

**ARKANSAS DEPARTMENT OF EDUCATION  
Special Education Unit**

**IN RE:**

**XXXXXXXXXXXX**

Parents on behalf of **XXXXXX**, Student

**PETITIONER**

VS.

**CASE NO. H-15-07**

**Bentonville School District**

**RESPONDENT**

**HEARING OFFICER'S FINAL DECISION AND ORDER**

**ISSUES PRESENTED:**

Whether the Bentonville School District (hereinafter "District" or "Respondent") denied XXXXXXXX (hereinafter "Student") a free, appropriate, public education (hereinafter referred to as "FAPE") during the 2012-2013 and 2013-2014 academic years, in violation of certain procedural and substantive requirements of the Individuals with Disabilities in Education Act of 2004, 20 U.S.C. §§ 1400-1485, as amended (hereinafter referred to as "IDEA"), by: (1) failing to provide an individualized educational program (hereinafter "IEP") reasonably calculated to provide educational benefit; (2) failing to properly address Student's ongoing behavior issues; (3) engaging in improper restraint and seclusion of Student; (4) failing to educate Student in the least restrictive environment; and (5) failing to grant Parents access to Student's due process file and related records.

**PROCEDURAL HISTORY:**

On September 30, 2014, the Arkansas Department of Education (hereinafter referred to as "Department") received a written request from XXXXXXXXXXXX (hereinafter

“Parents”) to initiate due process hearing procedures on behalf of Student. Parents requested a due process hearing because they believed that the District failed to comply with the IDEA, as well as the regulations set forth by the Department, by failing to provide an IEP reasonably calculated to provide educational benefit, failing to properly address Student’s ongoing behavior issues, engaging in improper restraint and seclusion of Student, failing to educate Student in the least restrictive environment, and failing to grant Parents access to Student’s due process file and related records.

At the time that Parents filed their request for a due process hearing, Student (male) was eight years old, in the third grade, and attending a private school chosen by Parents. Student has not been enrolled in the District since August 2014 when Parents voluntarily withdrew him from school. Because of the two-year statute of limitations, this case pertains only to issues going back to September 30, 2012.

In response to the Parent’s request for hearing, the Department assigned the case to an impartial hearing officer. Thereafter, the date of November 18, 2014 was set as the date on which a hearing would commence if the Parents and District failed to reach resolution prior to that time. An order setting preliminary timelines and instructions for compliance with the order was issued on October 1, 2014.

On October 30, 2014, counsel for Petitioner and Respondent jointly requested a continuance of the scheduled due process hearing. Thereafter, an Order granting the requested continuance was entered on November 6, 2014.<sup>1</sup> Pursuant to this Order, the due process hearing for this matter was continued to January 27, 2015 and was set for four days. A prehearing conference regarding this matter was scheduled for January 23, 2015.

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<sup>1</sup> See Hearing Officer Binder of Pleadings and Orders.

Thereafter, the due process hearing in the above-captioned matter began as scheduled on January 27, 2015. The hearing was open pursuant to Parent's request. Testimony was heard on January 27, 2015, January 28, 2015, and January 29, 2015. The hearing was concluded on January 29, 2015.<sup>2</sup> The following witnesses testified in this matter: XXXXX XXXXX, XXXXX XXXXX (hereinafter "XXXXX"), XXXXX XXXXX (hereinafter "XXXXX"), XXXXX XXXXX (hereinafter "XXXXX"), XXXXX XXXXX (hereinafter "XXXXX"), and XXXXX. Parents had the burden of proof regarding the issues raised in this case.

Having been given jurisdiction and authority to conduct the hearing pursuant to Public Law 108-446, as amended, and Arkansas Code Annotated §§ 6-41-202 through 6-41-223, Danna J. Young, J.D., Hearing Officer for the Arkansas Department of Education, conducted an open impartial hearing. Parent was represented by Theresa Caldwell (Little Rock, Arkansas) and the District was represented by Marshall Ney (Rogers, Arkansas).

Both parties were offered the opportunity to provide post-hearing briefs in lieu of closing statements, and both timely submitted briefs in accordance with the deadline set by this Hearing Officer.<sup>3</sup>

### **FINDINGS OF FACT:**

Student is an eight-year-old male and is currently in the third grade at the Northwest Center for Autism, also referred to as the Grace School, which is a private school in Fayetteville, Arkansas. Student has been at the Northwest Center for Autism (Grace School) since August 2014 when Parents withdrew him from the District.

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<sup>2</sup> See generally Transcript, Volumes 1 through 3.

<sup>3</sup> See Hearing Officer Binder of Pleadings and Orders.

Parent (mother) noticed very early that Student, who was born a fraternal twin, was not progressing at the same rate as his twin sister.<sup>4</sup> Student was diagnosed with Autism at the age of twenty months by child psychologist Dr. Lisa Fitzgibbons (hereinafter “Dr. Fitzgibbons”), and by the age of two years, Student was nonverbal and completely withdrawn.<sup>5</sup> Parents immediately took steps to enroll Student in speech, occupational, and physical therapies to address his disability.<sup>6</sup> Prior to attending school in the Bentonville School District, Student attended the Helen Walton Child Enrichment Center and was able to be integrated with non-disabled peers.<sup>7</sup>

When Student was five years old, prior to attending kindergarten, he was reevaluated by Dr. Fitzgibbons.<sup>8</sup> Dr. Fitzgibbons reported that Student was “twice exceptional,” and, thus, exhibited high intellectual abilities; however, Student continued at that time to struggle with self-regulation, peer relationships, and social reciprocity.<sup>9</sup> Based on this and other evaluations, Student began attending school in the Bentonville School District and began receiving special education services.<sup>10</sup> Student attended school in the Bentonville School District during kindergarten, first grade, and second grade, attending Elm Tree Elementary during kindergarten and first grade, and Sugar Creek Elementary during second grade.

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<sup>4</sup> Transcript, Volume 1, pp. 44-45.

<sup>5</sup> *Id.* at p. 45.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> The statute of limitations in this case is two years; therefore only events occurring between September 30, 2012 and September 30, 2014 will be considered for purposes of determining whether violations of the IDEA occurred. Events occurring prior to that time are referenced as background information so as to understand historical context in this case.

<sup>9</sup> Parent Binder, p. 130.

<sup>10</sup> Transcript, Volume 1, pp. 46-50.

On September 30, 2014, Parents filed a complaint with the Department and, therein, requested a due process hearing. In the complaint, Parents alleged procedural and substantive violations of the IDEA, specifically stating that Student had been denied FAPE.<sup>11</sup> In Parent's opinion, Student was doing very well at the Northwest Center for Autism (Grace School) and that she wanted Student to continue attending the school.<sup>12</sup>

**2012-2013 School Year: 1<sup>st</sup> Grade**

At the beginning of the 2012-2013 academic year, Student's first grade year, Student was operating under an IEP that was developed on June 1, 2012 (duration of services to be through June 1, 2013).<sup>13</sup> Pursuant to the IEP, Student was scheduled to receive 800 minutes of general education and 1300 minutes of special education per week.<sup>14</sup> In addition, Student was scheduled to receive speech therapy for a duration of 30 minutes per week.<sup>15</sup> The IEP contained a statement of present levels, which indicated that Student was on grade level, with specific notation that Student was performing above grade level in mathematics. The IEP further stated that Student exhibited "physically aggressive behaviors towards staff and other students" when he was angry, frustrated, or upset.<sup>16</sup> The IEP contained a "Behavior Support Plan" (hereinafter "BSP") to address the behaviors that impeded Student's learning, such as tantrums which escalated to yelling, scratching, punching, biting, and pulling hair,<sup>17</sup> The IEP indicated that the following supports would be utilized to address these behaviors: (1) point economy system; (2) visual behavior

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<sup>11</sup> See Hearing Officer Binder of Pleadings and Orders.

