D.S. by & ex rel. R.S. & E.S. v. Knox County

United States District Court for the Eastern District of Tennessee

June 21, 2021, Filed

Case No. 3:20-cv-240

Reporter
2021 U.S. Dist. LEXIS 251103 *; 2021 WL 6496726

D.S. by and through R.S. and E.S., Plaintiff/Counterclaim Defendant, v. KNOX COUNTY, TENNESSEE, Defendant/Counterclaimant

Core Terms

classroom, teachers, general education, predetermination, transitions, placement, attorney's fees, disabilities, progress, benefits, peers, deference, syndrome, special education, regular, private school, parties, mainstreaming, reimbursement, courts, public school, kindergarten, expertise, educated, holds, injunctive relief, removing, preschool, expert witness fees, handicapped

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Judges: CHARLES E. ATCHLEY, JR., UNITED STATES DISTRICT JUDGE.

Opinion by: CHARLES E. ATCHLEY, JR.

Opinion

MEMORANDUM OPINION AND ORDER

Plaintiff D.S. is a young girl with Down syndrome. For preschool she attended Knox County Public Schools, and she was planning to attend Knox County Public Schools for kindergarten. However, Defendant Knox County concluded that, for at least part of her day, she needed to be removed from a general education classroom and placed in a special education classroom. D.S.'s parents, R.S. and E.S., disagreed with Knox County's decision; they believed that Knox County's plans violated **[*2]** D.S.'s rights under the *Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, et seq.*

The IDEA provides that any state that accepts federal funds for education must provide every child with a disability within that state a "free appropriate public education" ("FAPE"). When a parent believes that guarantee is violated, they can initiate an administrative process, and as the process is ongoing, the parent can place their child in private education. If the public schools are later found to not provide a FAPE, the parents may be entitled to reimbursement of the costs associated with attending the private school.

That is exactly what D.S.'s parents did. Pursuant to state law, an expert from the Tennessee Department of Education acted as an administrative law judge ("ALJ") in a hearing. After the three-day hearing, the ALJ issued a well-reasoned and thorough opinion finding that (1) Knox County violated the procedural protections set forth in the IDEA; (2) its plan did not provide a FAPE; (3) D.S.'s parents were entitled to reimbursement for D.S's private placement; and (4) Knox County violated the Rehabilitation Act and the Americans with Disabilities Act ("ADA").

D.S. then filed a complaint in this Court against Knox County seeking attorney's fees **[*3]** and litigation expenses under the IDEA, the Rehabilitation Act, and the ADA. Knox County responded by "appealing" the ALJ's decision.

Before the Court is Knox County's Motion for Judgment on the Administrative Record. [Doc. 26]. Also before the Court is Plaintiff's Counter-Motion for Judgment. [Doc. 29]. For the following reasons, Knox County's Motion for Judgment on the Administrative Record [Doc. 26] is **GRANTED IN PART** and **DENIED IN PART**. The Court holds that Knox

County violated the IDEA, but it did not violate the Rehabilitation Act or the ADA. For those same reasons, Plaintiff's Counter-Motion for Judgment [Doc. 29] is **GRANTED IN PART** and **DENIED IN PART**. However, a judgment will not enter because D.S.'s claim for attorney's fees has not been resolved.

I. BACKGROUND

A. Statutory Background

The IDEA is a complex law, and the cases discussing it are "chocked full of jargon." *I.L. ex rel. Taylor v. Knox Cnty. Bd. of Educ., 257 F. Supp. 3d 946, 953 (E.D. Tenn. 2017)*. Thus, a brief explanation of the IDEA will help clarify the rest of this opinion.

The IDEA mandates that any state that accepts federal funding for education must provide a FAPE for students with disabilities. *20 U.S.C. § 1412(a)(1)(A)*. A FAPE can only be provided by "an educational program reasonably calculated to enable a child to make progress appropriate **[*4]** in the light of the child's circumstances." *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist., RE-1, 137 S. Ct. 988, 1001 (2017)*. This standard is inherently flexible; the child is not required to reach any specific level of educational attainment (for example a state-wide curriculum), but the plan must still provide for more than "some progress." *Id. at 997-99*.

A FAPE is carried out through the enactment of an Individualized Education Plan ("IEP"). *20 U.S.C. § 1401(9)(D)*; *Endrew F., 137 S. Ct. at 994* ("The IEP is the centerpiece of the statute's education delivery system for disabled children.") (internal quotation marks omitted) (quoting *Honig v. Doe, 484 U.S. 305, 311 (1988)*). To properly draft an IEP, the school must comply with a number of procedural requirements. *See 20 U.S.C. § 1414(d)*. These requirements include, but are not limited to, regulations that ensure parents maintain an active role in shaping the education of their children. *See Deal v. Hamilton Cnty. Bd. of Educ., 392 F.3d 840, 859 (6th Cir. 2004)*. If a procedural requirement is violated, the Court should view the substantive component of the IEP with heightened scrutiny. *Id. at 854*.

The IEP's substantive components are essentially two-fold: The local educational agency must provide a FAPE and it must do so in the least restrictive environment ("LRE") possible. *L.H. v. Hamilton Cnty. Dep't. of Educ., 900 F.3d 779, 789 (6th Cir. 2018)*. The LRE is the environment where the child with a disability has the most exposure to her typically developing peers. In other words, **[*5]** the IDEA has a strong preference for "mainstreaming." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 202-03 (1982)*. The "removal of children with disabilities" should occur only if "education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *34 C.F.R. § 300.114(a)(2)(ii)*; *see also Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983)*.

When parents believe their child is denied a FAPE, they can file a complaint that may lead to a "due process hearing." *20 U.S.C. § 1415*; *Fry v. Napoleon Cmty. Schs., 137 S. Ct. 743, 749 (2017)*. To bring a cause of action in the federal courts claiming a denial of a FAPE, the parent is required to follow this process. *Fry, 137 S. Ct. at 754-55*. The state's administrative body—in this case, the Secretary of State of Tennessee—then assigns an ALJ to hear the case. *Id. at 749*; *Tenn. Code Ann. § 49-10-606*. After exhausting administrative remedies, any party can appeal to the federal courts. *20 U.S.C. § 1415(i)(2)(A)*.

This process can take a while, and parents are not required to bide their time until it plays out. They can unilaterally pull their child out of public school, and (at their own financial risk) place their child in private school. *Florence Cnty. Sch. Dist. Four v. Carter ex rel. Carter, 510 U.S. 7, 15-16 (1993)*. If the public school violated the IDEA and the private school provides a FAPE, the parents can receive reimbursement for the expenses of sending their child to private school. *L.H., 900 F.3d at 791*. But if the difference between the two schools is only that the private school is **[*6]** less restrictive, the parents are not entitled to reimbursement. *Id.* With these principles in place, the Court can proceed to the factual background.

B. Factual Background

In an IDEA case, the Court cannot accept the facts as stated by the ALJ; it must examine the record and come to its own conclusions. *L.H., 900 F.3d at 791*. Therefore, all statements of fact in this section are uncontested unless otherwise noted.

At the time of the due process hearing, D.S. was a six-year-old child with Down syndrome. [R. at 1311].[1] Knox County

[1] While the Court generally prefers citations to the record to cite the specific document in ECF, in this case the administrative record was randomly divided due to the limitations of ECF. Thus, when the Court cites the record it will use the abbreviation 'R.' to refer to the record. When it cites to any other document, it will cite the document using the abbreviation of 'Doc.'

Schools is her zoned school district. [*Id.*] In 2016, D.S. began attending Cedar Bluff Primary School. [*Id.*] For the 2018-2019 school year, D.S. attended school in a "cotaught" classroom. [*Id.*] A cotaught classroom is a classroom where typically developing students and students with IEPs are taught together. [*Id.*] There are also two teachers: one regular education teacher and one special education teacher. [*Id.*] Mary Sutton, the special education teacher, was responsible for the eight to ten students in the class with IEPs. [*Id.* at 1312]. Rebecca Labig, the general education teacher, was primarily responsible for the other 19-20 typically developing students. [*Id.*] D.S. attended school **[*7]** for 5.25 hours a day, five days a week. [*Id.* at 1311].

Before D.S., Sutton had never taught a child with Down syndrome. [*Id.* at 1312]. Sutton was also not provided any specific training on how to educate children with Down syndrome. [*Id.*] There is a dispute as to whether she understood what the phrase "LRE" meant. The ALJ found that Sutton believed that LRE meant that D.S. was to be educated with the least amount of supports possible. [*Id.* at 1312-13]. Sutton testified that she understood the term correctly, but she just used the wrong words when she described it as "[g]iving the child the least amount of support possible where necessary." [R. at 199-200]. In addition, while Sutton had received some training on how to gather data for IEPs, she did not remember that training. [*Id.* at 1315].

D.S.'s IEP contained five goals. [*Id.* at 1314].[2] One of Sutton's primary responsibilities was to collect data as to D.S.'s progress towards these goals. [*Id.* at 1315]. Sutton developed her own system of data collection: she would note whether a task was accomplished by no prompting (i.e., no further prompting beyond the prompts already embedded in the program); partial prompting (for example a pat on **[*8]** the back or leading by the elbow); or full prompting (where the teacher had to "physically place her hand over D.S.'s and do the activity.") [*Id.*] There is a dispute as to whether this data was helpful in determining D.S.'s progress. D.S.'s expert, Dr. Kathleen Whitbread, testified that the information was not sufficient and that this method of collection generated little useful data as to D.S.'s progress. [*Id.* at 559-69]. The ALJ agreed, concluding this data was unhelpful. [*Id.* at 1317].

Regardless of its usefulness, Sutton relied on the data and her observations to track D.S.'s progress on her IEP. [*Id.* at 1315]. Sutton also used a statewide system for rating each of D.S.'s goals: a four meant that D.S. had met her goal, a five meant that she was expected to meet her goal by the end of the academic year, and a six meant that she was not expected to meet her goal by year's end. [*Id.*] Sutton recorded this data seven times. In D.S.'s last progress report, Sutton gave her all fives which meant that D.S. was expected to meet all of her IEP goals by year's end in her current general education setting. [*Id.* at 1360].

In the classroom, D.S. especially struggled with transitions. Transitions **[*9]** could mean physical transitions, for example going from the classroom to the bathroom, but it could also mean when D.S. changed from one activity to another. [*Id.* at 1316]. This problem was especially acute when D.S. transitioned from a preferred activity (an activity she enjoyed) to a nonpreferred activity. [*Id.*] To better facilitate those transitions, the school used peer modeling and rewards such as a toy or snack. [*Id.*]

Throughout the day, however, D.S. needed a good deal of assistance. She needed special seating for her to sit on the carpet. [*Id.* at 1317]. She often could not unzip her own backpack or grab the folder she needed for the day. [*Id.*] She needed assistance toileting and with other self-care tasks such as keeping track of her own belongings. [*Id.* at 1318]. D.S. also had difficulty coping with other children with disabilities, such as children with autism, due to their unexpected yelling, fits, or other outbursts. [*Id.*]

Near the end of her preschool year, Knox County and D.S.'s mother, R.S. planned a "bump up" meeting. [*Id.* at 1319]. The meeting was an IEP meeting where the parties would discuss D.S.'s transition to kindergarten. [*Id.*] Knox County's kindergarten curriculum **[*10]** is more academic than its preschool play-based curriculum. [*Id.*] D.S. was zoned for Hardin Valley Elementary School. [*Id.* at 1311].

Before this meeting, teachers from Knox County began to reduce the amount of support and prompting for D.S. [*Id.* at 1318]. D.S. argues that this was because Sutton did not understand the meaning of the term "LRE." [Doc. 29 at 6]. The ALJ found that this was an attempt to "fix" the data to support the conclusion that D.S. needed to be pulled out of class. [R. at 1328]. In her testimony, Sutton states that she did it to get a more accurate picture of D.S.'s abilities. [*Id.* at 274].

After learning that R.S. was bringing an educational advocate, Knox County cancelled the first scheduled IEP meeting an hour before it was to begin.[3] [*Id.* at 1319]. The second meeting was cancelled by R.S. after learning that teachers from Ball Camp Elementary would be present. [*Id.*]. Ball Camp had a more intensive version of special education. [*Id.*]

[2] Their exact contents are neither directly relevant nor in dispute.

[3] Sutton reduced D.S.'s supports after this first meeting was cancelled. [*Id.* at 1328].

Eventually, all parties agreed to meet on their third attempt.

The meeting started out as cordial. The parties began with discussions of D.S.'s strengths and goals. [Ex. 42 at 0:00-1:25].[4] Knox County staff seemed open to amending the **[*11]** goals set forth in the IEP with input from R.S. and her advocate. [*See id.*] Knox County and R.S. agreed to goals that were slightly more difficult than D.S.'s current goals. [*Id.* at 1368-69, 1471-73]. However, the tone of the meeting shifted swiftly when Knox County recommended that D.S. be pulled out of a general education classroom and into a special education classroom. [*Id.* at 1:55].

In Knox County's proposal, D.S. would spend 4.5 hours (64%) of her day with her peers in general education. [R. at 1320]. For 3.5 of these hours, D.S. would have one-to-one assistance with a paraprofessional. [*Id.*] D.S.'s advocates recommended, and Knox County accepted, that for one hour a day, a special education teacher would come into the general education classroom to provide "push-in" education for D.S. [*Id.*; Ex. 42 at 2:00-2:09]. For the other 2.5 hours (36%) of her day, D.S. would be pulled out of the general education classroom into a special education classroom. [R. at 1320]. Here, Knox County hoped that D.S. would be better able to learn because there would be fewer distractions and the teaching would be closely tailored to D.S.'s ability. [*Id.*] Her teachers argued that even with aides and **[*12]** push-in teachers, D.S. was distracted by other children and the activity in a larger classroom. [*See* Ex. 42 at 1:55-1:58]. Admittedly, none of the teachers present had ever seen a child with Down syndrome fully integrated into a kindergarten classroom. [*Id.* at 1325].

R.S. and her advocates disagreed. They argued that D.S. should be in a general education setting for the entirety of the day. [R. at 1322]. They argued that research showed that children with Down syndrome perform better when surrounded by their typically developing peers. [*Id.*] They also argued that the data demonstrated that D.S. performed well in a general education setting because she had received all fives on her IEP. [*Id.* at 1322].

While Knox County proposed this plan, it could not provide certain details. For example, it could not say how many students would be in the special education class. [*Id.* at 1321]. It could not say what ages those students would be or what grade level they would be. [*Id.*] It could not say how many teachers would be in the class. [*Id.*] It could provide no information as to what disabilities the other students in that class would have. [*Id.*] In addition, Knox County could not provide information **[*13]** on how many transitions the plan would be add to D.S.'s day. [*Id.* at 1321; *see also* doc. 26 at 14-15].

Knox County claims it could not provide this information because of Hardin Valley's process of placing students. [R. at 1321]. All the students at Hardin Valley come in for the first two weeks of school on staggered days and transition around to different kindergarten teachers. [*Id.*] Hardin Valley uses this opportunity to gather data and create schedules for each student, so the students can be placed appropriately among similarly achieving peers. [*Id.*]

Sutton made this proposal near the end of the first meeting. [Ex. 42]. As it became clear that the parties would not agree to that plan while in this meeting, the parties agreed to meet a second time. The first meeting lasted about three hours. [*Id.*] The second meeting lasted about two hours. [Ex. 43]. At the conclusion of the second meeting, it was clear that the parties would not agree on a proposed IED. [Ex. 43 at 1:28-1:31].

Unsatisfied with Knox County's IEP, D.S.'s parents placed her in Little River Montessori School. [R. at 1325]. The ALJ concluded that D.S. interacts well with her peers at Little River; the other students have **[*14]** identified D.S. as a friend, and she has learned from them. [*Id.* at 1325-2]. For example, she can better reciprocate emotions and she pushes others on the swing. [*Id.*] Her teacher at Little River testified that she is performing better with transitions in the classroom. [*Id.* at 1327]. R.S. is also satisfied with D.S.'s placement in Little River. [*Id.* at 1387]. However, D.S.'s teacher at Little River does not have any specific training in educating children with Down syndrome, and Little River and D.S.'s family decided that she would repeat her year in preschool at Little River. [*Id.* at 1326-27]. Tuition and fees at Little River are $7,250 a year. [*Id.* at 1327].

C. Administrative Background

D.S. filed an administrative complaint and received a due process hearing. The hearing was conducted over three days. Both sides presented numerous witnesses including expert witnesses. No party contends that there were any procedural defects in the hearing.

In a well-reasoned opinion which detailed his findings of fact and conclusions of law, the ALJ concluded that Knox County committed two procedural violations when formulating the IEP: (1) Knox County predetermined D.S.'s placement in kindergarten; **[*15]** and (2) Knox County denied D.S.'s

[4] There are two physical filings in this case. Ex. 42 will refer to the recording of the first IEP meeting on June 28, 2019. Ex. 43 will refer to the recording of the second IEP meeting on July 2, 2019.

parents' meaningful participation in the formulation of the IEP. [R. at 1328-30]. The ALJ also concluded that the IEP did not provide for D.S.'s LRE. [R. at 1330-38].

The ALJ also concluded that reimbursement for D.S.'s private education was appropriate. [*Id.* at 1337]. The ALJ reasoned that this case was "on all fours with *L.H.*" and that "D.S. is performing exceedingly well and making educational process" at Little River. [*Id.* at 1338]. Furthermore, the ALJ noted that D.S.'s education at Little River "avoids all unnecessary *transitions* between two entirely different environmental structures . . .." [*Id.*] In addition to the IDEA claim, the ALJ concluded that Knox County violated Section 504 of the Rehabilitation Act, and D.S. was entitled to attorney's fees including expert fees. [*Id.* at 1339-40]. The ALJ recognized that he could not award those fees. [*Id.*]

R.S. then filed a complaint in this Court seeking attorney's fees and other litigation costs. [Doc. 1]. Knox County filed a counterclaim that appealed the ALJ's decision. [Doc. 6]. Knox County argues that the ALJ erred in all of his conclusions of law and several findings of fact. Both parties now move for judgment on the administrative **[*16]** record. [Docs. 26, 29].

II. STANDARD OF REVIEW

When a parent challenges an IEP, the parent must prove, by a preponderance of the evidence, that the plan is inadequate. *McLaughlin v. Holt Pub. Schs. Bd. of Educ., 320 F.3d 663, 669 (6th Cir. 2003)*. When reviewing an order from a due process hearing, the Court applies a modified de novo standard of review. *L.H., 900 F.3d at 790*. This standard resembles a sliding scale: when a finding of fact requires educational expertise, more deference is owed to the ALJ, but when the finding requires no educational expertise, less weight is appropriate. *Burilovich v. Bd. of Educ. of Lincoln Consol. Schs., 208 F.3d 560, 566 (6th Cir. 2000)* ("[L]ess weight is due to an agency's determinations on matters for which educational expertise is not relevant, so that a federal court would be just as well suited to evaluate the situation. More weight is due to an agency's determinations on matters for which educational expertise would be relevant.") While some deference is owed both to the school staff and the ALJ, when their opinions conflict, the Court defers to the ALJ, not the staff. *See T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 160 (2d Cir. 2014)*.

IDEA cases thus require the federal courts to exercise restraint. As the Supreme Court has noted, the "courts lack the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy." *Rowley, 458 U.S. at 208* (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973)*) (internal **[*17]** quotation marks omitted). Not only do courts lack expertise in educational policy, they also violate the principles of federalism embodied in the IDEA when they substitute their own preferences for those of the state. Congress gave states and localities—not the federal courts—the primary responsibility for formulating educational requirements. *Id.*; *see also Burilovich, 208 F.3d at 567*.

III. ANALYSIS

A. Was D.S. Denied a FAPE?

To determine if D.S. was denied a FAPE, the Court reviews the IEP for both substantive and procedural compliance. *L.H., 900 F.3d at 790*. If the school complies procedurally with the IDEA, more deference is owed when the Court reviews the IEP for substantive compliance. *Id.* Mere technical violations will not support setting aside an IEP, but fundamental errors in its formulation may serve both as a procedural violation of the IDEA and a denial of a FAPE. *Id.*

The ALJ made several findings as to the IEP and its compliance with the IDEA. Most significantly, the ALJ found that: (1) Knox County predetermined D.S.'s placement; (2) Knox County denied D.S.'s parents a meaningful opportunity to participate; and (3) the IEP did not educate D.S. in her LRE. The Court will analyze each of these purported flaws in turn.

1. Predetermination ***[*18]***

Predetermination is a procedural violation of the IDEA which may cause substantive harm. *Nack ex rel. Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 (6th Cir. 2006)*. A school may enter an IEP meeting with an opinion as to the child's placement, but the school must be "willing to listen to the parents and parents [must] have the opportunity to make objections and suggestions." *Id. at 610* (quoting *N.L. ex rel. Mrs. C. v. Knox Cnty. Schs., 315 F.3d 688, 694 (6th Cir. 2003)*) (internal quotation marks omitted). Predetermination is often accompanied by a policy—either official or unofficial—regarding the child's placement. *See, e.g.*, *Deal, 392 F.3d at 858* ("The facts of this case strongly suggest that the School System had an unofficial policy of refusing to provide [the requested accommodation]."); *M.H. v. N.Y.C. Dep't of Educ., 685 F.3d 217, 256-57 (2d Cir. 2012)* (holding no predetermination because there was an absence of a policy

from the department of education). In the absence of a policy, a finding of predetermination is rare. *See, e.g.*, *Fort Osage R-1 Sch. Dist. v. Sims ex rel. B.S., 641 F.3d 996, 1005 (8th Cir. 2011)*; *Hazen v. S. Kingstown Sch. Dep't., No. CA 09-313, 2010 WL 5558912, at *10-11 (D.R.I. Nov. 22, 2010)*; *Winkelman v. Parma City Sch. Dist. Bd. of Educ.*, No. 1:07-cv-3860, *2009 WL 4456297, at *20 (N.D. Ohio Nov. 30, 2009)*. Predetermination is a mixed question of law and fact, and therefore the standard of review is de novo. *Deal, 392 F.3d at 857*.

The caselaw tends to demonstrate that predetermination is a high bar. If courts were quick to hold that a school's actions are predetermination, it could encourage schools to come to IEP meetings with no plan at all, **[*19]** creating an incentive for inadequate preparation. In the alternative, it may encourage schools to create ill-fitting plans so they could make some 'concessions' to avoid a finding of predetermination. To avoid these extremes, a court should be slow to hold that a plan is predetermined, but it should still ensure that the IEP is individualized and made with adequate parental participation.

The ALJ made three key findings when examining predetermination. First, the ALJ found that Sutton developed the plan before the IEP meeting. [R. at 1328-29]. Second, the ALJ concluded that when R.S. stated she was bringing an educational advocate, Knox County and Sutton "fixed" the data to support their conclusion that D.S. needed to be separated by removing D.S.'s supports. [*Id.*] To put it another way, Sutton sought data to confirm her conclusion instead of unbiased data that would lead to an accurate conclusion. Third, the ALJ found that Knox County steadfastly refused to alter their plan despite the information brought in by R.S. and her advocates. [*Id.*] No educational expertise is required to determine these facts, so the Court gives the ALJ's findings little weight. *Burilovich, 208 F.3d at 566*.

