MISSISSIPPI DEPARTMENT OF EDUCATION

Case No. 06182013-197

OPINION

This case arises under the Individuals with Disabilities in Education Act (IDEA), a federal law enacted "to ensure that children with disabilities receive a 'free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.'"[1]

The parties resolved several issues shortly before the due process hearing began.[2] As a result, four issues are presented for decision: (1) Was the Student improperly subjected to restraint and seclusion to the point that she was denied a FAPE? (2) Did the Student's placement during the Extended School Year (ESY) in 2013 result in a denial of FAPE? (3) What are the consequences that arise under state or federal special education law, or both, from the alleged denial of the Parent's observation of her child in the school setting? (4) Whether the Student was subjected to bullying to the point that she was denied a FAPE?

Based on a full review of the evidence, the Parent did not carry the burden of proof on the claims for bullying and for restraint and seclusion. The preponderance of the evidence favors the School District on the factual issue regarding whether the Student was subjected to bullying.

The instances of restraint by School District staff did not rise to the level of a violation of the IDEA. There was no credible evidence that the Student was improperly secluded at school.

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[1] *Houston Indep. School vs. V.P. ex rel. Juan P.,* 582 F.3d 576, 583 (5th Cir. 2009) (quoting 20 U.S.C. § 1400(d)(1)(A)) ; *see generally* 20 U.S.C. §§ 1400 to 1482.

[2] To ensure confidentiality, the parent, the student, and the school district in this case are not identified in this Opinion. They are referred to as the Parent, the Student, and the School District.

In addition, the Parent did not carry the burden of proving that the Student was denied a FAPE in relation to these issues.

The School District prevails on the observation issue as well. The denial of the Parent's opportunity to observe the Student in the school setting on one occasion did not violate the IDEA.

On the final issue, the Parent prevails because the School District violated the Least Restrictive Environment (LRE) requirement in the IDEA in connection with the Student's ESY program. As relief, the Student is entitled to an award of compensatory education in the form of a one-on-one aide for the student for one month beginning one week after issuance of this opinion.

I. Facts

The Parent's due process complaint raised allegations related to the Student's second grade (2011-12) and third grade (2012-13) school years. The Student actually enrolled in the School District in January 2012, midway through the 2011-12 school year. She moved from a nearby school district in which the Student had a special education ruling. The Student's ruling from the School District at the time of the due process complaint was emotional disability.[3]

The Parent made several allegations that the Student was bullied, restrained, and secluded by School District staff or other students. On February 17, 2012, a bus driver restrained the Student while taking her to the office.[4] The bus driver explained that restraint was necessary on that occasion because the Student would scream and sit down frequently as they made their way

[3] Parent's Main Brief, p.1; School District's Main Brief, p.1.

[4] Tr. 2/25. The references to the record are to the volume and specific page of the transcript. For example, Tr. 2/25 refers to volume 2, page 25.

to the office.[5] She also tried to run away from the teacher.[6] As a result, the trip to the office took longer than normal.[7] The bus driver did not know the Student and was not familiar with her disability.[8]

Another bus driver restrained the Student because she attempted to climb over the seats and open the door while the bus was moving.[9] A male staff member restrained the Student on one occasion after she had hit and kicked him.[10] The staff member was concerned that the Student would leave the room if she was not restrained.[11]

The Parent alleges that School District staff locked the Student in a closet on August 31, 2012, and also hit the student at that time.[12] The staff members testified that the Student was restrained because she attempted to run away from school.[13] They were with her in a classroom until administrators and the Parent arrived at school. They deny locking her in a closet room and deny hitting the Student.[14] The restraint was necessary for the Student's safety.[15]

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[5] Tr. 2/25.

[6] Tr. 2/24-25.

[7] Tr. 2/25, 34.

[8] Tr. 2/29.

[9] Tr. 1/136; Exs. P-5; P-8.

[10] Tr. 1/49-50.

[11] Tr. 1/55.

[12] Tr. 1/113.

[13] Exs. P-3, P-44; Tr. 1/114; Tr. 2/170.

[14] Tr. 1/113; Tr. 7/22.

[15] Tr. 3/34-35.

