

BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION DIVISION OF
SPECIAL EDUCATION

IN THE MATTER OF:

A.J. THE PARENT,
T.J. THE STUDENT,
Petitioners,

v.

KNOX COUNTY SCHOOLS,
Respondent.

APD Case No. 07.03-200779J

FINAL ORDER

This matter comes for consideration upon the parties' competing motions for summary judgment. Petitioners initiated this special education due process action pursuant to the Individuals with Disabilities Education Act (IDEA), § 504 of the Rehabilitation Act of 1973 (§ 504), and the Americans with Disabilities Act (ADA). Petitioners assert the following two claims: (1) denial of access to educational records under IDEA; and (2) denial of reasonable accommodation under § 504 and the ADA. For the reasons set forth herein, Petitioners' motion for summary judgment is granted and Respondent's motion for summary judgment is denied. This determination is based upon the following findings of fact and conclusions of law:

I. FINDINGS OF FACT¹

1. T.J. is a public-school student in Knox County with an IEP for autism. A.J. is the parent of T.J.
2. T.J.'s autism impacts his social skills and his ability to effectively interact with his peers and adults. T.J. engages in socially inappropriate behaviors in the school setting.

¹ The facts are undisputed by the parties and are found either in their statements of undisputed facts or otherwise in the record.

3. Knox County assigned Ms. Lynch to be T.J.'s special education manager. It assigned Ms. Carter to be his special education assistant. Ms. Harrison is the building principal at West Hills Elementary where T.J. attended.

4. Based upon his individualized education program (IEP), Knox County collected data to track T.J.'s progress on his IEP goals and social skills. The data was written on "data collection sheets," or "data tracking sheets."

5. The data tracking sheets came in two forms. The first form has five columns, while the second form has three columns. The second form features a space to record both a specific behavior and a larger writing space for teachers and aides to record comments in narrative form.

6. The data tracking sheets were clipped to the outside of a binder that T.J. carried throughout the school day. T.J.'s teachers and assistants recorded their behavioral observations on the data tracking sheets.

7. Knox County personnel estimate that approximately nine (9) Knox County personnel utilize T.J.'s data collection sheets on a daily basis.

8. Comments written by teachers or aides on the second sheet included private or embarrassing personal observations about T.J.'s behavior. This included the following observations written by Knox County personnel:

- "During processing with Ms. Lynch touched penis"
- "Told Mrs. C. to leave multiple times and did a motion on his neck like cutting off head."

9. Knox County used these sheets for assessing T.J.'s progress, completing progress reports, and developing present levels for IEPs.

10. At the end of T.J.'s school day, Knox County personnel retrieves these data tracking sheets from T.J., and they are given to Ms. Lynch. Ms. Lynch places the data tracking sheets in a folder with T.J.'s name on it and stored the folder in a locked filing cabinet. Ms. Lynch retains the data tracking sheets for as long as she is the child's case manager.

11. T.J.'s mother, who was employed in the school by Knox County during the relevant time hereto, witnessed other boys looking at T.J.'s binder and reading his behavioral information.

12. T.J.'s mother took a picture of T.J.'s binder with data sheets attached to it.

13. T.J.'s parents sought his educational records, including all behavior observations and comments. Knox County did not provide T.J.'s parents with data tracking sheets containing teacher comments about T.J.'s behaviors.

14. Knox County took the position that these data tracking sheets contain only "raw data" that T.J.'s parents were not entitled to receive.

15. T.J.'s parents sought modification of the means by which Knox County maintained the data tracking sheets to protect T.J. confidentiality.

16. The record shows, by a preponderance of the evidence, that the data tracking sheets contain more than raw data and are educational records T.J.'s parents are entitled to receive.

17. The record shows, by a preponderance of the evidence, that Knox County failed to make reasonable accommodations to protect T.J.'s embarrassing behavioral issues from other students.

II. CONCLUSIONS OF LAW

Petitioners advanced two legal claims: (1) denial of access to records under IDEA; and (2) denial of reasonable modification/accommodation under Section 504/ADA.

A. The IDEA Access to Records Claim

Knox County takes data on T.J.'s autism to track T.J.'s progress on his IEP goals and social skills. To participate in building his IEP goals and social skills, T.J.'s parents seek the written records of his behaviors at school. This includes the staff narratives of observations written on the tracking sheets.

The IDEA provision on educational records states:

“An opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child.”

20 U.S.C. § 1415; *see also* 34 C.F.R. § 300.613.

The IDEA aligns the definition of “education record” with the Family Educational Rights and Privacy Act (“FERPA”). 34 C.F.R. § 300.611. Knox County objects that the data tracking sheets are not “maintained,” as that term is defined by FERPA. (“For purposes of this section, the term ‘educational records’ means . . . those records, files, documents, and other material which—(i) contain information directly related to a student; and are **maintained** by an educational agency or institution or by a person acting for such agency or institution.”). 20 U.S.C. § 1232g(a)(4)(A), *emphasis added*.

