

**BEFORE THE THREE MEMBER DUE PROCESS HEARING PANEL
EMPOWERED BY THE MISSOURI STATE BOARD OF EDUCATION
PURSUANT TO SECTION 162.961 R.S.MO.**

,)
by and through his parent,)
,)
Petitioner,)
)
vs.)
)
Special School District of St. Louis)
County,)
Respondent.)

DECISION COVER SHEET

Petitioner

Mr. John C. Cary,
Superintendent
Special School District of St. Louis County
12110 Clayton Road
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Respondent

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TIME LINE

1. Student's mother filed a complaint herein on December 1, 2009.
2. District attorneys entered their appearance herein on December 10, 2009 and, requested five days additional time to respond.
3. The Chair granted the District five additional days to respond by Order dated December 11, 2009.
4. A resolution conference was held on December 15, 2009.
5. The District filed a challenge to the sufficiency of the Complaint on December 16, 2009.
6. The Chair sustained the District challenge by Order dated December 17, 2009 and, granted the parent additional time until January 29, 2010 to file an Amended Complaint.
7. Attorneys entered their appearance on parent's behalf and, filed an Amended Complaint on January 29, 2010.
8. District on February 8, 2010 requested additional time until February 26, 2010 within which to respond to the Amended Complaint.

9. The Chair granted Districts request for additional time by Order dated February 9, 2010.
10. District filed its response to the Amended Complaint on February 19, 2010.
11. A second resolution conference was held on March 3, 2010.
12. On March 17, 2010 District requested a hearing on May 10, 2010 with an extension of time for Decision until June 1, 2010.
13. The Chair extended the time for Decision until June 1, 2010 by Order dated March 22, 2010.
14. Hearing was scheduled for May 10, 2010 by Order dated April 14, 2010.
15. On April 30, 2010 the parties filed a joint Motion to Continue the hearing set for May 10, 2010.
16. By Order dated May 5, 2010, the hearing scheduled for May 10, 2010 was reset for August 23 to August 26, 2010.
17. On May 5, 2010, Parent through her attorneys requested that the time for decision be extended until October 1, 2010.
18. The time for decision was extended until October 1, 2010 by Order dated May 6, 2010.
19. Hearing was held August 23 – August 25, 2010.
20. This Decision has been timely rendered within the time as extended on September 29, 2010.

STATEMENT OF ISSUES

Student's mother has filed a complaint raising the issues of whether student is being offered a free appropriate public education (FAPE) in the least restrictive environment (LRE). Student's placement was changed from a general education setting with special education services to a public separate day school under an individualized education program (IEP) which includes the use of a secure observation room (SOR) as an accommodation. Student's mother seeks the return of the student to a general education setting with a positive behavior support plan excluding the use of an SOR.

FINDINGS OF FACT

1. Student is an 8 year 9 month old student
2. Over time, Student has had the following medical diagnoses: asthma, attention deficit hyperactivity disorder, seizure disorder and autism.
3. Student has been identified as a child with a disability in the area of other health impaired based on the medical diagnosis of ADHD.
4. Student has **not** been identified as a child with a disability in the area of autism. Judevine, now Touch Point, evaluated Student and found that he exhibited some autistic-like behaviors, but **did not** conclude that Student is a child with autism. The medical diagnosis of autism (Exh. R-69) was not compelling because there was no evidence to substantiate this diagnosis and because the mother testified that the doctor based the diagnosis "off of the assessment done by Judevine". (Tr. I, p. 155, ln. 18)
5. Student has a pineal cyst in his brain.
6. Student generally gets his way in the home. Mother reported that Student had been catered to because of his medical condition. Mother concedes that she has not been consistent in terms of disciplining him.[Exh. R-25 at 79]
7. Mother reported that he did have tantrums in the preschool setting when he did not get his way. [TR. I, p. 128, ln. 20-23]

