Before the
Administrative Hearing Commission
State of Missouri

, IN THE INTEREST OF,	)	
Petitioner,	)	
vs.	)	No. 14-1548 ED
NORTH KANSAS CITY 74 SCHOOL DISTRICT, and MISSOURI SCHOOLS FOR THE SEVERELY DISABLED,	)	
Respondents.	)	

DECISION

The Missouri Schools for the Severely Disabled (MSSD) provided (Student) with a free appropriate education (FAPE) during the 2012-13 and 2013-14 school years. We find that MSSD is the least restrictive environment, and the appropriate placement, for Student's education. If Student is re-enrolled in an MSSD school, she is entitled to compensatory time for community integration activities such as shopping.

Procedure

On September 18, 2014, (Mother) filed a due process complaint against the North Kansas City 74 School District (the District) on behalf of Student, her daughter. On September 19, 2014, we sent a notice of hearing to the parties in which we set the hearing for October 22-23, 2014.

The District filed a response on September 29, 2014. On October 10, 2014, Mother filed a motion for continuance. We granted the continuance.

On October 15, 2014, Mother filed a motion to recognize MSSD as a party already named in the complaint. On October 17, 2014, we held a prehearing conference with the parties and an attorney for MSSD. Subsequently, we issued an order denying the motion to recognize MSSD as an existing party, but allowing Mother to amend her complaint. We continued the hearing to December 8-9, 2014, and set a decision due date of January 9, 2015.

On October 24, 2014, the District filed a motion to continue the hearing. Mother opposed the motion. On October 27, Mother filed an amended complaint naming MSSD as a respondent in this case. Mother also added claims under § 504 of the Rehabilitation Act, the Americans with Disabilities Act, and 42 U.S.C. § 1983. Although no party moved to dismiss those claims, we have no authority to decide them. We dismiss them at this time for lack of jurisdiction.

By order dated October 28, 2014, we recognized MSSD as a respondent and notified it that it could respond to the motion to continue. On October 29, 2014, MSSD joined the District's motion to continue. We continued the hearing to January 5-6, 2015, and set a due date for the decision of February 4, 2015.

MSSD and the District filed answers to the amended complaint on November 6, 2014, but Mother filed a "first corrected amended complaint" on November 13, 2014. Because it made no substantive changes, and neither respondent objected, we granted Mother's motion to substitute the first corrected amended complaint for the amended complaint without changing any of the timelines in the case.

On November 26, 2014, Mother filed a motion to extend the hearing to three or four days. On December 2, 2014, we granted the motion to extend the hearing to three days, from January 5 to 7, 2015, and extended the decision due date to February 6, 2015.

On December 12, 2014, all three parties filed a joint motion to continue the hearing so that they could enter into mediation. On December 15, 2014, we granted the motion and rescheduled the hearing to February 23-25, 2015. We set a new due date for the decision of March 31, 2015.

The parties went to mediation on January 22, 2015, but did not reach a resolution. MSSD filed a status report on February 2, 2015, in which it stated that the mediation had been unsuccessful and that the case would likely proceed to hearing.

We held the hearing on February 23-24, 2015. The court reporter filed the transcript on February 27, 2015. We set a schedule for parties to simultaneously file proposed findings of fact and conclusions of law by March 13, 2015, and replies by March 20, 2015.

On March 2, 2015, Mother filed additional documents and asked that they be admitted into the record. We deemed this to be a motion to reopen the record and notified the Respondents that they could respond. On March 6, 2015, the District filed a memorandum in opposition to reopening the record. For the reasons discussed below, we deny the motion.

On March 11, 2015, Mother filed a motion, unopposed by Respondents, to extend the briefing schedule by one week. We granted the motion and extended our decision due date to April 6, 2015. The case became ready for our decision on March 27, 2015, the date the last written arguments were filed.

On April 1, 2015, Mother filed a motion for reimbursement for attorney fees, doctor bills, and "compensatory time for the last two years that my child has been left behind as well as the homebound teacher services that were not provided to my child while this due process has been going on." We deny the motion. The first two of Mother's requests are beyond the scope of our authority to grant. With one exception, as further discussed below, we also deny the last request for compensatory services because we have found that Student was provided FAPE by MSSD during the 2012-13 and 2013-14 school years, and because we have found that Student's proper

stay-put placement in this case was MSSD-Maple Valley, which has remained willing and capable to accept Student's re-enrollment during the pendency of this case. *See orders regarding stay-put* (March 5, 2015).

Findings of Fact

1. Student is an -year-old girl who resides with Mother and her father (Parents) within the boundaries of the District.

2. Student is eligible for special education services under the category of "multiple disabilities." She has diagnoses of generalized seizure disorder, static encephalopathy,[1] and autism. Student has had a Vagus Nerve Stimulator (VNS) implanted to help control her seizures.

Student's School Attendance

3. Student attended school in the District until 2007, when the District referred her to MSSD.

4. MSSD is a system of day schools established by state law to offer services in separate school settings to students with severe disabilities. MSSD students are referred by local school districts.

5. There are four MSSD schools within an hour of North Kansas City, where Student resides.

6. MSSD evaluated Student. In June 2007, it determined Student was eligible for its services. Parents agreed with Student's placement at the MSSD school closest to her residence, Maple Valley State School.

7. Student attended Maple Valley from the fall of 2007 through the summer of 2014.

8. Each year, a team met and developed a new individualized educational program (IEP) for Student at Maple Valley. For at least the last three years,[2] Mother and a District

[1] Static encephalopathy is a brain injury that does not change over time.

[2] Only the last three years of IEPs are in evidence.

representative, as members of the IEP team, have attended the IEP meetings along with Maple Valley staff. Each year, the IEP team agreed that Student should be placed in MSSD.

9. Student's last IEP at Maple Valley is dated February 26, 2014. That IEP also placed Student in MSSD at Maple Valley.

10. Mother withdrew Student from MSSD in August 2014.

Student's Challenges and Capabilities

11. Student's mental capability is that of an 18- to 36-month old. When she turned 18, Parents were appointed as her co-guardians and co-conservators.

12. The District last evaluated Student in February 2010. The evaluation report produced in March 2010 ("the 2010 evaluation") rated her cognitive functioning in the 18-24 month age range.

13. At the time, Student was able to identify a few of her own body parts, but no colors or letters. She was not able to copy the letter "A" and needed significant support to match colored shapes.

14. The 2010 evaluation continues to accurately reflect Student's challenges and abilities.

15. Student is primarily nonverbal, although she vocalizes and approximates ten to fifteen words such as "ma" for mother and "wa" for walk. To communicate, she uses gestures, "minimal" signs, and an iPad with "GO TALK" software. She has learned to express some of her wants and needs using the iPad.

16. Student has significant sensory issues. She dislikes crowds and noise. She likes food, scented lotions, massages, music and swinging. Maple Valley has a vestibular swing, which is a hammock-like swing suspended from a beam so that it can accommodate the weight of an adult. Student also has a vestibular swing at home.

17. Student engages in behaviors that require intervention or redirection such as non-compliance with instruction, swiping items off a desk, property destruction, elopement, physical aggression such as pinching, unsafe bathroom use, and inappropriate touching of self. She sometimes bites and scratches herself.

18. Student has a prolapsed rectum because she "self-stimulates" by probing her rectum. Therefore, although she is able to attend to many of her own toileting needs, her bathroom use must be monitored.

19. Student experiences many small seizures every day in which she appears to be staring. Her more significant seizures require medical attention, including Diastat, a medication that is administered rectally by a nurse.

20. Because of Student's diagnosis of static encephalopathy and her level of cognitive delay, progress toward her educational goals is expected to be in small increments.

21. Student is mobile and can walk, but she uses a wheelchair in settings in which extensive walking is required.

Student's Educational Experience at Maple Valley

22. Mother was satisfied with Student's education at Maple Valley from 2007 until 2009.

23. Mother filed a complaint against MSSD with the United States Department of Education, Office of Civil Rights ("OCR") in 2009. She alleged that MSSD staff retaliated against her for complaining about problems at the school.

24. As a result, MSSD and OCR entered into a settlement agreement regarding MSSD's retaliation policy. As recently as 2014, MSSD and OCR continued to correspond about whether

changes made by MSSD to its written policy brought MSSD into compliance with the settlement agreement.[3]

25. Nonetheless, Student continued to attend Maple Valley. Each year, her IEP team met to write a new IEP for her.

26. Student's IEPs provide for her to have one-on-one instruction, which is furnished either through her teacher or a teacher's aide.

27. Student's IEP also provides for her to be furnished transportation between home and Maple Valley. She wears a harness on the school bus and sits within the bus monitor's line of vision.

28. Each year, Student's IEPs contained a summary of parent concerns with references to the goals that addressed those concerns. For example, the following appeared in the 2013 IEP:

> [Student's] parents would like her to improve on communicating her wants and needs (Goal 1-1 and 1-2), to express her feelings and safety (Goal 1-3 and Goal 3), and to be spoken to in complete sentences and telling [Student] exactly what is expected of her. [Student]'s parents would also like her to be as independent as possible (Goal 1, 2, 3, and 4). Their long range goals for her are that she will stay at home after graduation. They also feel that she should not be told "no", but should be advised why she is not able to do something when asked. It is very important to them that [Student] hold her head up when walking and working at her desk, and to 'stop' and 'come here' when asked as well as request a 'break' and 'come here' (Goal 3-1, 3-2, 3-3, 3-4, 4-1 and 4-2).

Ex. MSSD-5, 2013 IEP, pp. 2-3 of 30.

29. The goals in Student's 2012 IEP were as follows:

- Goal 1: The student will express messages with the use of an Augmentative Communication Device, specifically on the iPad, independently.

- Goal 2: The student will perform 3 self-care skills.

[3] OCR and DESE entered into a resolution agreement to resolve Mother's complaint on May 19, 2010. MSSD sent a monitoring report regarding its compliance to OCR on January 10, 2011. OCR replied to MSSD's January 10, 2011 monitoring report by letter dated August 12, 2014 – in which it also apologized for the delay in issuing a written response. *Ex. W-12.* Thus, we do not consider the delay in MSSD's compliance with the resolution agreement to be particularly meaningful.

- Goal 3: The student will demonstrate proper handling of the iPad in a variety of environments.

- Goal 4: The student will demonstrate safety awareness in the surrounding environment.

- Goal 5: The student will play simple board games.

Ex. MSSD-5 (pages unnumbered).

30. The goals in Student's 2013 IEP were as follows:

- Goal 1: [Student] will use and manage her iPad appropriately (80% accuracy, 8 of 10 data days).

- Goal 2: [Student] will perform 3 self-care skills (upon request, 8 of 10 data days).

- Goal 3: [Student] will demonstrate safety awareness in the surrounding environment (80% accuracy, 8 of 10 data days).

- Goal 4: [Student] will demonstrate socially appropriate replacement behaviors as listed in her behavior intervention plan (50% over baseline, 3 of 4 data days).

Id.

31. The goals in Student's 2014 IEP were as follows:

- Goal 1: By the end of the IEP, [Student] will improve overall communication by accessing an iPad to express her wants and needs by putting together simple basic sentences (4 of 5 opportunities, 3 of 4 data days).

- Goal 2: By the end of the IEP, [Student] will demonstrate safety by maintaining proper posture when sitting and while ambulating in her environment and in the community, with visual and verbal prompts (3 of 4 data days).

- Goal 3: By the end of the IEP, [Student] will be more independent when completing tasks, using a 4 step task strip (laundry, vacuum, pick up and put away items, grooming, identify name) with 1 prompt per step, for 3 of 4 data days.

- Goal 4: By the end of the IEP, [Student] will sign her name (using her mark) on a 6 inch line (her mark touching part of the line), with 2 verbal prompts (2 of 3 opportunities, 3 of 4 data days).

- Goal 5: By the end of the IEP, [Student] will use her iPad to demonstrate socially appropriate replacement behaviors as listed in her behavior intervention plan, 50% over baseline, 3 of 4 data days.

Id.

32. All of the goals in the above IEPs were accompanied by measurable benchmarks. As an example, one of the benchmarks for Student's first goal of her 2014 IEP (improving communication by using her iPad to express her wants and needs) was "By the end of the IEP, [Student] will use an iPad to direct her wants and needs toward a specific adult (names) by accessing the appropriate icon with 1 verbal prompt (4 of 5 opportunities, 3 of 4 data days)." *Id.* One of the benchmarks for the second goal in her 2014 IEP (demonstrating safety by maintaining proper posture) was: "By the end of the IEP, [Student] will walk with her head up and visually attending to safely navigate obstacles in her environment for 20 complete steps with 4 verbal prompts, (2 of 3 opportunities, 3 of 4 data days)." *Id.*

33. Student's 2013 IEP notes that Student's expressive skills had increased in using her iPad, that she "has made notable progress in her ability to participate in and complete the activities of the classroom routine" such as plugging in the iPad, and that incidents of pinching and scratching had been reduced due to "increased multi-modal communication." *Ex. 5, 2013 IEP, first two unnumbered pages.*

34. Student's 2014 IEP notes she has made "significant progress in her ability to express wants and needs, modulate behavior, participate in class activities, and complete work tasks," and that her inappropriate behaviors were "occurring at a much lower frequency and intensity from when the initial assessment was completed in 2013." *Ex. 5, 2014 IEP, pp. 2-3 of 28.*

35. Pursuant to Student's IEPs, she receives occupational therapy, music therapy, and language therapy. Student has learned to use her iPad to request breaks to address her sensory

needs through music, walking, swinging, vibration, massage, and joint compressions. In addition to the vestibular swing, Maple Valley has a room of sensory input devices.

36. Because Student is prone to disruptive, self-injurious, and aggressive behavior, she has also had a behavior intervention plan (BIP) each year. Student's latest BIP, attached to her 2014 IEP, was written by a contractor, Summit Behavioral Services.

37. Student's teacher at Maple Valley from 2009 through 2014 was June Davis. Davis posted Student's BIP on the wall by Student's desk in her classroom. She and her aides implemented the BIP.

38. During the 2012-13 and 2013-14 school years, teachers and aides reported that Student hit herself and others in the head multiple times, bit herself multiple times, pinched and scratched teachers and aides, put her hand in her pants inappropriately, threw herself on the floor, and had screaming episodes.

39. During the 2012-13 and 2013-14 school years, Student also experienced a number of minor injuries at home. Mother reported that she had bruised herself, swallowed a paper clip, and been spanked. Maple Valley staff members noted that Student sometimes arrived with bruises or torn clothes. Her personal care attendant at home noted that she had meltdowns, "self-stimulated," and bit herself. *Ex. W-24.*[4]

40. On February 3, 2014, while at school, Student placed a crayon in her ear and the tip broke off and could not be removed manually. School representatives called Mother to inform her of the incident. Mother went to school, picked up Student, and took her to the hospital. The tip of the crayon was surgically removed. Student suffered no lasting harm.

41. Student wears a harness on the school bus. On May 9, 2014, when she got off the bus, a paraprofessional noticed a red mark on her neck. Mother was concerned, particularly because the mark was in the vicinity of Student's VNS, although the skin was not broken. Mother had

Student examined at the Hospital and it was determined that the VNS was undisturbed. Thereafter, MSSD staff padded the harness strap where it crossed Student's shoulder.

42. Student's aggressive behaviors increased during the spring and summer of 2014. *NKC-C; MSSD-2.*

43. In 2014, Mother became frustrated with what she perceived to be Student's lack of safety and educational progress at Maple Valley. In addition to filing this due process complaint, she also filed another complaint against Maple Valley with the OCR.

44. In August 2014, Mother withdrew Student from MSSD. She contacted the District and asked that Student be placed in a District school.

45. Student has been at home since August 2014. She has received some instruction and services through education and behavior professionals retained by MSSD on a contract basis.

46. Mother consulted with a psychiatrist during the summer of 2014, who changed Student's medications. Mother believes Student is calmer and happier now.

The District's Placement Decision

47. On August 19, 2014, the District convened a meeting to review existing data regarding Student. Mother attended the meeting along with various District staff including an occupational therapist, speech/language pathologist, school psychologist, autism spectrum specialist, the District's special education coordinator, and the District's director of pupil services. Tina Pike, the building administrator[5] of Maple Valley, also attended.

48. The meeting participants, including Mother, agreed that Student's 2010 evaluation continued to be accurate and that re-evaluation was unnecessary. They discussed potential placement options for Student.

[4] Examples appear throughout this exhibit, but sample entries may be found on 4/13/14, 5/17/14, and 6/28/14.
[5] The building administrator is the chief administrator, like a school principal.

49. The District has approximately 19,000 enrolled students. It currently has fifteen residents attending Maple Valley.

50. The District has three programming options for lower-functioning children: the functional program, the "GOALS" program, and the autism program. Students in the functional program have higher cognitive functioning than students in the other two programs.

51. There are functional programs at all four District high schools. The GOALS program and autism program are housed at Staley High School, which contains 1,455 students.

52. Students in the autism program at Staley have significant cognitive impairment as well as autism. Some of them engage in disruptive behavior, although not as violent as Student's. Students in the GOALS program do not have autism, but they have more significant cognitive impairment, and several are medically fragile. They are typically docile and do not engage in disruptive behavior.

53. Students in all three programs at Staley – functional, autism, and GOALS – eat lunch in the main cafeteria, and they are able to tolerate its crowds and noise.

54. Special education students attending Staley who receive transportation as a related service – including those with mobility impairments who use a walker or a wheelchair – enter the building on the main level and traverse a long hall, about the length of a football field, to the classroom area.

55. There is no vestibular swing or sensory input room at Staley.

56. The GOALS and autism classrooms are together in a suite of rooms. They have several doors, only one of which opens to the outside. That door leads to a grassy area. Currently, there is no way to drive up to those classrooms.

57. The District's special education coordinator arranged for Parents and Student to visit the autism program class in August 2014. Student used a wheelchair during the visit.

58. The District convened meetings of an IEP team for Student on September 10 and 12, 2014. Mother attended the meetings.

59. The District IEP team concluded that the appropriate placement for Student was MSSD, specifically Maple Valley. All members of the team except Mother concurred in this placement decision.

60. On September 16, 2014, the District issued a notice of action to Parents, stating that Parents' request to change Student's placement was denied.

61. Mother filed this due process complaint on September 18, 2014.

62. After the due process complaint was filed, Mother toured all four District high schools with the District's special education coordinator and an advocate hired by Mother.

Conclusions of Law

This Commission has jurisdiction over matters relating to identification, evaluation, placement or the provision of a free appropriate public education (FAPE) to students with disabilities. 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).

Under the IDEA, all children with disabilities are entitled to FAPE designed to meet their unique needs. 20 U.S.C. § 1412. The IDEA defines FAPE as specialized special education and related services that: have been provided at public expense, under public supervision and direction, and without charge; meet the standards of the state educational agency; include an appropriate preschool, elementary school, or secondary school education in the state involved; and are provided in conformity with the Student's IEP. *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). The IEP is not required to maximize the educational benefit to the child, or to provide each and every service and accommodation that could conceivably be of some educational benefit. *Rowley*, 458 U.S. at 199; *Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 612 (8th Cir. 1997) (IDEA does not require a school district to maximize a student's potential or provide the best education possible).

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. Mother availed herself of that review procedure by filing this due process complaint.