Another allegation concerns the Student losing a braid from her hair after allegedly being hit and grabbed by a teacher.[16] The teacher denies acting inappropriately and acknowledges restraining the Student because the Student was trying to hit her.[17] This teacher also denied the Parent's allegation that she grabbed the Student and hit her.[18] The Parent alleges that another third grade teacher hit the Student.[19] The teacher denied the allegation.[20]

The bullying allegations were investigated by the elementary school principal, and she did not substantiate the allegations.[21] The Parent subjected the principal to extensive cross-examination and challenged her credibility. The principal's testimony was credible, as was the testimony of the teachers who said that they saw no indication that the Student was bullied at school.[22]

Apart from these and similar allegations regarding bullying and restraint and seclusion, the Parent alleges a violation of IDEA because she was denied an opportunity to observe the Student in the school setting on June 25, 2013.[23] The School District admits that the Parent was

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[16] Ex. SD-4.

[17] Tr. 5/148, 150-51; Tr. 10/91.

[18] SD-4; Tr. 10/93-94.

[19] Tr. 10/50.

[20] *Id.*

[21] Tr. 7/103, 105-106; Tr. 11/23-24.

[22] Tr. 1/118; Tr. 9/222; Tr. 10/28, 37, 53, 84.

[23] Tr. 1/15-16, 19, 22, 26.

denied this opportunity but argues that it does not constitute a violation of IDEA. The Parent, the School District points out, observed the Student in the school setting on other occasions.[24]

The final issue relates to the Student's placement during the ESY 2013. There is no dispute that the ESY teacher taught the Student in a self-contained classroom for ten days during the summer of 2013 at a high school in the School District and that this placement was more restrictive than the Student's placement during the regular school year.[25] The Student was the only student in the ESY program that summer except for a special education high school student who attended the program for three days.[26] Regular education students were not eligible to attend ESY.[27] As a result, the Student could not have been in class with regular education students.[28] The Students's IEP stated that she would be taught 80% of the time in a general education class.[29] During the regular school year, the Student was taught in a regular classroom at the elementary school. [30]

II. Law

The IDEA establishes the framework for a hearing officer's decision. "[A] decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education."[31] When procedural issues under

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[24] Tr. 6/106-07, 111-12; Tr. 8/143.

[25] School District's Main Brief, p.15-16.

[26] Tr. 2/72-73, 90; Tr. 6/58, 104; Tr. 9/179-80, 196-98.

[27] Tr. 6/104.

[28] *Id.*

[29] Tr. 6/58.

[30] Tr. 9/179-80.

[31] 20 U.S.C. § 1415(f)(3)(E); *see also* 34 C.F.R. § 300.513(a)(2).

the IDEA are raised, "a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies" resulted in one of three outcomes.[32] A FAPE is denied if the procedural violation "(I) impeded the child's right to a free appropriate public education; (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or (III) caused a deprivation of educational benefits."[33]

The claims based on bullying and on restraint and seclusion do not allege procedural violations of the IDEA; therefore, they fall under § 1415(f)(3)(E)(i). The outcome-determinative issue on those claims is whether the School District denied the Student a FAPE.

The denial of the Parent's opportunity to observe the Student in the school setting and the failure to implement the ESY program are procedural issues. The Parent can prevail on these two claims only by a showing that meets § 1415(f)(3)(E)(ii)(I)-(III).

The beginning point for the FAPE analysis is the United States Supreme Court's decision in *Board of Educ. vs. Rowley*.[34] The Court began its review of the FAPE requirement by noting that Congress defined that term. The IDEA currently states:

> The term "free appropriate public education" means special education and related services that-
> (A) have been provided at public expense, under public supervision and direction, and without charge;
> (B) meet the standards of the State educational agency;
> (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
> (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.[35]

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[32] 20 U.S.C. § 1415(f)(3)(E); *see also* 34 C.F.R. § 300.513(a)(2).

[33] 20 U.S.C. § 1415(f)(3)(E); *see also* 34 C.F.R. § 300.513(a)(2).

[34] 458 U.S. 176 (1982).