2007-08 School Year

8. Student's kindergarten school year began in August of 2007. He was enrolled in the half-day kindergarten program, attending the afternoon session. [TR. I, p. 113, ln. 21-25]
9. Student was suspended from school on September 11, 2007. [TR. II, p. 345, ln. 2; Exh. R-2]
10. On November 1, 2007 Mother enrolled Student at a parochial school. [TR. I, p. 115, ln. 24 to TR. I, p. 116, ln. 2]
11. Mother stated Student had behavior problems at the parochial school. [TR. I, p. 117, ln. 8-11]
12. Mother reenrolled Student at a public school on December 7, 2007. [Exh. R-25 at 079]
13. On December 13, 2007, Student received a one day out of school suspension due to refusing to follow directions, destruction of the classroom environment, spitting, and attempts to destroy school property. [Exh. 7]
14. Student was referred to a Joint Review Committee on January 12, 2008. [Exh. R-9]
15. The Joint Review Committee referred Student for a special education evaluation on January 24, 2008. [Exh. R-11]
16. District presented Mother with a notice of action on February 26, 2008, and Mother signed consent for an evaluation in the area of social/emotional behaviors on that same date. [Exh. R-13]
17. Mother then agreed to a cognitive assessment on April 7, 2008. [Exh. R-17; TR. I, p. 129, ln. 7-13]
18. While the evaluation was ongoing, Student was suspended a third time, this time for being destructive and kicking a teacher assistant several times. [Exh. 18; TR. I, p. 129, ln. 14-20]
19. At an eligibility conference held on April 24, 2008, Mother agreed to evaluation of Student's task related behaviors. Mother also agreed to provide the District with documentation of Student's Attention Deficit Hyperactivity Disorder. [Exh. R-21]
20. The eligibility team met and considered the completed evaluation on May 20, 2008. [Exh. R-25]

21. Based on diagnoses of attention deficit hyperactive disorder and seizure disorder provided on May 13, 2008, the eligibility team found that Student met the eligibility criteria set out in the State Plan for the disability Other Health Impaired. [Exh. R-25]
22. Student's IEP team met to develop an initial IEP on May 22, 2008, the penultimate day of the 2007-08 school year. The present level of academic achievement and functional performance (PLAAFP) in the May 22, 2008 IEP notes that Student needs clearly established rules and expectations, preferential seating at the front of the classroom, sensory items, and testing in a small group. Despite Student's diagnosis of ADHD, parent informed the District and the May 22, 2008 PLAAFP indicated Student was not taking medication to address the ADHD. [Exh. R-25] Mother indicated at hearing that she requested that medicine not be prescribed to address Student's ADHD. [TR. I, p. 131, ln.20-25]
23. The May 22, 2008 IEP stated that Student demonstrated difficulty with changes in routine or task demands, difficulty with considering consequences before acting, difficulty with completing assignments, difficulty with following school and classroom rules, and difficulty with peer and adult interactions. [Exh. R-28]
24. The May 22, 2008 IEP further noted that Student experiences meltdowns in the classroom, marked by kicking, throwing items in the classroom, and spitting. If the behaviors are not addressed when they begin, they escalate. [Exh. R-28]
25. Student's May 22, 2008 IEP team decided to address his behaviors through IEP goals and accommodations. The IEP had three goals addressing (1) time on task, (2) the social skill of verbally expressing wants/needs, and (3) the social skill of transitioning within/between environments. The IEP called for 150 minutes per week of instruction in social skills and 150 minutes per week of instruction in task related skills, both in a special education setting. The placement contemplated in the May 22, 2008 IEP was outside regular education less than 21% of the time. [Exh. R-28]
26. Mother signed consent for initial placement on May 23, 2008, the last day of school for the 2007-08 school year. [Exh. R-28 at 116]

2008-09 School Year

27. Student started first grade on August 14, 2008.
28. Mother withdrew Student from school on August 27, 2008. [TR. I, p. 140, ln. 112-14]

