

Before the  
 Administrative Hearing Commission  
 State of Missouri



	, IN THE INTEREST	)	
OF	,	)	
		)	
	Petitioner,	)	No. 13-1819 ED
		)	
vs.		)	
		)	
	SPECIAL SCHOOL DISTRICT	)	
	OF ST. LOUIS COUNTY, MISSOURI,	)	
		)	
	Respondent.	)	

**DECISION**

The mother of a -year-old girl with an educational diagnosis of autism (“Student”) filed a due process complaint against the Special School District of St. Louis County, alleging that the District failed to provide a free and appropriate education to her daughter for a number of reasons. We disagree, and find that the District offered a free and appropriate public education to Student.

**Procedure**

On October 18, 2013, (“Mother”) filed a due process complaint in the interest of her daughter, Student. We scheduled a hearing for November 18-19, 2013. On October 28, 2013, the District responded to the complaint and asked that it be dismissed as insufficient. We issued an order finding the complaint sufficient on October 29, 2013.

The District filed its prehearing conference statement on October 31, 2013. We held a prehearing conference on November 4, 2013. Mother represented that she had mailed a copy of her prehearing conference statement to this Commission, but we had not received it. The parties agreed that they were willing to work on resolving the case, and moved for a continuance. We granted the continuance, scheduled another prehearing conference for November 14, 2013, and subsequently rescheduled the hearing for December 16-17, 2013.

The District filed a motion to dismiss on November 13, 2013, representing that neither it nor this Commission had received a prehearing conference statement from Mother, and that Mother had failed to respond to telephone calls, e-mails, and text messages from the District's counsel and school staff regarding further attempts to resolve the case.

We held a second prehearing conference on November 14, 2013. Following the prehearing conference, we ordered the District to submit a proposed resolution agreement to Mother no later than November 18, 2013, and ordered Mother to file a prehearing conference statement no later than November 20, 2013. We scheduled a third prehearing conference for December 2, 2013.

Mother filed her prehearing conference statement on November 18, 2013. On December 2, we held a third prehearing conference. The District moved for a continuance, which Mother did not oppose. We rescheduled the hearing for January 15-16, 2014. We also ordered the District to file suggestions as to appropriate relief in the case by December 9, 2013, and allowed Mother until December 16, 2013, to respond to the District's suggestions.

The District timely filed its suggestions, requesting that this Commission either grant its motion for involuntary dismissal, based on Mother's refusal to attend another IEP meeting, or that we order Mother to schedule and attend an IEP meeting with the District. On December 23, 2013, Mother filed a "request to proceed to the due process hearing without further delay." On

December 24, 2013, we denied the District's motion for involuntary dismissal, concluding that we lacked authority to grant the relief the District suggested.

On January 7, 2013, the District filed another motion to continue the due process hearing because extreme weather conditions had caused a delay in its preparation of documentary evidence. We granted the continuance and rescheduled the hearing for January 29-30, 2014. We set a due date for the decision of March 3, 2014.

We held a fourth prehearing conference with the parties on January 27, 2014. At that time, Mother had not provided the District with a list of exhibits or witnesses for the hearing as required by 34 CFR 300.512(a). The parties jointly requested a continuance of the hearing, and we rescheduled the hearing for February 5-6, 2014. We ordered Mother to provide the District and this Commission with the list of exhibits, list of witnesses, and a clarified list of issues for the due process hearing, no later than January 29, 2014. We extended the decision due date until March 10, 2014.

Classes at the high school Student attends were cancelled due to inclement weather on February 5, 2014. Because witnesses were unavailable, the hearing was continued at District's request. We rescheduled the hearing for February 10-11, 2014. The District then requested another motion to continue because certain of its witnesses were unavailable on those dates also. Mother did not object, and we continued the hearing until February 18-19, 2014, and extended the decision due date to April 4, 2014.

We held the due process hearing at the District office on February 18-19, 2014. Mother represented herself and Student (together, the "Petitioners"). Robert J. Thomczek represented the District. The transcript was filed on February 25, 2014. We issued a schedule for the parties to file proposed findings of fact, conclusions of law, and written argument, no later than March 14,

2014, with replies due no later than March 21, 2014. The matter became ready for decision on March 21, 2014, the date the last written argument was due.

## **Findings of Fact**

### Background Information

1. Student is a -year-old girl in the ninth grade. She resides in the Ritenour School District and attends Ritenour High School (“Ritenour”). During the 2012-13 school year, she attended Ritenour Middle School (“the middle school”). *Resp. Ex. D, F.*<sup>1</sup>
2. The District provides case management and special education services for students enrolled in school districts within St. Louis County, including Ritenour. *Tr. 38.*
3. Student has an educational diagnosis of autism and has received special education services from the District since elementary school. *Ex. C at 20.* According to a District evaluation report from 2012, her medical history is also significant for attention deficit hyperactivity disorder, oppositional defiance disorder, mood disorder (not otherwise specified), Tourette’s syndrome, and Asperger’s syndrome. *Id. at 22.*
4. Student has difficulty paying attention in class and completing work. She requires additional time to do many tasks, including class work, passing between classes, and preparing for school in the morning. *Tr. 381-82.*
5. Student had individualized education programs (“IEPs”) each year she attended middle school. *Resp. Ex. D.*
6. Student’s IEPs in the sixth and seventh grades included a paraprofessional to work with her and help her get to class on time. At the end of seventh grade, however, Mother asked that Student not be assigned a paraprofessional in the eighth grade. *Resp. Ex. D at 33.*

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<sup>1</sup>We accepted Petitioners’ exhibits into evidence at the hearing, but they are all duplicative of Respondent’s exhibits. Therefore, all citations are to Respondent’s exhibits.