First, the Court agrees with **[*20]** the ALJ that Sutton developed a plan before the meeting. This conclusion was collaborated by Labig, the general education teacher. [R. at 305]. Knox County argues that the Court should consider the evidence from the other participants who were not told of a plan beforehand, or the testimony of Sutton that she developed the plan during the meeting. [Doc. 26 at 25]. But that testimony is not credible in light of the recordings of the meetings. [Exs. 42, 43]. Sutton stated the plan for pull-out time, in its entirety, with little hesitation in the meeting. [Ex. 42 at 1:44-1:55]. Then every staffer from Knox County stuck to that plan, with no dissent, for the remainder of that meeting and for the next, almost two-hour long, meeting. [Ex. 43]. It seems implausible that without preparation Sutton presented a fully formulated plan that merited complete agreement for the next three hours. Therefore, the Court agrees with the ALJ: the exact schedule of pull-out time was determined before the first IEP meeting.

Second, the ALJ was correct that the committee did not seriously consider R.S.'s proposals regarding her removal from the general education classroom. At times, Knox County accepted R.S.'s **[*21]** recommendations. Her input was accepted in the phrasing of goals for D.S. [*See* Ex. 42 at 0:00-1:00]. The suggestion of push-in time was also made by R.S. and accepted by Knox County. [Ex. 42 at 2:10-2:15]. But when it came to pull-out time, Knox County steadfastly refused to alter its opinions or even consider new data. Instead, Knox County staff stuck to the plan and rejected any attempt to introduce evidence that would support the need for more mainstreaming. [*See* Ex. 43]. Therefore, the Court agrees with the ALJ that Knox County did not seriously consider parental input.

However, the Court disagrees with the ALJ's finding that Sutton collected additional data from D.S. in an attempt to support her predetermined conclusion. While Sutton's attempt to gather data was at worst misleading, the nefarious explanation given by the ALJ lacks record support. The far more likely explanation is that Sutton wanted more data, and that Sutton misunderstood what data was needed. Indeed, Sutton testified in an earlier hearing that she understood LRE to mean the environment with the least amount of behavioral or educational supports. [R. at 199-200]. And she admitted to removing supports in an attempt **[*22]** to gather more accurate information about D.S.'s independence. [R. at 274]. All of these seem to be the likely explanation as to why Sutton collected data from D.S. after her supports were removed. The Court will not infer that Knox County acted with an insidious purpose in the absence of evidence to support this conclusion. Accordingly, the Court finds that Sutton did not "fix" the data to match her predetermined conclusion.

So, the question is: if a school already has a plan at a student's IEP meeting and then demonstrates inflexibility with that plan, have they predetermined that child's placement. While it is a close case, the Court holds that Knox County did not predetermine D.S.'s placement. Knox County did accept some suggestions as to the IEP, and there was no official policy in place which established that children with Down syndrome had to be educated separately.

A comparison of this case to *Deal* helps illustrate why this case falls short of predetermination. In *Deal*, the Court found that the refusal to consider a one-on-one applied behavior

analysis ("ABA") for the disabled child resulted in predetermination of the child's IEP. *392 F.3d at 858-59*. But in that case, the school district "ha[d] a policy **[*23]** of not considering [the relevant] ABA program for autistic children." *Id. at 856*. The school even admitted it was impressed as to how well the child progressed in the program, but the district refused to provide the program anyway. *Id. at 858*. In short, the Court found that "no matter how strong the evidence . . . the School System still would have refused to provide the services." *Id. at 858*. This case—where there has been no finding as to whether Knox County maintains a policy preordaining the result—is unlike *Deal*.

Instead, this case more closely resembles *Nack, 454 F.3d at 604*. The court in *Nack* explained that the school had drafted part of the IEP before the meeting, and the child's parent objected, strenuously, to her child being removed from a general education setting. *Id. at 609-11*. But the court distinguished *Deal*:

> [T]his is a far cry from the situation in *Deal* where the Sixth Circuit found (1) numerous procedural and substantive errors, (2) that the school district had an unofficial policy of refusing to consider certain programs regardless of the child's needs, and (3) that the district's main concern was financial. Indeed, in *Deal*, the parents were not even allowed to ask questions during the IEP meetings.

Id. at 610-11 (quoting *Winkelman v. Parma City Sch. Dist., 411 F. Supp. 2d 722, 728-29 (N.D. Ohio 2005)*). The court also noted the case was unlike **[*24]** *Spielberg ex rel. Spielberg v. Henrico County Public School, 853 F.2d 256, 259 (4th Cir. 1988)*, where the United States Court of Appeals for the Fourth Circuit found that the school decided the child's placement and then developed the IEP around that decision. *Id. at 611*. When the parties simply did not agree, the court held that the school did not predetermine the IEP.

This is a case where the parties disagreed on the proper education of D.S. And while the plan was developed before the meeting, the whole IEP was not formed around that educational plan. *See Spielberg, 853 F.2d at 259*. The school also does not seem to have a policy of refusing to mainstream children with Down syndrome. There were no additional procedural violations (besides the closely related question of parental participation). And there is no indication that Knox County even considered, much less had as its primary concern, fiscal restraints. That leads the Court to hold that there was no predetermination by Knox County as to D.S.'s placement.

2. Parental Participation

While Knox County may have not predetermined placement, D.S.'s parents, R.S. and E.S. were denied effective participation in the education of their child. *L.H., 900 F.3d at 790*. Parental involvement is "[a]n important aspect in assessing procedural compliance." *Id.* A parent is entitled to more than **[*25]** just an opportunity to be heard, that opportunity must be meaningful. *Deal, 392 F.3d at 858*. In fact, "adequate parental involvement and participation in formulating an IEP . . . appear to be the [Supreme] Court's primary concern in requiring that procedures be strictly followed." *Doe ex rel. Doe v. Defendant I, 898 F.2d 1186, 1191 (6th Cir. 1990)*.

Here it is clear that R.S. was given an opportunity to be heard: there were over five hours of meetings regarding D.S.'s IEP. [Exs. 42, 43]. The question is whether that participation was meaningful. This question does not rely on an issue of educational fact. Therefore, the standard of review is de novo. *See Burilovich, 208 F.3d at 566*.

The ALJ found that there was not a meaningful opportunity for D.S.'s parents to participate in the formulation of D.S.'s IEP. [R. at 1329]. The ALJ found that Knox County never seriously considered any of the parent's concerns on pull-out time. [*Id.*] As noted above, Knox County never wavered in its view that D.S. needed to be pulled out of the general education classroom for 2.5 hours. *Supra* Sec. III.A.1. The ALJ also found that the parents lacked meaningful information such as what classroom D.S. would be in, how many transitions D.S. would have to undertake, how many students would be in the class, and what disabilities **[*26]** those students would have. [R. at 1329]. These facts are either settled or uncontested, so the issue is whether they prevented R.S. from participating effectively.

The Court agrees with the ALJ and holds that D.S.'s parents were denied a chance to meaningfully participate in the formulation of her IEP. First, the Court agrees that D.S.'s parents lacked essential information to predict, much less contest, how their child was being educated. *See Colonial Sch. Dist. v. G.K. ex rel. A.K., 763 F. App'x 192, 198 (3d Cir. 2019)* (examining whether an IEP was reasonably clear). The IEP must reasonably communicate essential facts to the parents about their child's education. *Id.* By not providing answers to key questions, such as how many students would be present and how many transitions would be added to D.S.'s day, R.S. could not reasonably understand the IEP. *Id.* Therefore, R.S. was denied meaningful participation in the

IEP process.[5]

Another issue regarding information is the data collected by Sutton. The ALJ did not rely upon this in the finding of a denial of meaningful participation, but the ALJ concluded that the information collected by Sutton was misleading and unhelpful. [R. at 1317]. The Court finds that the proper way to collect data in order to determine **[*27]** compliance with an IEP is an educational fact where the ALJs educational expertise can be brought to bear. As such, it is owed a degree of deference. *Burilovich, 208 F.3d at 566*. The Court agrees with Dr. Whitbread that the examination conducted by Sutton was unhelpful. [R. at 1703].[6]

Knox County relied on Sutton's data to make several recommendations and it relies on that data here to defend D.S.'s placement. [*Id.* at 1317; Doc. 26 at 9, 12]. But that data does not provide useful information. The lack of accurate information from Knox County also contributed to the parent's inability to meaningfully participate in the meeting. R.S. could not dispute Sutton's progress information because it was too difficult to understand and further it failed to provide any useful insight as to D.S.'s education.