29. During the time that Student was at school in August 2008, District conducted a functional behavior assessment of Student's behavior, utilizing an instrument called Project FACILE. [Exh. R-34]
30. Parent reenrolled at school on September 19, 2008, and Student returned following a September 22, 2008, IEP. [TR. I, p. 141, ln. 21 to TR. I, p. 142, ln. 8]
31. Student's special education teacher testified that at the very beginning of the 2008-09 school year, Student was able to spend some time in the general education setting. However, Student's behavior deteriorated and he was spending less time in the general education setting. [TR. II, p. 357, ln. 11-18] This was so despite the implementation of a variety of accommodations, including preferential seating, allowing movement in class, giving directions in a variety of ways, using non-verbal cues and prompts, checking for understanding, frequent eye contact, teacher proximity, breaks, and varying activities. [TR. II, p. 351, ln. 13-20]
32. The special education teacher testified that Student's behavior deteriorated as expectations were placed on him. Those expectations included such things as joining a group on the carpet, sitting in his desk, taking out paper and pencil, and raising his hand before speaking. [TR. II, p. 3578, ln. 13-18]
33. Student's IEP team increased Student's time in the special education setting to 1824 minutes per week. In addition, the IEP contemplated that a District social worker would be available to consult with Mother and Student's teachers. [Exh. R-38 at 181]
34. The September 22, 2008 IEP indicates that Student's behaviors included: poor listening skills, disrespectful to adults (saying no in a loud voice), running away from adults, physical aggression, throwing objects, knocking over furniture, climbing on furniture, and kicking people or objects. [Exh. R-38]
35. The IEP notes the need to develop a Behavior Intervention Plan (BIP) and calls for use of a visual (picture) schedule, pre-mack scheduling, and advance notice of transitions. [Exh. R-38]
36. Two weeks after the September 22, 2008 IEP meeting, Student's IEP team met again on October 6, 2008. [Exh. R-43]
37. During the two-week period between the September 22 and October 6, Student was supervised on a 2:1 basis (teachers to Student), with three trained [TR. II, p. 384, ln. 11-17]special education rotating in to the room. [TR. II, p. 385, ln. 17-18; TR. II, p. 385, ln. 22 to p. 386, ln. 3]

38. The three teachers were trained to work with children exhibiting difficult behaviors, and each was trained to work with children with autism. [TR. II, p. 385, ln. 10-17]
39. Despite the intensive programming at school, during the two-week period between September 22 and October 6, Student would engage in extremely disruptive behavior, including overturning furniture, throwing books and other classroom objects, and hanging from the metal brackets that hold ceiling tiles in place. [TR. II, p. 386-87, passim] Student was exhibiting this extreme behavior approximately 50% of the time. [TR. II, p. 389, ln. 2-6]
40. Mother participated in both the September 22, 2008 and the October 6, 2008 IEP. [Exh. R-38 and Exh. R-43]
41. The October 6, 2008 IEP called for a shortened school day for a week at public school (750 minutes of special education) and then transfer to a public separate day school. [Exh. R-43]
42. Not a single educator present at the October 6, 2008 IEP meeting disagreed with the proposed change of placement. [TR. II, p. 258, ln. 20-22]
43. The October 6, 2008 IEP noted that the reason for the change of placement to a public separate day facility was due to safety concerns. [Exh. R-43, p. 216] Student's special education teacher also noted that Student's behavior was impeding his own learning, as well as the learning of others. [TR. II, p. 392, ln. 2-6]
44. The October 6, 2008 IEP had four goals addressing initiating tasks, self-advocacy skill, social skills for transitioning, and social skills of keeping hands, feet, and objects to himself. [Exh. R-43]
45. Services at the public separate day school included 590 minutes per week of instruction in task related skills, 590 minutes per week of instruction in social skills, 590 minutes per week of instruction in self-advocacy, and 30 minutes per week of direct social work services. [Exh. R-43]
46. The October 6, 2008 IEP also included the use of a support room and a secure observation room as accommodations, when necessary, to address Student's dangerous behaviors. [Exh. R-43]
47. Student began attending the separate public day school on October 13, 2008. [TR. II, p. 261, ln. 6]

