

Before the
 Administrative Hearing Commission
 State of Missouri



)	
in the interest of)	
)	
Petitioners,)	No. 14-0441 ED
)	
vs.)	
)	
NORTH ST. FRANCOIS COUNTY R-I)	
SCHOOL DISTRICT,)	
)	
Respondent.)	

DECISION

The parents of, a -year-old boy (Student), filed a due process complaint after the North St. Francois County R-I School District (the District or Respondent) decided to place Student at a residential treatment facility. We find that the District did not offer a free and appropriate education (FAPE) to Student because it did not place him in the least restrictive environment. We also find the District violated the parents’ rights under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (the IDEA), because it hindered their right to meaningfully participate in the decisionmaking process for Student’s placement, but that the District did not fail to timely evaluate Student. We determine that day attendance at Edgewood School in Webster Groves, Missouri, is the most appropriate placement for Student to receive FAPE during the 2014-15 school year.

Procedure

On April 10, 2014, (Father and Mother, respectively, and together, the Parents) filed a due process complaint on behalf of their son, Student (together with Parents, the Petitioners), against the District. We sent our hearing notice to both parties on the same date. In the notice, we scheduled a prehearing conference for April 25, 2014, and ordered both parties to file a pre-hearing conference statement with this Commission three days before that date. We also scheduled the hearing for May 13, 2014.

Attorneys for the District filed an answer on April 21, 2014. We held a pre-hearing conference with the parties on April 25, 2014. At the pre-hearing conference, Petitioners made an unopposed motion to amend their complaint and to continue the hearing. We granted the motions and scheduled a second pre-hearing conference for May 23, 2014. We continued the hearing to June 16-17, 2014, and set a decision deadline of June 23, 2014.

Petitioners filed an amended complaint on May 13, 2014, which the District answered on May 19, 2014. We held the second pre-hearing conference on May 23, 2014, issued a discovery order, and set a new decision deadline of July 17, 2014.

On June 2, 2014, at the request of the District, we issued a qualified protective order pertaining to certain psychological records of Student.

We held the hearing on June 16-17, 2014, at the District's office in Bonne Terre, Missouri. At the hearing, Petitioners dismissed one of the issues in their complaint, relating to Student's suspensions from school. Petitioners also dismissed their request for reimbursement of the cost of the independent educational evaluation they obtained for Student.

At the close of the hearing, the parties moved to extend the decision deadline in the case from July 17, 2014 to August 1, 2014. We granted the motion and scheduled a post-hearing status conference for July 1, 2014. We also issued a schedule for the parties to file simultaneous

proposed findings of fact and conclusions of law, no later than July 18, 2014. The matter became ready for our decision on that date.¹

Findings of Fact

1. Student is a -year-old boy who recently completed the grade at North County Primary School in Bonne Terre, Missouri, in the District.
2. Student was adopted by Parents. As a young child he had tantrums, problems sleeping, and engaged in head banging.
3. Student lives with Parents on a ranch. Mother has a master's degree in clinical counseling and is employed. Father, along with Mother, manages the ranch, on which they keep horses and cattle. They also host competitions for sporting events such as cattle sorting, barrel racing, and cowboy-mounted shooting. The boys ride horses and compete in these sports, as well.
4. Student enjoys being on the ranch, riding horses, and being with his extended family and their close friends.
5. Student was enrolled in in a private parochial school in the fall. He attended kindergarten in the District from January 18through March 28. On April 4, Parents placed him in the Farmington R-VII School District. Student finished kindergarten and began first grade in the Farmington School District. He attended school there until October 21, 2013.
6. On October 21, 2013, Mother enrolled Student in the District again as a first grader. On that day, she spoke to the school counselor and explained that Student had behavioral issues and needed special education services.

¹ The District also filed objections to Petitioners' proposed findings of fact, conclusions of law and decision on July 30, 2014.

7. Student began attending school at North County Primary in the District on October 22.

8. On October 24, 2013, Emily Bach, the principal of North County Primary, developed a behavior plan, "The Cowboy Way," for Student. Resp. Ex. 3 at 8. The Cowboy Way contains a list of behaviors to be addressed, such as "I will keep my hands to myself," and commitments from parents, teacher, and the principal to support the plan. Resp. Ex. 13 at 2.

9. Within days of his re-enrollment, Student engaged in disruptive behavior. He received his first disciplinary referral for assaulting another student on October 28, 2013, six days following his enrollment at the District. Resp. Ex. 4 at 3, 41.

10. Parents sought a psychological evaluation for Student in November 2013. On November 11, 2013, Dr. Keisha Ross, Ph.D., with Family Life and Counseling in O'Fallon, Missouri, conducted a psychological evaluation of Student. Ross found Student had a nonverbal I.Q. of 129 and a verbal I.Q. of 88. She diagnosed Student with oppositional defiant disorder, adjustment disorder with mixed anxiety, and depression.

11. Also in November 2013, Student and Parents began to see Dr. Donald Respass, Psy.D., with Family Life Counseling, for family therapy. Respass is a psychologist and board-certified behavioral analyst (BCBA).

12. A BCBA observes a person's behavior in an environment and determines what environmental changes need to occur to increase positive behavior or decrease negative behavior.

13. Student and Parents saw Respass on five occasions from November 2013 to January 2014. As a behavioral therapist, Respass emphasized that Student should not be rewarded or reinforced for his problem behaviors. He encouraged the parents to work together toward this

end. Parents adopted his suggestions and Student's behavior at home improved, with less physical aggression and destruction of property.

14. At school, however, Student's behavior continued to deteriorate. Between October 21 and December 20, 2013, Student received ten disciplinary referrals, all of which included assaults on other individuals. They include:

- a. 10/28/13: Physical Aggression, kicking student in stomach. Resp. Ex. 4, pp. 3 & 41;
- b. 10/30/13: Assault, Physical Aggression – hitting staff member. Resp. Ex. 4, pp. 4; 39-40;
- c. 11/05/13: Fighting/Assault, Physical Aggression – hitting a student. Resp. Ex. 4, pp. 5; 38;
- d. 11/06/13: Assault, Physical Aggression – hitting & kicking administrator. Resp. Ex. 4, pp. 6; 36
- e. 11/14/13: Fighting/Assault– kicked three male students in genital area. Resp. Ex. 4, pp. 35;
- f. 11/15/13: Assault, Physical Aggression - hit & bit staff member, broke telephone. Resp. Ex. 4, pp. 7; 34;
- g. 11/21/13: Physical Aggression – kicked student, attempted to bite teacher. Resp. Ex. 4, pp. 8; 33;
- h. 11/22/13: Assault – hitting other students in the face. Resp. Ex. 4, p. 32;
- i. 11/25/13: Assault, Abusive Language, Property Damage – slapped student, kicked teacher, attempted to kick other students, required restraint. Resp. Ex. 4, pp. 9; 32;
- j. 12/20/13: Physical Aggression – kicked teacher. Resp. Ex. 4, pp. 10; 32.

15. Student was frequently restrained and sent to the office. He was also suspended or sent home from school several times.

16. Mother reported the results of Ross' evaluation to Bach on November 12, 2013. At the same time, she requested that Student be evaluated for special education services. Mother subsequently gave the District a copy of the evaluation when she received it in writing, around the end of November.

17. Mother also made specific requests for occupational therapy and physical therapy evaluations to determine whether there were specific factors that triggered Student's disruptive behavior.

18. The District denied Mother's request for special education on November 19, 2013. The District provided Parents with a Notice of Action ("NOA") to that effect, as well as the Procedure Safeguards required under the IDEA. The NOA stated that Student "does not demonstrate adverse educational impact," so he did not meet eligibility criteria for special education services. Resp. Ex. 14 at 1.

19. The District sent Parents another NOA on November 26, 2013, denying their request for an occupational therapy evaluation because the Student was "making progress in the general education curriculum at this time." Resp. Ex. 16 at 1.

20. Respass believed that school officials were not responding productively to Student's disruptive behavior. After one of Student's therapy sessions, he called Bach on November 26, 2013, to tell her that suspending Student was counterproductive because being sent home was Student's desired outcome. Rather, Respass told her, Student needed an IEP² and to be in a small class with a paraprofessional.

21. Bach took umbrage at Respass' tone. Their telephone call ended abruptly and she did not thereafter request records, information, or assistance from Respass.

22. On December 3, 2013, the District sent Parents a notice of intent to review existing data, as the first step in the process to evaluate Student for special education services. Resp. Ex. 18 at 1. The meeting was supposed to be held before Christmas, but it was cancelled several times due to snow days.

² An IEP is an individualized education program. 20 U.S.C. § 1414(d)(a)(A)(i).

23. After Christmas, Student's behavior continued to be problematic. From January 16, 2014 until March 31, 2014, Student received the following disciplinary referrals:

