S.C. §1401(17).

31. 20 U.S.C. §1401(16).

32. 20 U.S.C. §§1401(19) (defining IEP), §1414(a)(5) (requiring an IEP).

33. *Georgia Ass'n of Retarded Citizens v. McDaniel*, 716 F.2d 1565, 1570 (11th Cir. 1983), vacated in part on other grounds, 468 U.S. 1213, 104 S.Ct. 3581, 82 L.Ed.2d 880 (1983), reinstated in relevant part, 740 F.2d 902 (1984), cert. denied, 469 U.S. 1228, 105 S.Ct. 1228, 84 L.Ed.2d 365 (1985).

34. *Honig v. Doe*, 108 S.Ct. 592, 598, 98 L.Ed.2d 686 (1988).

35. 20 U.S.C. §1415(b)(2); 34 C.F.R. §§300.507; *Tenn.CodeAnno.* §49-10-601(a), *Tenn.Comp.R.&Regs.* 0520-1-3-.14(10)(a)(1)&(2).

36. Exhibit 7.

37. *Central Bucks School District v. Sara K.*, 34 IDELR 235, 34 LRP 59, 295 C.D. 2000 (Pa.Cmwlth., November 9, 2000); *Brownsville Area School District v. Student X*, 729 A.2d 198 (Pa.Cmwlth. 1999).

38. Transcript 82.

39. 20 U.S.C.A. §1414, 34 C.F.R. §300.346(a), *Tenn.CodeAnno.* §49-10-108, *Tenn.Comp.R.&Regs.* 0520-1-9-.05(6).

40. Transcript 126.

41. Transcript 149 & 176.

42. Transcript 149-154.

43. Transcript 166-170.

44. Transcript 141-147.

45. *Tenn.Comp.R.&Regs.* 0520-1-9-.01.

46. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 441 IDELR 130, 441 LRP 8991 (3d Cir., 1988).

47. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 441 IDELR 130, 441 LRP 8991 (3d Cir., 1988).

48. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 441 IDELR 130, 441 LRP 8991 (3d Cir., 1988).

49. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 441 IDELR 130, 441 LRP 8991 (3d Cir., 1988).

50. See, No Child Left Behind Act, January 8, 2002, and the proposed regulations, 34 C.F.R. §200.55-200.57, promulgated pursuant thereto at page 50995 of the Federal Register: August 6, 2002(Volume 67, Number 151).

51. *School Committee of Burlington v. Dept. of Education of Massachusetts*, 471 U.S. 359, 369 (1985).

52. *Independent School District #284 v. A.C.*, 258 F.3d 769,773 (8th Cir. 2001).

53. *School Committee of Burlington v. Dept. of Education of Massachusetts*, 471 U.S. 359, 369 (1985).

54. 20 U.S.C. §1415(i)(2)(S)(iii).

55. *Burlington, at* 369.

56. *Id., at* 370.

57. Id. at 37O-371.

58. 800 F.2d 7449 (8th Cir. 1986).

59. *Id., at* 753.

60. 468 U.S. 992 (1984).

61. *Smith at* 1020.

62. *Letter* to *Anonymous.* 21 IDELR 1061 (OSEP 1994).

63. 941 F.2d 402 (6th Cir. 1991). *cert den'd*, 112 S.Ct. 982 (1992).