48. Students with behavior issues are placed at the separate public day school because they have demonstrated extreme behaviors that are not manageable in the general education setting. [TR. II, p. 304, ln. 1-6; TR. III, p. 461, ln. 25 to TR. III, p. 462, ln. 7]
49. The entire staff at the separate public day school is trained in non-violent crisis prevention intervention [TR. II, p. 302, ln. 8-12], such that the entire learning environment at the separate public day school is imbued with a unified behavior prevention/intervention approach.
50. In addition, the separate public day school has a crisis team in place that includes school nurses, social workers, administrators, teachers and paraprofessional staff – thirteen people in all – who can be called in when a Student exhibits extreme behaviors, and that would be extreme behaviors for students who have been placed because of behavioral issues. [TR. II, p. 281, ln. 23-25; TR. II, p. 304, ln. 1-6] Staff are chosen to be part of the crisis team based, generally, on demeanor and availability. The school tries to pick staff for the crisis team who are calm, flexible, and student-centered. The school tries to limit the number of people who are pulled out of classrooms and tries to spread those selected among the various layers of staff. [TR. II, p. 300, ln. 9-20]
51. The separate public day school also has a school-wide behavior support system in place. The school-wide behavior support system focuses on three expectations: be safe, be kind, be responsible. Students can earn paw prints, which can be redeemed for activities or items from the school store. [TR. III, p. 429, ln. 6-12]
52. The support room that was used with Student during the 2008-09 school year is a regular sized classroom [TR. II, p. 277, ln. 19] where a student can go to take a break, to refocus, and to complete work in a quiet area. [TR. II, p. 240, ln. 15-17] In the support room were a beanbag, a weighted blanket with pad, a teacher's desk, a couple of student desks, a video monitor, a sink, and storage. There is an observation window through which someone can observe from an adjoining room. [TR. II, p. 278, ln. 2-13]
53. There are two secure observation rooms located within the support room. [TR. II, p. 278, ln. 17]
54. The secure observation rooms are small rooms with padded walls and floor. They are lighted. Each has an air vent and a window in the door. Each is equipped with a video camera, permitting the Student to be observed at all times. Each is also equipped with a magnetic locking door. [TR. II, p. 269, ln. 1-269] On the wall immediately outside the door of each secure observation room is a button. In

order to engage the magnetic lock, the door must be completely closed and the button pushed. [TR. II, p. 271, lin 9-11] The lock works only so long as the button remains pushed. As soon as the button is released, the door unlocks and disengages. [TR. II, p. 271, ln. 11-13] The door can be locked, then, only if someone is within arm's length of the door.

55. Beginning October 13, 2008 through the end of the 2008-09 school year, Student was sent to either the support room or the secure observation room, as follows:

October:	9 referrals
November:	29 referrals
December:	18 referrals
January:	12 referrals
February:	9 referrals
March:	7 referrals
April:	1 referral
May:	3 referrals

[TR. II, p. 261, ln. 8 to TR. II, p. 262, ln. 14; Exh. R-65]

56. During the 2008-09 school year, the secure observation room was located inside the support room.
57. Staff completed written reports whenever Student was sent to either the support room or the secure observation room. [Exh. R-65]
58. The reports would indicate whether or not it was necessary to physically escort, "hands-on," Student to the support room or secure observation room. [TR. II, p. 263, ln. 2-9]
59. For the overwhelming majority of the referrals listed in Paragraph 84, above, it was not necessary to physically escort Student to the support room/secure observation room. [Exh. R-65] Student may have been throwing chairs, kicking walls and kicking classroom doors, but he was nevertheless heading toward the support room/secure observation room. [TR. II, p. 263, ln. 24 to TR. II, p. 264, ln. 9]
60. Student's teacher at the separate public day school testified that Student exhibited the following behaviors while in her classroom: physically aggressive toward staff, physically aggressive toward peers, kicking, hitting, spitting, attempting to bite, slamming desks, slamming doors, and throwing school supplies. [TR. III, p. 426, ln. 3-9]

61. The teacher opined that, in her twelve years [TR. III, p. 421, ln. 17-20] in her current position at the separate day school, Student presented as a student with some of the more intense behaviors. [TR. III, p. 462, ln. 12-16]
62. Student's behaviors were triggered by wanting attention from adults [TR. II, p. 427, ln. 3] and task avoidance. [TR. III, p. 427, ln. 5-14]
63. While Student was in the teacher's class, she had a range of four (4) to eight (8) students. [TR. III, p. 428, ln. 6-7]
64. While Student was in the teacher's class, she was assisted at any given time by two or three paraprofessionals. [TR. III, p. 463, ln. 4-6]
65. The teacher tried a variety of strategies with Student, including visuals for daily schedule, visuals for behavior mapping, visuals for rules and consequences, rules for expectations and routines, verbal cues, verbal prompts, consistent structure throughout the day, previewing changes in schedule, timeout, one-on-one instruction, academic breaks, sensory input, and a token system. All of these were used in conjunction with a school-wide positive support system. [TR. III, p. 428, ln. 9-25]
66. The teacher used the secure observation room for safety purposes, as she implemented the other strategies in her classroom. [TR. III, p. 431, 20-21]
67. The teacher would send Student to the support room or the secure observation room only after she had exhausted everything in the classroom to keep him in the classroom safely. [TR. III, p. 434, ln. 15-18]
68. The behavior intervention plan that was in place during the 2008-09 school year at the separate public day school was effectively addressing Student's behavior concerns. [TR. III, p. 442, ln. 6-16]
69. The teacher never observed any inappropriate behavior on the part of paraprofessionals with respect to their interactions with Student. [TR. III, p. 444, ln. 5-7]
70. During one referral, one that did **not** involve a physical escort, Student injured his finger when he kicked the door to the support room, it flew back and pinched his finger. [TR. III, p. 453, ln. 19-21]
71. That incident occurred on May 4, 2009. [Exh. R-61]
72. Student continued to attend school through the end of the 2008-09 school year. [See, e.g., Exh. R-65 at 519 referral dated May 20, 2009]

73. Mother believed that a paraprofessional man-handled Student, thereby causing Student's injury. [TR. I, p. 192, ln. 18-25]
74. Parent hot-lined the paraprofessional to the Missouri Children's Division.
75. Missouri Children's Division investigated the finger incident. Missouri Children's Division exonerated the paraprofessional. [TR. I, p. 181, ln. 12-19]
76. Student admitted to his teacher that he had lied to his mother about the door-kicking incident. [Exh. R-62 at 341]
77. Earlier in the school year, Mother had communicated to the teacher that Student will say what he needs to get what he wants. [Exh. R-59 at 314]
78. Although the District amended Student's IEP to make extended school year services available to Student, Student did not take avail himself to the services during the summer, 2009. [TR. I, p. 155, ln. 10-21]

2008-09 School Year

79. By the beginning of the 2009-10 school year, Student was residing with his father.
80. Parents did not send Student to the separate public day school on the first day of the 2009-10 school year.
81. Instead, Parents demanded an IEP meeting. [TR. III, p. 465, ln. 21]
82. Student's IEP team met on August 24, 2009. [TR. III, p. 465, ln. 21]
83. During the IEP meeting, Parents asked that the use of the support room and secure observation room be removed from Student's IEP.
84. The consensus of the educators in attendance at the IEP meeting was that the support room and secure observation room should remain in Student's IEP as accommodations to address safety issues when Student engaged in aggressive behaviors. [TR. III, p. 469, ln. 23-25]
85. Student started in the separate public day school after the August 24, 2009 IEP meeting.
86. Although the use of the secure observation room remained in Student's IEP, Student's Parents and District officials agreed that it would not be used, at least for a while, when Student first returned to school. [TR. I, p. 164, ln. 18-23] In

addition, the District agreed to consult with Touch Point, a private agency that works with students who exhibit difficult behaviors, most often children with autism who exhibit such behaviors.

87. The teacher observed Student when he was in the support room at the beginning of the 2009-10 school year, when the use of the secure observation room was not available to the staff. During that time, the teacher observed Student move toward staff in a threatening manner, kick, hit, throw, spit, and make gun sounds with his hand in the shape of a pistol while pointing his index finger. Student threw a telephone receiver. [TR. III, p. 475, ln. 22-25] At one point, Student voluntarily walked into a secure observation room, on his own accord. [TR. III, p. 477, ln. 3-8]
88. During the time that the staff could not use the secure observation room, Student's behavior was very intense [TR. III, p. 478, ln. 19], and his education was "very sporadic." [TR. III, p. 479, ln. 19]
89. One particularly intense incident was recounted by the social worker who worked with Student:

He had been quite physical that day. I had been called -- I had him about 9:45 in the morning to -- over the walkie-talkie, as part of the crisis team, to assist with him.

He displayed several behaviors and we tried different strategies to get him to calm down; and we ended up in a room at the end of our hallway, one of our support rooms. It wasn't the main support room, but it was kind of a room next to it.

And while we were in there, he kept coming after me. And he had a chair -- and the principal was in there with me. And he had a chair, and he kept coming at me with the chair; and I would try to hold it and to keep it from hitting me. And he got me cornered at one point and was pushing the chair into me. The principal came out, helped me get the chair removed from his hands; and he asked me to come behind a blue carrel that the principal had put himself behind.

So the two of us were standing with our backs against the wall with a blue carrel surrounding us and [Student] was in front of us. And he -- [Student] kept -- just kept coming at us trying to hit us, kick us, spit. He was trying to grab over the top of the carrel, and he kept trying to grab on to the principal's arm. And in the process, I believe he got his arm scraped on the carrel.

[TR. III, p. 539, ln. 18 to TR. III, p. 540, ln. 18]

90. According to the Touch Point report: “Student admitted the following behaviors: Biting, scratching, pinching, hitting, punching, kicking, head-butting, spitting, pushing, head-banging, screaming, throwing items, hair pulling, climbing on furniture and walls, jumping off of furniture, leaving the area, hanging from the ceiling, and ripping items off the walls. Some of these behaviors resulted in injuries to staff and damage to property.” [Exh. R-80; TR. III, p. 492, ln. 11-19]
91. The teacher, herself, was hit by Student, kicked by Student, and injured by Student. [TR. III, p. 492, ln. 20-25]
92. When Student continued to engage in dangerous and disruptive behaviors, and the use of the secure observation room was not available as an accommodation in light of the informal agreement between Parents and District administrators, administrators imposed a suspension for violation of the school’s code of conduct. [Exh. R-73, documenting two suspensions, one on September 3 and one on September 14]
93. Prior to imposing a suspension, the school tried a number of alternative interventions. They tried walks with the social worker [TR. III, p. 491, ln. 12], sending Student to different classrooms [TR. III, p. 491, ln. 13], sending Student to different areas of the school [TR. III, p. 491, ln. 13], sending Student to the principal’s office [TR. III, p. 491, ln. 15-21], and utilizing Touch Point staff. [TR. III, p. 491, ln. 4-5]At the time that Student was suspended, he had been in the teacher’s room for only eleven (11) school days. [TR. III, p. 476, ln. 24]
94. Student’s IEP team was reconvened to consider Student’s behavior. [Exh. R-81]
95. The IEP meeting was actually a series of meetings that spanned several weeks.
96. Student could have returned to the separate public day school. However, the IEP team declined to remove the use of the secure observation room from Student’s IEP. [Exh. R-81]
97. A report from Touch Point confirmed that the use of the secure observation room was a necessary component of Student’s educational program. [Exh. R-80 at 620; TR. I, p. 157, ln. 10-14]

DECISION AND RATIONALE

As the party seeking relief, the parent bears the burden of proof. The evidence presented to the panel does not sustain the parent’s position that FAPE can be offered to the student in a general education setting and without the accommodation of a SOR at this time.

TIME LINE SECTION

1. Student's mother filed a complaint herein on December 1, 2009.
2. District attorneys entered their appearance herein on December 10, 2009 and, requested five days additional time to respond.
3. The Chair granted the District five additional days to respond by Order dated December 11, 2009.
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13. The Chair extended the time for Decision until June 1, 2010 by Order dated March 22, 2010.

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15. On April 30, 2010 the parties filed a joint Motion to Continue the hearing set for May 10, 2010.

16. By Order dated May 5, 2010, the hearing scheduled for May 10, 2010 was reset for August 23 to August 26, 2010.

17. On May 5, 2010, Parent through her attorneys requested that the time for decision be extended until October 1, 2010.

18. The time for decision was extended until October 1, 2010 by Order dated May 6, 2010.

19. This Decision has been timely rendered within the time as extended.

APPEAL PROCEDURE

PLEASE TAKE NOTICE that these Findings of Fact, Conclusions of Law, Decision, and Order constitute the final decision of the Department of Elementary and Secondary Education in this matter and you have a right to request review of this decision. Specifically, you may request review as follows:

1. Proceedings for review may be instituted by filing a Petition in the Circuit Court of the county of proper venue within forty-five days after the mailing or delivery of the notice of the agency's final decision.

2. The venue of such cases shall, at the option of the plaintiff, be in the circuit court of Cole County or in the county of the plaintiff or of one of the plaintiff's residence.

PLEASE TAKE NOTICE that you also have a right to file a civil action in Federal or State Court pursuant to the IDEA. See 34 C.F.R. Section 300.512.

Dated this _____ day of September, 2010.

Patrick O. Boyle, Chairperson

Dayna Deck, Panel Member

George Wilson, Panel Member

CERTIFICATE OF SERVICE

Copies of the foregoing Decision were mailed via certified mail, receipt requested to the attorneys, parent and school district and via regular U.S. Mail to Dayna Deck, George Wilson and Ms. Jackie Bruner on this _____ day of September, 2010:

Petitioner

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Patrick O. Boyle

DECISION BY PANEL MEMBER, DAYNA F. DECK:

The parents submitted ten (10) problems that amounted to claims under the IDEA that the District has not (1) placed the child in the least restrictive environment; (2) properly evaluated the child by doing an appropriate Functional Behavioral Analysis (FBA); and (3) that use of the support and seclusion room at Litzsinger School endangers the child and violates his civil rights. The problems allegedly resulted in the School's failure to provide a free and appropriate education (FAPE) to the child.

I. Least Restrictive Environment

The child remained in a general education placement¹ throughout his Kindergarten (2007-2008) year with numerous interventions provided by the school personnel. The student began the 2008-2009 school year in a first grade general education setting, was again briefly removed from the school by his parents, and returned to the school approximately three weeks later. After numerous interventions over a two-week period, the child's behavior did not improve and the IEP team recommended placement at a self-contained special education school that was better equipped to deal with the child's extremely disruptive behaviors. The evidence showed that the IEP team recommended placement at Litzsinger, a self-contained special education setting. The evidence showed that the parents were reluctant to

¹ For approximately one month of the 07-08 school year (Nov. to Dec.)parents removed the child from the general education setting and placed him in a private school. When the child continued to show behavior problems at the private school that the school could not or would not handle, the mother returned the child to the public school, general education setting.

have their child attend Litzsinger but they ultimately agreed and placed the child there in October 2008. The IDEA does not require a school district to obtain parental consent prior to changing a student's educational placement, except where parents have already filed a due process complaint, thereby triggering the stay-put provision. 34 C.F.R. § 300.518(a). Moreover, the evidence showed that the parent had participated in the IEP meetings, toured Litzsinger School and received the proper notice of the change.

The placement at Litzsinger began on October 6, 2008. From October 2008 to May 2009 the child's behavior continued to be dangerous to himself and others, however, based upon the number of referrals to, and time spent in, the support room or secure observation room over this period his behavior did show significant improvement from a high of 29 referrals in one month (November) to a low of 1 referral in a month (1 in April; 3 in May). While eligible for Extended School Year (ESY) services during the summer, the child did not attend. He returned to school in the fall of 2009 only after the parents requested and received an IEP team meeting where they asked that the support and secure observation rooms not be used. The Parents did not submit evidence explaining this request other than their complaint that the child had injured his finger the previous year.² The IEP team did not agree to remove the use of the support and secure observation rooms from the IEP but did agree to try not to use the rooms. When the child continued to engage in