- a. 01/16/14: Assault – striking staff member, hit and kicked administrator and behavioral specialist. Resp. Ex. 4, p. 32;
- b. 01/23/14: Assault – striking staff member, hitting and biting paraprofessional. Resp. Ex. 4, p. 32;
- c. 01/27/14: Inappropriate touching, kissing male students. Resp. Ex. 4, pp. 11; 32;
- d. 01/28/14: Inappropriate touching, kissing other students. Resp. Ex. 4, pp. 11; 31;
- e. 01/29/14: Physical Aggression, slapping and choking other students. Resp. Ex. 4, pp. 12; 31;
- f. 02/11/14: Assault, striking staff member. Resp. Ex. 4, p. 31;
- g. 02/13/14: Assault – hitting other students; classroom disruption/inappropriate language. Resp. Ex. 4, p. 31;
- h. 02/13/14: Classroom Disruption – kicking the wall, pretending to bite paraprofessional, attempting to trip paraprofessional. Resp. Ex. 4, p. 31;
- i. 02/25/14: Sexual Harassment – grabbed and twisted female staff member's breast. Resp. Ex. 4, pp. 13; 31;
- j. 02/26/14: Assault – striking staff member. Resp. Ex. 4, p. 31;
- k. 03/06/14: Assault – slapped, kicked & bit administrator; inappropriate language. Resp. Ex. pp. 14; 31;
- l. 03/07/14: Assault – struck staff member; inappropriate language. Resp. Ex. 4, pp. 30-31;
- m. 03/14/14: Assault – hit and spit at administrator. Resp. Ex. 4, p. 30; and
- n. 03/24/14: Disrespectful Speech/Conduct/inappropriate language. Resp. Ex. 4 at 30.

24. Stephanie Tinker was Student's first grade teacher from October 22, 2013 until February 2014³. During that time, she had to remove all the other students from the classroom

³ The precise date on which Student was permanently removed to a separate classroom varies in the record.

three to five times because Student's behavior was dangerous to himself and to the other students.

25. In January 2014, the District contracted with Heather Lewis, a licensed behavioral analyst, to develop a functional behavioral assessment ("FBA") for the Student. She observed Student at the school on January 16, 2014 and produced an FBA report on January 24, 2014. Lewis recommended a number of behavior interventions and strategies, including choice making, use of a timer, a visual behavior map, positive reinforcement for good behavior, and "extinction" strategies for undesirable behavior.⁴ Resp. Ex. 21.

26. From February 2014 until the end of the school year, Student attended school in an office classroom, which was a small room with no other students. He was taught by a retired teacher. Several paraprofessionals refused to work with him because they did not feel safe when they did so.

27. Even after he was placed in a classroom by himself, Student's behavior continued to deteriorate throughout the rest of school year.

28. The meeting to review existing data took place on February 18, 2014. Resp. Ex. 20. The team determined that Student was eligible for special education as emotionally disturbed (ED).

29. A meeting was convened on March 10, 2014 to discuss the development of an IEP for Student. Parents and seven District employees attended the IEP meeting. At the meeting, the IEP team discussed goals for Student, but not counseling or behavioral therapy.

30. At the IEP meeting, the participants discussed several placement possibilities for Student. They discussed Edgewood, a private school in the St. Louis area that offers both residential placement and day school for students with various disabilities, including ED

⁴ Extinction, in the behavioral context, means lack of reinforcement for a behavior so as to discourage the behavior. Tr. 56-57.

students. They also discussed Faith Foundation Children's Home, a residential school for behaviorally disordered (BD) and ED children located about an hour away from Parents' home.

31. Mother had previously completed two brief internships at Faith Foundation, and Kathy Wynn, a special education teacher and process coordinator who attended the meeting, was previously employed at Faith Foundation for two years. But no current employee of Faith Foundation attended the IEP meeting.

32. Parents were not in favor of a residential placement because Student's behavior had improved at home, and they believed Student suffered from separation anxiety. They had repeatedly communicated this concern to District staff, including Bach. They were also concerned about any day placement that involved a long daily commute for Student.

33. When the meeting adjourned, Parents believed that no final decisions had been made, and that placement options were open. Mother continued to research several day placement options during March.

34. On Friday, March 28, 2014, Bach spoke with the director of Faith Foundation to inquire about the possibility of a day placement there for Student. She was told that Faith Foundation only accepted residential students.

35. On Monday, March 31, 2014, without further discussion or consultation with Parents, the District sent Parents an NOA advising them that the District's placement for Student was at Faith Foundation. The NOA advised Parents that "[t]herapeutic services available in a residential placement are necessary for [Student] to receive FAPE." Resp. Ex. 28 at 1.

36. On April 10, 2014, Petitioners filed a Due Process Hearing Request.

Expert Testimony

37. Petitioners' expert was Dr. Donald Respass.

38. The District's expert was Dr. Gerald Cox. Cox is a clinical psychologist who contracts with a number of school districts in the St. Louis area to provide a variety of services to

those districts such as training staff, clinical support for homebound and special education programs, risks assessments for students, and consultation for placement decisions.

39. Both Cox and Respass testified that the District staff's management of Student, involving frequent restraints, removals from class, and being sent home, were counterproductive and made Student's behavior worse throughout the year.⁵

40. Respass testified that the appropriate placement for Student would be a specialized class with five to ten ED or BD students and a staff-to-student ratio of at least one to two, with a special education teacher and paraprofessional aides trained and experienced in working with BD and ED students. The placement should also include a therapeutic component; in other words, a mental health professional to work with the students in the class.

41. Cox testified that the appropriate placement for Student would be a separate therapeutic classroom of four to five ED students, staffed by one special education teacher trained in ED, a paraprofessional, and at least one licensed mental health professional. He also believes Student would benefit from social skills training.

42. Cox and Respass agree that a residential treatment facility is not appropriate for Student, and that it would be preferable for Student not to be in a classroom by himself.

43. Some public schools, such as the ones Cox works with in St. Charles County, have classrooms that meet the above criteria. The Fort Zumwalt district, for example, has recently begun an elementary "self-contained" program along these lines with four to five students.

Private Placement and District Capability to Provide FAPE

44. Two private St. Louis area schools meet the criteria of both Cox and Respass for an appropriate placement: Epworth and Edgewood. Edgewood is located about an hour and twenty

⁵ We would be remiss if we did not also note here that the District staff worked very hard to manage Student's behavior, create a positive atmosphere for him, and communicate with Student's parents. All evidence indicates that Bach and her colleagues spent tremendous amounts of time with Student, trying different methods to help him, and exerted extraordinary efforts to help him succeed.

minutes from Bonne Terre, “on a good day.”⁶ There is no evidence in the record as to how far Epworth is from Bonne Terre.

45. The cost to place Student at Edgewood is about \$130/day for the 174 days of the school year, or about \$22,600. Transportation cost would be additional. The cost to place Student at Faith Foundation is \$110/day for the 365 days of the calendar year, or about \$40,150. There is no evidence in the record as to the cost of Epworth. The District would bear these costs.

46. The District has separate ED classes in some of its buildings, but none at the elementary level. None of the classes has a mental health professional assigned to work with it.

47. There are two other ED students at the elementary level. Both are mainstreamed part of the day.

48. Bach believes Student needs therapeutic help beyond the District’s current resources, and that its staff does not have the expertise to manage his behavior.

49. Parents believe a residential placement would be emotionally devastating for Student.

Conclusions of Law

The Administrative Hearing Commission has jurisdiction over this case. Section 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, 6206 (2005). We must determine the credibility of witnesses. *J. L. v. Francis Howell R-3 School Dist.*, 693 F. Supp.2d 1009, 1033 (E.D. Mo. 2010).

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

⁶ Bach testimony, Tr. 272.

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 local educational agency (“LEA”) 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 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).

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 v. Columbia 93 Sch. Dist*, 217 F.3d at 1027, 1035 (8th Cir. 2000).

Expert Testimony

Courts lack the specialized knowledge and expertise necessary to resolve persistent and difficult questions of educational policy. *Gill*, 217 F.3d at 1036-37. Congress therefore created

a comprehensive scheme that enables parties to a due process hearing to present their views and those of experts in the field of special education in order to effectively review a child's education plan. *Id.* Prior to the hearing, both parties filed motions in limine to exclude expert testimony. We held a conference call with the parties and denied both motions.

At the hearing, counsel for the District asked Mother questions about Student's treatment by a therapist, James Womack, who Student saw after the IEP meeting took place. Tr. 181-86. He also asked that a portion of Womack's records, a page entitled "Anger and Anxiety Management Skills," be entered into evidence. Student's counsel objected to the line of questioning and to the documentary evidence on the basis of relevance because Womack's opinions as to the appropriate treatment for Student were not available to and not considered by the IEP team. We took these evidentiary issues with the case, with the following instruction to the District's counsel:

[M]y initial thought is this is – this is so marginally relevant and probative that I am tempted to exclude it, but if you want to make the case in your brief that it is relevant, you may do so. If you don't argue it, I'll exclude it, if you do argue it, I'll consider it with the case[.]

Tr. 219.

In its written argument, the District mentioned neither the testimony regarding Womack's opinions, nor the page from Womack's notes. We exclude both from our consideration of the case.

Petitioners also objected to Cox's testimony because he had never met or observed Student, nor were his opinions available at the IEP meeting. They rely on *Gill* and on the district court opinion that it affirmed, *Gill v. Columbia 93 School Dist.*, 1999 WL 33486650 (W.D. Mo., 1999) (together, the *Gill* cases). Our discussion below cites and relies on both *Gill* cases.

In *Gill*, parents offered testimony on a teaching method from experts who had participated in neither their son's educational program prior to the formation of his IEP nor the IEP meetings. 217 F.3d at 1033. The administrative panel excluded the evidence because it had not been brought up at the IEP meeting and was therefore not relevant to the appropriateness of an IEP. *Id.* Parents made an offer of proof. The administrative panel found that the Student's IEP was appropriate, and the parents appealed. *Id.*

The district court granted the school district's motion for summary judgment. 1999 WL 33486650 at *1. The plaintiffs filed a motion to alter or amend the order based in part on the exclusion of their experts' testimony regarding the appropriateness of the student's IEP. *Id.* The court noted that one of the experts evaluated the student seven months after the IEP meeting. *Id.* at *2. Her testimony would have been that a particular program for teaching autistic children would have been better than the methods adopted by the IEP team. *Id.* The court stated that an IEP "must be evaluated as of the date it is offered. It cannot be evaluated on the basis of facts and circumstances which became known after that date." *Id.* at *1.

On appeal, parents claimed the evidence should not have been excluded. 217 F.3d. at 1034. The court of appeals noted the extensive record before the district court and the district court's extensive factual findings. *Id.* at 1037. It held that the district court did not abuse its discretion when it concluded the record was sufficient to evaluate the educational program offered to student. *Id.* at 1038.

We interpret the *Gill* cases to mean that an administrative tribunal or court should not judge the product of an IEP team based on factual evidence not available to that team. We do not interpret them to mean, as Petitioners urge, that an expert whose opinions were not provided to the IEP team may not testify as to the appropriateness of an IEP, and we have discovered no subsequent case that cites the *Gill* cases to stand for such a proposition.

To the contrary, in a later district court case in the Eighth Circuit, a petitioner appealed a hearing officer's decision, arguing that the hearing officer had erred by admitting the testimony of the District's expert witness for a similar reason. *Grant v. Independent School Dist. No. 11*, 2005 WL 1539805, *16 (D.Minn., 2005). The court found the petitioner's point meritless, stating:

Plaintiff argues the IHO erred by admitting the testimony of Dr. Spicuzza, Defendant's expert witness, because Dr. Spicuzza neither met nor evaluated the Student. Without citing to any authority, Plaintiff argues "the IEP process envisioned by the IDEA supposed that any experts who testify about the student will have some knowledge of the student."

Dr. Spicuzza's testimony addressed the meaning and appropriateness of the evaluations used to measure the Student's reading ability and whether those evaluations indicated improvement. *See* IHO Decision at 2. Plaintiff offers no precedent requiring exclusion of expert testimony based solely on a records review. In fact, Minnesota hearing officers generally admit the opinion of experts who have never met the student and then decide what weight to give such testimony. The IHO did not err by admitting Dr. Spicuzza's testimony.

Id. (internal citations omitted). *See also Stanley C. v. M.S.D. of Southwest Allen County Schools* 628 F. Supp.2d 902, 927 (N.D. Ind., 2008) (court will not disturb hearing officer's finding that school districts' experts who had not met Student were more credible than Student's experts).

There is a difference between allowing expert testimony that includes information not available to the IEP team, then unfairly judging the IEP team's actions with the benefit of that information, on the one hand, and on the other hand allowing expert testimony that assesses the actions of the IEP team based on information it possessed and generally accepted expertise in the field. Cox's testimony falls into the latter category. We overrule Petitioners' objection to his testimony. We note also, as further discussed in our analysis of the appropriate relief in this case, that Cox's testimony on this point is substantially similar to that of Respass.

Petitioners' Complaint

We set forth Petitioners' issues substantially as they appear in their amended complaint.

A. Petitioners' Issue #1: When the IEP team convened on February 25, 2014, and March 10, 2014, did the team fail to include a representative of the private residential school where the team intended to place Student, and if so, did this omission result in a denial of FAPE?

Before a school district places a child with a disability in a private school or facility, it must hold a meeting to develop an IEP and it "must ensure that a representative of the private school or facility attends the meeting. If the representative cannot attend, the school district must use other methods to ensure participation by the private school or facility," such as a conference call. 34 CFR § 300.325(a)(2). Missouri's State Plan for Special Education, Part B 2013 ("the State Plan"), Regulation IV, at 50, echoes this requirement.

"Must" means must, not may. No representative of Faith Foundation attended the IEP meeting, in person or by telephone. The failure to include such a representative therefore violated the IDEA.

The District argues that such failure was a procedural error that did not amount to a denial of FAPE. Not all procedural violations warrant relief; they are a basis for relief if the violation either impeded the child's right to FAPE or "significantly impeded the parents' opportunity to participate in the decisionmaking process." 20 U.S.C. § 1415(f)(3)(E)(ii).

We find the latter occurred in this case. At the IEP meeting, the parties discussed private placements at several facilities, including placement at Faith Foundation. Parents opposed either residential placements or distant non-residential placements. No one from any of the private facilities attended the IEP meeting in person or by telephone. After the meeting, Parents left with the understanding that various options for Student's placement were under consideration, and Mother continued to research options.

But on Friday, March 28, 2014, Bach spoke to the director of Faith Foundation. After finding out that Faith Foundation only accepted children on a residential basis, and without further consultation with Parents, Bach and Wynn apparently decided on Student's placement. On the next school day, March 31, 2014, Wynn mailed the notice of action regarding residential placement at Faith Foundation to Parents. Thus, the District made the decision to place Student at a residential facility without ever having arranged for Parents to meet with representatives of the facility.

The District also argues that individuals present at the IEP meeting were familiar with Faith Foundation, so any failure to include an actual representative of the facility is minor. Wynn had formerly worked at Faith Foundation for two years, and Mother had done two internships at the girls' home there, for a total of about two months.