<sup>12</sup> Transcript, Volume 3, pp. 343-49.

<sup>13</sup> District Binder, p. 686.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at pp. 678-79.

reminder (5-point scale); (3) communication with parents via weekly behavior sheets; and (4) use of paraprofessional when Student was in general education activities.<sup>18</sup> An explanations of each of these supports was included in the IEP.<sup>19</sup>

The June 1, 2012 IEP contained annual goals for behavior, English language arts, math, and English language arts/speech. In addition, the June 1, 2012 IEP contained instructional modifications, supplemental aids, and supports for Student. Specifically, Student was be provided short instructions, encouragement to verbalize steps needed to complete assignments, preferential seating, visual aids, study aids/manipulatives, extended time for testing, and small group testing. Regarding management of Student's behavior, Student was to be provided clearly defined rules, limits, and consequences, modeling of appropriate behavior, frequent reminder of rules, supervision during transitions, and praise for appropriate behavior. Student was also to be provided with a paraprofessional in all general education activities.<sup>20</sup>

Parents (mother and father) were present at the IEP meeting on June 1, 2012, and signed indicating participation.<sup>21</sup> In addition, a special education advocate was present and signed indicating participation.<sup>22</sup>

During the first grade, Student attended school at Elm Tree Elementary.<sup>23</sup> Elm Tree Elementary operates on a year-round schedule. Students have regular breaks throughout the school year as a result.<sup>24</sup>

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<sup>18</sup> *Id.* at p. 681.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at pp. 739, 742.

<sup>21</sup> *Id.* at p. 751.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at p. 686.

On October 29, 2012, a separate programming conference was held to discuss Student's BSP, as well as to discuss obtaining data to determine Student's progress on current IEP goals.<sup>25</sup> At this conference, Student's BSP was reviewed and updated, and it was determined that Student would begin participating in adaptive physical education.<sup>26</sup> It was also noted that Student's BSP included the implementation of a point system so that Student could receive daily rewards for appropriate behavior.<sup>27</sup> Parents (mother and father), as well as a special education advocate, attended and participated in this programming conference.<sup>28</sup>

On December 5, 2012, a separate programming conference was held to review Student's current IEP and individual test reports.<sup>29</sup> Although there was mention of the fact that a BSP had been implemented for Student and was ongoing, the focus of the programming conference was to devise a plan to review current goals, review current assessments, observe Student, and then begin writing new goals for the second semester of Students' first grade year. It was noted that the IEP team would meet again at the beginning of 2013 to determine goals.<sup>30</sup>

Between January 2013 and March 2013, according to documents in the record, Student engaged in severely aggressive behavior on at least nine separate occasions. Specifically, Student exhibited aggressive behavior on January 17, 2013, January 24, 2013, February 4, 2013, February 6, 2013, February 7, 2013, February 8, 2013, February 22,

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<sup>24</sup> Transcript, Volume 2, p. 63.

<sup>25</sup> District Binder, p. 869.

<sup>26</sup> Parent Binder, pp. 194A-194C.

<sup>27</sup> District Binder, p. 869.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at p. 868.

<sup>30</sup> *Id.*

2013, February 27, 2013, and February 28, 2013.<sup>31</sup> A review of the documentation regarding these incidents indicates that Student engaged in the following aggressive behaviors toward staff, peers and himself: hitting, spitting, throwing objects, yelling, biting, pushing into walls and objects, scratching, pulling hair (sometimes ripping out hair), head butting, pulling clothing, attempting to insert spit into electrical outlet, disrobing, attempting to choke self by putting finger down throat, running around the room, banging on doors, and banging on glass.<sup>32</sup> He further engaged in the following destructive behaviors toward school property: pushing over cabinets, throwing furniture, throwing school supplies, tearing the back off of cabinets, dumping out containers, ripping handles off of closed shelves, throwing books, kicking computer monitors, kicking chairs and desks, and urinating on carpet.<sup>33</sup>

Documents describing Student's aggressive behavior incidents show that school staff attempted to diffuse Student's behavior with stated interventions from the BSP.<sup>34</sup> When this was not successful, however, Student sometimes had to be transported to an alternate location for a time out.<sup>35</sup> In addition, when staff was unable to successfully block Student's aggressive behavior toward them or prevent Student from hurting himself, Student would be placed in a CPI (Crisis Prevention Institute) hold, referred to in documentation as the children's control position.<sup>36</sup> A children's control was described as a

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<sup>31</sup> *Id.* at pp. 34-39, 206-10, 211-19, 272, 274-281, 284-299, 322-323, 328-29.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*



hold where staff, standing behind Student, holds his wrists so that Student's arms are wrapped around him.<sup>37</sup>

Student's aggressive behaviors occurred in the classroom, as well as the conference room, which was the location that Student was taken when he needed to be relocated to an alternate location for a time out.<sup>38</sup> Student sometimes had to be transported from one location to another, and also had to be restrained in some situations.<sup>39</sup> A restraint form was completed when Student had to be restrained.<sup>40</sup> Student was not locked in the conference room when he was taking a time out. The conference room had two doors, one that exited to the hallway and another that exited to the principal's office. The door leading to the hallway was locked for safety; however, the door leading into the principal's office was always unlocked.<sup>41</sup> A staff member was always in the conference room during the time out, or standing at or right outside of the doorway to the room, when Student was in the room.<sup>42</sup> The conference room had windows in the wall, as well as windows inset in the door.<sup>43</sup> Depending on the incident, Student was in the conference room, in time out, anywhere from ten minutes to a couple of hours.<sup>44</sup>

Physical restraint was to be utilized as a last resort, reserved only for situations on which Student was in imminent danger to himself or others.<sup>45</sup> Physical restraint was never used as punishment or a planned behavior intervention. The restraint incident reports

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<sup>37</sup> Transcript, Volume 1, p. 260.

<sup>38</sup> *Id.*, pp. 221-22.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 223-24.

<sup>42</sup> *Id.* at 224.

<sup>43</sup> *Id.* at 94.

<sup>44</sup> *Id.* at 243.

<sup>45</sup> *Id.* at 261.

show that Student was only restrained until he appeared to calm down and then was immediately released. Student was not verbally abused, ridiculed, or humiliated when physically restrained, and Student's ability to communicate was never restricted.

On March 8, 2013, a separate programming conference was held.<sup>46</sup> Prior to this meeting, a CIRCUIT referral had been made requesting assistance from the state to review Bentonville's autism program and make recommendations on how to better assist Student.<sup>47</sup> The purpose of this conference was to discuss the possibility of transitioning Student from the autism room to the general education setting, as well as to review information gathered from the CIRCUIT referral which had been requested. At this meeting, it was decided by the IEP team that a functional behavior analysis (hereinafter "FBA") would be completed, and Student's BSP would be revised. The notice of decision also stated Student's special education teacher, aides, and administration would assist Student to calm down if his behavior began to escalate. If Student was unable to calm down, he would be removed to an alternate location." Parent (mother) signed an informed consent so that an FBA could be conducted.

Between the March 8, 2013 separate programming conference and May 30, 2013, according to documents in the record, Student engaged in severely aggressive behavior on at least eight separate occasions. Specifically, Student exhibited aggressive behaviors, similar or same as those described *supra*, on March 11, 2013, March 13, 2013, April 3, 2013, April 8, 2013, April 16, 2013, April 19, 2013, April 23, 2013, and April 24, 2013.<sup>48</sup> As with the previous incidents described, documents describing Student's aggressive behavior

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<sup>46</sup> District Binder, p. 857.