² This panel member found the school district's testimony that the injury was minor and accidentally self-inflicted to be credible.

dangerous and disruptive behaviors³ and the use of the secure observation room was not available as an accommodation in light of the informal agreement between parents and District administrators, Litzsinger administrators imposed a suspension for violation of the school's code of conduct. After the suspensions on September 3 and 14, 2008, the IEP team had numerous meetings over a period of weeks. The evidence showed the parents refused to return the child to Litzsinger or any other self-contained special education placement in the district and the team ultimately agreed to homebound placement so the child could receive some educational services. While the testimony showed that the child has not had significant disruptive behavior problems in the one-on-one homebound placement⁴, it is not clear that he can be returned to a general education setting. While this panel member understands the parents desire to have their child in a general education setting, I believe that it is reasonable, and the least restrictive environment under the circumstances, for the district to request that he return to school in a self-contained setting to determine if he has made enough progress to safely return to a general education setting. This panel member agrees with the other panel members that the parents have not met their burden to prove that this child's placement in a self-contained special education classroom was not the least restrictive environment.

³ This panel member found all of the evidence and testimony about the child's dangerous and disruptive behavior to be credible. Even the TouchPoint staff that observed the child in school, at the parent's request, observed kicking, hitting, pushing, and yelling.

⁴ Homebound, in this case, means the child is seen at the public library by a special education teacher while one of the parents is present.

II. Functional Behavioral Analysis

While the District characterizes the Parents complaint as failing “to provide access to or provide copies of the Functional Behavior Assessment that was done for the child’s Behavior Improvement Plan (BIP) at the initial intervention after it was requested in a timely manner” the Parent’s complaint is more accurately a complaint that an adequate and useful FBA was never fully completed, and hence, the school did not have an appropriate Positive Behavior Support Plan as required by the IDEA.

The District characterizes the assessment called *Project FACILE* as a functional behavior assessment. However, the parent’s expert, Todd Streff, testified that in his opinion the *Project FACILE* survey was part of doing an FBA, but that the team never fully and accurately completed a Functional Behavioral Analysis. This panel member agrees, and if the child is returned to a school setting would recommend that the District to do a complete and accurate FBA along the lines suggested in *Addressing Student Problem Behavior: An IEP Team’s Introduction To Functional Behavioral Assessment And Behavior Intervention Plans*.⁵

However, this panel member does not believe that the Parent’s have met their burden to prove that District’s failure to do a complete and effective FBA (and Positive Behavior Support Plan) resulted in the child *not* receiving a free and appropriate education. I concur with the other panel members and find in favor of the District.

III. Use Of The Support And Seclusion Room Endangers The Child And Violates His Civil Rights

⁵ Prepared By The Center for Effective Collaboration and Practice and found at <http://cecp.air.org/fba/problembehavior/funcanal.pdf>. The *Center for Effective Collaboration and Practice: Improving Services for Children and Youth with Emotional and Behavioral Problems* is funded under a cooperative agreement with the Office of Special Education Programs, Office of Special Education and Rehabilitative Services, U.S. Department of Education, with additional support from the Child, Adolescent, and Family Branch, Center for Mental Health.

The child's IEP permits use of the seclusion room, known as the Secure Observation Room(SOR) as an accommodation for his extreme and disruptive behavior, despite parent's request that the IEP not contain the SOR. The Parent's claim that use of the SOR violates the child's civil rights and endangers the child. The Parent's have not met their burden of proof. Indeed, this panel member finds that the use of the secure observation room with the child was not only reasonable, it proved to be a necessary and appropriate method for helping the child while also protecting him, his peers and the staff. I find in favor of the District.

/s/ Dayna F. Deck
Panel Member

CERTIFICATE OF SERVICE

Copies of the foregoing Concurring Opinion were mailed via certified mail, receipt requested to the attorneys, parent and school district and via regular U.S. Mail to Dayna Deck, George Wilson and Ms. Jackie Bruner on this 29th day of September, 2010:

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