7. Student had a behavior intervention plan (“BIP”) in middle school. In her May 2012 IEP, the “problem behavior,” as stated in the BIP, was Student’s refusal to comply with teacher directives and requests. The “desired behavior” was compliance with reasonable requests from teachers, and decreasing her “continuous inappropriate or random verbalizing.” *Id. at 43.*

8. The BIP contained antecedent strategies, such as prompting before changing a routine, explaining a contingency before beginning a non-preferred task, planned ignoring of inappropriate behavior, and verbal praise for appropriate behavior. It contained consequence strategies such as taking Student to a designated quiet area when she was disruptive, and referring her to the office for verbally abusive or significantly inappropriate behavior. Another strategy was to teach Student to become aware of her own behavior. *Id.*

9. Student was reevaluated by the District at Mother’s request in February 2012. *Resp. Ex. C at 20.* Her full scale IQ was 97. Her processing speed, which indicates how well a student performs on tasks that require her to quickly and correctly solve problems, particularly under pressure to maintain focused attention and concentration, was also evaluated. Student’s processing speed index was 100, or average. *Id. at 24.*

10. Mother, who suffers from chronic pancreatitis, transports Student to school every morning. *Tr. 192, 347.*

#### April 2013 Functional Behavior Assessment

11. Three District staff members conducted a functional behavior assessment (“FBA”) of Student in April 2013. The purpose was to define Student’s target, “off-task,” behavior, and Student’s replacement, “on-task,” behavior.<sup>2</sup> *Resp. Ex. I at 74.*

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<sup>2</sup> “Off task behavior” is any behavior the student engages in other than attending to the assigned activity. “On-task” behavior is attending to the assigned activity. *Resp. Ex. I at 74.*

12. The FBA consisted of interviews with Student and one of her teachers, and short periods of direct observation of Student. *Id.* A teacher observed Student in a class on April 9, 2013<sup>3</sup> for 30 minutes beginning at 10:15 a.m. A counselor observed her on the same date in two other classes for 14 minutes and 19 minutes. His last observation period ended at 1:04 p.m. *Id.* at 85-89.

13. The teacher who observed Student for 30 minutes wrote:

[Student] was observed for 30 minutes during Language Arts class. This was a lesson which had started the previous day when [Student] was absent. She took another student's paper (with his consent) and copied his answers from yesterday. The teacher passed out a 1-page reading . . . [Student] had her paper covered by her binder; she sat and stared for 2 minutes before she was directed to look at her paper, which she did for 30 seconds. Then for 12 minutes she stared down at her desk (but not at the paper) while students took turns reading. Other off-task behaviors during this time were picking at fingernails and looking around the room. The teacher then selected students to read questions and give oral answers. [Student] was called on to read a question and give the answer, which she did. Then she put her head down. Two minutes later the teacher called her name four times. On the 4<sup>th</sup> call, [Student] put her head up. Then she closed her eyes while sitting up straight.

*Id.* at 89.

14. Based on their observations, the members of the FBA team concluded that Student displayed on-task behavior at the same rate as her peers (81% as opposed to 80%), and did not recommend a formal BIP. *Id.* at 75.

#### May 2013 IEP

15. The District held an IEP meeting for Student on May 3 as she was completing the eighth grade. Along with Student's teachers from the middle school, Michelle Quinlivan, the District's area coordinator who is placed at Ritenour, and Lindsay Webster, a counselor employed by Ritenour, attended. The District made several attempts to schedule the meeting so

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<sup>3</sup> All subsequent dates are in 2013 unless otherwise noted.

that Petitioners could attend, and notified Mother in writing and by e-mail and telephone, but Petitioners did not attend the May 2013 IEP meeting. *Resp. Ex. K at 100.*

16. The May 2013 IEP team adopted six goals for Student to carry forward into the next school year. The May 2013 IEP also included numerous accommodations and modifications, including allowing frequent breaks, restroom breaks, additional passing time without penalty, and adult support for transitions until schedules are established. *Id. at 116.*

17. At the May 2013 IEP meeting, the IEP team adopted the FBA team's recommendation that Student no longer needed a BIP. Instead, the IEP team developed a crisis plan for Student. *Id. at 102.*

18. Student's crisis plan, as set forth in the May 2013 IEP, provided:

If [Student] becomes agitated or frustrated she may become verbally inappropriate or leave the situation without destination or permission. Through social skills instruction and adult support, [Student] has learned to recognize when she is becoming upset and has been encouraged to go to a supervised calming place. This strategy has been effective in helping [Student] self-calm.

1. With [Student], identify three places/people at school where she would feel comfortable going to calm should the need arise. If her teacher sees [Student] becoming upset, he/she should initiate this process by asking her if she wants to go to her calming place. If [Student] refuses, she should be issued a pass (to designated place) and gently directed to go there.
2. [Student] should be given a pass to the calming place, and the receiving adult should be notified to expect [Student].
3. When [Student] and the designated adult feel she is calm and may return to class, a pass for this should be written and [Student] should return to class.

[STUDENT] SHOULD NOT BE SENT FOR DISCIPLINARY ACTION BEFORE SHE IS ALLOWED TO GO TO AN ALTERNATE PLACE TO CALM.