<sup>47</sup> Transcript, Volume 2, p. 18.

<sup>48</sup> *Id.* at pp. 220-36, 254-69, 300-10, 314-17.

indicated that District staff attempted to diffuse Student's behavior with stated interventions from the BSP.<sup>49</sup> When this was not successful, however, Student sometimes had to be transported to the conference room for a time out for purposes of calming down.<sup>50</sup> In addition, when staff was unable to successfully block Student's aggressive behavior toward them, or prevent Student from hurting himself, Student would be placed in a CPI hold.<sup>51</sup>

Beginning March 11, 2013 and ending April 19, 2013, the District observed Student's behavior and completed a weekly functional assessment observation form in preparation of the FBA.<sup>52</sup> There was some delay in completing the functional behavior assessment on account of Elm Tree Elementary School's nontraditional schedule, stating specifically that spring break and a break in May delayed the assessment. In addition, there were delays on account of Student missing school, as well as scheduling conflicts with the CIRCUIT team.<sup>53</sup>

On May 30, 2013, an IEP meeting was held at which time Student's IEP for the upcoming school year (second grade) was developed. The duration of services on the IEP was from August 1, 2013 to August 1, 2014.<sup>54</sup> The IEP provided for 400 general education and 1700 special education minutes per week. In addition, the IEP provided that Student

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at pp. 364, 425-28, 433-38, 439.

<sup>53</sup> Transcript, Volume 2, p. 65.

<sup>54</sup> District Binder, pp. 652-73.

would receive 60 minutes of speech each week, and 30 minutes of occupational therapy each quarter. The IEP also provided six different annual goals for Student.<sup>55</sup>

The IEP contained a statement of present levels which stated that, on the 2013 MAP assessment (spring), Student scored 180 in reading and 204 in math. The end of year reading goal for same aged peers was 177, and the end of year math goal for same-aged peers was 179, indicating that Student's scores exceeded the expected scores for his same-aged peers.<sup>56</sup> The STAR reading test was administered to Student on April 19, 2013, and Student scored a scaled score of 66, which indicated that he scored greater than only 2% of students nationally in the same grade and had a grade equivalent of 0.7.<sup>57</sup> This was the same grade equivalent documented for Student in June 2013; however, it was noted in the IEP that Student had a behavioral incident on same date the test was administered.<sup>58</sup> Student's STAR math score, which was administered on April 24, 2013, indicated that Student's scaled score was 525, which placed him greater than 95% of students nationally in the same grade.<sup>59</sup> Student's grade equivalent in math was 3.1, as compared to 2.2 in June 2013.<sup>60</sup>

The May 30, 2013 IEP stated that Student continued to display aggressive behaviors, including verbal aggression, nonverbal threats of harm, and physical aggression, when he encountered a task demand that was "challenging, requires writing or is non-preferred."<sup>61</sup> The May 30, 2013 IEP indicated that Student had met 3/3 speech objectives, 0/6 behavior

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<sup>55</sup> *Id.* at pp. 144-45, 662-68.

<sup>56</sup> *Id.* at p. 655.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

objectives, 0/7 reading objectives, 0/4 writing objectives, and 7/8 math objectives during the 2012-2013 school year. In addition, the May 30, 2013 IEP stated that Student had met 22 of 41 first grade standards. The May 30, 2013 IEP, as well as testimony, established that the IEP team was talking with Parents during this IEP meeting about moving Student from Elm Tree Elementary, which has a non-traditional, year-round school schedule, to Sugar Creek Elementary, which has a traditional schedule.<sup>62</sup> Parents expressed some concerns about this move, and the discussion was tabled until June 10, 2013, when the IEP team would reconvene.<sup>63</sup>

On June 10, 2013, the IEP team reconvened the annual review conference meeting to discuss placement for Student, his BSP, and continued development of the IEP for the upcoming school year.<sup>64</sup> Parents once again shared their concerns about moving Student to Sugar Creek Elementary. It was determined Student would remain at Elm Tree Elementary, but that his behavior would be reevaluated after the break to determine if the proposed change in placement needed to be reconsidered.<sup>65</sup>

Between the June 10, 2013 annual review conference and August 2013, pursuant to documents in the record, Student engaged in severely aggressive behavior on at least five separate occasions.<sup>66</sup> Specifically, Student exhibited aggressive behaviors, similar or same as those described regarding previous incidents, on June 13, 2013, June 14, 2013, June 17, 2013, June 18, 2013, and June 19, 2013.<sup>67</sup> Regarding some of these incidents, Student had

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<sup>62</sup> *Id.*; see also Transcript, Volume 3, p. 327-29.

<sup>63</sup> District Binder, p. 839.

<sup>64</sup> *Id.* at p. 832.

<sup>65</sup> *Id.*; see also Transcript, Volume 3, p. 327-29.

<sup>66</sup> District Binder, pp. 238-44.

<sup>67</sup> *Id.*

to be transported to a time out room.<sup>68</sup> In addition, when staff was unable to successfully block Student's aggressive behavior toward them or prevent Student from hurting himself, Student was placed in a CPI hold.<sup>69</sup>

**2013-2014 School Year: 2<sup>nd</sup> Grade**

Prior to the beginning of the 2013-2014 school year, Student's second grade year, Parents agreed to transfer Student from Elm Tree Elementary, where Student had been operating on a non-traditional school calendar, to Sugar Creek Elementary, where Student would begin operating on a traditional school calendar.<sup>70</sup> On August 9, 2013, an IEP meeting was held for the purpose of transiting Student's IEP to the staff at Sugar Creek Elementary. As part of this process, a new IEP was developed.<sup>71</sup> The duration of services for the IEP was August 19, 2013 to August 19, 2014.<sup>72</sup>

Pursuant to the August 9, 2013 IEP, Student was scheduled to receive 400 minutes of general education and 1700 minutes of special education per week.<sup>73</sup> In addition, Student was scheduled to receive speech therapy for a duration of 60 minutes per week.<sup>74</sup> Regarding the statement of Student's present levels, the IEP reiterated the levels which were addressed in the May 30, 2013 IEP. Specifically, at the end of first grade, Student's reading score indicated that Student was performing between beginning of the year and

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Transcript, Volume 3, pp. 327-335.

<sup>71</sup> District Binder, p. 651.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

mid-year goal for second grade. Student's math score indicated that Student was performing at mid-year goal for fourth grade.<sup>75</sup>

The IEP further addressed Student's aggressive behaviors and included a FBA, as well a revised BSP which had been provided to Parents on June 10, 2013. The revised BSP, which had been developed with assistance from behavioral consultants from the state of Arkansas, outlined setting event strategies, preventative strategies, teaching strategies, and consequence strategies. Setting event strategies included parent communication, availability of "help" and "break" cards, predictable schedule, token system for completing activities, choices for work output, and positive praise and interaction when behavior was appropriate to avoid negative attention seeking behavior. Preventative strategies included review of behavioral expectations with Student, use of five-point scale, use of behavior thermometer to identify feelings, consistent arrival and departure time each day, and structured schedules and routines. Teaching strategies included video self-monitoring of student performing replacement behaviors, teaching/modeling use of "break" card, teach/model five-point scale, and teach Student to follow simple verbal cues when he begins to escalate. Consequence strategies included use of appropriate cue cards with verbal commands during escalation of undesired behavior and reduced interaction with adults until appropriate behavior occurs.<sup>76</sup>

The BSP also included a crisis response plan that provided staff with responses to situations when Student was engaging in aggressive behavior. The crisis intervention plan included personal safety techniques when Student was hitting, kicking, holding dangerous

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<sup>75</sup> *Id.* at p. 654.