This argument – that Mother and Wynn knew something about Faith Foundation, so no current representative needed to attend the IEP meeting – not only does not comply with the letter of the law, in this case it also does not comply with its spirit. Participants at the IEP meeting lacked important information about Faith Foundation. This is made clear by Bach's summary of her conversation on March 28, 2014 with the Director of Faith Foundation, in which she determined that Faith did not accept day placements (evidently something she had not known before), and confirmed details of the visitation guidelines. Resp. Ex. 27. Both pieces of information would have been critical for the parents of a seven-year-old to know before assenting to such a placement. But on the next school day, without attempting to impart the information to Parents or engage in further discussion with them, the District sent them an NOA placing Student at Faith Foundation.

We find the District significantly impeded Parents' opportunity to participate in the decisionmaking process for Student's placement by failing to arrange for the IEP team, including Parents, to meet with a representative of Faith Foundation before placing the Student there.

B. Petitioners' Issue #2: Was the private residential school at which the IEP team placed Student after the March 10, 2014 meeting, the least restrictive environment as required by 20 U.S.C. § 1412(a)(5) and the Missouri State Plan, Reg. IV(3)?

The IDEA states that, to the maximum extent appropriate, children with disabilities must be educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment should occur **“only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”** 20 U.S.C. § 1412 (a)(5)(A) (emphasis added). This concept, known as the “least restrictive environment” (LRE), is the vehicle through which Congress sought to bring children with disabilities into the mainstream of the public school system. *See Mark A. v. Grant Wood Area Education Agency*, 795 F.2d 52, 54 (8th Cir. 1986); *Rowley*, 458 U.S. at 189.

The concept of educating students in the LRE reflects a “strong preference” that disabled children attend regular classes with non-disabled children and a presumption in favor of placement in the public schools. *T.F. v. Special Sch. Dist. of St. Louis Cnty.*, 449 F.3d 816, 820 (8th Cir. 2006). The *T.F.* court also quoted *Evans v. Dist. No. 17*, 841 F.2d 824, 832 (8th Cir.1988): “[C]hildren who can be mainstreamed should be mainstreamed, if not for the entire day, then for part of the day; similarly, children should be provided with an education close to their home, and residential placements should be resorted to only if these attempts fail or are plainly untenable.” 449 F.3d at 820.

The District concedes that Petitioners met their burden to prove that Student’s placement at a residential facility was not the least restrictive environment. Nonetheless, we discuss the issue briefly, for context, and because it bears some relevance to the relief requested by Petitioners.

Although there was ample evidence that Student needed a self-contained ED class and a therapeutic environment, there was no evidence that a residential placement was the only placement where the Student could receive these services. Both experts opined that a residential placement was undesirable for a seven-year-old. Respress noted that Student was making progress at home. Cox called it a “last resort,” and said, “unless it was a situation under which he was in imminent danger to himself or others, I would never separate a seven-year-old child from his parents.” Tr. 401.

We find that the District did not offer FAPE to Student when it placed him at Faith Foundation, because Faith Foundation was not the LRE required for Student to receive FAPE.

C. Petitioners’ Issue #4: Did the District violate 20 U.S.C. § 1414(a)(1)(C)(i)(I) and deny Student FAPE when it failed to conduct a full and individual initial evaluation within 60 days of receiving parental consent for the evaluation?

The parties’ written arguments on this issue are confusing. Petitioners argue, simultaneously, that the District did not timely conduct a proper evaluation on Student after receiving parental consent, and that the District never obtained written consent from Parents to conduct the evaluation. They also argue that the District violated the “child find” obligations of the IDEA by failing to timely evaluate Student.

20 U.S.C. § 1414(a)(1)(A) requires a local educational agency such as the District to conduct a full and individual initial evaluation before providing special education services to a child with a disability. 20 U.S.C. § 1414(a)(1)(C)(i)(I) requires that such initial evaluation be conducted within sixty days of receiving parental consent for the evaluation. The point Petitioners raised in their complaint is the timeliness of the evaluation. To the extent that they now raise other points, even if they are related, there is no evidence that the District agreed those issues could be raised. Therefore, they are not properly before us. 20 U.S.C. § 1415(f)(3)(B); 34 C.F.R § 300.511(d). Furthermore, our consideration of this point is complicated by the fact that

there is no evidence that Parents provided written consent for the evaluation at all, which makes it difficult to determine whether the District fulfilled its timeliness obligations.

What is clear is that Mother verbally requested special education for Student on October 21, 2013. She renewed her request, directly to Bach, on November 12, 2013. Using either of these dates, the District timely provided an NOA to Parents on November 19, 2013, refusing to evaluate Student for special education services at that time. The District was authorized to refuse the Parents' request. 34 C.F.R. § 300.503; State Plan, Part III, § 3 at 31.