*Id. at 118.*

Beginning of 2013-14 School Year; September 2013 IEP

19. Ritenour began its 2013-14 school year on Wednesday, August 14. *Resp. Ex. GG.*

20. In Student's original schedule, she was incorrectly left out of a special education class, "Career Connections." Her schedule was changed effective Monday, August 19, to place her in that class, and that necessitated one other class change. *Tr. 177; Resp. Ex. EE.* After that, teachers walked her to her classes until she knew her way and Student asked them to stop. *Tr. 509.*

21. From the beginning of school, Student was tardy to, or absent from, class ("tardies and absences") on a number of occasions. *Resp. Ex. DD.*

22. Tardies and absences at Ritenour are recorded by Ritenour personnel. *Tr. 110.* Unless otherwise agreed to by Ritenour, they are accumulated according to Ritenour policies, even if a student is receiving services from the District. *Tr. 414-15.* Mother was informed of a number of Student's tardies and absences by text message. *Tr. 35.*

23. After school started, Student chose three "trusted adults" she could seek out for calming purposes, in accordance with her crisis plan. On one occasion between August 14 and September 6, however, when Student needed to avail herself of her crisis plan, all three of the designated adults were occupied and none could assist her. *Tr. at 57.*

24. Mother requested an IEP meeting early in the school year. She asked that Roosevelt Mitchell, a representative of St. Louis Regional Center for Developmental Disabilities, be invited, and the notification of the meeting lists him as an invitee. *Resp. Ex. M at 131.* Ms. Peterson, Student's case manager, asked Mother to contact him regarding the meeting, or to provide her with his contact information. *Id. at 134.* Mother did not provide the contact information. *Tr. 52.*

25. An IEP meeting was held at Ritenour on September 6. Mother and Student attended as well as Ms. Quinlivan and Ms. Webster. Also in attendance were Mr. Clark, a Ritenour assistant principal, three of Student's special education teachers, and Ms. Peterson. Mr. Mitchell was not in attendance. *Resp. Ex. N at 136.*

26. The September 2013 IEP team discussed whether Student needed a BIP. They decided they did not yet have enough data and might need to conduct another FBA with an autism interventionist. *Tr.* 55-56. Instead, they modified Student's crisis plan by adding two more people to Student's "trusted adult" list. *Resp. Ex. N at 151.*

27. At the September 2013 IEP meeting, Mother also expressed concerns about Student's tardies. *Id.* at 138. The September 2013 IEP team discussed the need for Student to learn to get to class on time, and their perception that it was problematic for her to be in the halls by herself between classes. *Tr.* 34, 250. As a result, they included in the September 2013 IEP accommodations similar to those from the May 2012 IEP to address Student's tardies such as allowing the student to use the restroom as needed and providing adult support for transitions until routines and schedules are established. But instead of allowing her to have additional passing time without any penalty, that accommodation was changed to not requiring a student to get a "Plascopass,"<sup>4</sup> which carried discipline consequences, but still noting her tardy or absence in her electronic record. *Resp. Ex. N at 150; Tr.* 34, 55, 250.

28. The September 2013 IEP contains numerous accommodations for Student's slow pace in completing work: grading her on work completed and giving her shortened assignments, extended time to complete work assignments and tests, and extended time for oral and written responses. *Resp. N at 149-50.*

29. The May 2013 IEP contained six goals. The September 2013 IEP team intended to continue these goals in the September 2013 IEP, but inadvertently omitted the goal for semantics and the 60 minutes per week of language therapy provided in the May 2013 IEP. *Resp. Ex. N; Tr.* at 58. Despite this, Student continued to receive language services from the speech language pathologist as provided in the May 2013 IEP. *Resp. Ex. Y at 192-93; Tr.* 221.

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<sup>4</sup> Ritenour's name for a tardy pass obtained at the administrative office.

30. At the time of the September 2013 IEP, Student was making progress on the five listed goals. *Resp. N at 138*. She was also making progress on her semantics goal. *Tr. 222*.

Late September 2013

31. Student has used her crisis plan successfully at times. *Tr. 263, 311*. But she also had a number of behavioral incidents in September.

32. In an effort to collect data on Student's behavior, Ms. Peterson asked teachers to complete disciplinary "referral forms" for documentation. Ms. Peterson collected the forms, but Student was not actually referred for discipline as a result of these incidents. *Tr. 25*.

33. On September 18, five teachers documented Student's behaviors during that day on referral forms. The behaviors included interrupting class, leaving class without permission, addressing teachers with vulgarity, calling teachers liars, and telling them she hated them. *Resp. Ex. O at 152-60*.

34. On September 20, three teachers and one student documented Student's behaviors during that day, including interrupting, using vulgar language, leaving class without excuse, and engaging in verbal altercations and abuse of other students. *Id. at 161-65*.

35. On September 23, a teacher documented that Student continuously took pictures of people in class, despite being told to stop. She called one teacher stupid and told another to shut up. *Id. at 166*.

36. At about the same time, Student verbally abused the Ritenour truancy monitor. *Tr. 29*.

37. Student was suspended from Ritenour on September 24, 25, and 26, for "defiance, improper language and truancy." *Resp. Ex. Q*.

38. Student's case manager thought Student's behaviors were not unusual for a student with autism in a new school, and that she was transitioning "pretty well" to Ritenour.

*Tr. 88.*

October 2013

39. Mother called Ms. Quinlivan after Student's suspension, asking for a manifestation determination, and requesting that the IEP team reconvene. *Tr. 277.*

40. Ms. Quinlivan responded to Mother on October 1. She informed Mother that the District would not hold a manifestation determination because a three-day suspension did not warrant one. She also wrote:

I was not able to clarify your request to hold another IEP meeting for [Student]. If your request is to reconvene the IEP, what new information will you be providing to the team for consideration? What would be the purpose of the team meeting again? Please let me know what new information will be provided.

*Resp. Ex. R.*

41. Student planned to go to Ritenour's homecoming dance scheduled on October 5. Ritenour's homecoming dance guidelines specify that, in order to attend the dance, students must have at least 90% attendance for the eight weeks prior to the dance, and must be in school all day on the day before the dance. Ritenour allows no exceptions to these guidelines. *Resp. Ex. U;*

*Tr. 386-87.*

42. Student was tardy to school on September 30 and was absent without excuse from her seventh period class. She was tardy to school on October 1. She did not attend her first period class on October 3. From August 14 until October 3, Student was tardy to school twelve times, tardy to class four times, and truant from class six times. She was absent with a medical excuse two full days and part of another day. She was absent from school three full days because of her suspension.

43. On October 4, Student was absent from school most of the day. She accompanied Mother to court in St. Louis County, where Mother filed for a protection order. *Resp. Ex. T.*

44. Due to Student's absence from school on October 4 and her overall attendance record, Mr. Clark denied her permission to attend the homecoming dance. *Resp. Ex. U at 178; Tr. 385-87.*

45. Mother and Student were both very upset that Student was not allowed to go to the homecoming dance. On October 7, Student went to the emergency room at Children's Hospital. *Resp. Ex. CC at 199.*

46. Student was absent from school with a medical excuse from October 7 through the end of the semester. *Tr. 104.* During this time, she was receiving both inpatient and outpatient therapy. *Tr. 116, 315; Resp. Ex. CC.*

47. On October 10, Mother requested in writing that the IEP team reconvene to discuss Student's crisis plan and her tardies and absences. *Resp. Ex. V.*

48. Mother and Ms. Peterson agreed on a meeting time on October 15. *Tr. 72-73.* The District scheduled the meeting and also notified Mother in writing. *Resp. Ex. W.*

49. The IEP team convened on October 15 as scheduled. Neither Mother nor Student appeared for the meeting. The IEP team did not proceed with the meeting. *Tr. at 11.*

50. Mother filed the due process complaint on October 18.

### **Conclusions of Law**

The Administrative Hearing Commission has jurisdiction over this case. § 162.961, RSMo Cum. Supp. 2013. The burden of proof in an administrative hearing challenging an IEP is on the party seeking relief, in this case the Petitioners. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

Under the IDEA, all children with disabilities are entitled to a free appropriate public education (FAPE) designed to meet their unique needs. 20 U.S.C. § 1412. The IDEA defines FAPE as specialized special education and related services that: have been provided at public expense, under public supervision and direction, and without charge; meet the standards of the state educational agency; include an appropriate preschool, elementary school, or secondary school education in the state involved; and are provided in conformity with the individualized education program. *See* 20 U.S.C. § 1401(9). The IDEA does not prescribe any substantive standard regarding the level of education to be accorded to disabled children. *Board of Education of Hendrick Hudson Central School District, Westchester County, et al. v. Rowley*, 458 U.S. 176, 189, 195 (1982). Rather, a school district fulfills the requirement of FAPE “by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Id.* at 203. The IDEA does not mandate that special education “maximize the capabilities” of disabled children, nor is a school district required to furnish every service necessary to maximize a child's educational potential. *Id.* at 198.

The primary vehicle for carrying out the IDEA’s goals is the IEP. 20 U.S.C. § 1414. An IEP is a specialized course of instruction developed for each disabled student, taking into account that child's capabilities. 20 U.S.C. § 1414(d)(1)(A). The IEP is not required to maximize the educational benefit to the child, or to provide each and every service and accommodation that could conceivably be of some educational benefit. *Rowley*, 458 U.S. at 199; *Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 612 (8th Cir. 1997) (IDEA does not require a school district to maximize a student’s potential or provide the best education possible); *Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027 (8th Cir. 2000) (Missouri requires an appropriate and not a maximizing standard).

If a child's special education program or placement, as defined in the child's IEP, is disputed by the child's parents, the IDEA provides for a review procedure. 20 U.S.C. § 1415(a), (b), (d); 34 C.F.R. §§ 300.500–580. The key inquiry in determining whether a district is providing FAPE is to assess “whether a proposed IEP is adequate and appropriate for a particular child at a given point in time.” *Burlington v. Dep’t of Educ.*, 736 F.2d 773, 788 (1st Cir. 1984), *aff’d*, 471 U.S. 359 (1985). The standard to judge whether an IEP is appropriate under IDEA is whether it offers instruction and supportive services reasonably calculated to provide some educational benefit to the student for whom it is designed. *Gill*, 217 F.3d at 1035.

### Petitioners’ Complaint

In their due process complaint and their pre-hearing conference statement, Petitioners raise a number of points. Most relate to the ultimate issue of whether the District provided Student with FAPE. To lend structure to our conclusions of law, we group Petitioners’ issues into four main categories: (1) issues relating to the September 2013 IEP; (2) Lack of a BIP and ineffective crisis plan; (3) inappropriate discipline and no manifestation determination after Student’s September suspension; and (4) poor communication from both Ritenour and District staff. In addition, we briefly address two issues Petitioners brought up at the hearing and in pre-hearing conferences that were not contained in the complaint.

We paraphrase Petitioners’ allegations below.

- A. Issues Relating to Student’s IEP.
  - 1. A representative of the St. Louis Regional Center for Developmental Disabilities was not notified of the September 2013 IEP meeting.
  - 2. The IEP incorrectly states that Mother states Student can gain “self control.”
  - 3. The IEP identifies language deficits that impact Student’s written expression, but language and communication needs are not addressed in the IEP.
  - 4. Student has made no progress on several goals in the IEP.
  - 5. Student has a processing disorder.
- B. Issues Relating to Student’s Crisis Plan and Lack of BIP

1. Student's last FBA was not completed.
2. Student's crisis plan is not working.
3. The IEP should contain a BIP.

C. Inappropriate Discipline/No Manifestation Determination

1. After Student was suspended for three days, Mother requested a manifestation determination, but none was conducted.
2. Student was not allowed to go the Ritenour homecoming dance on October 5.
3. Student's absences and tardies should be excused because of her and her mother's medical issues.

D. Poor Communication from Ritenour and the District.

1. Mother was not notified of eight office referrals before Student was suspended.
2. When Mother requested another IEP meeting in late September, District staff asked "what new info" she had to address.
3. Student's schedule was changed several times at the beginning of the school year.