To the contrary, Knox County invests its special education case managers as the custodians for the behavior records for children with IEPs. Ms. Lynch, the special education case manager for T.J., described how and why the records are produced, utilized, and maintained. She, as the case manager, maintains the behavior tracking sheets in her own room,

in individual folders for each child with a disability, further secured in a “locked filing cabinet” for “as long as [Ms. Lynch] is the case manager.” Accordingly, they are “maintained.”

Knox County also objects that the records are not “kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.” 20 U.S.C. § 1232g(a)(4); 34 C.F.R. § 99.3. To be applicable, this exception to FERPA involves three elements that must *all* be met: (1) sole possession; (2) used solely as a personal memory aid; “*and*” (3) are not accessible or revealed to another person. *Id.*

Analyzing these factors, there is no dispute that the records were *not* in the “sole possession” of a single staff member. Ms. Lynch began the day with possession of the data tracking sheets, but then the data tracking sheets traveled daily to many other teachers and staff who contributed to them before returning them to Ms. Lynch. The record shows that up to nine (9) different staff members may possess the data sheets because they move with T.J. from class to class and other activities. That alone defeats elements 1 *and* 3. While that is sufficient to defeat the exception, on the second element, the data sheets are not “temporary memory aids,” as even Knox County acknowledges they are used for “assessing T.J.’s progress, completing progress reports and developing present levels for IEPs.”²

T.J.’s parents clearly seek substantive narrative information recorded by staff about T.J.’s socially inappropriate behaviors in the school setting. The examples given of T.J. touching his private parts and making a threatening gesture to staff certainly qualify. For a child with autism, observations of touching one’s private parts or making a violent gesture against adults is more than a simple “tally mark” of known behaviors in the unreported case of *Bd of Educ. Toledo Sch.*

² Knox County Undisputed Fact Number 34

Dist. v. Horen, 2011 U.S. ap. Lexis 26644 (6th Cir. 2011). T.J.’s parents, just like Knox County, require this information about T.J. to participate in building and revising T.J.’s IEP.

As formulation of an appropriate IEP is central to the IDEA, this procedural violation resulted in “substantive” harm to T.J. of depriving him of a FAPE. The case of *Woods v. Northport Pub. Sch.*, 487 F.App’x 968 (6th Cir. 2012) is particularly informative on this issue. In *Woods*, parents wanted access to testing protocols so that an expert could review them. *Id.* at 976. By denying the parents access to the information enjoyed by the school, the school district committed a procedural violation that resulted in a substantive harm, denial of a FAPE. *Id.*

The same is true here. T.J.’s autism impacts his social skills of interacting appropriately with peers and adults. Knox County is taking data, each day, on T.J.’s behaviors in order to address those very deficits. The parents must have access to that same information to build accurate IEP goals, to determine social and behavioral supports, and address the effectiveness of those, and even to address placement. As in *Woods*, denying this behavioral information to the parent was not only a procedural violation of the IDEA, but it was a substantive denial of effective and meaningful participation, a denial of a FAPE.

B. Reasonable Modification

Under the ADA (and similarly § 504), “modifications” a/k/a “accommodations” must be made to avoid discrimination:

A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

28 CFR § 35.130(b)(7) (1998); *Olmstead v. L. C. by Zimring*, 527 U.S. 581, 592 (1999).

Behavioral data for a child with a disability is obviously sensitive. There is no dispute that T.J.'s very private information about his behavioral challenges traveled openly with him and was viewed by other students. However, T.J. is entitled to a reasonable accommodation that keeps his health-related information confidential, just as persons without a disability are entitled to have their health-related information kept confidential.

Reviewing the undisputed facts regarding how the behavioral data was kept (on the top of his binder, carried from class to class, where other peers could see it), it is clear Knox County failed to provide T.J. reasonable accommodations under the ADA and § 504 related to his disabilities by failing to employ a data collection method that did not reveal his behaviors to his non-disabled peers.

III. RELIEF

Accordingly, Petitioners' motion for summary judgment under the IDEA and § 504 and the ADA is **GRANTED**. The LEA is ordered to produce all behavioral narratives and comments about T.J. in the school setting. The LEA is ordered to provide T.J. an appropriate accommodation that protects his confidential information. Respondent's motion for summary judgment is **DENIED**. The Petitioners are the prevailing parties in this contested case.

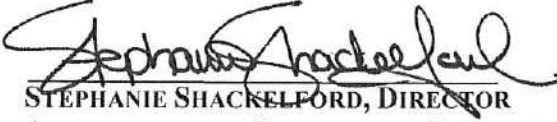
It is so **ORDERED**.

This FINAL ORDER entered and effective this the **23rd day of August, 2021**.



STEVE R. DARNELL
ADMINISTRATIVE JUDGE
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE

Filed in the Administrative Procedures Division, Office of the Secretary of State, this the
23rd day of August, 2021.



STEPHANIE SHACKELFORD, DIRECTOR
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE