

Before the
Administrative Hearing Commission
State of Missouri



IN THE INTEREST)	
OF,))	
)	
Petitioner,)	
)	
vs.)	No. 14-0250 ED
)	
ST. LOUIS CITY SCHOOL DISTRICT,)	
)	
Respondent.)	

DECISION

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

Procedure

On February 24, 2014, (“Mother”) filed a due process complaint in the interest of her daughter, Student. We scheduled a hearing for March 12, 2014. On March 5, 2014, the District filed a motion for extension of time to respond to the complaint. By order issued March 6, 2014, we gave the district until March 12, 2014 to respond. On March 10, 2014, the District filed a motion for an extension of time to file its prehearing conference statement.

By order issued March 10, 2014, we gave the district until March 11, 2014 to file the statement. On March 11, 2014, the District filed its prehearing statement. On March 11, 2014, Mother also filed her prehearing statement.

We held a prehearing telephone conference on March 12, 2014. During the call, the parties made an oral joint motion to continue the hearing. By order issued March 12, 2014, we granted the motion and reset the hearing for May 28, 2014. On May 7, 2014, the District filed a motion to continue the hearing, stating that Mother had no objections. By order issued May 14, 2014, we granted the motion and reset the hearing for June 30, 2014. We stated that the decision would be issued no later than August 4, 2014. On June 4, 2014, the District filed a motion for continuance of the hearing and a request for extension of time to submit disclosures. By order issued on June 4, 2014, we denied the motion for continuance of the hearing and granted the request for extension of time to submit disclosures.

On June 30 – July 1, 2014, we held a hearing. Sarah Jane Hunt and Thomas E. Kennedy, with the Law Office of Thomas Kennedy, III, represented Mother. John F. Brink, with Thomeczek & Brink, LLC, represented the District. We issued a schedule for Mother to file proposed findings of fact, conclusions of law, and written argument no later than July 16, 2014, the District to file no later than July 22, 2014, and Mother to file a reply brief no later than July 25, 2014. The matter became ready for decision on July 25, 2014, when the last written argument was filed.

Findings of Fact

1. Student is an -year old girl (birth date) with a diagnosis of autism. She has resided in the District since October 2013.

IEP/Services at the Pattonville School District

2. Prior to October 2013, Student and Mother lived with Mother's aunt, , and attended school in the Pattonville School District ("Pattonville District"). They moved to this location to be closer to Mother's doctor when she learned she had cancer.

3. In the Pattonville District, Student was found eligible for early childhood special education as a Young Child with Developmental Delays. While in the Pattonville District, Student's special education services were arranged through the Special School District of St. Louis County ("SSD").

4. In April 2012, when Student was attending Robert Drummond Elementary School ("Drummond") in the Pattonville District, the SSD completed a reevaluation of Student. On April 25, 2012, a reevaluation meeting was held. attended the meeting instead of Mother. Student was determined to meet the criteria for "Autism, Speech Impairment – Sound System Disorder."¹ Student's eligibility diagnosis was changed from "Young Child with Developmental Delays" to "a student with Autism and Speech Impairment."² Student's Full Scale IQ based on the Stanford-Binet Intelligence Scale, 5th Edition, was 80. This score falls within the "low average" range of cognitive ability and places Student at the 9th percentile when compared to peers of the same age.³

5. On April 15, 2013, when Student was attending Drummond, an Individualized Education Program ("IEP") meeting was held. attended instead of Mother. The April 15, 2013, IEP meeting produced an IEP that provided for 460 minutes per week of special education, consisting of 200 minutes per week of instruction in social skills, 100 minutes per week in reading, 100 minutes per week in math, and 60 minutes per week of speech therapy. The IEP

¹ Respondent's ex. A. at 27.

² Respondent's ex. A at 44.

³ Respondent's ex. A at 34.

provided for related services of 30 minutes of occupational therapy and 60 minutes of language therapy.⁴ The IEP provided that Student would get preferential seating to be close to the teacher. The IEP provided that Student would participate in special education (29%) and regular education (71%).⁵

6. Student began the 2013-2014 school year (2nd grade) at Bridgeway Elementary School in the Pattonville District. Mother visited the school. She also received daily notes from Student's regular and special education teachers in a communication log. The log indicated whether Student had a good or a bad day and described her progress. Student was happy and liked school. "She couldn't wait to go back to school."⁶

7. Student's last day at the Bridgeway Elementary School was October 10, 2013.

IEP/Services at the St. Louis City School District

8. In October 2013, Mother and Student relocated to a residence in the District with Student's grandmother and Mother's four other daughters. After relocating, Mother attempted to contact the District for information about special schools for autism. She attempted to call Colleen Reichert, the District's autism manager, but the calls were not returned.⁷ Mother contacted Dr. Adrienne Lacey-Bushnell, the District's director of special education, and they set up a meeting.

9. On or about October 23, 2013, Mother met with Reichert and Bushnell to discuss Student. Mother did not bring Student's April 15, 2013 IEP. They discussed sending Student to Clay Elementary School rather than Ashland Elementary School ("Ashland"), Student's neighborhood school, because Clay Elementary School had a self-contained autism room,

⁴ Respondent's ex. B at 58.