<sup>76</sup> *Id.* at p. 789; Transcript, Volume 3, p. 243.

objects, and pulling clothes, as well as addressed utilization of restraint techniques for continuous aggressions, continuous self-injurious behavior, and continuous high magnitude disruption.<sup>77</sup>

The August 9, 2013 IEP contained annual goals for behavior, English language arts, and math. In addition, the IEP included instructional modifications, supplemental aids, and supports for Student which were nearly identical to those provided on the June 1, 2012 IEP. Parent (mother) was present at the IEP meeting on August 9, 2013, and signed indicating participation.<sup>78</sup> In addition, Dr. Fitzgibbons, who was Student's psychologist, was present at the meeting and signed indicating participation.<sup>79</sup>

During the 2013-2014 school year, Student experienced a significant decrease in aggressive behavior incidents. Student was not "melting down" every day, and Student liked going to school.<sup>80</sup> Student's behavior showed improvement and he was not being physically restrained as a result of lack of aggressive behavior.<sup>81</sup> There were no incidents in the 2013-2014 school year where Student was physically restrained, and this improvement was attributed to Student's new setting in a traditional calendar school, specialized transportation to and from school, and a revised BSP.

Beginning in May 2014, Student's behaviors began to escalate once again, and Student began eloping from school. The record shows that Student had numerous incidents of tardiness and several early checkouts during the spring 2014 semester, as

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<sup>77</sup> *Id.* at p. 792.

<sup>78</sup> *Id.* at p. 751.

<sup>79</sup> *Id.* at p. 675.

<sup>80</sup> Transcript, Volume 3, pp. 336-37.

<sup>81</sup> *Id.* at pp. 370-71.



opposed to few incidents of tardiness and early checkouts in the fall semester 2013.<sup>82</sup> Student was no longer riding the special education bus, as he had been in the first semester of the 2013-2014 school year.<sup>83</sup> As a result of these changes, some of the predictability of Student's school environment was eliminated. In August 2014, Parents made the decision to move Student to the Northwest Center for Autism (Grace School). Parent (mother) notified the Bentonville School District in writing that she was removing Student from the District and sending him to the Northwest Center for Autism (Grace School).<sup>84</sup> Student's tuition at the Northwest Center for Autism is \$1855 per month, and Parent testified that she has additional transportation costs because the school is located in Fayetteville, Arkansas and requires that she travel round trip from Bentonville to Fayetteville each school day.<sup>85</sup>

### **Other Information**

The record contains a report by Dr. XXXXX XXXXX, Ph.D, BCBA-D.<sup>86</sup> In his report, Dr. XXXXX addressed the use of evidence-based strategies for addressing challenging behavior. Specifically, the evidence-based strategies that he discussed included, but were not limited to, FBAs, the use of reinforcement, antecedent-based strategies (*i.e.* visual schedules and reminders), and consequence-based strategies (*i.e.* positive reinforcement, token economy system).<sup>87</sup>

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<sup>82</sup> *Id.* at p. 361.

<sup>83</sup> *Id.* at p. 165.

<sup>84</sup> *Id.* at pp. 343-46.

<sup>85</sup> *Id.* at pp. 347-48.

<sup>86</sup> Parent's Binder, pp. 619-622.

<sup>87</sup> *Id.* at p. 628-39.

Dr. XXXXX observed Student at the Northwest Center for Autism (Grace School) on January 16, 2014 for 1.5 hours.<sup>88</sup> During his observation, Dr. XXXXX noted that the teacher used evidence-based practices including “[d]irect Instruction reading and mathematics curricula, group contingencies of reinforcement, choral responding, token economies, differential reinforcement, negative reinforcement, time delay, and stimulus control.”<sup>89</sup> Dr. XXXXX noted that there were eight students in the classroom with one teacher.<sup>90</sup> Student was not exposed to any peers in the classroom that appeared to be non-disabled.<sup>91</sup>

Dr. XXXXX report stated that Student was well-behaved throughout the duration of his observation.<sup>92</sup> In forming his opinion’s regarding Student, Dr. XXXXX reviewed documentation provided by the school that indicated that Student had attended the school since August 2014, and in the first three months of school engaged in 90 instances of property destruction and 350 instances of aggressive behavior toward others. Between November 2014 and mid-January 2015, however, Student had engaged in only three incidents of property destruction and one incident of aggressive behavior.<sup>93</sup> In the first three months of school, Student eloped twenty three times, but since October 2014 has had no other instances of elopement. <sup>94</sup> Dr. XXXXX stated that, in his opinion, the Northwest Center for Autism (Grace School) was the appropriate placement for Student.<sup>95</sup>

Dr. XXXXX made the following conclusions in his report: “There exists clear and unequivocal evidence indicating the denial of process and benefit standards of FAPE.

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<sup>88</sup> *Id.* at p. 656.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 282.

<sup>92</sup> Parent’s Binder, p. 656.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

[Student] was not provided access to the least restrictive environment when entering kindergarten or subsequent school years. Student failed to receive meaningful benefit due to poorly constructed IEPs, delays in conduction of FBAs, incorrect conduction of FBAs, poorly designed BSPs, failure to use evidence-based practices, and repeated, inappropriate applications of seclusion and restraint. “<sup>96</sup> Dr. XXXXX also recommend compensatory education, program evaluation and personnel training.”<sup>97</sup>

Dr. XXXXX did not observe Student in a classroom setting during the 2013-2014 school year when Student was a second grader at Sugar Creek Elementary.<sup>98</sup>

Parent (mother) testified that despite request for information starting in March 2014, she had not received all of Student’s records from the District. Parent testified that she submitted a FERPA request in July 2014, but that she received a certified letter from the District stating that her attorney had all documents and reports.<sup>99</sup> Attorney for Petitioner, Mrs. Caldwell, sent to Respondent’s attorney, Mr. Ney, a letter dated November 22, 2014 requesting records. Parent testified that, to her knowledge, the requested records were not received.<sup>100</sup> Parent testified that she had received 852 documents on January 20, 2015 pursuant to the five-day rule in this case, but that she had never seen some of the documents that were provided on that date, despite her requests.<sup>101</sup> This case was previously prepared and litigated before another due process hearing officer prior to being dismissed without prejudice.

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<sup>96</sup> *Id.* at p. 658.

<sup>97</sup> *Id.*

<sup>98</sup> Transcript, Volume 3, p. 250.

<sup>99</sup> Transcript, Volume 1, p. 107-09.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

## **CONCLUSIONS OF LAW AND DISCUSSION:**

Pursuant to Part B of the IDEA, states are required to provide a FAPE for all children with disabilities between the ages of three and twenty-one.<sup>102</sup> In 1982, in *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, the U.S. Supreme Court addressed the meaning of FAPE and set forth a two-part analysis that must be made by courts and hearing officers in determining whether a school district has failed to provide FAPE as required by federal law.<sup>103</sup> Pursuant to *Rowley*, the first inquiry that a court or hearing officer must make is that of whether the State, *i.e.* local educational agency or district, has complied with the procedures set forth in the IDEA. Thereafter, it must be determined whether the IEP(s) developed pursuant to IDEA procedures was reasonably calculated to enable the student to receive educational benefits.<sup>104</sup>

### ***Allegations of Procedural Violations of the IDEA***

It must first be determined whether District complied with the procedures set forth in the IDEA. In the present case, Petitioner asserts that District procedurally violated the IDEA by failing to grant Parents access to Student's due process file and related records.