Furthermore, as discussed above, Knox County refused to change its recommendation as to D.S.'s placement. *See Supra* Sec. II.A. It effectively stonewalled any attempt to introduce evidence that D.S. would benefit from mainstreaming. This refusal to consider, coupled with the lack of information, makes this a case where R.S. was denied meaningful parental participation in her child's education.[7]

While procedural in nature, **[*28]** denial of meaningful parental participation is a per se denial of a FAPE. *Knable ex rel. Knable v. Bexley City Sch. Dist., 238 F.3d 755, 765 (6th Cir. 2001)* ("[A] school district's failure to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such a violation causes substantive harm to the child or his parents. *Substantive harm occurs when the procedural violations in question seriously infringe upon the parents' opportunity to participate in the IEP process*.") (citations omitted) (emphasis added); *see also Deal, 392 F.3d at 859*. The Court holds that D.S. was denied a FAPE because her parents did not have an opportunity to meaningfully participate in her IEP meeting. Therefore, Knox County violated the IDEA.

3. Substantive Violations

Because the Court held that D.S.'s parents were denied a chance to effectively participate in the development of her IEP, the Court does not need to determine if there were additional substantive violations. *Knable, 238 F.3d at 765*. However, in the alternative, the Court holds that Knox County also denied D.S. a FAPE by refusing to place her in her LRE.

The IDEA contains a strong preference for "mainstreaming" handicapped children; children with disabilities should be educated with their typically developing peers whenever that is achievable. **[*29]** *Rowley, 458 U.S. at 202*; *L.H., 900 F.3d at 789*. The Sixth Circuit has laid out a three-part test for determining when a school can remove a child from a general education classroom: A child can be removed when: "(1) the student would not benefit from regular education; (2) any regular-class benefits would be far outweighed by the benefits of special education; (3) the student would be a disruptive force in the regular class." *L.H., 900 F.3d at 789* (citing *Roncker, 700 F.2d at 1063*).[8] Improperly removing a child

[5] Defendant argues that it was not required to provide such information because it did not have the information. [Doc. 26 at 22]. It cites cases where the court (or a concurrence) stated that the IEP is a "snapshot." *See e.g.*, *Adams ex rel. Adams v. State of Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999)*; *Fuhrman v. E. Hanover Bd. of Ed., 993 F.2d 1031 (3d Cir. 1993)* (Mansmann, J., concurring). But those quotes arise in the context of how a court is to measure performance under an IEP. They ask: At the time it was drafted, was the IEP formulated in such a way to achieve reasonable progress. *Adams*, 993 F.2d at 1041. The "snapshot" language was not applied as a shield to a school that lacks key information: it was a warning against the pervasiveness of hindsight bias. Those cases provide no guidance here when the issue is whether there was meaningful parental participation.

[6] Dr. Whitbread found that the proper way to gather data was to break down the desired task into multiple, discrete steps. By doing that, a teacher can presumably show where and why the student struggles with a task. Without that division, the data is impermissibly general, and it provides almost no information on how to best advance the child's education. [R. at 559-69].

[7] The Court is not holding that a school must concede some ground to parents who disagree with its proposed IED plan in order for the parents to meaningfully participate. Such an approach would be plagued by the same ills that accompany an overexpansive approach to predetermination.

[8] In its reply, Knox County states that the test is whether "D.S. has shown beyond a preponderance of the evidence that the marginal benefits of a full-time general education placement far outweigh the benefits of 2.5 hours in the special education setting." [Doc. 33 at 9]. That standard is essentially the opposite of the proper test developed in *Roncker*. It presumes that special education is proper, but the

from general education also acts as a denial of a FAPE.

Knox County never attempted to argue that D.S. was a "disruptive force in the regular class," so the ALJ focused on the first two justifications and found that removing D.S. from a general education classroom was inappropriate. [R. at 1321-27]. LRE is a nonacademic restriction on the IEP process: thus, the ALJ's findings are not entitled to deference. *L.H., 900 F.3d at 789*. With that being said, the ALJ carefully and correctly determined that Knox County's plan did not provide for D.S.'s LRE.

First, D.S. would benefit from a general education setting. The strongest evidence of this fact is that D.S. benefited from education among her typically developing peers. When analyzing D.S.'s progress, Sutton gave D.S. all fives **[*30]** on her IEP report (meaning that D.S. was expected to meet all of her goals that year). [R. at 1360]. When recommending new goals for kindergarten, Knox County changed the goals and made them more difficult. [*Id.* at 1368-69, 1471-73]. These facts demonstrate that even Knox County, through its teachers, acknowledged that D.S. benefited from a general education setting.

Second, the evidence demonstrates that D.S. learns well from peer modeling. [*Id.* at 1324-26]. The ALJ made this finding and it is one that requires educational expertise. Therefore, the finding is entitled to some deference. But even if it was not, the Court would find that D.S. learned from her typically developing peers. Sutton even used D.S.'s typically developing peers to model for D.S. The students would help her with transitions throughout the day in preschool. [*Id.* at 1316]. Furthermore, at Little River, D.S. has learned skills like how to better reciprocate emotion from peer modeling. [*Id.* at 1325-26]

Third, the ALJ found that D.S. has benefited from education at Little River, among her typically developing peers.[9] The ALJ found that the Montessori school generated positive results such as an increase in confidence **[*31]** for D.S. and less fear of transitions. [*Id.*] D.S. has shown interests in a variety of tasks at Little River and she has made academic progress in lessons such as basic biology and geology. [*Id.*]

Finally, Knox County's argument, if accepted, proves too much. If D.S. would not benefit from regular education, the school should completely remove her from the general education setting. Indeed, if a child makes no progress, whether mainstreamed or not, the school has failed to provide a FAPE. *Endrew F., 137 S. Ct. at 1001*. But Knox County's plan educated D.S. in a regular classroom for the majority of the day. If she really did not benefit from regular education, did Knox County simply intend for her to languish for most of the day? Certainly not. Thus, the Court can safely reject the argument that D.S. did not benefit from regular placement.

Because D.S. clearly benefited from regular education, Knox County has to prove that it could remove her from the general education setting because the benefits of special education far outweighed keeping her among her typically developing peers. *L.H., 900 F.3d at 789*. However, "a placement which may be considered better for academic reasons may not be appropriate because of the failure to provide for **[*32]** mainstreaming." *Roncker, 700 F.2d at 1063*. In fact, "[t]he perception that a segregated institution is academically superior for a handicapped child may reflect no more than a basic disagreement with the mainstreaming concept." *Id.* Here, Knox County argues that removing D.S. is appropriate precisely because it will allow for greater academic advancement.

The Court first states that this reason—on its own—may not be enough to validate removal. Many children would likely benefit from more direct instruction as compared to general "lecturing." But the simple observation that D.S. may be better off with more direct instruction, and fewer children around to distract her, cannot be the end-all-be-all. *See Id.* The school must also consider other ways in which a child benefits from education.

