# Before the
# Administrative Hearing Commission
# State of Missouri

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| , in the interest of , | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | No. 16-3103 |
| | ) | |
| SENATH-HORNERSVILLE C-8 SCHOOL DISTRICT, and MISSOURI SCHOOLS FOR THE SEVERELY DISABLED, | ) | |
| | ) | |
| Respondents. | ) | |

**DECISION**

(Mother) filed a due process complaint against the Senath-Hornersville C-8 School District (District), alleging that the District failed to provide her daughter (Student) with a free appropriate public education (FAPE). We find the District failed to provide Student with FAPE in 2016 because it did not provide her with extended school year (ESY) services. We order the District to provide Student with ESY in 2017, and to provide Student compensatory education for the instruction she would have received in ESY during the summer of 2016. We also find that Student requires a full day of instruction in order to receive FAPE, and is able to attend school all day with the proper support. We order the District to provide full-day instruction to Student in a District classroom beginning the first day of the 2016-17 school year. Finally, we order the District to evaluate Student's need for occupational therapy services.

## Procedure

On June 20, 2016, (Mother) filed a due process complaint against the District on behalf of Student. On June 20, 2016, we sent a notice of hearing to the parties, in which we set the hearing for July 25-26, 2016.

Also on June 20, 2016, Mother and the District agreed by e-mail to waive the resolution period for due process complaints established in 34 CFR § 300.510. On June 21, 2016, the District filed a motion to reschedule the hearing to a date no earlier than September 6, 2016. Mother filed a response opposing the District's motion. We subsequently issued an order denying the request to continue the hearing, but we reset the hearing for July 11-12, 2016, so that a decision could be issued within the 45-day period required by 34 CFR § 300.510(c)1. We also set a prehearing conference for June 27, 2016 and a decision deadline of August 4, 2016.

On June 23, 2016, the District filed a renewed motion to reschedule the hearing to July 14-15, 2016. After holding the scheduled pre-hearing conference, we issued an order scheduling a second pre-hearing conference for July 5, 2016; and rescheduling the matter for hearing on July 14-15, 2016. We also set a new deadline for the decision of August 15, 2016.

On June 30, 2016, the District filed a motion to dismiss portions of the complaint alleging violations of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701, et seq. (Section 504), and seeking relief in the form of monetary damages. The District also filed a response to the complaint.

On July 5, 2016, we held a second pre-hearing conference with the parties and on July 6, 2016, we issued an order in which we 1) granted in part and denied in part the District's motion to dismiss, dismissing Student's Section 504 claims and request for monetary assistance and/or

damages for lack of jurisdiction, 2) identified the issues for the due process hearing; and 3) set forth procedures for the hearing. We issued an amended order on July 7, 2016, clarifying certain hearing procedures.

We held the hearing on July 14-15, 2016. The court reporter filed the transcript on July 19, 2016. We issued an order on that date in which we recognized that our previous order resetting the decision deadline on this Commission's own initiative was not authorized under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (IDEA), and moved the decision deadline back to August 4, 2016, with an abbreviated briefing schedule. On July 20, 2016, the parties filed a joint motion to extend the decision deadline to August 15, 2016, which we granted. We therefore revised the briefing schedule as well.

The parties filed briefs on August 1, 2016, and reply briefs on August 8, 2016. Also on August 8, 2016, Student's IEP met to develop Student's IEP for the 2016-17 school year. The parties filed status reports after the IEP meeting. On August 9, 2016, the District filed a report on the meeting accompanied by a copy of the August 2016 IEP and two notices of action. On August 10, 2016, Mother filed her report. Because the parties agreed we could take notice of the results of the August 8, 2016, IEP meeting, we admit the August 2016 IEP and the two notices of action into the record.

## Findings of Fact

1. Student is an -year-old girl who resides with Mother in a rural area within the boundaries of the District. In her home environment, Student sees few other children.

2. Student is eligible for special education services under the category of autism.

### Student's Challenges and Capabilities

3. Student has significantly delayed receptive and expressive communication skills. She is able to identify letters, numbers, shapes, and colors, and utters isolated words, but is unable to

name objects, answer questions logically, describe objects, or use words to talk about places or positions. Her overall language age as measured in 2014 was two years, one month, or more than three standard deviations below the mean.

4. When last tested in 2014, Student's scores on the Stanford-Binet Intelligence Scale fell into the moderately delayed range and her score on the Vineland Adaptive Behavior Scale was low.

5. Student primarily plays alone and does not interact with her peers. She has a limited attention span and has frequent screaming episodes and "meltdowns."

6. Student is not toilet trained. Mother provides diapers to her school. School employees change Student's diaper on a regular basis. Other students who wear diapers attend school on a full-day basis.

Student's School Attendance

7. Student attended in the during the 2014-15 school year. Mother withdrew her from school shortly before the end of the school year when she relocated to .

8. Student finished the 2014-15 school year at the in (the ). Student also attended grade in the during fall 2015.

9. . Student attended school in the for the full spring semester.

Student's IEPs

10. Student had an individualized education program (IEP) in the District during the 2014-15 school year. When she moved to, the assembled an IEP team for her, held a meeting, and formulated an IEP for her dated June 8, 2015 (the IEP).

11. Pursuant to the IEP, Student was placed in a special education program for moderate cognitive impairment 1950 minutes/week, or 6.5 hours/day, with no time in regular education. She was also placed in speech therapy with 20 to 45 minute sessions, 25 to 50 sessions per school year (typically once a week). It was determined that Student did not need extended school year (ESY) services.

12. 's school year, at 220 days, is longer than Missouri's, at 180 days.

13. Mother was satisfied with Student's placement in . Student attended school for a full school day and rode the bus to and from school.

14. When Mother moved back to Missouri, the sent its IEP for Student to the District. District personnel reviewed and rejected the IEP on December 14, 2015.

15. Mother met with District staff members on December 16, 2015. They agreed that Student would begin school in January with a four-hour school day and that the IEP team would consider increasing Student's school day at the end of the third quarter of school.

16. The District provided Mother with a notice of action rejecting the IEP on January 13, 2016. As the reason for rejecting the IEP, the notice stated:

> The transfer IEP could not be accepted and implemented as written. The IEP team determined this to be [Student's] least restrictive environment due to her specific needs which cannot be fully met in the regular education setting. [Student's] Autism adversely affects her participation in the classroom setting and she requires intense one-on-one specialized academic instruction as

> well as related services in order to progress toward her annual IEP goals and the regular education curriculum.

Jt. Ex. 5 at 30. Mother signed the notice of action on January 13, 2016.

17. The District IEP team met on January 13, 2016. Besides Mother, the IEP team consisted of Halley Gurley (LEA representative), Christie Risinger (speech/ language pathologist), Laura Harris (Student's special education teacher), (paraprofessional assigned to Student's classroom), Lori Hoffman (the elementary principal), (Student's regular education teacher), Dawn Cochran (Student's case manager from the Department of Mental Health), and the school nurse.

18. The resulting IEP (the January IEP) placed Student in regular education 50% of the time and in special education 50% of the time with a four-hour school day. The IEP also provided for speech/language therapy as a related service, but not for occupational therapy.

19. Student's special education classroom had one teacher and one aide who was available for one-on-one assistance. Student was also assigned an aide to accompany her during transition periods such as going to meet the bus.

20. The IEP team deferred its decision on whether Student was eligible for ESY services, stating "The need for ESY services will be addressed at a later date." Jt. Ex. 4 at 21.

Length of Student's School Day

21. During the 2014-15 school year, Student attended school for half days. When Student had screaming episodes and could not be consoled, Hoffman called Mother to come pick her up from school. Thus, Student left school early on a number of occasions.

22. At some point during the 2014-15 school year, the IEP team agreed to increase Student's school day by one hour/day. Student had difficulty with the longer school day and the team changed her school day back to half days.

23. In , Student attended a full (6 ½ hour) day of school. Her placement was 100% in special education. The class had one teacher, one paraprofessional, and two aides.[1] Student tolerated this placement.

24. Under the January IEP, Student was to be provided 310 minutes/week of specialized instruction in basic reading skills, 310 minutes/week of compliance skills, and 60 minutes/week of speech/language therapy. The IEP also states she would spend 50% of her time in regular education, but the minutes of regular education are not stated in the IEP.[2]

25. Mother e-mailed Gurley on March 2, 2016 to ask her about several issues, one of which was when Student's school day could be extended.

26. Mother met with Charla Hayes, the District's director of special education, on March 4, 2016. Hayes and Mother agreed at that time to lengthen Student's school day by 30 minutes, or 150 minutes per week, consisting of 120 minutes of regular education and 30 minutes of special education, effective March 14, 2016. Student attended school from 8:00 to approximately 12:30 p.m. for the remainder of the school year.

27. Mother was never called to pick Student up from school early in 2016.

[1] This finding is based on Mother's description of the staff in Student's class in . Harris testified, based on a telephone conversation with Student's teacher in that she thought Student's class there was staffed with two teachers and two aides. We accept Mother's report as more likely to be accurate, but note the two agree on the main point, which is that the classroom was staffed with four staff members as opposed to the two in Student's class in the District.

[2] The evidence in the record on Student's time in regular education is confusing. The IEP specifies that Student will receive 620 minutes/week of special education and 60 minutes/week of speech/language therapy. Nowhere does it set forth the amount of regular education minutes Student is to receive, but we assume, based on its description of special education and regular education as a 50/50 split, that she was also to receive 620 minutes of regular education, for a total of 1300 minutes (620 + 620 + 60) per week. Jt. Ex. 4 at 26. This equates to a school day of 260 minutes, or four hours and twenty minutes. However, other testimony described Student's school day from January to March, 2016, as a four-hour school day beginning at 8:00 and ending at 12:00. Because the IEP does not state the regular education minutes, we assume that Student's school day lasted four hours rather than four hours and twenty minutes.

Speech and Occupational Therapy

28. Student's IEP provides for 60 minutes/week of speech and language therapy as a related service, but not occupational therapy.

29. Student received the speech and language therapy services as provided by the IEP.

30. Student's IEP provided for "20-45 minute(s) 25-50 session(s) per school year" of speech therapy. Jt. Ex. 1 at 10. It also provided for occupational therapy consultative service, stating: "OT to monitor [Student]'s sensory needs and handwriting adaptations through her classroom placement by providing classroom staff with training, tools and activities to implement into their daily routine." *Id.* at 9.

31. In 2015, Mother asked the District to evaluate Student's eligibility for placement in the Missouri Schools for the Severely Disabled (MSSD). Occupational therapy needs are assessed in determining whether a Student is eligible for MSSD. Accordingly, Mother also asked that Student receive an occupational therapy evaluation.

32. The District initiated the process for an occupational therapy evaluation near the end of the 2014-15 school year. The evaluation was to be performed by a contract agency in Jonesboro, Arkansas, and several forms needed to be completed before it could take place.

33. Mother moved to before Student's occupational therapy evaluation could be performed. To date, Student has not undergone an occupational therapy evaluation.

Homework

34. During the January IEP meeting, Mother expressed a desire that Student be given one to two pages of homework each night, and it was agreed that Student's regular education teacher would send homework home with her every night. This agreement is memorialized in the "concerns of the parent" section of the 2016 IEP.

35. Because Student finished her day in the special education classroom, Harris made sure her homework was in her backpack every day when she left school.

36. In February, Mother wrote Harris a note, informing her that Student struggled with the math homework, cried, and refused to finish it. She asked that Harris return to giving Student alphabet homework because Student liked it, and "we are building a routine." Resp. Ex. L.

37. Harris replied on February 8, 2016:

> Ms. ,
>
> I understand [Student] prefers some activities over others, but as her teachers we feel it is important that we expand her ability to work on other skills.
>
> Thank you.
>
> Mrs. Harris

Resp. Ex. M.

38. In Mother's March 2, 2016 e-mail to Gurley, she also raised issues about Student's homework, complaining that it was too difficult for her. On March 4, 2016, Hayes informed Mother by e-mail that Harris would be sending homework home starting March 7, 2016.

Extended School Year

39. Student received ESY from the District in the form of speech/language services during the summer for two years.[3] Student's IEP indicated that ESY was not required for Student.

40. Student's IEP team did not reconvene after the January 2016 IEP meeting to discuss Student's eligibility for ESY.

[3] Student's previous District IEPs are not in evidence. .

41. On May 19, 2016, Mother e-mailed Jeremy Chad Morgan, the superintendent of the District. She informed him she could not afford to provide more diapers for the school to use with Student, and asked about several other issues. She also informed him she had never heard whether Student would receive ESY.

42. Morgan replied to Mother's e-mail on May 20, 2016. He did not respond to her query about ESY.

43. Mother responded to Morgan later that day. Among other issues, she reminded him that he still had not answered her question about ESY.

44. Morgan replied to Mother later that evening. He did not answer her question about ESY. On May 22, 2016, Mother again e-mailed him about Student's ESY.

45. Morgan replied to Mother on May 23, 2016: "When you and I spoke last we talked about her coming to summer school and being in a regular class and you said you were not interested in that." Jt. Ex. 13. Mother replied to him later that morning and told him she was interested in special education, not regular education, for Student's summer school.

46. On May 27, 2016, Mother wrote that Student was "eligible for 504 plan, extended school year. Shes had it two years at your school already. By denying that to her, that is failing to achieve fape for her." Jt. Ex. 15. She also asked about dates for her children's upcoming IEP meetings.

47. On May 28, 2016, Morgan replied to Mother, stating he would e-mail her the following week about the IEP meeting dates. He did not address her request for ESY.

48. Mother replied to Morgan's e-mail on the same day, stating:

> Again, what seems to me to be completely avoided, again and again . . . why am I constantly having to ask over and over again about extended school year, which you didn't respond about yet again. Why do I have to constantly bring things up and seemingly beg for that which she is eligible for. You cant tell me, there is no

> kid getting this service and even if that were the case, shes eligible and the school is obligated by law. I won't ask again. I will file again and if I have to, I will follow thru all the way to court[.]

Jt. Ex. 17.

49. Morgan realized that Mother was asking about special education rather than general education for Student during the summer. He checked with Gurley and Harris, who discussed whether Student was eligible for ESY. Based on Harris' input, Gurley decided Student was not eligible. On May 29, 2016, Morgan replied to Mother:

> As far as extended school year, [Student] didn't qualify but I'll double check again and let you know next week when I have the meeting dates. I did let you know that she is more than welcome to attend summer school but you said you didn't want her to attend. That is your choice but she is more than welcome to attend and she will be placed in a regular class.

Jt. Ex. 18.

50. On May 31, 2016, Morgan e-mailed Mother that he had checked on ESY again. He wrote:

> I checked on extended school year for [Student] and from what I understand, extended school year is used so students don't regress. Its for students to maintain not to gain. During the school year different breaks are used to determine if extended school year is necessary i.e. Christmas break, spring break. At this it is felt that [Student] will not regress over the summer so extended school year is not necessary.
>
> As I mentioned in earlier emails and discussions [Student] is more than welcome to attend our summer school program. This time was going to be used to see how she would do during a full day setting. Let me know if she will be attending.

Jt. Ex. 19.

51. By e-mail dated June 1, 2016, Mother informed Morgan she did not agree with the District's decision on ESY. She also told him she did not agree with the decision on ESY being made without her input or knowledge, and that she was a member of the IEP team.

52. Mother filed this due process complaint on June 20, 2016.

53. Student's IEP team met on August 8, 2016, to develop her IEP for the upcoming school year. On August 9 and 10, 2016, the parties filed status reports on the results of that meeting.

**Conclusions of Law**

This Commission has jurisdiction over matters relating to identification, evaluation, placement or the provision of a 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 Mother. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). 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). Our findings of fact reflect our credibility determinations.

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 such as the District fulfills the requirement of FAPE "by providing personalized instruction with

sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 203.

The 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; *Gill v. Columbia 93 School Dist.*, 217 F.3d 1027, 1037 (8th Cir., 2000) (IDEA does not require a school district to maximize a student's potential but to provide student with some educational benefit).

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.

**Issues in the Case**

Mother's complaint references a wide range of concerns she has with the District. Based on the prehearing conferences we held with the parties and the statements they filed before those prehearing conferences, we identified six issues in this case:

1) Whether Student's IEP should include ESY;
2) Whether Student's IEP should include occupational therapy;
3) Whether Student's IEP should provide for full-day school;
4) Whether Student is being provided speech and language therapy sufficient to provide FAPE;

5) Whether Student's placement is appropriate and in the least restrictive environment (LRE); and

6) Whether homework assignments should be addressed by Student's IEP.

We address these issues below. As the District observes in its written argument, issues (3) and (5) are closely related, and we discuss them together.

1. Extended School Year

ESY services are defined as special education and related services that are provided to a child with a disability beyond the normal school year in accordance with the child's IEP, at no cost to the child's parents. 34 CFR § 300.106(b). ESY must be provided to a child "only if a child's IEP Team determines, on an individual basis . . . that the services are necessary for the provision of FAPE to the child." 34 CFR § 300.106(a)(2). The District contends Student is not eligible for ESY because she did not show regression during breaks from school or display problems with recoupment of her skills after such breaks.

Harris testified as to her understanding of when a Student should receive ESY:

> My understanding is that when you are out for an extended period of time, like Thanksgiving break or spring break, if that student shows regression or recoupment over that time then it's very likely that they would in the summer as well and they would need services over the summer.

Tr. 93-94. She also stated that she knew of no other criteria for consideration of the provision of ESY services to a special needs student in Missouri other than recoupment or regression issues. Harris testified that Student showed no signs of regression during Thanksgiving, Christmas, and spring break during the 2014-15 school year, or after the 2016 spring break.

Unlike some other states, neither the Missouri statutes nor the Missouri State Plan for Special Education (State Plan) specifies the criteria for determining whether ESY should be provided to a child. However, in *Pachl ex rel. Pachl v. School Bd. of Indep. School Dist. No. 11,*

2005 WL 428587 (D.Minn. 2005), a case construing both Minnesota law and the IDEA, the court stated that the purpose of ESY services was to prevent regression and recoupment problems rather than to advance the educational goals in the Student's IEP. *Id.* at *8 (*citing Letter to Myers* (OSEP Dec. 18, 1989)). Many circuits have used such an analysis,[4] although some have also emphasized that a regression/recoupment analysis is not the sole criterion by which to judge the need for ESY. For example, in *Johnson By and Through Johnson v. Indep. School Dist. No. 4 of Bixby, Tulsa County, Okl.*, 921 F.2d 1022 (10th Cir. 1990), the court stated:

> However, the regression-recoupment analysis is not the only measure used to determine the necessity of structured summer program. In addition to degree of regression and the time necessary for recoupment, courts have considered many factors important in their discussions of what constitutes an "appropriate" educational program under the Act. These include the degree of impairment and the ability of the child's parents to provide the educational structure at home; the child's rate of progress, his or her behavioral and physical problems, the availability of alternative resources, the ability of the child to interact with non-handicapped children, the areas of the child's curriculum which need continuous attention, and the child's vocational needs; and whether the requested service is "extraordinary" to the child's condition, as opposed to an integral part of a program for those with the child's condition.

*Id.* at 1027-28 (internal citations omitted).

One of the cases cited in *Johnson* was *Yaris v. Special School Dist. of St. Louis City*, 558 F.Supp.545, 551 (E.D.Mo. 1983), *aff'd*, 728 F.2d 1055 (8th Cir.1984). At issue in *Yaris* was the State of Missouri's policy of distributing federal funds to local districts for the purpose of educating non-handicapped children during the summer months without providing comparable services to the severely handicapped. Construing the IDEA's predecessor, the Education for All

[4] *See T.M. ex rel. A.M. v. Cornwall Cent. School Dist.*, 752 F.3d 145 (2nd Cir. 2014); *M.M. ex rel. D.M. v. School Dist. of Greenville County*, 303 F.3d 523 (4th Cir. 2002); *S.H. ex rel. A.H. v. Plano Indep. School Dist*., 487 Fed. Appx. 850 (5th Cir. 2012); *Bd. of Educ. of Fayette County, Ky. v. L.M.*, 478 F.3d 307 (6th Cir. 2007); *Todd v. Duneland School Corp.*, 299 F.3d 899 (7th Cir. 2002); *N.B. v. Hellgate Elem. School Dist., ex rel. Bd. or Directors, Missoula County, Mont.*, 541 F.3d 1202 (9th Cir. 2008).

Handicapped Children Act, the court held the policy was discriminatory. The court noted that the experts in the case emphasized that the decision on whether ESY was necessary should be made on an individual basis, considering "the availability of alternative resources, the ability of a handicapped child to interact with non-handicapped children, the areas of the child's curriculum which need continuous attention, the degree of regression suffered by the child, and a child's vocational needs." *Id.* at 551.

While the State Plan does not address the criteria for ESY, the Web site of the Missouri Department of Elementary and Secondary Education (DESE) discusses DESE's position on this issue:

> The seminal extended school year case in Missouri is Yaris v Special School District 558 F. Supp. 545 (E.D. Mo 1983). In Yaris the court held that the school year for special education students cannot arbitrarily be limited to 180 days; that because special education students require individualized programs, an extended school year may need to be part of an individual student's program. Yaris in so holding, recognized the importance of regression/ recoupment considerations in determining whether a 180-day school year meets the individualized program needs of a specific student.
>
> In formulating your district policy you may want to also consider the following factors suggested in various court cases from other jurisdictions:
>
> - Nature of the child's disability;
> - The severity of the disability;
> - The areas of learning crucial to the child's attainment of self-sufficiency and independence;
> - Child's progress, behavioral and physical needs;
> - Opportunities to practice skills outside the formal classroom setting (the more functional the skill, the more opportunities the child has to practice it);
> - Availability of alternative resources;
> - Areas of child's curriculum which need continuous attention;
> - Child's vocational needs;
> - Ability of child's parents to provide educational structure at home; and

> - Opportunity for the child to interact with non-disabled children.
>
> **Regression/recoupment rate is recognized across the nation as the standard in determining whether or not to provide ESY. However, districts must not limit their policies to documented regression/recoupment. Instead, the case law indicates a need for the policy to allow for an extended school year based on the prediction of regression/recoupment problems and must always keep in mind that the decision whether to provide ESY for each student eligible for special education is a decision which should be made based on the unique characteristics of the individual student.** Prediction of regression/recoupment problems is a decision the IEP team might make based on evaluation information, evaluator opinion, and/or looking to the numerous factors, referenced above, from various court cases.

https://dese.mo.gov/special-education/compliance/extended-school-year-policies (emphasis added).

Information on DESE's Web site does not constitute legal authority. Nonetheless, the information reflects a common-sense approach to the issue of whether ESY should be considered for a student, indicating that the potential for future regression and recoupment issues must be considered, not just the Student's history of such issues.

But even if we accepted the District's position, we would still find Harris' testimony on the issue of ESY for Student to be unconvincing. After stating that the criteria for ESY were recoupment and regression, Harris was unable to define the term "recoupment" and admitted she did not know the difference between regression and recoupment. We also conclude that Harris' testimony regarding Student's lack of regression over school breaks is insufficient to overcome the inference we draw from Student's previous District IEPs that ESY *was* necessary to provide her with FAPE; since the time of Student's previous IEPs, the only opportunity that Harris had to

assess Student's regression since the time of the previous IEPs was one spring break, in 2016. [5] Finally, in accordance with *Yaris*, we consider Student's severe deficits in speech/language and behavioral compliance, Mother's testimony that she lacked other resources and lived in an isolated rural area, and Student's documented difficulty in interacting with other children. All of these indicate that Student requires ESY in order to receive FAPE.

Moreover, there is no question – and the District concedes – that Mother's procedural rights under the IDEA were violated in the course of deciding whether Student would receive ESY. In January, Student's IEP team decided that the team would address her need for ESY at a later date. The team did not meet to discuss this issue, and the District determined that Student was not eligible for ESY based on a conversation between Harris and Gurley at the end of the year. In this manner, the team failed to implement Student's IEP, and failed to inform Mother of a decision-making process she had the right to be involved in. *See* 34 CFR § 300.321(a)(1) (IEP team must include child's parent[s]); 34 CFR § 300.322 (parents must be notified of IEP

[5] One other concern regarding Harris' testimony must be noted here. The District agreed to accept service of subpoenas for the District employee witnesses Mother wished to call if they were working during the summer. By e-mail of July 5, 2016, the District's counsel stated he was unable to accept service for Harris. In addition, although Mother placed Harris' name on her witness list that was provided to the District and filed with this Commission on July 7, 2016, Harris' name did not appear on the District's list. Therefore, Mother did not anticipate being able to call Harris, but was able to do so when she saw Harris walking into the building in which the hearing was held on the first day of the hearing. Harris was not working in the District during the summer of 2016. When asked why she appeared for the hearing, District counsel stated he asked her to come "consistent with my representation that we were going to make her available." Tr. 51. In fact, District counsel never made such a representation to Mother. At the hearing, Harris referenced notes she had made in 2016 on Student's behavior, and Mother asked that they be made available. The District objected because Mother had not previously disclosed them as exhibits and that they were not subject to production, but as Mother pointed out, she was not likely to make such a request given her understanding that Harris would not appear. Nonetheless, we sustained the District's objection. We note that the notes – or some notes that Harris made pertaining to Student's behavior – appear in the binder of the District's exhibits as Resp. Ex. GG, but the District did not ask that they be admitted into evidence.

We remind the parties that "[t]he purpose of the IDEA is to ensure that disabled children receive a free appropriate public education. See 20 U.S.C. § 1400(d)(1)(A). To accomplish this purpose, the IDEA grants parents the right to challenge any annual IEP or placement decision at an impartial due process hearing." *Strawn v. Missouri State Bd. of Education*, 210 F.3d 954, 961 n.2 (8th Cir. 2000). The purpose of the IDEA is frustrated if the parties do not interact with one another in a cooperative and straightforward way at all times, including while a due process case is pending.

meetings); 34 CFR § 300.324(1)(a)(6) (changes to an IEP must be made by the entire IEP team at an IEP team meeting unless parent agrees not to convene IEP team to make changes).

The District argues, correctly, that not every procedural violation amounts to a denial of FAPE. Whether a procedural violation amounts to a denial of FAPE depends on whether the violation impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefit. 34 CFR § 300.513(a)(2). The District argues that its procedural violation in this case was essentially harmless, but we disagree. Here, the way the District decided Student's eligibility for ESY services did not just impede Mother's right to participate in the decision-making process; it utterly ignored that right. We conclude that the District's decision to deny ESY services to Student amounted to a denial of FAPE.

We order the district to provide Student with ESY services that shall include, but not be limited to, speech/language therapy. Our order obviously comes too late to provide Student with ESY in 2016. Therefore, Student is entitled to compensatory speech/language services in the amount she would have received had her regular school year programming continued throughout the summer. We calculate this amount at 60 minutes/week x 12 weeks, or 720 minutes compensatory speech/language therapy, to be provided during the 2016-17 school year on a schedule mutually agreeable to the parties.

School Day/Least Restrictive Environment

A shortened school day may be valid under the IDEA if appropriately included in the child's IEP. *Myles S. By and Through S.S. v. Montgomery County Bd. of Education,* 824 F.Supp. 1549, 1561 (D.C. M.D. Ala., 1993); *Doe v. Maher*, 793 F.2d 1470, 1491 (9th Cir.1986), *mod. in part* 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988); *Timms v. Metro. School Dist.*, 722 F.2d 1310, 1312 (7th Cir.1983). In meetings in December 2015 and January 2016, Mother

agreed to a shortened school day for Student, to be gradually lengthened. Student's school day was lengthened by one-half hour beginning in March 2016.

Mother now wishes Student to attend school for full days, and she cites Student's experience in to support her position that full-day school is feasible for her. She also contends that one reason the District has not provided her daughter with all-day school is that she wears diapers. The District disagree with this, and it also argues that Student's experience in–a full school day in a 100% special education class with one teacher, one paraprofessional, and two aides – is not comparable to the school environment in the District, so the experience cannot be used to support the viability of a full-day school year for Student in the District. The District also contends the shortened school day, divided evenly between special education and regular education, was appropriate for Student because it provided her education in the least restrictive environment.

We agree with the District that the IEP team did not place Student in an abbreviated school-day setting because she wore diapers; the evidence indicates that other District students in diapers attended school all day. But we disagree that a shortened school day is appropriate for Student to receive FAPE.

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). 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. *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).

The District is correct that under the IDEA, it must educate Student in the LRE, and it is correct that a roughly equal split[6] between regular and special education is a less restrictive environment than Student's 100% special education placement in . But its argument that this also makes Student's shortened school day appropriate rests on a logical fallacy.

The District's argument fails because it presents the possibilities for Student's placement as binary: either the Student goes to school all day in a special education classroom with more staff support than is present in her current special education class, or she goes to school for four or four and one-half hours, but spends two of those hours in regular education. This is a false dichotomy because 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.

[6] Under the January IEP, Student was in regular education 50% of the time and special education 50% of the time. After the notice of action lengthening her school day by 30 minutes in March 2016, Student was in special education 53% of the time and regular education 47% of the time. We consider this still to be a roughly equal division.

Thus, other placements and supports that could facilitate Student's full school day attendance exist. For example, Student could spend the same amount of time in regular education, but more time in special education. Student could be assigned a one-on-one aide to help address her behavior problems. Short of that, another aide could be assigned to her classroom.

As additional support for Mother's contention that a full-day placement is suitable for Student, Mother points out that during the 2014-15 school year, Hoffman called Mother on a number of occasions to ask her to pick Student up from school,[7] but that did not happen in 2016. Mother inferred from that discrepancy that Student's behavior improved from one year to the next. But in answer to Mother's question about changes in Student's behavior, Harris testified that Student's behavior did not change over that time; rather, that she handled Student's screaming episodes in 2016 by taking her to a room across the hall as a quiet space in lieu of Hoffman's intervention. Even if Harris' contention that Student's behavior did not improve is accurate, the difference in handling that behavior in 2014-15 vs. 2016 proves the point that there are ways to handle Student's disruptive behavior without sending her home or shortening her school day.

Therefore, we reject the District's argument that in order for Student to spend the maximum amount of time in a regular education environment, she must also spend her afternoons at home receiving no instruction. This argument is not only illogical, it ignores the IDEA's requirement that a continuum of alternative educational placements be available in order to provide FAPE. We find that the District has not produced evidence sufficient to counter

[7] Although Hoffman initially denied she asked Mother to pick Student up ("you offered to come pick her", tr. 154), she later admitted, "I have called you on occasion to come pick her up. I mean, I said that wrong." Tr. 159. Harris also testified that Hoffman called Mother to ask her to pick Student up from school. Tr. 107.

Mother's contention, based on Student's experience, that Student is able to tolerate a full-day placement with proper supports.

We note that Mother did not request, in her due process complaint, that a one-on-one aide or an additional paraprofessional be assigned to Student or her classroom. The only evidence in the record regarding the supports necessary for a successful all-day placement is the evidence regarding Student's placement in , in a special education classroom with a teacher and three paraprofessionals or aides. If the addition of one or more aides to Student's class is necessary to ensure the viability of her attending school for a full day, the District must provide those personnel. But the specific measures that need be taken to ensure the success of Student's full-day placement were not the subject of this hearing. Therefore, we confine our order to the following. As of the first day of the 2016-17 school year, Student is entitled to attend school in the District for full school days, in the LRE, as determined by the IEP team. Student's school day should include at least the amount of regular education (approximately 600 minutes/week) that Student currently receives; it may, but is not required to, include more than that. The IEP team should determine the proper supports necessary to ensure the success of Student's all-day placement.[8]

[8] In the District's status report filed on August 9, 2016, it represents that the IEP team has decided to increase Student's special education instruction time by 350 minutes/week for a total of 950 minutes/week, plus Student's 60 minutes/week of speech/language therapy. A notice of action reflecting this change is attached to the status report. Mother signed the notice of action, but added this statement: "I don't agree w/ the time. I want full day. My signing is not saying I agree w/ it just that it can be started." Ex. B. to Resp.'s Report to Commission.

In Mother's status report filed on August 10, 2016, she avers that the "minutes are wrong," and that 150 minutes/week are being added, not 350. This is inconsistent with the notice of action. Mother also states, "If the school wants to stand on the fact of 350 minutes added a week Like Mr. Trakas stated, I will be good with that, as it means she will go all day or just shy of it at about 2:10."

Because the August IEP, like the January IEP, does not state the number of minutes of regular education to be provided to Student, we cannot determine the length of the school day proposed by the IEP team at the August meeting. Therefore, we do not modify our decision or orders to reflect a proposed addition of 350 minutes/week. In addition, we advise the District that the information on minutes of regular education would be a helpful component of any IEP.

Occupational Therapy

Mother presented no evidence from which we can conclude that Student's IEP should include occupational therapy services. From the evidence presented at hearing, however, we gather that Mother wants Student to have an occupational therapy evaluation because she believes that is a component for establishing eligibility for enrollment in the MSSD, which she believes would be beneficial for her daughter. At the hearing, Morgan testified that the District was willing to make the arrangements for the performance of such an evaluation, which is apparently performed by a contractor, not by District personnel.

We order the District to make the arrangements for Student to be evaluated for occupational therapy services. All necessary paperwork to prepare for such evaluation should be completed by the District by August 31, 2016. The evaluation should occur not later than October 31, 2016. We also note that the parties agreed to a comprehensive evaluation including this component at the August 8, 2016 IEP meeting.

Speech/Language Therapy

There is no evidence in the record suggesting that Student did not receive the speech/ language therapy services prescribed by the January IEP. However, Mother is concerned that the speech therapist who worked with Student did not follow certain protocols she alleges are proper for autistic students. Mother cites a behavioral evaluation report prepared by the Southeast Missouri State University Autism Center. The report recites an incident in which Student asked for a break and the speech therapist stated, "No. Work, then you can have a break." Pet. Ex. 22 at 14. Mother argues that when an autistic student with speech/language issues verbally requests a break, a break should be given and not deferred.

The District objected to the report on the ground that it was hearsay. We sustained the objection, but admitted the report, not for the truth of its contents, but to provide context for some of Mother's concerns.

We note that even if we consider the contents of the report for the truth of the matter, it does not prove that Student's speech therapy was delivered inappropriately or ineffectively. First, there is no evidence in the record other than Mother's assertion that the speech therapist handled Student's request for a break inappropriately. Second, even if such handling were deemed inappropriate under certain protocols, that would not prove the speech therapist was not following an equally valid methodology for providing speech therapy to an autistic student. Parents "do not have a right under the [IDEA] to compel a school district to provide a specific methodology in providing for the education of their handicapped child." *Gill v. Columbia 93 School District* 1999 WL 33486649, *14 (W.D.Mo.,1999) *citing Lachman v. Illinois Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988).

Mother's other concern is that she wants Student to receive speech/language therapy during the summer as a component of ESY, as she previously did. Given our determination that Student is entitled to ESY services and the evidence regarding Student's speech/language deficits, we agree that Student should receive speech/language therapy as a component of her ESY services. However, as we previously ordered that Student's ESY include speech/ language therapy, we make no separate order on this issue here.

Homework

Mother has repeatedly discussed homework for Student with teachers and other District staff members. Although Harris' practice is not to assign homework to her special education students, Mother desires that Student receive homework every night to establish a beneficial routine that will assist her as she advances into higher grades in which homework may be an

expectation. The IEP team agreed, but did not include as a goal in Student's IEP, that Student's regular education teacher would send homework home for Student daily.

Harris sent homework home with Student, but Student was frustrated by at least some of it. As a result, Mother grew increasingly dissatisfied with the homework sent home by the School. On March 2, 2016, she wrote an e-mail to Gurley complaining about it, and on March 4, 2016, Hayes wrote Mother a note to inform her that Harris would again be sending homework home beginning on March 7.