⁵ Respondent's ex. B at 59.

⁶ Tr. at 24 (Mother's testimony).

⁷ We do not know when Mother began attempting to contact Reichert, but a message to Bushnell dated October 14, 2013, describes Mother's statement that she had left five messages with Reichert with no return calls.

sensory room, and specially trained staff. Mother brought Student's IEP to Reichert later that day.

10. After reviewing Student's IEP, Reichert determined that Clay Elementary School's program would not be Student's least restrictive environment ("LRE") and that Student should attend Ashland.⁸

11. Reichert arranged to meet with Mother on October 24, 2013, at Ashland. Mother did not show up, and Reichert provided a copy of Student's IEP to Rose Jackson, Ashland's special education teacher. Reichert and Jackson discussed whether Ashland could implement the IEP, and Jackson stated that it could.

12. After Jackson receives an IEP for a new student, she reviews the case and assembles the team. She provides the team with a copy of the IEP. Student's IEP did not have the evaluation for the occupational therapy and speech therapy, so Jackson sent it to SSD for the information.

13. After being told Student would be enrolled at Ashland, Mother attempted to find other schools for Student. She was unable to do so, and she enrolled Student at Ashland on November 11, 2013.⁹

14. On November 19, 2013, Mother met with Jackson at Ashland. Jackson invited Mother to tour the classroom, and reviewed the services Student would receive.

15. Student began attending Ashland on November 20, 2013. She was absent from school on November 26, 2013, December 6, 2013, and December 12, 2013. Winter break started on December 20, 2013.

⁸ Respondent's ex. D at 75; Tr. at 166.

⁹ Mother does not remember the date she enrolled Student, but the new and re-entry student registration form is signed on November 11, 2013.

16. On Student's first day of school, Jackson met her and took her to Jackson's classroom. Jackson told Student that she would be working with two girls and introduced the girls. Every day at 1:40 p.m., Jackson picked up Student from her regular classroom and Student had instruction in Jackson's classroom until 3:00 p.m.

17. Patricia Kopp was Student's regular classroom teacher. Kopp was informed in October 2013 that she would be getting a student with autism. Kopp did not receive a copy of Student's IEP and "kept pressing"¹⁰ Jackson for a copy. In mid-December 2013, Kopp received several pages of Student's IEP that Jackson "thought was relevant."¹¹ Kopp usually only receives the pages of a child's IEP that are relevant to the regular classroom teacher.

18. Although Kopp did not have a copy of the entire IEP, she knew Student's diagnosis. She arranged for Student to sit with two other girls at a table that was close to the whiteboard in the classroom and close to Kopp.

19. The District's speech and language therapist, Tifani Lulman, received a copy of Student's 2013 IEP a short time after Jackson informed her that Student would be attending. Lulman did not initiate therapy with Student.

20. The District's occupational therapist, Cindy DeMendoza, did not receive a copy of Student's 2013 IEP until December 11, 2013.

Physical and Sexual Harassment of Student

21. The first few days after Student began attending the District, Kopp observed a boy hitting Student. Kopp informed the principal, but did not inform Mother. The District took no further action.

¹⁰ Tr. at 222.

¹¹ *Id.*

22. About a week or two after Student began attending the District, Kopp saw Student and another girl fighting. They were on the floor, pulling hair, punching and hitting. The other girl pulled a braid of hair out of Student's head. The security officer took both girls to the office, then brought them back. Kopp attempted to contact both sets of parents, but was unable to contact Mother.

23. Mother noticed Student had bumps and bald spots on her head. Student wrote a note to Mother¹² saying that she had a bad day and that girls pulled her hair out and hurt her.

24. After the incident Student described, Mother visited Ashland and spoke with Kopp about that incident and also mentioned that a boy was bothering Student. Kopp gave Mother a braid of hair that had been pulled out of Student's head.¹³ Kopp also gave Mother her cell phone number to contact her if there were other problems, and stated she would check out the incident with the little boy.

25. Kopp talked to the boy and the boy's father. The boy denied hitting any girls, and Kopp asked Student if she would tell the boy's father what the boy had done. Student told the boy's father that the boy hit her. Kopp did not ask Mother's permission or even inform Mother that she had directed Student to talk to the boy's father about the incidents.

26. About a week after the hair-pulling incident, Student wrote a note to Mother that a little boy pushed her down, spit on her, and punched her.

27. Mother visited the school again. Mother noticed that in the regular classroom, Student did not have preferential seating in front and was sitting in the back of the room.

28. Kopp admitted to Mother that she had "asked" Student to speak to the boy's father about what had occurred.

¹² Mother testified Student communicates better with notes than verbally.

¹³ Kopp denied giving Mother the braid. Tr. at 208. But we find Mother's testimony credible, and the braid is in evidence. Petitioner's ex. 5.

29. Student wrote notes to Mother that boys threatened to kill her, choked her, and had forced her to do their homework. We reproduce some of Student's notes as accurately as possible with all misspellings in the original:

MOM the Boys made me do they work They hit me alot

I had a bad day They calll me stupd dumandugly. I feel sad because they did that

Miss CoB¹⁴ don't help wen They do that I'm hurt because They say I m stupd¹⁵

30. Mother visited Ashland and talked with Jackson. Jackson explained that while the boys and girls were usually separated, they had been showing a movie and the boys were mixed with the girls to view it. Jackson apologized for the boys' conduct.

31. During this period, Student's overall demeanor changed. Student became sadder and cried every morning because she did not want to go to school. She was not eating as much and lost interest in her appearance.

32. Mother filed a due process hearing request on December 31, 2013, then voluntarily dismissed it.

The Winter Break

33. The District's winter break started on December 20, 2013.

34. On December 30, 2013, Student asked her six-year-old sister if they had school the next day. The younger sister said yes, and Student grabbed a knife and tried to stab herself in the neck. Mother knocked her down and her older sister picked up the knife. Student screamed, "I don't want to go back there, you're not going to send me back there. They touch on me. They hurt me. [Another student] hurt me."¹⁶ Student told Mother that a boy was sexually touching

¹⁴ We assume Miss CoB refers to Kopp.

¹⁵ Petitioner's ex. 4.

¹⁶ Tr. at 53 (Mother's testimony about Student's statements).

her in the line for the bathroom. Student told Mother that she raised her hand to tell the teacher about this, but Student was not acknowledged and thus she did not tell anyone. Mother had told Kopp that Student did not readily communicate her problems to teachers.

35. Mother called Kopp, who did not answer. Mother called Student's pediatrician, Dr. Craig A. Spiegel, and took her to see him. Student was seen in the St. Louis Children's Hospital Emergency Department on December 30, 2013, at 9:24 p.m.¹⁷ The social worker who evaluated Student noted, "The pt currently has a portion of her hair missing and a small bruise in her hairline from the incidents at school."¹⁸

36. In December 2013, Mother left Kopp a voicemail message that a child was touching Student inappropriately. Kopp did not call Child Services or anyone else because she had not spoken with Student. Kopp did not return Mother's call because Kopp was ill.

37. On December 31, 2013, the District received a Missouri school violence hotline report from the Missouri Department of Social Services that resulted from a complaint describing Student's account of the bullying, harassment, and inappropriate touching at the school.

38. On January 2, 2014, Debra Falkiner, Coordinator of Parent and Student Engagement, sent Ashland's principal, Lisa Brown, a copy of the hotline report.

39. On January 7, 2014, Kopp received an e-mail from Brown asking if Kopp knew anything about the inappropriate touching. Kopp responded by e-mail that Mother had left her a message about it.

40. On January 17, 2014, at 2:00 a.m., Mother woke up with Student on top of her while holding a knife to Mother's neck. Mother grabbed the knife and asked what was wrong.

¹⁷ Respondent's ex. X and EE.

¹⁸ Respondent's ex. X at 242.

Student said, “You’re trying to send me back there[.]”¹⁹ Student threatened to kill Mother and kill herself.

41. Mother took Student to DePaul Health Center, and Student was admitted. Student was discharged on January 21, 2014, with a prescription for Risperidone/Risperdal.²⁰ She had never taken this medication before. It was prescribed because Student had been aggressive, having trouble sleeping and having nightmares, and had been experiencing headaches and stomach aches. It is “a very commonly used medication to help children calm down, relax and not act out.”²¹ Student’s discharge diagnosis was:

Axis I: Mood disorder, not otherwise specified. Rule out bipolar disorder. Post-traumatic stress disorder. Rule out PDD.^[22]

42. Student was instructed to follow up with Dr. Syed Mumtaz, M.D., her psychiatrist. Mother also took Student to see Dr. Peter Feuerstein, a psychologist.

Services After the Winter Break

43. Due to snow days, the second school semester at Ashland did not start until January 13, 2014.

44. On January 23, 2014, through counsel, Mother was asked by the District for dates for an IEP meeting. On January 24, 2014, Mother’s attorney responded that Student’s doctor had recommended homebound services.

45. The District received a homebound services application dated January 31, 2014. The name of the attending physician was Dr. Spiegel, the diagnosis was post-traumatic stress disorder, and the recommendation was for 20 weeks of homebound education.²³

¹⁹ Tr. at 57.

²⁰ Risperidone is “a benzisoxazole derivative used as an antipsychotic agent, administered orally.” DORLAND’S ILLUSTRATED MEDICAL DICTIONARY 1650 (32th ed. 2012).

²¹ Tr. at 283.

²² Respondent’s ex. FF.

²³ Respondent’s ex. K.

46. Debra Bell, the District's special education compliance teacher for contractual homebound and state schools, processed the homebound application. She assigned Karen Ward, a special education homebound teacher, to provide services. Ward confirmed that Mother wanted Student to receive related services provided for by the IEP.

47. Homebound special education services ("the sessions") started for Student on February 4, 2014.

48. Student was to receive related services weekly as follows: 60 minutes speech therapy, 30 minutes occupational therapy, and 60 minutes language therapy.

49. Student met with the District's professionals for the sessions at the Julia Davis Library. Mother did not have a car, and this location was approximately a 30-minute walk from their home. Mother had to rent a car to take Student to her psychiatrist and psychologist appointments and sometimes to the sessions. Sometimes Student's grandmother took her to the sessions.

50. Ward was not working one-to-one with Student.²⁴ There were about four or five other students (mostly boys) meeting with Ward at the same time. The students were in a range of grade levels from second grade to tenth grade.

51. There were four or five occasions when Ward was unable to attend a session and she called Mother. Several times Ward called Mother only a few minutes before the session, which meant that Mother and Student were already walking to the library or had already arranged for transportation. Ward rescheduled and made up the time for the missed sessions.

52. On February 20, 2014, Student was evaluated for the continuing need for occupational therapy services. It was recommended that Student continue occupational therapy services.²⁵

²⁴ There is no evidence that this was required, although Mother testified that this was her impression.

²⁵ Respondent's ex. Q at 175.

53. The District started Student's occupational therapy services as required by her 2013 IEP on February 28, 2014. The District's occupational therapist, Cindy DeMendoza, had not provided the service while Student was attending Ashland because she was "still looking for the paperwork, still trying to get it together[.]"²⁶

54. DeMendoza's scheduled sessions were 9:00 to 9:30 on Friday at the Julia Davis Library. Mother cancelled several sessions due to lack of transportation or chemotherapy treatment for her cancer.

55. The District attempted to start Student's speech and language services as required by her 2013 IEP on March 4, 2014. Because Mother cancelled this session, Lulman did not see Student until March 5, 2014. Student has not been evaluated for speech and language services since 2012.

56. On March 6, 2014, the District convened an IEP meeting. Mother attended the meeting. DeMendoza did not attend the meeting, but her supervisor did. Bell, Ward, Lulman and Kopp attended the meeting. The IEP meeting did not address Student's social or emotional problems such as multiple suicide and matricide threats and actual attempts.

57. On April 15, 2014, a Review of Existing Data ("RED") meeting was held. The District acknowledged Student's emotional issues and medical diagnosis, but notes from the meeting reflect no plans to address those concerns as they related to Student's education needs.

58. Student's 2013 IEP sets forth specific goals with a baseline and target numbers. Student's 2013 IEP states that Student was able to count numbers up to 30 with 77% accuracy and write numbers up to 30 with 100% accuracy.²⁷ At the end of the 2014 school year, Student

²⁶ Tr. at 267.

²⁷ Respondent's ex. B at 49.

could not do this.²⁸ The only mention in the 2014 IEP or RED form of meeting 2013 IEP goals was, “She met a previous goal for shoe tying.”²⁹

Expert Testimony

59. Mumtaz testified that Student needs to be in an alternative small-sized classroom with a teacher trained to work with autism. Mumtaz testified that in addition to the related services already provided for in her 2014 IEP, Student would need counseling services and adequate services to address Student’s poor social skills. Mumtaz testified that if the public school could not or would not provide the required services, Edgewood Children’s Center could meet Student’s needs.

60. Feuerstein testified that Student did not meet the benchmarks of a typically developing eight year old. He said Student was “anywhere from four years to even lower in terms of aspects of her comprehension and being able to express herself and understand[.]”³⁰ Feuerstein testified that Student would need an intensive program with a small class size. He did not recommend further homebound placement because Student requires intensive services in the area of social development and language development.

Great Circle/Edgewood Placement

61. Great Circle is a behavioral health agency that operates on the Edgewood Children’s Center Campus (“Edgewood”). Edgewood has three schools on its campus. One school is for children with emotional disturbance diagnoses. One school is for children with an autism diagnosis, and one school is for children with high functioning autism or other social skills deficits. Edgewood offers a day program and residential facilities.

²⁸ Tr. at 430.

²⁹ Respondent’s ex. DD at 431.

³⁰ Tr. at 308.

62. Every classroom is put together based on children's functioning ability as well as age.

63. The Great Circle program is accredited by the Missouri Department of Elementary and Secondary Education and by the Independent Schools Association of the Central States (for private schools' accreditation).

64. Great Circle has a contract with the District, and there are approximately 13-18 District students at Edgewood.

65. A typical student attends Edgewood for a school year. A student may need to stay at Edgewood for his or her entire educational career.

66. The goal at Edgewood is to get the children's "behaviors modified so that they can meet the criteria for the school district to be successful with them in the classroom."³¹

67. Compared with the autism classrooms in a public school setting, Edgewood offers more therapies, such as play therapy, music therapy, and art therapy, and has clinicians who offer individual therapy sessions.

68. Edgewood serves children similar to Student.

Conclusions of Law

This Commission has jurisdiction over this case.³² The burden of proof in a due process hearing challenging an IEP is on the party seeking relief, in this case the Petitioner.³³

Credibility

This Commission must judge the credibility of witnesses, and we have the discretion to believe all, part, or none of the testimony of any witness.³⁴ When there is a direct conflict in the

³¹ Tr. at 241.

³² Section 162.961. Statutory references, unless otherwise noted, are to the RSMo Cum. Supp. 2013.

³³ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

³⁴ *Harrington v. Smarr*, 844 S.W.2d 16, 19 (Mo. App., W.D. 1992).

testimony, we must make a choice between the conflicting testimony.³⁵ Our Findings of Fact reflect our determination of credibility.

Expert Testimony

Courts and independent hearing officers lack the specialized knowledge and expertise necessary to resolve persistent and difficult questions of educational policy.³⁶ 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.³⁷

Petitioner's Complaint

In her due process complaint and her pre-hearing conference statement, Petitioner raises a number of points that we address below.

Denial of FAPE – Failure to Implement IEP

Mother argues that the District denied Student a free appropriate public education (“FAPE”) because it failed to implement the 2013 IEP that had been created in the Pattonville District.

Under the IDEA, all children with disabilities are entitled to a FAPE designed to meet their unique needs.³⁸ 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.³⁹ The IDEA does not

³⁵ *Id.*

³⁶ *Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027 (8th Cir. 2000).

³⁷ *Id.*

³⁸ 20 U.S.C. § 1412.

³⁹ *See* 20 U.S.C. § 1401(9).

prescribe any substantive standard regarding the level of education to be accorded to disabled children.⁴⁰ 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.”⁴¹ 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.⁴²

The primary vehicle for carrying out the IDEA’s goals is the IEP.⁴³ An IEP is a specialized course of instruction developed for each disabled student, taking into account that child's capabilities.⁴⁴ 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.⁴⁵

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.⁴⁶ 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.”⁴⁷ The standard to judge whether an IEP is appropriate under IDEA is whether it offers instruction and supportive services

⁴⁰ *Board of Education of Hendrick Hudson Central School District, Westchester County, et al. v. Rowley*, 458 U.S. 176, 189, 195 (1982).

⁴¹ *Id.* at 203.

⁴² *Id.* at 198.

⁴³ 20 U.S.C. § 1414.

⁴⁴ 20 U.S.C. § 1414(d)(1)(A).

⁴⁵ *Rowley*, 458 U.S. at 199; *Fort Zumwalt Sch. Dist. v. Clynnes*, 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).

⁴⁶ 20 U.S.C. § 1415(a), (b), (d); 34 C.F.R. §§ 300.500–580.

⁴⁷ *Burlington v. Dep’t of Educ.*, 736 F.2d 773, 788 (1st Cir. 1984), *aff’d*, 471 U.S. 359 (1985).

reasonably calculated to provide some educational benefit to the student for whom it is designed.⁴⁸

In this case, there is no attack on the 2013 IEP created when Student was attending the Pattonville District. The attack is on the implementation of that IEP in the District. Mother cites *Neosho R-V School Dist. v. Clark*,⁴⁹ in which the court found that a school district denied FAPE to a student by failing to develop and implement an appropriate behavior management plan as required by his IEP. The Court, referencing *Houston Ind. School Dist. v. Bobby R.*,⁵⁰ stated:

[W]e cannot conclude that an IEP is reasonably calculated to provide a free appropriate public education if there is evidence that the school actually failed to implement an essential element of the IEP that was necessary for the child to receive an educational benefit.^[51]

Mother also cites *Van Duyn v. Baker School Dist. 5J*,⁵² in which the court held that a substantial or significant failure to implement an IEP would violate the IDEA. The IDEA would be violated when a there is more than a de minimis failure to implement the IEP.

The District cites, among other cases, *Bradley v. Arkansas Dept. of Educ.*,⁵³ in which the court held that implementation of the IEP does not have to be perfect, and concluded that the many services provided by the school were sufficient. The District also cites *Melissa S. v. School Dist. of Pittsburgh*,⁵⁴ in which the court found no violation of the IDEA for failure to implement the IEP. The child's IEP called for a full-time aide to assist her during the day. The court found there was no evidence that the child was left alone, and the parents were notified at those times the school could not provide an aide so that the child could be kept home.

⁴⁸ *Gill*, 217 F.3d at 1035.

⁴⁹ 315 F.3d 1022 (8th Cir. 2003).

⁵⁰ 200 F.3d 341, 349 (5th Cir. 2000).

⁵¹ 315 F.3d at 1027, n.3.

⁵² 502 F.3d 811 (9th Cir. 2007).

⁵³ 443 F.3d 965 (8th Cir. 2006).

⁵⁴ 2006 WL 1558900 (3rd Cir. 2006).

In this case, Student's IEP provided for related services of occupational therapy and speech therapy. It is an undisputed fact that Student started school in the District on November 20, 2013, and received her first occupational therapy session on February 28, 2014, and her first speech therapy session on March 5, 2014. The District offers many excuses, including Student's limited time actually attending school, but as discussed later, the District was not blameless regarding the set of circumstances leading to Student's absences.

The District argues that it was in the process of implementing the IEP. We do not believe this. Had the District wanted to implement the IEP, it would not have taken from October 2013 to late February/early March 2014 to do so. Key individuals were not even informed of Student's needs, and key records were not sought.

The District argues that the related services were not necessary for Student to benefit from her education. This argument that she does not need the services is undercut by their inclusion in the 2012, 2013 and the March 6, 2014 IEPs. In fact, the 2012 IEP stated:

The concerns demonstrated during this language sample have the potential to affect classroom performance in the areas of formulating complete oral and written sentences, retelling stories and events, using/understanding a variety of vocabulary, grammar in writing and speaking, and topic initiation and maintenance. There were no behaviors that interfered with language performance.^[55]

Intelligibility was severely impacted by [Student's] speech sound errors, especially if context is unknown. Examples of specific weaknesses in the speech area included s/sh, distortion of /r/, and cluster reduction. The weaknesses demonstrated during this speech sample appear to adversely impact classroom performance in the areas of speech intelligibility.^[56]

⁵⁵ Respondent's ex. A at 39.

⁵⁶ Respondent's ex. A at 43.

Similarly, with regard to occupational therapy, the 2012 IEP stated: “The results of this evaluation indicate that [Student’s] sensory-motor and fine motor skills appear to impact her ability to access the school environment or curriculum.”⁵⁷ Student’s 2013 IEP, which the District was supposed to be implementing, did not contradict these statements. Rather, it instead listed speech and occupation therapy issues as matters that were still a problem for Student:

School staff concerns:

- visual-motor skills related to handwriting
- does not talk to classroom teacher
- receptive and expressive language skills
- speech/articulation skills[.⁵⁸]

In addition, the occupational therapy evaluation on February 20, 2014, recommended that Student continue receiving the services.

We find that the related services of speech and occupational therapy were material and necessary for Student to benefit from her education.

The District asks us to give deference to the testimony of its staff members. But several of its witnesses, including Kopp, cannot even correctly pronounce Student’s name. When evaluating the credibility of witness testimony, which included our notice of the examples stated below, we find that deference to the testimony of the District’s staff would be misplaced.

In its further attempt to show that Student received FAPE, the District’s witnesses testified as to progress Student made during the school year. Due to the conflicting nature of the testimony, we find that much of the District’s staff’s testimony is not credible. Jackson described Student as “very happy to come to the classroom, very cheerful.”⁵⁹ We find it difficult to reconcile this description with other evidence, which we do find credible. Mother testified

⁵⁷ Respondent’s ex. A at 33.

⁵⁸ Respondent’s ex. B at 49.

⁵⁹ Tr. at 149.

that Student's demeanor changed from the time she was at the Pattonville District. Student became sadder and cried every morning because she did not want to go to school. She was eating less and lost interest in her appearance. We find Mother's assessment of Student's behavior to be more consistent with Student's behavior just over a month later, when she had at least two episodes of suicidal and homicidal threats and attempts at the thought of returning to Ashland.

Mumtaz's observation when he saw her on February 18, 2014, supported the diagnosis of post-traumatic stress disorder. Feuerstein testified:

Q: You also talked about in the June 23, 2014 letter that has previously marked as Petitioner's Exhibit 2 in that first paragraph that six lines down additionally, she exhibits multiple nonverbal deficits as well. Can you describe some of those deficits that you're referring to?

A: Sure. We communicate in two ways. Verbally, which is what I'm doing with you right now, and then nonverbally which is body language, and again in a social context we're talking about eye contact, we're talking about recognizing facial expressions. We're talking about giving facial expressions that are congruent with one's mood, with one's affect, with the situation that one is describing. For instance, if you were talking about something that was enjoyable or funny, you would expect that person to make eye contact, would smile and would be somewhat a little bit animated. Now, in the case of [Student], she's completely flat. There's literally no affect. When I say "mood," that's how one feels. When I say "affect," that's what we can see. So with [Student] she's completely monotone and she has absolutely no affect whatsoever. In fact, you could almost say she appears – she has a sedated kind of personality if you will.

Q: In the time frame you've been seeing [Student], have you ever seen her smile?

A: Absolutely not.^[60]

⁶⁰ Tr. at 310-11.

Ward described Student's actions during her sessions at the library:

Like I said, at first she was very quiet and shy, you know. Eventually she started getting along with the other students and talking with them and joking around with them.^[61]

Ward also describes Student as a child who joked with the other students in the session who were in the eighth and tenth grades. Again, this is inconsistent with other testimony from her family and her doctors about Student's personality and actions. We find that Ward is not a credible witness.

Rather than showing signs of progress, Student seems to have lost skills under the tutelage of the District staff. Jackson testified that Student enjoyed playing math games and usually won. She testified that Student enjoyed the competition and that there were no problems interfering with her academics. Feuerstein testified that Student has trouble with simple, basic games like Candyland and Chutes and Ladders. He testified:

[Student] needs literally almost every – if you would call it a turn taking, you know, if it's her turn, she needs redirection on how to go next, what's the next step to follow, what's the sequence of events that, you know, that transpires, you know, based on the rules of the game.^[62]

When contrasted against the expert's evaluation of Student's level of functioning, we find Jackson lacks credibility.

Kopp describes Student's work while attending Ashland, but none of Student's work product while attending Ashland was put into evidence. Although Ward attributed significant progress to Student, both Mother and Grandmother testified that Ward had been giving Student the answers to her work assignments. Additionally, they testified that it was impossible that Student worked at the advanced levels of math and writing Ward described in her testimony.

⁶¹ Tr. at 395.

⁶² Tr. at 309.

When presented with the exhibits of Student's work with Ward, in which Student made no mistakes, Kopp admitted that the exhibits did not exemplify the work Student had done for Kopp, and that in her opinion, Student was not doing that well and had "difficulties."⁶³ Student's 2013 IEP sets forth specific goals with a baseline and target numbers. Student's 2013 IEP states that Student was able to count numbers up to 30 with 77% accuracy and write numbers up to 30 with 100% accuracy.⁶⁴ At the end of the 2014 school year, Student could not do this.⁶⁵ The only mention in the 2014 IEP or RED form of meeting 2013 IEP goals was, "She met a previous goal for shoe tying."⁶⁶

We find that the District denied FAPE to Student by failing to implement her IEP, and that this failure is substantial and significant. The related services were necessary for Student to receive an educational benefit. The District's implementation of the 2013 and 2014 IEPs did not provide educational benefit to Student.

Denial of FAPE – Failure to Address Bullying

Mother argues that the District denied FAPE to Student by failing to address the bullying and harassment that was taking place. Missouri has defined "bullying" in a law requiring school districts to adopt an antibullying policy:

2. "Bullying" means intimidation or harassment that causes a reasonable student to fear for his or her physical safety or property. Bullying may consist of physical actions, including gestures, or oral, cyberbullying, electronic, or written communication, and any threat of retaliation for reporting of such acts.^[67]

⁶³ Tr. at 234.

⁶⁴ Respondent's ex. B at 49.

⁶⁵ Tr. at 430.

⁶⁶ Respondent's ex. DD at 431.

⁶⁷ Section 160.775.

For a discussion of bullying and the IDEA, see *T.K. v. New York City Dep't of Educ.*⁶⁸ Both sides agree that bullying and harassment can be an issue that may violate IDEA and result in denial of FAPE.⁶⁹ The parties disagree on the standard used to make that determination.

The District cites the Eighth Circuit case, *Stringer v. St. James R-1 School Dist.*,⁷⁰ in which the court held that a district court should not have “flatly dismissed” a claim that harassment resulted in a denial of FAPE. The *Stringer* court cited cases from two other circuits that had found harassment could result in lack of FAPE, one of which was *M.L. v. Federal Way School Dist.*⁷¹ The District asks us to adopt the Title IX standard set forth in *M.L.*, that the harassment is “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”⁷²

Mother cites *T.K. v. New York City Dep't of Educ.*,⁷³ which set forth the following rule to be applied when addressing bullying:

When responding to bullying incidents, which may affect the opportunities of a special education student to obtain an appropriate education, a school must take prompt and appropriate action. It must investigate if the harassment is reported to have occurred. If harassment is found to have occurred, the school must take appropriate steps to prevent it in the future. These duties of a school exist even if the misconduct is covered by its anti-bullying policy, and regardless of whether the student has complained, asked the school to take action, or identified the harassment as a form of discrimination.

It is not necessary to show that the bullying prevented all opportunity for an appropriate education, but only that it is likely to affect the opportunity of the student for an appropriate

⁶⁸ 779 F. Supp.2d 289 (E.D.N.Y. 2011).

⁶⁹ *Shore Reg'l High School Bd. of Educ. v. P.S.*, 381 F.3d 194 (3rd Cir. 2004); *Charlie F. v. Bd. of Educ. of Skokie Sch. Dist.*, 98 F.3d 989 (7th Cir. 1996).

⁷⁰ 446 F.3d 799, 803 (8th Cir. 2006).

⁷¹ 394 F.3d 634 (9th Cir. 2005).

⁷² 446 F.3d at 803 (citations omitted).

⁷³ 779 F. Supp.2d 289 (E.D.N.Y. 2011).

education. The bullying need not be a reaction to or related to a particular disability.⁷⁴

In this case, even under the *M.L.* standard requiring the harassment to be a bar to educational opportunity, we find the District denied FAPE by its woefully inadequate response to the bullying and the detriment to Student because of it.

Kopp testified that she saw the incident in which another girl pulled the braid from Student's head. Kopp also knew that a boy had hit Student at least once. Unbelievably, Kopp directed Student to confront the boy's father. Asking a seven year old to confront an adult with such an accusation is inappropriate. Kopp did not ask permission for the confrontation or even inform Mother of the violence. Mother noticed bumps and bald spots on Student's head. On December 30, 2014, the social worker at the emergency room noticed the missing hair and bruise. We do not believe that Kopp and Jackson could have missed these signs. Neither informed Mother of anything. Mother had to learn of the problems from her own observation and Student's notes.

Kopp knew that Student did not tell teachers when something was wrong. That information combined with Kopp's first-hand knowledge of the bullying incidents demanded more action than was taken – which was essentially nothing. The District did not even attempt to address this as an IEP issue. The harassment and bullying clearly interfered with Student's education – she cried at the thought of going back to school and later became violent. The admission note from DePaul Health Center after Student was admitted, confirms Student's fear of school: "Pt . . . states she would probably try and do the same thing (hurt self or mom) if she has to go back to school."⁷⁵

⁷⁴ *Id.* at 317 (citations omitted).