Mother's Motion to Reopen the Record

The hearing in this case was held February 23-24, 2015. At the hearing, all three parties submitted evidence and engaged in extensive discussion of the exhibits. Afterward, on March 2, 2015, Mother filed several sets of documents. She describes them as records provided to her by MSSD in advance of the hearing, and states that she thought they would be introduced into the record by MSSD. Mother asks that they be admitted into the record because she believes they are relevant, but she did not realize that documents had to be accepted into evidence at the hearing in order to become part of the record. We deemed Mother's filing to be a motion to reopen the record and notified MSSD and the District that they could respond to the motion. On

March 6, 2015, the District filed a memorandum in opposition to Mother's motion. MSSD filed no objection.

Regulation 34 CFR § 300.512(1)(3) provides that any party to a hearing has the right to "prohibit the introduction of any evidence *at the hearing* that has not been disclosed to that party at least five business days before the hearing." (Emphasis added.) This regulation contemplates that evidence to be admitted into the record will be introduced at the hearing, not afterward.

In considering Mother's motion, we also look at the materials she submitted. The records consist of transportation records, old notices of action, progress reports, and pages from IEPs. Some are duplicative of materials already in the record, and some predate the limitations period for this case.[6] Although Mother states she believes they are important, she did not cite to any of these records in her post-hearing written arguments.

Considering all these factors – the wording of the regulation, the untimeliness of Mother's request, and the dubious relevance of most of the records – we agree with the District that the records should not be admitted. We deny Mother's motion to reopen the record.

Issues in the Case

Although Mother's amended complaint contains considerable detail, there are really two issues in this case. The first is whether Student received FAPE at Maple Valley. The second is whether Maple Valley is the least restrictive environment in which Student can be educated, or whether she can receive FAPE within the District.

Issue 1: Did Student Receive FAPE at Maple Valley from 2012 through 2014?

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."

[6] Although there are many facts in the record before this time period, a two-year statute of limitations applies to IDEA claims. 20 U.S.C. § 1415(f)(3)(C); *Lathrop R-II School Dist. v. Gray* 611 F.3d 419, 428 (8th Cir. 2010).

Town of 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). Then, the IEP must be substantially implemented. *See J.L. v. Francis Howell R-3 School Dist.*, 693 F. Supp.2d 1009, 1033 (E.D. Mo. 2010).

Mother raises a number of specific points about Student's recent education at Maple Valley. We summarize them as follows: safe environment, meaningful educational benefit, necessary equipment and software, community integration, certified special education teacher in classroom, qualified aide on the bus, and procedural compliance with the IDEA. We discuss these below.

a. Safe Environment. Mother points to the incident in which a crayon tip became lodged in Student's ear and the red mark on her neck when she got off the bus. In her complaint she also alleges that: Student came home with bruises, scratches, bite marks, torn clothes, broken zippers, and hand indentations on her arm; she came home one day with a boy's underpants on; the door to the bathroom was left wide open when she sat on the toilet; staff manhandled Student; and the classroom was sometimes understaffed.

The evidence in the record indicates that Student did sustain some injuries at school, primarily self-inflicted. Student sometimes bit and scratched herself. She did go home from school once with boy's underpants on; her teacher testified that they were the only spare underpants available that day. The same teacher testified that the bathroom door was left ajar when students used the bathroom for safety reasons, but only slightly, so that students using the bathroom were not visible to the other students in the classroom.

Because Mother filed her complaint on September 18, 2014, the relevant time period in this case begins on September 18, 2012.

One of our tasks is to determine the credibility of witnesses. *J.L. v. Francis Howell R-3 School Dist.*, 693 F. Supp.2d 1009, 1033 (E.D. Mo. 2010). Although we find much of Mother's testimony credible, especially her testimony regarding Student's condition and her capabilities, she exaggerated certain points when making claims against Maple Valley. For example, she claimed that Maple Valley had violated her daughter's privacy rights by publishing her picture in the school yearbook against her wishes. As evidence, she offered a page from the 2012 yearbook with Student's picture on it. But Tina Pike testified that until 2014 Mother had assented to having Student's picture in the yearbook, and that after Mother signed a form in 2014 asking that she not be pictured, Student's picture was not included in the yearbook. Likewise, Mother implied that Student was endangered in her classroom at Maple Valley because her teacher forgot that magnets could interfere with the operation of her VNS, and that Mother walked into the classroom one day and saw magnets on the wall. But June Davis testified that the day Mother saw the magnets on the wall was *before* Mother told her that the doctor had said magnets could interfere with the VNS' functioning. As a final example, individual service plans prepared for Student by mental health professionals not connected with MSSD clearly indicate that Student's prolapsed rectum is a result of her own rectal probing, and the 2014 plan contains considerable detail about this behavior and the measures taken by Parents to prevent it at home. *Ex. W-23* at 5. But at the hearing, Mother said that she now believes the prolapsed rectum resulted from sexual abuse.

On the issues relating to Student's injuries and behaviors at school, we find the testimony of Maple Valley staff credible. We conclude that she was not abused by staff, as Mother repeatedly alleged, and that her injuries were almost all minor and self-inflicted. That conclusion does not address all of Mother's concerns regarding Student's safety, however. Even if Student inflicted her own injuries by biting and scratching herself, those injuries are still a legitimate concern. And with a one-on-one aide, Student should not have been able to stick a crayon into

her ear far enough so that the tip broke off. We agree that these incidents are cause for concern.

Student has had BIPs each year. Peter Griggs, a behavioral specialist who was Mother's witness, testified that he thought the latest plan was a good one. The plans were designed to address and prevent Student's undesirable behaviors, including those like pinching in which she injured herself and others. Student's BIP was posted in her classroom, and Davis testified that she and the aides implemented it. Mother offered no convincing evidence from the relevant time period to the contrary.

Student's BIP clearly did not prevent or curtail all of Student's undesirable behaviors, including her self-injurious ones. But the evidence indicates that MSSD took those behaviors and the risks to Student seriously and tried to adhere to the behavior plan. The fact that Student also injured herself at home indicates that it was simply a difficult task to keep Student safe at all times. While the Maple Valley staff was not able to prevent all of Student's self-inflicted injuries, this does not mean they denied her FAPE.

b. Meaningful Educational Benefit. Mother alleges that Student's goals changed little from year to year, and that she made little progress. For example, every year Student had a goal to learn to brush her hair and brush her teeth. Some goals have been difficult to measure because of a lack of clear benchmarks.

An IEP must contain a statement of the student's present level of academic and functional performance, measurable annual goals, a description of how progress will be measured, a statement of educational and related services to be provided, an explanation of the extent to which the student will not be in the regular classroom, a statement of accommodations necessary to measure achievement, and the date on which services will commence. *Park Hill Sch. Dist. v. Dass*, 655 F.3d 762,766 (8th Cir. 2011). Student's IEPs contained all necessary components.

The goals in the IEP must meet the needs of the child resulting from the child's disability. *K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 807 (8th Cir. 2011). In addition, FAPE does not require that a child's potential be maximized, and the IDEA does not guarantee that the student will actually make any progress. *Lathrop R-II School Dist. v. Gray*, 611 F.3d 419, 424 (8th Cir. 2010), citing *CJN v. Minneapolis Pub. Schools*, 323 F.3d 630, 642 (8th Cir. 2003). Rather, "FAPE requires special education and related services to be provided to the disabled child in accordance with applicable state education standards, and that such services be provided in an appropriate learning environment, and in conformity with a specialized education plan (IEP) as required by 20 U.S.C. § 1401(a)(8)(A)-(D)." *Clark ex rel. J.J. v. Special Sch. Dist. of St. Louis County*, 2012 WL 592423, *8 (E.D. Mo. 2012). When Student's education at Maple Valley is evaluated under these standards, we conclude that she received FAPE.

Student's goals related to her disabilities, and there is no evidence they were inappropriate. Although some of them remained very similar from year to year, this fact is not surprising given Student's relatively static condition. And they do show some change over time: for example, Student's 2014 IEP contains goals that were not present in her 2012 IEP, such as performing multistep tasks, signing her name, and learning socially appropriate replacement behaviors. Student has also made progress in learning how to communicate, as evidenced by the fact that she can now use her iPad to communicate certain wants and desires.

The IDEA requires only that a student derive *some* benefit. Student's IEP has provided her with personalized, one-on-one instruction and support services tailored to her needs, such as language therapy and occupational therapy. The record indicates that Student has benefited from the instruction and services provided by MSSD, although not as much as Mother desires and perhaps not as much as Student could have. But the IDEA does not require a school district to maximize a student's potential or provide the best education possible. *Fort Zumwalt*, 119 F.3d at 612. We find that Student has received educational benefit.

c. Equipment and Software. Mother complains that she had to buy Student's iPad and that other students at Maple Valley have been furnished with an iPad by the school. She also believes that Student has made little progress on the iPad because staff have loaded too many words and icons onto it.

The evidence at hearing indicates that Mother did buy Student's iPad, and that other students have since been furnished with iPads by Maple Valley. Mother introduced the idea to Maple Valley staff several years ago, and Student was the first in the school to use an iPad at school. Since then, the school has introduced their use more widely and bought iPads for various students. But those iPads remain at school when students leave, and Mother wants Student to be able to bring her iPad home so that she can learn to use it consistently.

There is no evidence in the record that Maple Valley staff refused to provide Student with a school-issued iPad under the same conditions as one is provided for other students, that the iPad has been loaded with too many icons, or that it has not been used properly or effectively for instruction.

d. Community Integration. Under Student's IEP, she was supposed to have 240 minutes per year of bowling and 270 minutes of shopping, both activities to take place in the community. Mother asked at the last IEP meeting for Student to have more time in the community, but was told that resources for this were insufficient.

Both parties introduced log sheets with records of trips made by Maple Valley students into the community for shopping and bowling. Mother contends that Student did not receive all the minutes for these activities to which she was entitled according to her IEP.

There is no proof, one way or another, that Student did not receive her 240 minutes per year of bowling. Although the logs indicate that bowling trips were taken, they do not indicate which class or which students went on the trips.