The issue before us is whether daily homework should be included in Student's IEP. Although Mother desires this, there is little evidence in the record from which we can conclude that it is necessary for Student to receive FAPE. Nonetheless, Mother presented her opinion, based on her experience with her older children, that it would be beneficial for Student in order to establish positive routines for her, and the District presented no contrary evidence. The District is apparently amenable to including this in Student's IEP because at the August 8, 2016, meeting, the Student's IEP team agreed to include daily homework for Student as a modification/accommodation. Specifically, the August 2016 IEP states: "[Student] will receive homework from the regular education classroom when it is assigned to other students. On days there is no homework assignment in the regular classroom, the special education teacher will send home handwriting practice as homework for [Student]." August 2016 IEP at 15.

Mother's post-IEP status report filed on August 10, 2016, continues to mention concerns about homework, such as that the IEP does not state the names of the teachers who will send the homework home with Student. Nonetheless, we consider that the IEP team satisfactorily addressed this issue in the August IEP and make no further orders on it.

## Other Issues

At various times, Mother has brought up other topics that were not included in our prehearing order as issues for this case. We make no orders on these topics, but offer brief observations for the benefit of the parties.

A. Diapers and Toilet Training. Mother supplies the school with a certain number of diapers per month. The District has agreed to purchase diapers Student may need in excess of Mother's supply. Mother wants the District to obtain the diapers from another source to relieve her obligation to supply them, in whole or in part.

We encourage the parties to continue to work together on this issue. We also note that nothing precludes the parties from making toilet training a goal in Student's IEP, as it has been in others. *See McKay v. School Bd. of Avoyelles Parish*, 2015 WL 9236989 (W.D. La., 2015) (Student's IEP goal was to use the restroom with 100% accuracy in 3/5 trials, given cues and a structured setting). Such a goal would benefit both parties.

B. Eligibility for MSSD. 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.

Mother believes Student would be better served by MSSD than by the District. Harris agreed with Mother, but Gurley and Hayes both stated Student was not eligible for MSSD because her IQ and adaptive scores were too high. Nonetheless, Mother would like Student to be fully evaluated for MSSD eligibility. At the hearing, Morgan represented that the District was willing to undertake that evaluation. The District's status report filed on August 9, 2016, includes a notice of action signed by Mother indicating that Student will undergo a re-evaluation with assessment in the areas of health/motor, language, intellectual/cognitive, adaptive behavior, social/emotional/behavioral skills, and academic achievement, including an evaluation by an occupational therapist. Therefore, it appears this concern has been addressed.

C. Physical Therapy. In her brief, Mother states she wants Student to have physical therapy, but there was no evidence on this point at the hearing, and the issue was not included in our July 5, 2016 order setting forth the subjects for the hearing.

D. Transportation. Mother would like alternative transportation for Student, who currently rides the regular school bus, because she believes it is difficult for Student to tolerate the regular bus environment. This issue was not raised in the due process complaint, and we do not address it here.

E. School of Choice. In several written documents, and at the hearing, Mother asked for "school of choice." She did not include it in her prehearing conference statement of the issues, and we did not include it as an issue for this due process hearing.

School of Choice is a program available in Michigan and certain other states. According to the Web site of the Michigan Department of Education:

> Schools of Choice programs provide students with additional enrollment opportunities, which range from allowing students to determine which school within the resident district they will enroll, to allowing non-resident students to enroll in a district other than their own. Participation in choice programs is optional for districts.

> The degree and extent of participation are determined at the local level, including details such as application and enrollment dates, and which building, grades or programs will be accepting enrollment under a choice program. Interested parties will need to contact districts directly for detailed information regarding their program.

http://www.michigan.gov/mde/0,1607,7-140-6530_30334-106922--,00.html . In short, the program appears to allow students to enroll in a district other than their resident district so long as the receiving district participates in the program. Mother desires this option because she is dissatisfied with the education provided by the District to Student and another of her children.

We have found no indication that the "school of choice" program has been implemented in Missouri. We urge Mother and the District to continue to work together to ensure Student receives FAPE within the District.

**Summary**

The District failed to provide Student with FAPE in 2016 because it did not provide her with ESY. Beginning in 2017, we also order the District to provide Student with ESY services that shall include, but not be limited to, speech/language therapy. We determine that Student is entitled to compensatory speech/language services in the amount she would have received had she received ESY during the summer 2016, or 720 minutes of speech/language therapy, to be provided during the 2016-17 school year on a schedule mutually agreeable to the parties.

We also find that Student is entitled to receive instruction for a full school day in order to receive FAPE. As of the beginning of the 2016-17 school year, Student is entitled to a full day of education in the District, in the LRE as determined by the IEP team. This should include at least the amount of regular education (approximately 600 minutes/week) that Student currently receives. The IEP team should determine the proper supports, such as an additional aide

assigned to Student's classroom, necessary to ensure the success of Student's all-day placement. However, we make no order specifying what those supports should be.

Finally, we order the District to evaluate Student's need for occupational therapy services by no later than October 31, 2016.

SO ORDERED on August 15, 2016.

_____
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.