Parents assert that the District failed to provide all of Student's educational records, as requested prior to and during the pendency of this matter. Parent (mother) alleged that, despite a FERPA request and requests by her attorney for records, she received some documents on January 20, 2015, pursuant to the five-day rule, that she had never seen before.

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<sup>102</sup> 20 U.S.C. § 1412(a); 34 C.F.R. § 300.300(a).

<sup>103</sup> 458 U.S. 176, 206-07 (1982).

<sup>104</sup> *Id.*

In the present case, Parents have failed to provide sufficient evidence to establish that the District failed to provide requested documents. In addition to the lack of sufficient evidence on this issue, it seems unlikely to this Hearing Officer that records were withheld in this case, particularly in light of the fact that this case was previously prepared and litigated before another hearing officer before being dismissed and refiled in September 2014. Specifically, the District fully prepared and litigated its case for the initial hearing in this matter in early 2014. Following the hearing, Parents dismissed this matter and subsequently refiled the case on September 30, 2014. It makes no sense that the District would fully prepare for and litigate this matter in early spring 2014 using approximately 800 fewer documents than it would produce and rely on in the hearing of this matter which commenced on January 27, 2015.

Having considered Parents allegations of procedural due process violations, and in light of the findings and conclusions *supra*, it is the conclusion of this Hearing Officer that Student was not denied FAPE as a result of procedural violations of the IDEA.

***Allegations of Substantive Violations of the IDEA***

Having analyzed the first prong of the FAPE analysis, it is now necessary to consider whether the District substantively denied FAPE to Student. Pursuant to *Rowley*, the goal of the IDEA is “more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.”<sup>105</sup> Essentially, an IEP is not required to be designed to “maximize a student’s potential commensurate with the opportunity provided to other children,” thus making the standard

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<sup>105</sup> *Id.* at 192

that District must meet very minimal.<sup>106</sup> However, what constitutes educational benefit when dealing with a disabled student must be determined on a case-by-case basis. Specifically, “[t]he IDEA requires public school districts to educate ‘a wide spectrum of handicapped children,’ and the benefits obtainable by children at different ends of the spectrum will ‘differ dramatically.’”<sup>107</sup>

The IDEA also requires that students with disabilities be educated in the least restrictive environment pursuant to 20 U.S.C. §1412(a)(5). There is a “strong preference in favor of disabled children attending regular classes with children who are not disabled,” resulting in a “presumption in favor of public school placement.”<sup>108</sup> However, the IDEA “significantly qualifies the mainstreaming requirement by stating that it should be implemented to the ‘maximum extent appropriate.’”<sup>109</sup> Essentially, a disabled student should not be separated from his or her peers unless the services that make segregated placement superior cannot be “feasibly provided in a non-segregated setting.”<sup>110</sup> The requirement to mainstream is not applicable when it “cannot be achieved satisfactorily.”<sup>111</sup> As such, it is permissible to remove a disabled child from a mainstream environment when he or she would not benefit from mainstreaming or when the “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.”<sup>112</sup>

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<sup>106</sup> *CJN v. Minneapolis Pub. Sch.*, 323 F.3d 630, 68-39 (8th Cir.), cert. denied, 540 U.S. 984 (2003).

<sup>107</sup> *C.B., by and through his parents, B.B. and C.B. v. Special Sch. Dist. No. 1, Minneapolis, MN*, 636 F.3d 981 (8th Cir. 2011) (quoting *Rowley*, 458 U.S. at 202).

<sup>108</sup> *CJN*, 323 F.3d at 641.

<sup>109</sup> *Pachl v. Seagren*, 453 F.3d 1064, 1067 (8th Cir. 2006); see also 20 U.S.C. § 1412[a](5).

<sup>110</sup> *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983).

<sup>111</sup> *Pachl*, 453 F.3d at 1068.

<sup>112</sup> *Roncker*, 700 F.2d at 1063.

In the present case, Parents asserted that the District failed to provide FAPE when it: (1) failed to develop and implement an appropriate IEP for Student that was reasonably calculated to provide educational benefit; (2) failed to properly develop and implement an appropriate BSP to address Student's ongoing behavioral issues; (3) engaged in improper restraint and seclusion of Student; and (4) failed to educate Student in the least restrictive environment.

**Appropriate IEP.** Parents asserted that the District failed to develop and implement an appropriate IEP that was reasonably calculated to provide educational benefit to Student. Specifically, Parents asserted that a denial of FAPE is evidenced by the fact that the District provided insufficient evidence to establish academic progress of Student, and that Student's academic abilities deteriorated over the course of the 2012-2013 and 2013-2014 school years.

"Academic progress is an 'important factor' in deciding 'whether a disabled student's IEP was reasonably calculated to provide educational benefit.'"<sup>113</sup> For children who are Student's age, the IDEA requires that IEPs include the following: "(1) a statement of the student's present levels of academic and functional performance, (2) measurable annual goals, (3) a description of how progress will be measured, (4) a statement of educational and related services to be provided, (5) an explanation of the extent to which the student will not be in the regular classroom, (6) a statement of accommodations necessary to measure achievement, and (7) the date on which services will commence."<sup>114</sup>

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<sup>113</sup> *M.M.*, 702 F.2d at 479 (citing *CJN*, 323 F.3d at 638 (citing *Rowley*, 458 U.S. at 202)).

<sup>114</sup> *Park Hill Sch. Dist. v. Dass*, 655 F.3d 762 (8th Cir. 2011). See also 20 U.S.C. § 1414(d)(1)(A)(i).

In the present case, the record shows that Student's IEP was reasonably calculated to enable Student to receive educational benefit during the 2012-2013 academic year, while Student attended Elm Tree Elementary, as well as during the 2013-2014 academic year, while Student attended Sugar Creek Elementary. Prior to the commencement of both school years, the District prepared an IEP for Student that included specific goals for math, English language arts, and behavior. In addition, Student's IEPs for both academic years included a statement of the student's present levels of academic performance, progress indications, a statement of educational and related services being provided to Student, an explanation of the extent to which Student would be in special education classes versus the general education, a statement of accommodations necessary to measure Student's achievement, and the date on which services outlined in the IEP would commence. The IEPs also outlined Student's progress toward his goals.

Parents contended that, despite the various components present in Student's IEPs for the 2012-2013 and 2013-2014 academic years, Student's academic performance declined significantly as his behavior deteriorated. Specifically, Parents point to progress reporting that occurred at the May 30, 2013 IEP meeting regarding Student's progress during the 2012-2013 academic year. The May 30, 2013 IEP indicated that Student had met 3/3 speech objectives, 0/6 behavior objectives, 0/7 reading objectives, 0/4 writing objectives, and 7/8 math objectives during the 2012-2013 school year. In addition, the May 30, 2013 IEP stated that Student had met 22 of 41 first grade standards. Parents assert that the failure of Student to meet stated IEP goals indicates that Student was not



benefitting from his instructional program and, thus, that his IEPs were inappropriate and constituted a violation of FAPE.

“When a disabled student has failed to achieve some major goals, it is difficult to look back at the many roads not taken and ascertain exactly how reasonable his IEPs were at the time of their adoption.”<sup>115</sup> The Eighth Circuit has held that specific results are not required, and an IEP is not required to be designed to “maximize a student’s potential ‘commensurate with the opportunity provided to other children.’”<sup>116</sup>

The May 30, 2013 IEP, in addition to indicating the number of goals mastered, stated Student’s 2013 MAP assessment (administered in Spring 2013). On this assessment, Student scored 180 in reading and 204 in math. Comparatively, the end of year reading goal for same aged peers was 177, and the end of year math goal for same-aged peers was 179, indicating that Student’s scores exceeded the expected scores for his same-aged peers. Essentially, despite Student’s deteriorating behavior beginning in early spring 2013, Student still received academic benefit. Parent pointed out that Student’s STAR reading test score during the same period showed no increase in grade equivalent during the 2012-2013 academic year, a fact that this Hearing Officer also observed. However, the record established that Student had a behavioral incident on the same date that he was administered the STAR reading test. For this reason, and in light of Student’s reading score on the MAP test, it appears that the STAR reading test was likely unreliable in this case. Student’s STAR math test, however, showed scores commensurate to those seen on the

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<sup>115</sup> *CJN*, 323 F.3d 630 (8th Cir. 2003).