A. Issues Relating to Student's IEP

The IDEA requires that an IEP contain a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability so as to enable the child to be involved in and make progress in the general education curriculum and meet each of the child's other educational needs that result from the child's disability. 20 U.S.C. § 1414(d)(1)(A)(i)(II). In addition, DESE publishes Compliance Standards and Indicators that direct Missouri school districts in the implementation of special education services. See Compliance Standards and Indicators, 200.810 (<http://dese.mo.gov/se/compliance/StandardsManual/>). Annual IEP goals must demonstrate consistency with the content of the student's present level of performance, enable the child to be involved in the general education curriculum as appropriate, and address the child's other educational needs resulting from her/his disability. *Id.*

Student had IEPs for several years before she entered high school. Staff from the District and Ritenour high school and middle school crafted an IEP for her in May 2013, shortly before the end of the school year, intended to continue into her freshman year in high school. At the beginning of her freshman year, however, Mother became concerned about Student's frequent absences and tardies, and the efficacy of her crisis plan. She requested an IEP meeting. The IEP team convened on September 6 and produced a new IEP, the September 2013 IEP.

1. Semantics goal/Speech therapy. The September 2013 IEP document inadvertently omitted Student's "semantics" goal from the May 2013 IEP, and the 60 minutes weekly of speech therapy Student was supposed to receive. Mother and Student testified that Student did not receive the speech therapy, but the speech language pathologist and several teachers testified otherwise, and the District presented the speech language pathologist's records of her sessions with Student as evidence.

One of our tasks is to determine the credibility of witnesses. *J. L. v. Francis Howell R-3 School Dist.*, 693 F. Supp.2d 1009, 1033 (E.D. Mo. 2010). On this issue, we find the District's witnesses more credible. Student continued to receive 60 minutes of speech therapy weekly and work on her semantics goal even after they were omitted from the September 2013 IEP. Additionally, in its prehearing conference statement, the District offered to reconvene the IEP team and correct the IEP to include this service as well as Student's semantics goal.

A school district provides FAPE if it provides personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Rowley*, 458 U.S. at 203. Despite the inadvertent omissions of Student's semantics goal and her speech therapy services from her IEP, she continued to receive personalized instruction and sufficient support services in these areas to benefit educationally. Therefore, she was not denied FAPE on account of these omissions.

2. Incorrect statement in IEP. In the due process complaint, Mother complains that the September 2013 IEP states “parent agrees that student can gain ‘self-control.’ That is false.” The September 2013 IEP actually states: “[Student]’s mom identified some strengths as being leadership potential, strong advocate for herself and others and gaining in self control.” *Resp. Ex. N* at 138. Whether or not Mother’s statement from the September 2013 IEP meeting is accurately reported, such a statement within the IEP document does not result in a denial of FAPE.

3. Parent’s Invitee not notified of IEP meeting. The due process complaint alleges that Mr. Mitchell, Mother’s invitee from the St. Louis Regional Center for Developmental Disabilities, was not notified of the meeting. Ms. Peterson asked whether Mother could contact him regarding the meeting, or in the alternative for his contact information. Mother did not provide his contact information to her.

Federal regulations specify the required members of an IEP team. 34 CFR § 300.321(a). Mr. Mitchell was Mother’s invitee, and was not a required member. The IEP team may include other individuals with knowledge or special expertise, “*at the discretion* of the parent or the agency.” 34 CFR § 300.321(a)(6) (emphasis added). Mother did not take the steps to notify him of the meeting, or to give the District his contact information. Under this circumstance, we do not find a denial of FAPE.

4. No progress on IEP goals. In the due process complaint, Petitioners state, in reference to the September 2013 IEP, “There are several goals that have not been met and no progress is shown.” It should be noted that little school time had elapsed between May 2013, when the last IEP was developed, and September 6, 2013. Nonetheless, under the section, “Changes in current functioning of the child since the initial or prior IEP,” the IEP notes progress on five of Student’s

six goals. The sixth goal, semantics, contains no progress report, but Student's speech language pathologist testified she was making progress on that goal as well.<sup>5</sup>

The evidence shows that the District was providing Student with personalized instruction and she was receiving some educational benefit from that instruction. Once again, therefore, we determine it met the *Rowley* standard, and we find no denial of FAPE in connection with this issue.

5. Processing Disorder. In their complaint, Petitioners mention Student's "processing problems that reflects on her constant time needed to complete any and all tasks," but they make no specific complaint related to a processing disorder, nor do they request relief such as testing or an accommodation. At the hearing, Petitioners raised the issue of whether Student has a processing disorder several times. The District objected that it was not a subject contained within their complaint. We overruled the objection.

Student was reevaluated in February 2012. At that time, her processing speed was evaluated, and she obtained a processing speed index score of 100, which is average. Furthermore, even if Student has a processing disorder, her current IEP contains numerous accommodations for her slow pace in completing work, such as grading her on work completed and giving her shortened assignments, extended time to complete work assignments and tests, and extended time for oral and written responses. We find no denial of FAPE for failure to evaluate for or accommodate a processing disorder.

#### B. Issues Relating to Crisis Plan and Lack of BIP

Student had a BIP in her IEPs in middle school. At the end of eighth grade, pursuant to an FBA completed in April 2013, Student's IEP team reevaluated her need for a BIP and decided

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<sup>5</sup> There is also evidence in the record that indicates Student was making progress only on four of her six goals. *Resp. Ex. Y*. Even under this more negative assessment, the evidence supports the conclusion that she was making progress on the whole.

she needed only a crisis plan. Petitioners disagree with this decision, alleging that Student's FBA was not a complete assessment, that her crisis plan is not effective, and that she continues to need a BIP. As these issues are inextricably intertwined, we address them together.

In the case of a child whose behavior impedes the child's learning or that of others, IEP teams are required to consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 20 U.S.C. § 1414(d)(3)(B)(i); 34 CFR 300.324. Missouri's State Plan for Special Education, Part B 2013 ("the State Plan"), Regulation IV, echoes this requirement. It does not require that a BIP be included in a child's IEP unless a manifestation determination has occurred and the manifestation team has determined that the child's actions leading to disciplinary action are related to his or her disability. *See* State Plan (Regulation IV, Section 2 at 44; and Regulation V, Section 9 at 77).

"Neither Missouri nor federal law requires a written BIP to be attached to an IEP." *Clark v. Special School Dist.*, 2012 WL 592423 (E.D. Mo., 2012), *citing Lathrop R-II School Dist. v. Gray*, 611 F.3d 419, 425-26 (8<sup>th</sup> Cir., 2010). Public school districts are not required to develop a formal BIP, provided that the IEP team notes the student's individual behavior issues, as well as other limitations and concerns, in a manner which reflects that the IEP team considered strategies to address that behavior. *Park Hill School Dist. v. Dass*, 655 F.3d 762, 767 (8<sup>th</sup> Cir. 2011). Student's September 2013 IEP does reflect such consideration. In *Park Hill*, the court found it was acceptable practice to use methods and strategies that the IEP team believed would be effective, and, if those strategies prove unsuccessful with the particular student, to conduct a functional behavioral assessment and develop an individualized BIP at that time. *Id.* At the time Petitioners filed their complaint, the District was on that path.

An FBA normally precedes a BIP. As a result of Student's April 2013 FBA, the May 2013 IEP team substituted a crisis plan for her BIP. Petitioners allege that Student's last FBA was not a complete assessment. In response, the District notes that an FBA was completed on April 15, 2013. One of the members of the FBA team testified at the hearing that the FBA contained "all the components of an FBA"<sup>6</sup> – i.e., that it was "complete." But he also testified that it was not as extensive as some FBA's, and that if he had been leading the FBA team he would have tried to make sure the observation periods took place on more than one day.

The FBA performed in April 2013 has a skeletal quality: the structure is present, but the bones lack flesh. The "observation" consisted of three short periods within a three-hour time span in a single day. And even though the data collected during those short observation periods indicated that Student remained on task as much as her peers, the single narrative supplied by one teacher paints a different picture. Only one teacher – the same one that observed Student – completed a questionnaire regarding her behavior. The FBA may have been technically complete, but it was not very informative.

Furthermore, the April 2013 FBA focused on Student's on- and off-task behaviors, whereas her BIP was directed at her inappropriate verbalizing and lack of compliance with teacher requests. These may be related behaviors, but they are not identical. The May 2013 IEP team concluded that Student no longer needed a BIP because of the FBA's conclusion that she was on task as much as other students; that conclusion seems incongruous given that the behaviors targeted by the FBA and the BIP were not the same.

That incongruity does not necessarily mean the District failed to provide FAPE to Student. Student had a crisis plan that contained some of the same elements as her previous BIP, with its emphasis on Student's recognition of her behaviors, redirection, and calming. The fact

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<sup>6</sup> Tr. 482.

that Student's crisis plan was not always effective does not mean the District failed to provide her FAPE. At the IEP meeting on September 6, Student's crisis plan was modified to add two more adults, one of whom would always be in the building and available to Student when needed. After that date, Student continued to engage in inappropriate behaviors at times, such as swearing, interrupting, and leaving class. These incidents were of the type described in her crisis plan ("If [Student] becomes agitated or frustrated she may become verbally inappropriate or leave the situation without destination or permission."). Student's crisis plan did not prevent her being suspended from school in late September. But a crisis plan does not mean that Student's negative behaviors can be effectively managed or put to a stop in every instance. It is a tool toward that end, but not a guarantee.

Student was in school less than eight weeks before she went on extended medical leave. Both she and her teachers testified at the hearing that her crisis plan worked some of the time. During the September 2013 IEP meeting, the team discussed whether Student needed another FBA and a BIP, and determined that they lacked the data to make this determination. They improved her crisis plan, and Ms. Peterson attempted to collect further data, but Student attended school for less than four weeks after the September 2013 IEP meeting. The "referral forms" collected by Ms. Peterson documented a number of instances of disruptive behavior, but all of them took place within a week – too short a time to fully evaluate Student's crisis plan.

When we consider all these factors, we cannot conclude that Student's crisis plan was ineffective. The District met the standard set in *Park Hill*: the crisis plan was a strategy the IEP team believed would work with Student, and there is evidence that it has worked. The District was monitoring Student's behavior and collecting data, and it had not precluded the possibility of conducting another FBA or developing a BIP for Student. The IDEA requires an IEP team only to "consider, when appropriate, strategies, including positive behavioral interventions, strategies,

and supports to address that behavior[.]” 20 U.S.C. s 1414(d)(3)(B)(i) (emphasis supplied). The District fulfilled this obligation. Thus, we do not find that the District denied FAPE to Student simply because she did not have a BIP at the beginning of the 2013-14 school year.

We do conclude, however, that Student would benefit from another FBA. Her on- and off-task behaviors should be analyzed again, but so should the other behaviors that were the subject of her middle school BIP: inappropriate verbalizing and lack of compliance with teacher requests. Then, the IEP team should reconvene to determine whether a BIP is needed.

In its prehearing conference statement, the District offered to take these steps. It proposed to “reconvene the IEP team to determine whether additional assessment was necessary and modify the Crisis Plan and/or create a BIP.” Petitioners did not avail themselves of this offer, insisting numerous times that once a due process complaint was pending and the resolution period was over, the parties could no longer meet to discuss Student’s IEP.

Petitioners have supplied us with no authority to support this position, and we have found none. The closest authority we have found is to the contrary, in the attorneys’ fees context, in which the IDEA “encourages settlement in, for example, § 1415(e)(4)(F)(i), [by requiring] the court to reduce attorneys’ fees for a parent or guardian who unreasonably protracts the final resolution of the controversy. “ *Jason D.W. by Douglas W. v. Houston Independent School Dist.*, 158 F.3d 205, 212 (5th Cir., 1998). And § 1415(i)(3)(D)(i) of the IDEA provides that:

Attorneys’ fees may *not* be awarded ... in any action or proceeding under this section for services performed *subsequent to the time of a written offer of settlement* to a parent if ... the offer is made ... in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins; ... the offer is *not* accepted within 10 days; and ... the court or administrative hearing officer finds that the relief finally obtained by the parents is *not* more favorable to the parents than the offer of settlement.