But Mother did show that Student did not receive her 270 minutes per year of shopping. Although we cannot make any determination about the 2014 IEP year because Mother withdrew Student six months into the IEP period, both Mother's records (Ex. W-6) and the MSSD records (MSSD-3) show that Student received less than 270 minutes of shopping during the 2012 IEP year. If Student returns to Maple Valley or another MSSD school, she is entitled to compensatory time for community integration activities such as shopping.

e. Certified Special Education Teacher. Mother's complaint is that MSSD planned for a "certified substitute," rather than a certified special education teacher, to take over Student's classroom when June Davis retired. She alleges she asked that the requirement of a certified special education teacher be included in Student's IEP at the end of the 2013-14 school year, but the school refused her request.

The IDEA requires states that receive federal special education funds to ensure that personnel necessary to carry out the requirements of the IDEA are "appropriately and adequately prepared." 20 U.S.C. § 1413(a)(3)(A)(B). But the IDEA does not equate licensure with "appropriately and adequately prepared." *Moubry By and Through Moubry v. Indep. Sch. Dist. No. 696*, 951 F.Supp. 867, 894 (D. Minn. 1996). Mother did not carry her burden to show that MSSD's failure to specify in Student's IEP that her teacher would be licensed in special education violated the IDEA.

f. Transportation. Mother complains that the bus was sometimes broken and the monitor was sometimes absent. Mother also observed black smoke coming out of the back of the bus. No evidence on this point was presented at the hearing.

g. Procedural Compliance with IDEA. Mother alleges she was denied an IEP meeting at the end of the 2014 school year because Mother was not present, and that when the principal agreed to a meeting she was told she could not bring up the word "teacher." At the September 10, 2014 IEP meeting with the District, Mother alleges that the IEP team refused to consider her

input that Student could be educated in the District, and did not truly consider Mother's concerns about the safety issues and lack of progress for Student at Maple Valley.

There is too little evidence on the first point to determine whether any discussions on an IEP meeting that may have occurred at the end of the 2013-14 school year might have violated Mother's procedural rights under the IDEA. With regard to the second point, the evidence is that the District's staff members met with Mother, reviewed existing data regarding Student, toured special education classrooms with Mother, and held an IEP meeting to determine Student's appropriate placement. There is no evidence that District staff did not fully consider the facts surrounding Student's condition and the respective educational opportunities within MSSD and the District when they decided the appropriate placement for Student was within MSSD. Mother did not carry her burden of proof on this point.

Issue 2: Can the District provide Student with FAPE in a less restrictive environment?

It is the policy of the State of Missouri that all children with disabilities between the ages of three and twenty-one have a right to FAPE. *Missouri's State Plan for Special Education, Part B 2013 (State Plan), Regulation IV,* at 39. The local school district or special school district in which a child with a disability resides is responsible for implementation of FAPE. *Id.* at 40. In this case, that local school district is the District.

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). This mandate also applies to the District.

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). But 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. ex rel. B.B. v. Special School Dist. No. 1*, 636 F.3d 981, 991 (8th Cir. 2011). 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.*

MSSD was established by state law to serve students with severe disabilities referred to the State Board of Education by local school districts that do not operate such programs themselves and that are not part of a special school district. *State Plan, Regulation X,* at 141. Local school districts may refer severely disabled students to MSSD. If they do, Regulation X sets forth a lengthy process for justifying the placement of a child in MSSD. If a school district wishes to place a student in a state school, it shall:

> Provide justification of why it is not the least restrictive environment for the student. The district must demonstrate why it cannot educate the student in the local school and justify why the services they have provided are not adequate to meet the needs of the student.

Id. at 142. Once a student is enrolled in MSSD, IEP teams are to be convened annually or more frequently to review and revise the student's IEP. *Id.* at 144. At any time, the IEP team may determine that the student should no longer be placed at MSSD because of higher functioning or because a separate school no longer appears to be the student's least restrictive environment. *Id.* at 145. In addition, the local school district must periodically reevaluate the child as required by state regulations.

Thus, a school district is not completely absolved of the responsibility for educating a disabled child who resides within its boundaries once that child has been referred to and accepted by MSSD. In this case, the District recognized its responsibility when its staff members met with Mother, reviewed existing data regarding Student, toured special education classrooms with Mother, and held an IEP meeting to determine Student's appropriate placement. After this process, District and MSSD staff members continue to believe that MSSD is the appropriate placement for Student. Mother believes Student can receive FAPE in the GOALS or the autism classrooms at Staley, but neither the District personnel nor the MSSD staff familiar with Student believe that is possible.

Certainly, there is evidence that Maple Valley is currently better suited to meet Student's needs. Student has strong sensory needs. Maple Valley has a sensory room and a vestibular swing. Maple Valley staff members have been trained to implement Student's behavior plan and deal with her sometimes aggressive and disruptive behavior. Student would not be exposed to as much noise or crowds as she would be at Staley or another District high school. She does not have to traverse long hallways or eat lunch in a crowded, noisy setting. Student has a one-on-one aide.