And there is reason to doubt Knox County's conclusion that D.S. would benefit more in a separate classroom. First, Knox County acted with little evidence and little information. For example, it did not know how many extra transitions the IEP would add to D.S.'s day. And while Knox County knew that D.S. often had problems around other children with disabilities, it did not know what disabilities the other students in the special **[*33]** education classroom would have. To make a conclusion with so little information tends to demonstrate that Knox County has a "basic disagreement with

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IDEA mandates that the courts presume that general education is proper. The evidence must show that the benefits of special education would outweigh those of general education. *See I.L., 257 F.Supp.3d at 970*.

Knox County also asks the Court to limit *Roncker* to its facts. [Doc. 26 at 31]. But it provides no persuasive justification as to why the test from *Roncker* should be so limited. Other panels of the Sixth Circuit have applied it to a variety of factual situations, and the Court sees no reason as to why it should depart from those holdings here. *See, e.g., L.H., 900 F.3d at 789*.

[9] Another finding of fact in which educational expertise is brought to bear, so deference is appropriate. *Burilovich, 208 F.3d at 566*.

the mainstreaming concept," instead of reasonable evidence that D.S. would thrive in a special education classroom. *Id.*

Knox County also makes much of the fact that D.S. would be better able to keep track with the kindergarten curriculum in a segregated classroom. Indeed, one of the main concerns in the IEP meeting was the more academic approach of kindergarten as compared to the play-based approach of preschool, and it was pitched as a reason for removing D.S. from the regular classroom. [Doc. 26 at 41] ("[The special education setting] would allow for the special education teacher to slow down the pace of the general education curriculum.") But the general curriculum is of little concern in an IDEA case. *Endrew F., 137 S. Ct. at 1001*. D.S. needs to make reasonable progress: she does not need to keep pace with any state-set criteria. *Id.*

Additionally, D.S.'s expert, Dr. Whitbread, concluded that D.S. would do better in a regular education classroom. Knox County argues that the ALJ's findings of fact for this analysis were improper because the ALJ did not defer to the **[*34]** opinions of D.S.'s teachers. While an ALJ should defer to the opinions of a child's teachers, deference is not absolute. *See L.H., 900 F.3d at 794*. Here, the ALJ disagreed with the teachers for valid reasons.

First, the ALJ properly recognized that Knox County's teachers had little experience. Sutton had never taught another student with Down syndrome. [R. at 1312]. No teacher in the IEP meeting had ever seen a child with Down syndrome fully integrated into a kindergarten classroom. [*Id.* at 1325]. No teacher had received any specific training on educating children with Down syndrome. [*Id.* at 1312-14]. And, the teachers and staff of Knox County were relying on unhelpful information. *See Supra* Sec. III.B. (discussing Sutton's data gathering).

Second, the ALJ found the testimony of Dr. Whitbread, D.S.'s expert, to be credible. Dr. Whitbread explained that studies consistently produce results which demonstrate that children with Down syndrome—especially younger children—benefit far more from mainstreaming than from separation. [R. at 1735]. Dr. Whitbread also reviewed the testimony of D.S.'s teachers and observed D.S. at Little River. [*Id.* at 1734-35, 1749]. All of the data lead to her conclusion that D.S. was **[*35]** better served in a general education environment.

The finding that Dr. Whitbread was more accurate then D.S.'s teachers is appropriate, and it involves educational expertise, so the ALJ is entitled to some deference. While D.S.'s teachers may be owed some deference, their lack of experience and inaccurate information made them ultimately less helpful in determining if D.S. would progress in a special education setting. Therefore, the ALJ did not err by not deferring to D.S.'s teachers.

Furthermore, there is evidence that making D.S. transition from setting to setting throughout the day would actively harm her. D.S. had problems with transitions from task to task and from room to room. Knox County's schedule would add as many as eight transitions into her day. [R. at 1330]. This could cause a large loss of education time, and it could put a strain on D.S. during her school day. [*Id.*] Therefore, not only do the benefits of general education seem to outweigh special education, but a general education placement may actively avoid the harm of additional transitions.

After an independent review of the evidence, the Court finds that: (1) D.S. benefited from education in a regular classroom and **[*36]** (2) the benefits of special education would not greatly outweigh the benefits of education among her typically developing peers. In light of these findings, the Court holds that Knox County's IEP did not educate D.S. in her LRE. Therefore, D.S. was denied a FAPE by Knox County. *L.H., 900 F.3d at 788*.

B. Relief

Because Knox County failed to provide D.S. a FAPE, the next question before the Court is the appropriate remedy. D.S. requested reimbursement, injunctive relief, and attorney's fees. The ALJ concluded that D.S. was entitled to reimbursement. [R. at 1338]. The ALJ also stated that D.S. was entitled to attorney's fees under the IDEA and expert witness fees under the ADA and the Rehabilitation Act, but the ALJ noted that he did not have the ability to award those fees. [*Id.* at 1339-40]. The ALJ did not rule on injunctive relief, and it was not requested below. [*Id.* at 20].

The Court holds that reimbursement is proper, but the Court will not grant injunctive relief. Additionally, the Court concludes that Knox County did not violate the ADA or the Rehabilitation Act. Finally, the question of attorney's fees under the IDEA cannot be fully settled at this stage in litigation because of the lack of evidence on the record.

*1. **[*37]** Reimbursement*

The Court will begin with reimbursement. Reimbursement of private school tuition is an appropriate remedy if, "(1) the public school violated the IDEA and (2) the private school is appropriate under the IDEA." *L.H., 900 F.3d at 791* (citing *Florence Cnty., 510 U.S. at 15*). To be "appropriate under the IDEA," the private school does not need to comply with all

the procedural requirements of the IDEA: it needs only to provide a FAPE. *Id. at 796*. The Sixth Circuit has also held that the private school cannot be merely less restrictive than the public alternative. *Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 (6th Cir. 2003)*. Instead, the private school must "provide some element of special education services in which the public school placement was deficient." *Id. at 523*. In practice, the bar set in *Berger* has not been difficult to overcome. In fact, the court in *L.H.* found that the private school provided an additional "element of special education services" when the student "produce[d] a daily journal, ha[d] nightly homework, and receive[d] report cards." *L.H., 900 F.3d at 798*. The court also noted that the school provided the child "with an involved, qualified teacher and an individual aide." *Id.* These slight differences were found to be sufficient to award reimbursement.

Knox County argues that Little River does not provide an education **[*38]** that is appropriate under the IDEA. [Doc. 26 at 52]. Specifically, it notes that D.S. is repeating preschool, not taking more academic lessons, and the schoolteachers at Little River are not certified like teachers in the public schools. [*Id.* at 51-52]. The certification point is irrelevant. It does not matter if the teachers meet the standards of the public schools; it matters if they provide a FAPE. *See L.H., 900 F.3d at 797*. The former arguments, however, merit further analysis.

The ALJ found that Little River was appropriate under the IDEA. The ALJ stated that D.S. had made appropriate progress at Little River. [R. at 1326]. This included progress in academic instruction and in socialization. The ALJ also found that Little River's lessons were sufficient. They removed problematic transitions, and it helped D.S. to learn sequentially. [R. at 1338]. These findings are facts where the ALJ's expertise in education is brought to bear. Thus, the ALJ's determination is owed deference. *Burilovich, 208 F.3d at 566*

The Court also agrees with the ALJ's determinations. D.S.'s progress included her increased confidence that was noted by her mother. [*Id.* at 1338-39]. The observations of D.S.'s mother were bolstered by her teacher at Little **[*39]** River, and they were supported by Dr. Whitbread. [*Id.*] All of this testimony demonstrates that D.S. "was making reasonable progress" at Little River, and it means that Little River provided D.S. with a FAPE. *Endrew F., 137 S. Ct. at 1001*.

Knox County's main objection, that D.S. is repeating preschool, does not counsel otherwise. The question the Court has to answer is whether D.S. is making reasonable and appropriate progress, and she is. Little River is not tethered to Knox County's standards, and it does not need to be. *Id.*; *L.H., 900 F.3d at 797*. The IDEA does not require any specific level of educational attainment.