Shortly after that, the District changed its position. It provided notice to Parents on December 3, 2013, that it intended to meet to evaluate Student on December 10, 2013. For a variety of reasons, including snow days and the Christmas holidays, the evaluation meeting did not occur until February 18, 2013 – about four months after initial Mother's request, three months after the District denied that request, and about seventy days after the District's first notice of intent to evaluate Student. Because we have no evidence of Mother signing a written consent to evaluate, we cannot determine that the District failed to meet its timeliness obligations.

Furthermore, even if the failure to obtain Parents' written consent were properly before us, which it is not, we would find such a failure to be, in this case, a procedural error that did not meaningfully deprive Parents of the right to participate in the evaluation and IEP process: Mother had previously requested that the District evaluate Student, and there is no evidence she had changed her mind on this point.

We find the District did not violate the IDEA by failing to timely evaluate Student for special education services.

Relief Requested

The relief requested by Petitioners in their amended complaint, as further modified at the hearing, is:

- a. That Student receive FAPE through the development of an appropriate IEP that meets his needs in the District, and that is related to keeping the child in the public school system without need for residential placement; and
- b. That Student be allowed to remain in the public school system, as the LRE appropriate for his needs, and participate to the “maximum extent appropriate” in the same activities as his non-disabled peers, per 20 U.S.C. § 1412(a)(5)(A) and 34 C.F.R. s 300.114.

There is substantial agreement in this case as to the type of educational environment necessary for Student to receive FAPE. Both experts testified that Student needs to be in a small classroom with other ED students. Respass testified his ideal class would have five to ten students, one special education teacher, and enough paraprofessionals to achieve a 2 : 1 student to teacher ratio. Cox testified that his ideal class for Student would consist of four to five students with one special education teacher, one paraprofessional, and one mental health professional. Respass agreed that the class should have a therapeutic component. Cox testified that Student needs social skills training and interaction with peers; Respass agreed it was preferable that Student not be in a class by himself.

There is also agreement that the District must provide an educational environment for Student that meets the above criteria. Every school district “must ensure that a continuum of alternative educational placements is available to meet the needs of children with disabilities for special education and related services.” 34 C.F.R. § 300.115(a). The continuum of placements must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. 34 C.F.R. § 300.115(b)(1). The District does not contest its obligation to provide the type of special education recommended by both experts. The remaining question is whether the District must provide it within the District, or Student should

be placed in a private school such as Edgewood or Epworth, both of which are in the St. Louis area. Petitioners advocate the former option; the District, the latter.

In their *Proposed Findings of Fact and Conclusions of Law*, Petitioners state:

The primary relief sought by the parents is a non-residential placement decision. They would now prefer a public school placement with an effective behavior management system and where their son would have some chance to interact with non-disabled students. . . . Expert witnesses for both parties agree that the Student needs a self-contained class serving students who are Emotionally Disturbed, with only about 4-5 students in the class, with at least one trained paraprofessional in addition to the teacher, and with counseling or therapy services provided as needed to the students. Placement of the Student in such a class would satisfy the parents, would be far less restrictive than a residential placement, and would probably cost less than a \$41,000.00 residential placement.

Id. at 23-24. They also argue that “there is no evidence in the record that creation of an ED class with a therapeutic component would be too expensive or too difficult for the Respondent to accomplish.” *Id.* at 19. But the District argues:

The District does not have an appropriate ED program or classroom, and its staff does not possess sufficient training or experience to provide an appropriate educational placement for Petitioner. The Edgewood School and the Epworth School in St. Louis, Missouri are private schools that operate self-contained, therapeutic ED programs and classrooms necessary and appropriate to properly serve Petitioner’s needs.

Resp. Proposed Findings of Fact, Conclusions of Law, and Decision at 11.

Most of the evidence at hearing focused on the issue of whether a residential placement was the LRE for Student. Perhaps because of this, there is comparatively little evidence in the record on the issue of where the appropriate non-residential environment should be provided. Edgewood can provide such an environment with trained special education teachers, self-contained ED classes, paraprofessionals and mental health support for students, but day attendance there would involve approximately three hours in the car for Student every day. A

setting in the District would be much more convenient for Student and his family. He would be able to spend more time being with his family and riding his horse. He would have greater opportunities to participate in the mainstream educational environment when appropriate. But the District would have to hire additional personnel with specialized training to teach Student, and would have to obtain mental health services for him as well (which, presumably, it could obtain by contract). And because the District has only two other ED students at the elementary level, it might be impossible for it to create an appropriate-size, self-contained ED classroom.