These provisions of the IDEA governing attorneys' fees are not directly applicable to this case, but they reflect Congress' position that the settlement of disputes under the IDEA is encouraged, and that such settlement may take place after a due process complaint has been filed. As parties must meet and discuss issues relating to a Student's IEP in order to settle a due process complaint, we conclude that the pendency of the complaint does not bar them from doing so.

C. Inappropriate Discipline/No Manifestation Determination

1. No manifestation determination after three-day suspension. A manifestation determination is an inquiry to determine whether conduct for which a student's placement is changed was related to the student's disability or the failure to implement a student's IEP. 34 CFR § 300.530(e). Mother requested a manifestation determination when Student was suspended, but none was conducted. Mother has contended that one is necessary because the behavior for which Student was suspended – defiance, improper language, and truancy – constitutes pattern behavior linked to her disability. As evidence, she points to the “office referral” forms collected by Ms. Peterson, which do indeed show a pattern of defiance, improper language, and truancy.

Nonetheless, no manifestation determination was legally required after Student's three-day suspension in September. A manifestation determination must be performed when a district proposes disciplinary measures that result in a *change of placement* for a child with a disability. 34 CFR § 300.530(e). Pursuant to 34 CFR § 300.536(a), a change of placement occurs if:

- (1) The removal is for more than 10 consecutive school days; or
- (2) The child has been subjected to a series of removals that constitute a pattern –
  - (i) Because the series of removals total more than 10 school days in a school year;
  - (ii) Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and

(iii) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

In this case, there was no change of placement. The suspension was for less than ten days, and there had been no previous suspensions, so there had been no “series of removals.” Those are the only circumstances in which a manifestation determination is *required*. The District’s failure to conduct one did not deny Student FAPE.

2. Homecoming dance; absences and tardies. Student was not allowed to attend the Ritenour homecoming dance because her attendance rate prior to the dance was less than 90%, and she was absent from school the day before the dance. Petitioners protest this decision, which was made by Ritenour rather than the District. This relates to their contention that because of her disabilities, Student’s absences and tardies should not have disciplinary or adverse consequences.

In its response to this issue, the District simply stated, “This is not an IDEA issue.” This response is too simple. In fact, a student may make a claim under the IDEA related to denial of participation in an extracurricular activity such as a school dance. *See Indep. Sch. Dist. No. 12 v. Minnesota Dep’t of Educ.*, 788 N.W.2d 907 (Minn. 2010) (construing the IDEA and the regulations thereunder to require school districts to provide all types of extracurricular activities in a manner necessary to afford disabled students an equal opportunity to participate in them). The fact that Ritenour rather than the District established the attendance and extracurricular policies in this case may not excuse the schools’ obligations under the IDEA.

In this case, however, Student’s absence from school the day before the dance was not related to her disability; she was in court with Mother, who was seeking a protection order. And while Student had many absences from class during the weeks before the dance, it is unclear how many of them were attributable to her disability as opposed to other reasons such as truancy, a stomach ache, and her suspension. In short, Petitioners did not carry their burden of proof to

show that Student was denied attendance at the homecoming dance for reasons related to her disability.

With regard to Student's tardies, the evidence shows that the September 2013 IEP team balanced competing factors – its knowledge that Student takes more time to do things, including passing between classes, than other students, versus the IEP team's awareness that Student sometimes got into trouble if she was allowed to remain in the halls by herself after class had begun – to develop a plan in which Student's tardies would be recorded, but she would not suffer the full range of disciplinary consequences for them. Mother might disagree with this approach, but we cannot say it is unreasonable. Furthermore, of the sixteen tardies on Student's record during the period at issue, twelve were to first period; in other words, Student was late to school. Mother transports Student to school; together, they are in the best position to remedy this problem.

We do not find that Student was denied FAPE because of the policies applied to her absences and tardies.

#### D. Poor Communication

Petitioners complained about poor communication from both Ritenour and the District in terms both general and specific. We address the specific issues in their complaint below, and do not find the District's communication or lack thereof denied FAPE to Student, but offer a brief preliminary observation.

At the due process hearing, several points of confusion emerged that, while they do not amount to a denial of FAPE, understandably concerned the Petitioners. For example, Student's attendance record showed several instances coded as "unexcused absence office." *Resp. Ex. DD at 204-05*. Mother did not know what this meant, and neither did Student's case manager. *Tr. 48*. While the evidence indicates that attendance recording is a Ritenour function rather than a

District function, it would be helpful if District staff placed at Ritenour understood Ritenour's policies and record keeping conventions well enough to explain them to parents or at due process hearings.

Student was suspended for three days in September for "defiance, improper language, and truancy." Neither Mother nor Student knew precisely which incident or incidents triggered Student's suspension, and the evidence at the hearing did not clarify whether the suspension resulted from the cumulative incidents teachers documented the week before her suspension, or the incident in which Student took pictures of other students and did not stop after being told to, or an incident in which Student cursed at Ritenour's truant officer. The reason for her suspension should have been clearly communicated to Mother and Student.

Finally, documents such as the February 2012 evaluation and the September 2013 IEP contained numerous errors and typos, such as referring to Student by the wrong name, omitting one of her goals, and omitting her speech services. Mistakes happen, but these obviously did not inspire confidence in the Petitioners, and may have contributed to their desire for a due process hearing.

Of course, communication flows two ways. The evidence in this case also indicates that Mother has not always communicated well with the District. The record contains numerous examples of District personnel trying to contact Mother and Mother not returning telephone calls or returning e-mails. Mother has, on several occasions, not appeared for IEP meetings. She and the District are currently at loggerheads over another issue regarding Student that is not the subject of this case, in which Mother has refused to provide releases and access to medical records the District says it needs to further Student's education. Mother suffers from a chronic disease and issues may arise that prevent her from attending meetings. But the obligation to

maintain frequent and reliable communication with the District falls on her as well as on the District.