Finally, the placement at Little River provides more than just the benefits of mainstreaming. D.S. does not have to transition throughout the day, so she avoids a major stressor. D.S. is making educational process in self-taught and chosen lessons which would be unavailable in Knox County. [R. at 1387]. Finally, her parents are more satisfied with the placement. [*Id.*] The facts demonstrate that reimbursement is an appropriate remedy.

The ALJ awarded D.S. private tuition and fees of $7,250. [R. at 1327]. That reimbursement was appropriate here.

2. Injunctive Relief

At the end of D.S.'s Counter-Motion for Judgment, she also **[*40]** requested injunctive relief as to Knox County's treatment of children with Down syndrome.[10] [Doc. 29 at 45]. However, counsel's cursory briefing is insufficient to warrant relief. *McPherson v. Kelsey, 125 F.3d 989, 995-96 (6th Cir. 1997)* ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones.") (quoting *Citizens Awareness Network, Inc. v. U.S. Nuclear Regul. Comm'n, 59 F.3d 284, 293-94 (1st Cir. 1995)*) (internal quotation marks omitted). The briefing in this case does not address whether injunctive relief is appropriate. *See Jolivette v. Husted, 694 F.3d 760, 765-66 (6th Cir. 2012)* (identifying factors a court should consider before issuing injunctive relief). Furthermore, it is unclear if D.S. can even request this relief. D.S. is not enrolled in Knox County Schools and R.S. stated she was unsure if she ever intended her daughter to go back to the public schools. [R. at 442]; *see City of Los Angeles v. Lyons, 461 U.S. 95, 106 (1983)* (holding that for a plaintiff to have standing to request injunctive relief there must be a plausible risk of future harm). Therefore, the Court will not award any injunctive relief.

3. Attorney's (and Expert) Fees

D.S. also sought any other recoverable costs under the IDEA, Section 504 of the Rehabilitation Act, and Section II of the ADA. *29 U.S.C. § 794a(b)*; *42 U.S.C. § 12205*, and **[*41]** *42*

[10] The entirety of the briefing is limited to one sentence.

U.S.C. § 1988. This gives rise to two separate issues: (1) whether D.S. entitled to attorney's fees and (2) whether those fees include expert witness fees.

Under the IDEA, a prevailing parent can recover attorney's fees. 20 U.S.C. § 1415(i)(3)(B)(i)(I) ("In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees . . . to a prevailing party who is the parent of a child with a disability.") Those fees, however, do not include expert witness fees. Arlington Cent. Sch. Dist. of Educ. v. Murphy, 548 U.S. 291 (2006). The Court holds that D.S. is entitled to reasonable attorney fees, not including expert witness fees, under the IDEA.

The Court assumes without deciding that expert witness fees are recoverable if Knox County also violated Section 504 of the Rehabilitation Act or Section II of the Americans with Disabilities Act.[11] The ALJ examined if D.S. was entitled to attorney's fees and expert fees under Section 504 of the Rehabilitation Act. Section 504 provides:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or **[*42]** activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794(a). The ALJ found that Knox County violated Section 504 of the Rehabilitation Act, and that under that act, D.S. is entitled to expert witness fees. [R. at 1339]. The ALJ relied on L.H. to conclude that Section 504 is violated whenever the IDEA is also violated; more specifically, the ALJ described the Section 504 claim as "pretermitted" and "redundant." [*Id.*]

The ALJ erred in finding that L.H. held that a Section 504 claim and an IDEA claim are identical. The Court in L.H. described the ADA and the Rehabilitation Act in this manner:

> The parents had also sought restitution for the private school placement via the Americans with Disabilities Act, 42 U.S.C. § 12132, and Rehabilitation Act, 29 U.S.C. § 794(a), and the district court held that they had proven those claims, though it appears to have awarded no relief. Because the parents sought only monetary restitution, and because we hold herein that they are entitled to reimbursement under the IDEA, we find that these claims are now redundant and we therefore pretermit these ADA and [Rehabilitation Act] claims in this appeal.

900 F.3d at 784, n.1. This quote shows that the court in L.H. did not reach the merits of the Rehabilitation Act and ADA claims because the plaintiff requested a limited remedy.

The ALJ concluded that the L.H. court held that these claims are **[*43]** "pretermitted," but that makes little sense. "Pretermit" means to ignore. Pretermit, *Black's Law Dictionary* (11th ed. 2019) ("To ignore or disregard purposely."); Pretermit, *Oxford English Dictionary* (3d ed. 2007) ("To neglect or omit . . . to fail to attend to.") The court's discussion in L.H. provides no information on the ADA and Rehabilitation Act claims because the court specifically stated that it would not reach a holding as to the proper scope of these statutes. Instead, the Sixth Circuit refused to reach the claims presented.

Furthermore, the court in L.H. did not hold that Section 504 and the ADA cover the same ground as the IDEA. Indeed, there is substantial overlap between them (as will be explained later), but the ADA and Rehabilitation Act were redundant in L.H. because the plaintiff requested only reimbursement, a remedy the IDEA already provides. 900 F.3d at 784, n.1. Where the parties request expert fees, which are not provided under the IDEA, the claims cease to be redundant and must be analyzed separately. *See* Arlington Cent. Sch. Dist. of Educ. v. Murphy, 548 U.S. 291 (2006).

The parties disagree on what showing is needed to succeed on a claim under the Rehabilitation Act and the ADA. Knox County states that to make out a claim under these statutes the plaintiff must prove "malice, bad faith, **[*44]** indifference or specific discrimination" in addition to the denial of a FAPE. [Doc. 26 at 52-53]. D.S. contends that no additional intent is required. [Doc. 29 at 44].

In order to prevail on a Rehabilitation Act claim, the plaintiff must first satisfy four elements:

> (1) The plaintiff is a "handicapped person" under the Act; (2) The plaintiff is "otherwise qualified" for participation in the program; (3) The plaintiff is being excluded from participation in, or being denied the

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[11] *See* Lovell v. Chandler, 303 F.3d 1039, 1058-59 (9th Cir. 2002) (holding expert witness fees recoverable under ADA); I.H. ex rel. D.S. v. Cumberland Valley Sch. Dist., 842 F. Supp. 2d 762, 777 (M.D. Penn. 2012) (awarding expert fees under the Rehabilitation Act). *But see* M.P. ex rel. K.P. v. Ind. Sch. Dist. No. 721, No. 01-771 2007 WL 844688, at *4 (D. Minn. Mar. 16, 2007) (holding expert witness fees not recoverable under the Rehabilitation Act).

> benefits of, or being subjected to discrimination under the program solely by reason of his handicap; and (4) the relevant program or activity is receiving Federal financial assistance.

G.C. v. Owensboro Public Schs., 711 F.3d 623, 635 (6th Cir. 2013) (quoting *Campbell v. Bd. of Educ. of Centerline Sch. Dist., 58 F. App'x 162, 165 (6th Cir. 2003)*).[12] The ADA and Rehabilitation Act similarly provide that the denial of a FAPE may be discriminatory, but the denial of a FAPE alone is not sufficient. *See N.L., 315 F.3d at 695* ("[M]ore harm is required than a denial of [a FAPE] to make out a section 504 claim.") In fact, the Sixth Circuit stated:

> the Rehabilitation Act *further requires* that the [plaintiff] must ultimately prove that the defendant's failure to provide [the plaintiff] with a free appropriate public education was *discriminatory*. Surmounting that evidentiary hurdle requires that either bad faith or gross misjudgment must be **[*45]** shown before a § 504 violation can be made out, at least in the context of education of handicapped children.