Petitioners argue that the District’s “current lack of an appropriate in-district classroom setting does not limit the Student’s right to be educated in the least restrictive environment. The Student’s least restrictive environment is based on his disabilities, not what placements the school district may offer.” *Pet. Proposed Findings of Fact and Conclusions of Law* at 19. They cite a recent case, *T.M. v. Cornwall Central School Dist.*, 752 F.3d 145 (2nd Cir. 2014), to that effect. The subject of *T.M. v. Cornwall* was whether a school district had to offer extended school year services (ESY) in the least restrictive environment. Cornwall offered summer school only for students with disabilities. The court held that Cornwall had violated the IDEA by not offering a student ESY in a mainstream environment, but it also stated:

Of course, a school district need not itself operate all of the different educational programs on this continuum of alternative placements. The continuum may instead include free public placements at educational programs operated by other entities, including other public agencies or private schools . . . We therefore agree with both parties that the IDEA does not require a school district to create a new mainstream summer program from scratch just to serve the needs of one disabled child.

Id. at 165-66.

On the other hand, although the District presented evidence that it does not *currently* have the capability to provide student with a special education teacher and paraprofessional trained in ED and mental health support, it presented no evidence that it *could not* do so. For this

reason, if the District based its argument that Student should receive FAPE outside the District solely on its available resources, we would decide in Student's favor that it should provide Student's education within the District. But the uncontradicted evidence was that Student needed not only these services, but that his optimal placement would be in a classroom with four to five ED children. We think this is a critical factor. Student clearly needs to develop appropriate behavior skills in the context of a classroom with other children; both Cox and Respass agreed he should not be isolated. See *Chris D. v. Montgomery County Bd. of Educ.*, 743 F. Supp. 1524 (M.D. Ala., 1990) (where it is clear that behavior problems must be addressed, isolated environment is inappropriate and peer interaction is critical). Although there is evidence that the District has two other ED children at the primary school level, there is none as to their ages or grades. And, even if Student interacted with non-disabled peers part of the day in a District school, it is clear from the severity of his issues and his need for a "self-contained" ED classroom, that such interaction would be limited. Thus, we cannot conclude, based on the record before us, that the District can provide this crucial part of the environment the experts agree Student should have.

This last fact tips the balance and leads us to conclude that Edgewood is the appropriate placement for Student for the 2014-15 school year. While it is, arguably, a more restrictive placement than a self-contained class in a public school within the District, it is the placement best suited to meet all of Student's needs, including the need to be in a classroom with peers. Put another way, the District cannot be the LRE if it cannot meet the student's needs. The mainstreaming preference of the IDEA is not absolute; 20 U.S.C. § 1412(a)(5)(A) "calls for educating children with disabilities together with children who are not disabled '[t]o the maximum extent appropriate.'" *C.B. v. Special School Dist. No. 1*, 636 F.3d 981, 991 (8th Cir. 2011) (emphasis supplied by court). In *C.B.*, the court concluded that a private placement need not satisfy a least-restrictive environment requirement to be "proper" under the IDEA. *Id.*

We recognize that under 34 C.F.R. § 300.116(b)(3), placements must be “as close as possible to the child’s home.” “Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled[.]” 34 C.F.R. § 300.115(c). But the IDEA does not create a right for a child to attend a particular school. *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373 (5th Cir. 2003); *see Schuldts v. Mankato Indep. Sch. Dist. No. 77*, 937 F.2d 1357, 1361–63 (8th Cir.1991) (in a case pre-dating the Americans with Disabilities Act, school may place student in non-neighborhood school rather than require physical modification of the neighborhood school to accommodate the child's disability).

We look to other cases in which the location at which FAPE was to be provided has been at issue. We have found few in which the daily commuting distance was this significant, but those few we have found tend to place the educational needs of the disabled child over the distance he or she must travel. In *M.M. ex rel. Moore v. Unified School Dist. No. 368*, 2008 WL 4950987 (D. Kan. 2008), the court held that a student’s 90-minute bus ride to and from school to an out-of-district placement did not make his placement overly restrictive because the student’s own neighborhood school lacked the functional skills instruction that the student required. In *Tammy S. v. Reedsburg School Dist.*, 302 F. Supp.2d 959 (W.D. Wis., 2003), the court upheld the two-day-a-week placement of a teenage deaf student at the Wisconsin School for the Deaf, a two hour and ten minute commute for the student, because of the student’s demonstrated need for services provided only at the School for the Deaf. In *Student v. Somerset County Board of Educ.*, 24 IDELR 743 (D.C. Md., 1996), the court determined that a placement approximately 50 miles from a ten-year-old Student’s home was the LRE.

This is a difficult decision. On balance, however, we conclude that the LRE for Student to receive FAPE during the 2014-15 school year is Edgewood School, where he should be placed

in a self-contained ED classroom with about five students, staffed by a special education teacher trained to teach ED students and a paraprofessional, and that he should be provided social skills training and mental health support from a licensed professional.

Summary

We order the District to pay Student's for tuition to Edgewood and to provide transportation to and from Edgewood at the District's expense.

SO ORDERED on July 31, 2014.

KAREN A. WINN
Commissioner

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. Section 300.512.