Student would not fit into either the GOALS or autism programs at Staley as those programs are currently implemented. Accommodations would have to be made for her to enter

and exit the building. Mother's suggestion is that a parking area be constructed right outside the classroom because there is currently no parking area there. There is no vestibular swing or sensory room. Members of the GOALS and autism classes eat lunch in the main lunchroom, traverse the long halls of the high school, and do not have one-on-one aides. The doors to the outside present elopement concerns. Student's sometimes violent and disruptive behavior could pose a danger to medically fragile students.

None of these concerns is an absolute bar to Student attending Staley. Accommodations could be made. A parking area could be built and a vestibular swing could be constructed. These would require the expenditure of additional District funds. Student could be assigned a one-on-one aide, and, as Mother suggests, she could eat her lunch in her classroom. Of course, these measures would increase the isolation and restrictiveness of Student's environment, thus defeating in part the purpose of removing Student from MSSD. And the fact that such changes could be made does not change the conclusion that Maple Valley is currently better suited to meet Student's needs.

The Eighth Circuit has adopted the following test in such circumstances:

> In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act. Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some handicapped children simply must be educated in segregated facilities . . . because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting . . . . Cost is a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children.

Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir.), *cert den.,* 464 U.S. 864 (1983), quoted in *A.W. by and Through N.W. v. Northwest R-1 School District*, 813 F.2d 158, 163 (8th Cir., 1987). In

A.W., the court went on to say, "We believe that the Sixth Circuit in *Roncker* correctly interpreted the [IDEA]'s mainstreaming provisions as allowing a court to consider both cost to the local school district and benefit to the child." 813 F.2d at 163.

This case is similar in some ways to *Pachl v. Seagren*, 453 F.3d 1064 (8th Cir. 2006). In *Pachl*, the parents of a significantly disabled child sued because they wanted their child to be mainstreamed full time and not placed in the school district's special education program ("STARS") at all. The school district revised its IEP to reduce, but not eliminate, the student's educational time in STARS. The parents contended that the IEP violated their child's right to be educated in the least restrictive environment. A hearing officer, and subsequently a district court, found that the district's combination of mainstream education and STARS was appropriate and would provide the student with a meaningful education in the least restrictive environment. *Id.* at 1067.

On appeal, the parents argued the district court applied the wrong legal standard in judging student's IEP "by inquiring whether the inclusion of STARS time was the most appropriate alternative, rather than determining whether there was a way feasibly to provide supplementary services in the regular classroom environment." *Id.* at 1068. The court disagreed, finding that the district court described the correct legal standard in detail and discussed the appropriate governing cases, including *Roncker*. The court's conclusion – that the IEP at issue provides "a meaningful education in the least restrictive environment – also accords with the applicable law." *Id.* (internal citations to the record omitted).

As in *Pachl*, the issue in this case is not so much whether Student *could* be educated within the District as whether MSSD is the least restrictive environment, and the most appropriate placement, for Student. Even Mother does not really argue that MSSD is an inappropriate placement in principle. Rather, she argues that Maple Valley was an unsafe environment because her daughter was injured and abused there; that Student did not make

progress on her goals and that they remained fairly static; and that the staff at Maple Valley and MSSD discriminated against Student and Mother and treated them with disrespect. She argues that it is possible for Student to be educated in the District, and that given her complaints about Maple Valley, Student should be placed in a District school.

We have already determined, however, that Student received FAPE at Maple Valley, and that she was not abused. Given this determination, we see this case as similar to *A.W.*, *Pachl*, and *Clark ex rel. J.J. v. Special School Dist. of St. Louis County*, 2012 WL 592423 (E.D. Mo., 2012) . *Clark* involved a student with behavior problems placed at a special school. The student's mother filed a due process case asking that the student be returned to a general education setting. *Id.* at *8. The court found against her, noting that the IDEA's preference for mainstreaming was not absolute, and that all the educators who testified at the hearing agreed that the special school placement and use of a particular behavior control method were necessary to provide the student with FAPE. The court found this unanimity of opinion among the educators to be persuasive. *Id.* at *15.

The evidence in this case is that it would be costly and disruptive to provide a comparable environment and instructional setting for Student in the District. At the hearing, the only person who testified that Student could be appropriately educated in a District school, including Mother's own witnesses, was Mother. The setting best equipped to provide Student's education, given her behavior issues, low cognitive ability, and strong sensory needs, is an MSSD school. Given all of these factors, we determine that an MSSD school is the appropriate placement for Student.

The reality of this case, unfortunately, is that Mother has very negative feelings about Maple Valley and MSSD. She states that she is adamantly opposed to returning her daughter to an MSSD school. But given our decision in this case, we urge the parties to consider whether another MSSD school might be a viable alternative to Maple Valley.

Summary

We find that MSSD provided FAPE to Student during the 2012-13 and 2013-14 school years. We find that the least restrictive environment and most appropriate placement for Student is an MSSD school such as Maple Valley. If Mother re-enrolls Student in an MSSD school, Student is entitled to compensatory time for community integration activities such as shopping.

SO ORDERED on April 3, 2015.

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KAREN A. WINN
Commissioner

Appeal Procedure

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