G.C., 711 F.3d at 635 (quoting *Campbell, 58 F. App'x at 167*) (insertions in original) (internal quotation marks omitted). Thus, binding circuit precedent requires the Court to find that there was bad faith or gross mismanagement before holding that Knox County violated the Rehabilitation Act. *Id.*

This conclusion, however, requires some more explanation. Other district courts, including some in this district, have held that there is no additional intent required to make out a claim under Section 504. *See I.L., 257 F. Supp. 3d at 969*; *L.H. v. Hamilton Cnty. Dep't of Educ.*, No. 1:14-cv-126, 2017 WL 4558020, at *5 (E.D. Tenn. July 17, 2017). In *I.L.* the court held that intent was never required to state a claim under Section 504. *I.L., 257 F. Supp. 3d at 969*. In *Hamilton*, the court found that intent was not required when the plaintiff sought an equitable remedy. 2017 WL 4558020, at *5. Other courts seem to assume, without explanation, that Section 504 and the IDEA are coterminous. *See Neena S. v. Sch. Dist. of Phila., No. 05-5404, 2009 WL 2245066, at *11 (E.D. Penn. July 27, 2009)*.

This confusion is understandable. In *Alexander v. Choate, 469 U.S. 287, 294-97 (1985)* the Supreme Court assumed that Section 504 applied to more than intentional acts of discrimination: "We assume without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped." That was echoed by the Sixth Circuit in *Ability Ctr. of Greater Toledo v. City of Sandusky, 385 F.3d 901, 908 (6th Cir. 2004)*: "Case law as well supports our determinations that Title II reaches beyond prohibiting merely intentional **[*46]** discrimination . . .." At first glance, it may appear that these pronouncements conflict with *G.C.*

They do not. Section II of the ADA and Section 504 of the Rehabilitation act are not all-or-nothing provisions: different standards can apply to different claims even within the same act. *Choate, 469 U.S. at 299* ("[W]e reject the boundless notion that *all* disparate-impact showings constitute prima facie cases under § 504 . . ..") (emphasis added).[13] Instead, the standard for discrimination can vary under these statutes in different claims (i.e. there may be a difference between the required state of mind for a claim for educational discrimination and a claim made against a hospital for disability discrimination). *See Reid-Witt ex rel. C.W. v. District of Columbia, 486 F. Supp. 3d 1, 7-9 (D.D.C. 2020)*. Section 504 requires bad faith or gross misjudgment in the context of education of children with disabilities because to provide otherwise would conflict with the IDEA and with the principles of federalism that underly its implementation. *Id.*; *I.Z.M. v. Rosemount-Apple Valley-Eagan Pub. Schs., 863 F.3d 966, 973 (8th Cir. 2017)* ("This rule reflects what we believe to be a proper balance between the rights of handicapped children, the responsibilities of state educational officials, and the competence of courts to make judgments in technical fields.") (quoting *Monahan v. Nebraska, 687 F.2d 1164, 1171 (8th Cir. 1982)*); *D.A. ex rel. Latasha A. v. Houston Ind. Sch. Dist., 629 F.3d 450, 454-55 (5th Cir. 2010)*.[14]

The Court is bound by Sixth Circuit precedent, and **[*47]** the

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[12] There are some differences in the standards provided by the Rehabilitation Act and the ADA. For example, the ADA does not require the disability to be the sole cause of exclusion. *McIntyre v. Eugene Sch. Dist. 4J, 976 F.3d 902, 911-12 (9th Cir. 2020)*. In this case, these minor differences are not relevant.

[13] *But see Doe v. BlueCross BlueShield of Tenn., Inc., 926 F.3d 235, 241 (6th Cir. 2019)* ("We now resolve what *Choate* did not and conclude § 504 does not prohibit disparate-impact discrimination.")

[14] Indeed, the majority of the courts of appeals agree that the mere denial of a FAPE does not warrant relief under the Rehabilitation Act or the ADA. *See, e.g., D.B. ex rel. Elizabeth B. v. Esposito, 675 F.3d 26, 40 (1st Cir. 2012)*; *Garcia v. S.U.N.Y. Health Sciences Ctr. of Brooklyn, 280 F.3d 98, 115 (2d Cir. 2001)*; *Sellers ex rel. Sellers v. Sch. Bd. of City of Manassas, Va., 141 F.3d 524, 529 (4th Cir. 1998)*; *Est. of Lance v. Lewisville Ind. Sch. Dist., 743 F.3d 982, 992 (5th Cir. 2014)*; *J.S., III ex rel. J.S. Jr. v. Houston Cnty. Bd. of Educ., 877 F.3d 979, 985 (11th Cir. 2017)*.

Court sees no reason to distinguish or question the continuing validity of *G.C. 711 F.3d at 635*. Notably, it has recently been followed by subsequent panels of the Sixth Circuit. *Cochran ex rel. Shields v. Columbus City Schs., 748 F. App'x 682, 687 (6th Cir. 2018)*. And the less expansive view of liability imposed also fits with the limited role of the courts in these educational disputes. *Rowley, 458 U.S. at 208*.

Consistent with *G.C.*, Plaintiff must establish bad faith or gross misjudgment on the part of Knox County in order to demonstrate a violation of Section 504. D.S. has presented no evidence that Knox County acted in bad faith or exercised gross misjudgment. Experts disagree, and the ALJ disagreed with the conclusion of Knox County as to the education of D.S., but mere disagreement among experts does not establish gross misjudgment. *See I.Z.M., 863 F.3d at 973*. Therefore, Knox County did not violate Title II of the ADA or Section 504 of the Rehabilitation Act, and as a result, D.S. is not entitled to expert witness fees.

4. Procedural Posture

There remains one issue which is the proper disposition of this case. D.S. filed a complaint in which she claimed attorney's fees. [Doc. 1]. Yet, no evidence has been put on the record regarding attorney's fees. This would not be atypical for a run-of-the-mill case where the plaintiff states a claim for relief because a motion for attorney's fees **[*48]** would come after judgment. *Fed. R. Civ. Pro. 54(d)(2)(B)(i)*. But here, attorney's fees are not a collateral issue; they are the whole of D.S.'s claim.

In situations like this, courts have generally proceeded under a summary judgment standard to determine if attorney's fees are appropriate. *See Moore v. Crestwood Local Sch. Dist., 804 F. Supp. 960 (N.D. Ohio, 1992)*; *Arthur v. District of Columbia, 106 F. Supp. 3d 230, 232 (D.D.C. 2015)*. Here, both parties have filed only for review on the administrative record.

The Court will follow the example set forth in *Moore. 804 F. Supp. at 963*. To reiterate, the Court holds that D.S. is entitled to reasonable attorney's fees not including expert fees. *See supra* Sec. IV.C. However, the Court does not decide at this point, the appropriate amount of fees. Instead, D.S. is **ORDERED** to present evidence of damages, the amount of attorney's fees she is owed, within **30 days** after the entry of this order. Knox County can respond within **14 days** after D.S. files the evidence. D.S. can then reply to Knox County within **seven days**. The Court will then determine what amount of relief is appropriate.[15]

IV. CONCLUSION

For the reasons stated, Knox County's Motion for Judgment on the Administrative Record [Doc. 26] is **GRANTED IN PART** and **DENIED IN PART**. The Court holds that Knox County violated the IDEA, but it did not violate the Rehabilitation Act or the ADA. For those same reasons, **[*49]** Plaintiff's Counter-Motion for Judgment [Doc. 29] is **GRANTED IN PART** and **DENIED IN PART**. D.S. is further **ORDERED** to submit evidence of damages within 30 days which will establish what amount of relief is appropriate. Failure to comply may result in dismissal under *Federal Rule of Civil Procedure 41(b)*.

SO ORDERED.

/s/ *Charles E. Atchley, Jr*.

CHARLES E. ATCHLEY, JR.

UNITED STATES DISTRICT JUDGE

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[15] The parties are advised that this is not an opportunity to relitigate any matter settled by this order. It is only to determine the amount of damages owed.