<sup>116</sup> *Id.*

MAP test. Specifically, in a year's time, Student's math progressed from a grade equivalent of 2.2 to that of 3.1.

In sum, Parents have failed to meet their burden in regards to establishing that Student was not academically progressing during the 2012-2013 academic year at Elm Tree Elementary School, and the 2013-2014 academic year at Sugar Creek Elementary.<sup>117</sup> Although Student may not have progressed as much as Parents would have preferred, Student did receive educational benefit, despite his behavior issues, and therefore was not denied FAPE during the 2012-2013 and 2013-2014 academic years.

**Development and Implementation of Behavior Support Plan.** Parents asserted that Student was not provided FAPE on account of the fact that his BSP, as developed by the District, was inappropriate in light of Student's behaviors, and, further, was not properly implemented and followed. In addition, Parents asserted that the District failed to take additional steps to modify Student's BSP in a timely manner once Student's behaviors began to escalate in January 2013, and failed to timely conduct a FBA. In support of these arguments, Parents relied on the report and testimony of expert witness, Dr. XXXXX XXXXX. Dr. XXXXX concluded that the District's ineffective management of Student's behavior resulted in academic decline and constituted a violation of FAPE.

"When a child's learning is impeded by behavioral issues, the IDEA requires that the IEP team 'consider the use of positive behavioral interventions and supports, and other strategies, including positive behavioral interventions.'"<sup>118</sup> A failure to address behavioral

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<sup>117</sup> It is noted that insufficient evidence was presented to establish Student's academic progression at the end of the 2013-2014 academic year.

<sup>118</sup> *M.M.*, 702 F.2d at 479 (citing 20 U.S.C. §1414(d)(3)(B)(i)).

issues appropriately can amount to a denial of FAPE for a student.<sup>119</sup> The Eighth Circuit Court of Appeals has stated that “it is ‘largely irrelevant’ if the school district could have employed ‘more positive behavior interventions’ as long as it made a ‘good faith effort’ to help the student achieve the educational goals outlined in his IEP.”<sup>120</sup> In addition, a school is not required to change methodologies based on the preferences of each parent. In fact, doing so would create the potential that a school district could be required to provide more than one method for different students based on parents with different preferences.<sup>121</sup>

In the present case, the District prepared and included a BSP with Student’s June 1, 2012 IEP. This BSP, as well as the IEP to which it was attached, indicated significant parental input and support. The fact that Student had previously engaged in aggressive behaviors was noted in the IEP, and the various behaviors of concern were addressed in the BSP. Pursuant to the June 1, 2012 BSP, the following supports were to be utilized to address Student’s aggressive behaviors: (1) point economy system; (2) visual behavior reminder (5-point scale); (3) communication with parents via weekly behavior sheets; and (4) use of paraprofessional when Student is in general education activities.<sup>122</sup> An explanation of each of these supports was included in the IEP.

Nearly four months later, on October 29, 2012, Student’s IEP team met again to review and update Student’s BSP, among other issues. Thereafter, beginning January 17, 2013, Student’s aggressive behaviors significantly escalated. Between January 17, 2013 and the next recorded IEP meeting on March 8, 2013, the District called the Arkansas

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<sup>119</sup> *Neosho R-V School District v. Clark*, 315 F.3d 1022 (8th Cir. 2003).

<sup>120</sup> *M.M.*, 702 F.2d at 479 (citing *CIN*, 323 F.3d at 639).

<sup>121</sup> *M.M.*, 702 F.2d at 479 (citing *K.E., ex. rel. K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 805-06 (8th Cir. 2011); *E.S. v. Indep. Sch. Dist., No. 196*, 135 F.3d 566, 569 (8th Cir. 1998)).

<sup>122</sup> *Id.* at p. 681.

Department of Education and requested a CIRCUIT referral so that the District could receive assistance from the state with regard to Student's behavior. Thereafter, it was determined at the March 8, 2013 meeting that a FBA would be conducted and Student's BSP would thereafter be revised accordingly. Pursuant to this decision, observations of Student began on March 11, 2013 for the purpose of conducting the FBA and continued until April 19, 2013. Although Parent asserted that there was significant delay in completing observations for the FBA, the record established that the delay in completing these observations was due to school breaks, scheduling conflicts with the state CIRCUIT team, and student's attendance.

On May 30, 2013, June 10, 2013, and August 9, 2013, Student's IEP team met to discuss Student's IEP for the upcoming school year. During the May 30, 2013 and June 10, 2013 meetings, and based on District's observations, it was advised that Student be transferred from Elm Tree Elementary to Sugar Creek Elementary so that Student would be on a traditional school calendar which would provide predictability in schedule. As such, on August 9, 2013, Student's IEP team at Sugar Creek Elementary met to discuss his IEP, transitioning of Student to the new school, the completed FBA, and the revised BSP that had been developed for Student.

The revised BSP, which had been developed with assistance from state behavioral consultants, outlined setting event strategies, preventative strategies, teaching strategies, and consequence strategies. Setting event strategies included parent communication, availability of "help" and "break" cards, predictable schedule, token system for completing activities, choices for work output, and positive praise and interaction when behavior is

appropriate to avoid negative attention seeking behavior. Preventative strategies included review of behavioral expectations with Student, use of five-point scale, use of behavior thermometer to identify feelings, consistent arrival and departure time each day, and structured schedules and routines. Teaching strategies included video self-monitoring of student performing replacement behaviors, teaching/modeling use of “break” card, teach/model five-point scale, and teach Student to follow simple verbal cues when he begins to escalate. Consequence strategies included use of appropriate cue cards with verbal commands during escalation of undesired behavior and reduced interaction with adults until appropriate behavior occurs. The BSP also included a crisis response plan that provided staff with responses to situations when Student was engaging in aggressive behavior.

In addition to the fact that state behavioral consultants had assisted in the development of the BSP, Dr. Fitzgibbons, who was Student’s private psychologist, was present at the meeting and signed indicating participation.

During the 2013-2014 school year, Student experienced a significant decrease in aggressive incidents. In fact, Student’s behavior at the new school and under the new behavior support plan never escalated to a point where Student had to be restrained by District staff.

This chain of events establishes that the District addressed Student’s behavior beginning in June 2012 for the upcoming 2012-2013 academic year. When Student’s aggressive behaviors significantly escalated in January 2013, the District once again took steps to address Student’s needs by contacting the Arkansas Department of Education for

assistance and, ultimately, initiating a FBA in March 2013. As a result of these actions, a revised BSP was developed for Student at the end of the 2012-2013 academic year, and recommendations to transfer Student to a different school with a traditional schedule were made and accepted. The record established that these changes ultimately resulted in a significant improvement in Student's behavior issues in the 2013-2014 academic year.

Based on these facts, it cannot be concluded that the District's actions regarding Student's ongoing behavioral issues constituted a denial of FAPE. The District made a good faith effort to address Student's ongoing behavior issues, as well as assist Student in achieving the educational goals outlined in his IEP.