1. Mother not notified of office referrals. Although a number of “office referral” forms are in the record, the evidence establishes that these were used for data-gathering by Ms. Peterson, and did not actually result in disciplinary referrals to Ritenour administration. We do not find that the District’s failure to notify Mother of each of the incidents documented by the “referrals” amounted to a denial of FAPE.

2. District response to Mother’s request for another IEP meeting. The IEP team, including Petitioners, convened an IEP meeting on September 6 and produced a new IEP for Student. After Student was suspended, Mother called the school to request both a manifestation determination and another IEP meeting. On October 1, Ms. Quinlivan wrote Mother and asked her whether she had new information for the team, and what the purpose of another meeting would be. Mother apparently perceived her response as expressing refusal or at least reluctance to reconvene the IEP team. However, when Mother again requested on October 10 that the IEP team reconvene, a meeting was scheduled for October 15. The school-based members of the team convened, but did not hold the meeting because Petitioners did not attend.

Ms. Quinlivan’s response to Mother should be considered in context. The IEP team had met and produced a new IEP less than a month before Mother’s request. Student was still relatively new at Ritenour and becoming familiar with the high school. The team had discussed the need for Student to learn time management at the previous IEP meeting, and was still gathering data on Student. When Mother asked for another IEP meeting a few days later, the District scheduled another IEP meeting within five days – which Petitioners did not attend.

We do not find that the District either refused to hold an IEP meeting, or that its initial response asking whether new information warranted such a meeting amounted to a denial of FAPE.

3. Student's schedule changes. Mother and Student both testified that Student's class was changed multiple times during the first few weeks of school. Ritenour and District personnel all testified that it was changed once, on the fourth day of school, to ensure Student's placement in "Career Connections," a special education class. On this point, we must decide whose testimony to believe.

The District presented the testimony of multiple teachers and the Ritenour guidance counselor, who all agreed that Student's schedule was changed once during the first semester. It also placed into evidence a record from its student schedule database, indicating that only that change had been made. We do not believe that either Mother or Student made intentional misrepresentations on this point, but both displayed confusion on this point as well as in other areas of their testimony. Therefore, we credit the District's evidence on this point, and we find Student's schedule was changed only once at the beginning of the year.

Even if we found that it had been changed multiple times, Petitioners have pointed us to no authority indicating that multiple schedule changes result in a denial of FAPE. This is particularly true where, as in this case, Student was not disciplined for her tardies and District personnel walked Student to classes at the beginning of the year until she asked them to stop because she felt she knew her way.

We find no denial of FAPE in connection with this issue.

#### E. Issues Raised at the Hearing, but not in the Complaint

The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint unless the other party agrees otherwise.

20 U.S.C. § 1415(f)(3)(B); 34 CFR 300.511(d). Petitioners raised two issues at the hearing that do not appear in their complaint, and we have no indication that the District has agreed that these are issues properly before us. So that we may thoroughly consider Petitioners' concerns, however, we discuss those issues briefly.

October 15 IEP Meeting. Petitioners contend that the District should have proceeded with the October 15 IEP meeting Mother requested, despite the fact that they did not attend. Public agencies are required to take steps to ensure that one or both of the parents of a child with a disability are present at each IEP team meeting or are afforded the opportunity to participate. 34 CFR 300.322. An IEP meeting may be conducted without a parent in attendance "if the public agency is unable to convince the parents that they should attend." 34 CFR § 300.322(d). However, the school district in such a case must keep a record of its attempts to arrange a mutually agreed on time and place. *Id.* In other words, the default position for a school district in such a case would be to *not* proceed with the IEP meeting; it should only proceed with the meeting after multiple attempts to communicate the time and place of the meeting with the parent had been made and documented. This would seem to be particularly true in a case such as this one, in which the parent herself requested the meeting.

Attorney Fees/Monetary Damages. In several prehearing conferences, and again at the hearing, Petitioners asked for attorney fees, or \$3,000 to establish a not-for-profit foundation to advocate for students with disabilities, in the event she prevailed. Under the IDEA, a court, in its discretion, may award reasonable attorneys' fees to the prevailing party, 20 U.S.C. § 1415 (i)(3)(B)(i), but an administrative tribunal may not. Moreover, Petitioners have not prevailed in this proceeding. Even if they had, a parent is not entitled to attorney fees for representing a child even if the parent is an attorney, which Mother is not. *D.B. ex rel. Elizabeth B. v. Sutton School Dist.*, 2013 WL 3892900 (D. Mass., 2013). Finally, the IDEA provides for injunctive or

prospective relief, such as compensatory educational services, but generally not monetary damages. *B.M. ex rel. Miller v. South Callaway R-II School Dist.*, 2012 WL 5818001, 2 (W.D. Mo., 2012). As part of compensatory educational services, the IDEA allows for reimbursement of educational services where the public school district had failed to provide FAPE to a disabled child. *School Comm. of Town of Burlington v. Department of Educ. of Mass.*, 471 U.S. 359, 370, (1985). But the IDEA does not allow for monetary damages of the type Mother has requested.

### **Summary**

The District has provided Student with FAPE. However, Student would benefit from another FBA to assess her on- and off-task behaviors as well as her inappropriate verbalizing and non-compliance with teacher requests. As the District has previously offered, the parties should then convene for another IEP meeting, in order to 1) add the semantics goal and speech language services back into Student's IEP; 2) consider the results of Student's new FBA; and 3) review her crisis plan and determine whether a BIP should replace it.

### **Appeal Procedure**

Please take notice that this is a final decision of the Administrative Hearing Commission 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. § 300.512.

SO ORDERED on March 31, 2014.

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KAREN A. WINN  
Commissioner