⁷⁵ Respondent's ex Z at 331.

Kopp admits Mother contacted her and left a message that Student had been sexually touched by another student since enrollment at Ashland. Kopp did not contact Social Services or even the school principal. Kopp did not contact Mother until January 7, 2014, the same day Kopp received an e-mail asking if anyone had information about the reported incident of abuse. When Kopp returned the call, Mother told her of the allegations of sexual abuse and the suicide attempts. The District continued to do absolutely nothing. The District did not request Student's psychiatrist, psychologist, pediatrician, and other medical records until March 28, 2014. The District did not convene an IEP meeting until March 2014. The 2014 IEP does not even address Student's increasingly serious emotional problems (PTSD and depression), the bullying (which was known to have occurred), or the sexual abuse allegation (which should at least have been investigated).

Student preferred the option of suicide and matricide to returning to that school. The bullying endured by Student along with the District's deliberate indifference to it clearly resulted in a situation in which Student could not benefit from her educational services.

The District denied FAPE to Student.

Placement/Least Restrictive Environment

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.”**⁷⁶ This concept, known as the “least restrictive environment” (LRE), is the

⁷⁶ 20 U.S.C. § 1412 (a)(5)(A) (emphasis added).

vehicle through which Congress sought to bring children with disabilities into the mainstream of the public school system.⁷⁷

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.⁷⁸ The *T.F.* court also quoted *Evans v. Dist. No. 17*:⁷⁹ “[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.”⁸⁰

The District argues that it, not Edgewood, is the LRE for Student. We disagree. The District describes the services it can provide for Student, but fails to explain why it did not provide those services during the last school year.

Relying on information in the 2013 IEP is disingenuous. It was created and based on data from Student’s year in the Pattonville District. Student may have been doing well in the Pattonville District. She was not doing well this last school year at the District.⁸¹ Student was being bullied by peers while staff ignored or did nothing about it. After Student fled the school to the most restrictive environment – homebound education – the District failed to provide services required by her IEP. Issues interfering with her education such as bullying were never

⁷⁷ See *Mark A. v. Grant Wood Area Education Agency*, 795 F.2d 52, 54 (8th Cir. 1986); *Rowley*, 458 U.S. at 189.

⁷⁸ *T.F. v. Special Sch. Dist. of St. Louis Cnty.*, 449 F.3d 816, 820 (8th Cir. 2006).

⁷⁹ 841 F.2d 824, 832 (8th Cir.1988):

⁸⁰ 449 F.3d at 820.

⁸¹ Mother’s testimony sums up the evidence presented to us. “I send my daughter to them just as happy and normal and they send me a child that I don’t even recognize no more. She needs to be around children somewhat like her as I feel to make her feel where she won’t feel so out of place and so not normal.” Tr. at 78-79.

addressed in an IEP, and the District failed to even acknowledge her emotional and medical issues until the April 15, 2014, RED meeting.

Of course, the opportunities for mainstreaming will not be the same at Edgewood as at a public school. But this is not a complete bar to the placement. The court in *C.B. v. Special School Dist. No. 1*⁸² found that a child’s private school placement with other disabled children was not the least restrictive environment, but was the most appropriate placement for the child to receive FAPE. The court stated:

We conclude that the mainstreaming preference of the IDEA does not make [the private school] an inappropriate private placement under the circumstances. The statute calls for educating children with disabilities together with children who are not disabled “[t]o the maximum extent appropriate.” Here, the School District failed to develop an IEP that made available a free appropriate public education. At that point, C.B.’s parents had a “right of unilateral withdrawal,” and a right to reimbursement for private tuition, so long as the placement was “proper under the Act”⁸³

Similarly, in this case, the District failed to implement an IEP that would have provided FAPE. This gives Student the right to a placement, at District expense, that would do so.

Mumtaz testified that Student needs to be in an alternative small-sized classroom with teachers trained to work with autism. Feuerstein testified that Student would need an intensive program with a small class size. He did not recommend further homebound placement because Student requires intensive services in the area of social development and language development.

He testified:

[Student] needs – she will more than likely require a very restricted environment, very intensive training with a teacher and support staff, whether that’s para professionals or co-teaching, that will begin with her at her current level of academic development and again very intensely one on one at a very minimum, very, very small group instruction.⁸⁴

⁸² 636 F.3d 981 (8th Cir. 2011).

⁸³ *Id.* at 991 (citations omitted).

⁸⁴ Tr. at 321.

The District attacks both doctors' testimony for a number of reasons, and we have considered those factors. We still find both doctors' opinions credible and valuable to our decision.

We determine that Edgewood is the most appropriate placement for Student, even if it might not be the LRE.

Summary

The District has not provided Student with FAPE. Edgewood is the most appropriate placement for Student. We order the District to pay Student's tuition to Edgewood and to provide transportation to and from Edgewood at the District's expense.

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 August 4, 2014.

SREENIVASA RAO DANDAMUDI
Commissioner