Parents in this case argue that the continued escalation of Student's behavior issues is evidence that the District was not properly implementing Student's BSP. This Hearing Officer disagrees. The evidence is clear that the District was taking steps to address Student's escalating aggressive behaviors during the 2012-2013 academic year. In addition, Parents' expert testified Student's BSPs were inappropriate for lack of evidence-based strategies and interventions. However, a close look at the behavior support plans in light of the expert's recommendations shows that many of the recommendations were followed. For example, positive reinforcement was addressed, and a token system was implemented. In addition, the District completed a FBA and implemented recommended strategies to assist Student.

In sum, there is insufficient evidence based on the facts of this case to conclude that the District failed to properly develop, implement, revise, and follow a BSP for Student. To the contrary, the evidence suggests that the District worked with Parents, sought outside

assistance from the Arkansas Department of Education, considered input from Student's private psychologist, and continually acted in response to Student's escalating behavior. In addition, evidence suggests that the District's efforts, in fact, were successful given that the modifications to Student's BSP, along with his transfer to Sugar Creek Elementary, decreased behavioral incidents significantly in Student's second grade year, as compared to those that occurred in his first grade year. As such, the District did not deny Student FAPE by its actions pertaining to Student's behavioral issues.

**Restraint and Seclusion.** A major issue in this case was that of whether Student was improperly restrained or secluded by the District in response to behavioral incidents. Parents allege that Student was improperly restrained and secluded numerous times during the 2012-2013 academic school year.

The 2014 Arkansas Department of Education Advisory Guidelines for the Use of Student Restraint in Public School or Educational Settings (hereinafter "ADE Guidelines") addresses physical restraint and provides definitions of specific terms. "Physical restraint" is defined as "a personal restriction that immobilizes or reduces the ability of a student to move his or her torso, arms, legs, or head freely." "Crisis" is defined as a "situation where a student is engaging in behaviors that threaten the health and safety of him or herself or others." The guidelines further state that a crisis is often a situation in school where a student becomes aggressive or violent and is unable to regain self-control without posing a danger of injury to self or others. "Crisis Intervention" is defined as the implementation of services, support, and strategies to immediately stabilize a crisis situation.<sup>123</sup>

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<sup>123</sup> Arkansas Department of Education Advisory Guidelines for the Use of Student Restraints in Public School or Educational Settings (2014).

The ADE Guidelines set forth recommendations for school districts in the event that physical restraints are used. Specifically, the state guidelines include, but are not limited to, the following recommendations: (1) physical restraints should only be used in situations in which a student's behavior poses imminent danger of serious physical harm to self or others, and physical restraint should be discontinued as soon as that imminent danger has dissipated; (2) physical restraint should never be used as punishment, discipline, as a means of coercion to force compliance, as retaliation, or as a substitute for appropriate educational or behavioral support, as a routine school safety measure, as a planned behavioral intervention in response to behavior that does not pose imminent danger, as a convenience for staff, or to prevent property damage (unless the act of damaging property causes imminent danger of serious physical harm to self or others); (3) personnel should use only the amount of force reasonably believed to be necessary to protect the student or others from imminent danger of serious physical harm; (4) the use of physical restraint should not be accompanied by verbal abuse, ridicule, humiliation, taunting, or anything else that could result in emotional distress or trauma of a student; (5) school personnel should use the least restrictive technique necessary to end the threat of imminent danger of serious physical harm; (6) a student's ability to communicate should not be restricted; (7) a student who is being restrained should be continually observed and monitored; (8) school personnel should use the safest possible method for administering physical restraint; (9) the use of physical restraint should be for crisis intervention only, and should not be written into an IEP or behavior intervention plan as a planned behavioral intervention; (10) a FBA should be conducted following the first incident of restraint, unless one has



been previously conducted for the behavior at issue; and (11) physical restraint should only be implemented by assigned personnel who have been appropriately trained.<sup>124</sup>

The ADE Guidelines also recommend that Districts develop policies and procedures regarding the use of restraints, and that all incidents involving physical restraint be documented by written record. Further, it is recommended that there be notification and debriefing procedures.<sup>125</sup>

In the present case, a significant portion of the transcript is dedicated to questioning regarding the issue of restraint. It is undisputed by the District that Student was restrained on several occasions when he began engaging in aggressive behaviors that could result in imminent danger to himself or others, and that when restraint was necessary, a CPI-approved children's control position was utilized. Parents asserted that the District inappropriately restrained Student by failing to follow all of the ADE recommended guidelines pertaining to physical restraint.

First, a review of the restraint incident reports in this case illustrates that a large majority of the ADE recommended guidelines were followed in every restraint situation specific to Student. Physical restraint was only used when Student's behavior posed imminent danger to himself or others, and was never used as punishment or a planned behavior intervention. The restraint incident reports in the record show that District staff used only the amount of force reasonably necessary to protect Student from imminent danger of serious physical harm. In fact, the records show that Student was restrained until he appeared to calm down and then was immediately released. Student also was not

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

restrained unless it became absolutely necessary, as demonstrated by the fact that staff documented blocking Student's aggressive attacks to the extent possible. There is no evidence that Student was verbally abused, ridiculed, or humiliated when physically restrained, and Student's ability to communicate was never restricted. Records indicate that Student was continually observed and monitored, as evidenced from the fact that there are several logs which show specifically what Student was doing every minute to two minutes while engaged in an aggressive behavior incident. Finally, the use of physical restraint, pursuant to testimony and documentation, was for crisis situations only, and restraint was not included in Student's IEP or BSP as a planned behavioral intervention.

Second, the ADE guidelines on restraint are simply guidelines. While it is advised that District follow these guidelines, there is certainly no black and white rule that says that failure to do so, standing alone, constitutes a violation of FAPE. In the case of *CJN v. Minneapolis Public Schools*, a case which is factually very similar to the case at hand, parents argued that the school district had violated Minnesota rules governing behavioral interventions, which constituted inappropriate use of restraints and time-outs and, thus, a violation of FAPE.<sup>126</sup> The Eighth Circuit Court of Appeals held that the "deficiencies" stated by parents were minor procedural and technical deficiencies in the IEP and could not support a claim that FAPE had been denied.<sup>127</sup> Similarly, in the present case, despite the fact that a couple of the ADE restraint guidelines were not specifically followed, Student's IEP and BSP were reasonably calculated to provide him educational benefit, as demonstrated by the fact that Student showed academic progression via test scores at the

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<sup>126</sup> 323 F.3d 630.

<sup>127</sup> *Id.*

end of the 2012-2013 academic year. As such, the District's use of physical restraints in this case did not constitute a violation of FAPE.

Regarding seclusion, the United States Department of Education defines seclusion as the involuntary confinement of a student, alone in a room or area, from which the student is physically prevented from leaving. It is specifically stated in the definition that seclusion does not include a timeout, *i.e.* a behavior management technique that is part of an approved program, involves the monitored separation of the student in a non-locked setting, and is implemented for the purpose of calming.<sup>128</sup> It is likely that the Eight Circuit Court of Appeals, pursuant to *M.M. v. Dist. 0001 Lancaster County Sch.*, 702 F.2d 479, would agree with this definition given its finding that use of a "calming room" was acceptable.<sup>129</sup>

The Arkansas Department of Education, however, provides a more vague definition for "time-out seclusion," specifically "removal of the opportunity to engage in reinforced behavior."<sup>130</sup> Pursuant to ADE regulations, the use of a time-out seclusion room should adhere to the following: (1) time-out seclusion should be used only for behaviors that are destructive to property, aggressive toward others or severely disruptive to the class environment;<sup>131</sup> (2) time-out seclusion should be used only as a last resort;<sup>132</sup> (3) time-out seclusion rooms must provide for continuous monitoring, visually and auditorily, of the student's behavior;<sup>133</sup> (4) the teacher or behavioral specialist should have documentation

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<sup>128</sup> U.S. Department of Education Restraint and Seclusion Resource Document, p. 10.

<sup>129</sup> In this case, the Eighth Circuit Court of Appeals held that the school district had not failed to provide FAPE when it continued using a "calming room" for the purpose of allowing students to calm down and for protecting staff and other students.

<sup>130</sup> ADE Regulation 20.02.1.

<sup>131</sup> *Id.* at 20.03.1.

<sup>132</sup> *Id.* at 20.03.2.

<sup>133</sup> *Id.* at 20.03.4.

which establishes that milder forms of time-out have been ineffective in suppressing inappropriate behavior;<sup>134</sup> (5) the use of seclusion time-out and the behaviors which result in its use must be stated in the student's IEP and parent consent for the use of time-out seclusion;<sup>135</sup> (6) time-out must be paired with a BSP to provide positive reinforcement for appropriate behaviors, and such behavioral plan must be included in student's IEP;<sup>136</sup> and (7) written procedures must be developed and followed for each student whose IEP includes the use of time-out.<sup>137</sup>

In addition, ADE regulations address when students should be physically removed to a time-out area, and what behaviors, *i.e.* high intensity, require immediate removal to time-out seclusion.<sup>138</sup> It is stated that lower elementary students should spend no more than fifteen minutes in time-out seclusion; however, should there be a need for a time-out period to extend past this prescribed time limit, the appropriateness of continuing the time-out seclusion should be evaluated.<sup>139</sup>

At the time of the 2012-2013 academic year, the District utilized a conference room at Elm Tree Elementary that was referred to as the "cool down" room. This was a room that had doors on each end, one which exited to the hallway and another that exited into the principal's office. Student was never locked in the room, as the door to the principal's office was always unlocked and often open. The "cool down" contained windows as well. A staff member was present at all times when Student was in the "cool down" room.

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<sup>134</sup> *Id.* at 20.04.1.

<sup>135</sup> *Id.* at 20.04.2.

<sup>136</sup> *Id.* at 20.04.3.

<sup>137</sup> *Id.* at 20.04.4.

<sup>138</sup> *Id.* at 20.04.5.2; 20.04.5.3.

<sup>139</sup> *Id.* at 20.04.6.1; 20.04.6.3.

Assuming that the “cool down” room did constitute a “time-out seclusion” room, a fact that is not entirely clear to this Hearing Officer based on conflicting definitions of what constitutes seclusion, the record suggests that the “cool down” room was only used when Student was destructive to property or aggressive toward himself and others. In addition, the record contains evidence, both in documents and testimony that the “cool down” room used by the District was only used as a last resort, and only after other forms of intervention had been attempted. Certainly, the record contains numerous incident reports which show that Student nearly destroyed his classroom before he was transported to the “cool down” room. When Student was in the “cool down” room, as stated above, he was continuously monitored and staff was present with him.

Parent argues that certain time-out seclusion requirements were not followed, therefore resulting in improper seclusion and a violation of FAPE. For example, Parents raised the fact that student’s IEP did not state that time-out seclusion would be utilized. Parents also argued that the District lacked written procedures for use of the time-out room. Some of the deficiencies pointed out by Parents do exist and should be addressed by the District going forward. However, as stated *supra*, these deficiencies constitute minor procedural and technical deficiencies in this case and, therefore do not support a claim that FAPE had been denied.<sup>140</sup>

It should be noted that, most certainly, a school district’s failure to follow physical restraint and seclusion guidelines/regulations can result in a denial of FAPE. It is necessary, however, to look at all facts regarding Student’s education to determine whether, on the whole, Student’s IEP and accompanying documents, such as a BSP, were

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<sup>140</sup> *Id.*

reasonably calculated to provide educational benefit. In the present case, the deficiencies raised by Parents were not sufficient to overcome the educational benefit received by Student and, thus constituted procedural and technical deficiencies that did not support a claim that FAPE had been denied.

**Least Restrictive Environment.** Parents alleged that the District failed to educate Student in the least restrictive environment. As stated *supra*, the IDEA requires that students with disabilities be educated in the least restrictive environment pursuant to 20 U.S.C. §1412(a)(5). There is a “strong preference in favor of disabled children attending regular classes with children who are not disabled,” resulting in a “presumption in favor of public school placement.”<sup>141</sup> However, the IDEA “significantly qualifies the mainstreaming requirement by stating that it should be implemented to the ‘maximum extent appropriate.’”<sup>142</sup> Essentially, a disabled student should not be separated from his or her peers unless the services that make segregated placement superior cannot be “feasibly provided in a non-segregated setting.”<sup>143</sup> The requirement to mainstream is not applicable when it “cannot be achieved satisfactorily.”<sup>144</sup> As such, it is permissible to remove a disabled child from a mainstream environment when he or she would not benefit from mainstreaming or when the “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.”<sup>145</sup>

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<sup>141</sup> *CJN*, 323 F.3d at 641.

<sup>142</sup> *Pachl v. Seagren*, 453 F.3d 1064, 1067 (8th Cir. 2006); *see also* 20 U.S.C. § 1412[a](5).

<sup>143</sup> *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983).

<sup>144</sup> *Pachl*, 453 F.3d at 1068.

<sup>145</sup> *Roncker*, 700 F.2d at 1063.

Parent asserted that Student should have been integrated into the general education curriculum, as opposed to spending a majority of his school day in special education curriculum. Student was receiving general education minutes during both the 2012-2013 and 2013-2014 academic years. However, despite the modifications which were listed in Student's IEPs, and despite attempts via the BSP to address aggressive behavior, Student continued to struggle socially, and behaviorally. Under these circumstances, it is likely that Student received more intensive instruction and support in the autism classroom and other special education activities. It is possible that, had Student continued with the Bentonville School District, his behaviors might have continued to improve to a point that he could be integrated to a greater extent with his non-disabled peers in the general education curriculum.

It is also noted that Parents voluntarily withdrew Student from the Bentonville School District in August 2014 and enrolled him at the Northwest Center for Autism (Grace School). Dr. XXXXX testified that, based on his observations, Student was not in class with any non-disabled peers at the Northwest Center for Autism (Grace School). It is illogical that Parents would move Student to a more restrictive educational environment if this was of concern.

**Conclusion.** Having considered Parents allegations of substantive due process violations, and in light of the findings and conclusions *supra*, it is the conclusion of this Hearing Officer that Student was not denied FAPE as a result of substantive violations of the IDEA. It is noted here that, based on this Hearing Officer's finding that Student was not

denied FAPE, there is no need to address whether the private school placement requested by Parents is appropriate and should be reimbursed.

**ORDER:**

The results of the testimony and evidence warrant a finding for the District. There is not sufficient evidence to warrant a denial of FAPE as alleged by Parents. This case is hereby dismissed with prejudice.

**FINALITY OF ORDER AND RIGHT TO APPEAL:**

The decision of this Hearing Officer is final and shall be implemented unless a party aggrieved by it shall file a civil action in either federal district court or a state court of competent jurisdiction pursuant to the Individual's with Disabilities Education Act within ninety (90) days after the date on which the Hearing Officer's Decision is filed with the Arkansas Department of Education.

Pursuant to Section 10.01.36.5, Special Education and Related Services: Procedural Requirements and Program Standards (Arkansas Department of Education 2008), the Hearing Officer has no further jurisdiction over the parties to the hearing.

**IT IS SO ORDERED.**

/s/ Danna J. Young

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**HEARING OFFICER**

03/02/2015

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**DATE**