After noting that "[l]ike most statutory definitions, this one tends toward the cryptic rather than the comprehensive," *Rowley* concluded that a FAPE "consists of educational instruction specially designed to meet the unique needs of the [disabled] child, supported by such services as are necessary to permit the child to benefit from the instruction."[36] As a result, "if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act."[37]

Rowley held that Congress did not impose a specific substantive educational standard under the predecessor to the IDEA. Instead, "the intent of the Act was more to open the door of public education to [disabled] children on appropriate terms than to guarantee any particular level of education once inside."[38] Therefore, "the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the [disabled] child."[39]

Having explained the contours of a FAPE, the Court addressed how a school district fulfills the requirement. "Insofar as a State is required to provide a [disabled] child with a 'free

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[35] 20 U.S.C. § 1401(9). "Special education" is also defined in the IDEA:

> The term "special education" means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including-
> (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
> (B) instruction in physical education.

Id. § 1401(29).

[36] 458 U.S. at 188-89 (internal quotations omitted).

[37] *Id.* at 189.

[38] *Id.* at 192.

[39] *Id.* at 201.

appropriate public education,' we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."[40]

The Fifth Circuit Court of Appeals has elaborated on *Rowley*.

> The FAPE required by the IDEA need not be the best possible one, nor one that will maximize the child's educational potential; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him "to benefit" from the instruction.
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> Nevertheless, the educational benefit to which the [IDEA] refers and to which an IEP must be geared cannot be a mere modicum or de minimis; rather an IEP must be likely to produce progress, not regression or trivial educational advancement.[41]

"In short, the educational benefit that an IEP is designed to achieve must be 'meaningful.'"[42]

The School District produced evidence that demonstrated the Student received a meaningful educational benefit during the past two school years. This benefit is reflected in the Student's report cards[43] and the testimony of several of her teachers. One of the Student's third grade teachers said that, "[a]cademically, [the Student] was a good student" and "performed on grade level."[44] The Student was reading on a third grade level. She also "loved to answer questions [and] loved to get the question right."[45] The Student's fourth nine-week average was a

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[40] *Id.* at 203.

[41] *R.P. vs. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 809 (5th Cir. 2012) (citations and quotations omitted) (citing and quoting *Cyrpress-Fairbanks Indep. Sch. Dist. vs. Michael F.*, 118 F.3d 245 (5th Cir. 1997)).

[42] *Michael F.*, 118 F.3d at 248.

[43] Exs. SD-20, SD-21.

[44] Tr. 10/9-10.

[45] *Id.*

"C" and her yearly average was a "C". A "C", however, did not reflect the Student's true ability. The Student's performance often depended on her level of engagement.[46]

Another third grade teacher said the Student performed on grade level and never fell behind.[47] The Student maintained an "A" or "B" average.[48] Her yearly average was an 80, which is a "B" grade, and her second semester average was an 86. The fourth nine-week average was an 84.[49] This teacher said that the Student made academic progress in this class based on STAR reading test data and the teacher's observations.[50] Her academic achievement improved during the year.[51] Another teacher who had the Student in her classroom for two months during the 2012-13 school year, said the Student was an average, on-grade-level student.[52] The Student was a "B"/"C" student.[53]

Dismissing this evidence of meaningful academic benefit to the Student as "laughable," the Parent contends the Student was denied a FAPE because the School District had to provide "compensatory hours for academic instruction due to the sheer number of hours that [the Student] was out of the classroom in 2012."[54] The Parent's argument, however, does not prove

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[46] Tr. 10/11.

[47] Tr. 10/38-39.

[48] Tr. 10/39.

[49] Tr. 10/40.

[50] Tr. 10/38.

[51] *Id.*

[52] Tr. 10/80-81, 96.

[53] Tr. 10/96.

[54] Parent's Rebuttal Brief, unnumbered page 4.

that the Student was denied a FAPE *as a result* of bullying, restraint, or seclusion. The Parent's primary reliance on an April 2013 assessment[55] by a consultant is outweighed by the direct testimony of the Student's teachers regarding her academic progress and standing.

Against this factual and legal background, the four issues are addressed in turn.

1. Was the Student improperly subjected to restraint and seclusion to the point she was denied a FAPE?

The United States Department of Education issued a document in May 2012, titled "Restraint and Seclusion: Resource Document," that addresses the use of restraint and seclusion in schools.[56] The document defines physical restraint:

> A personal restriction that immobilizes or reduces the ability of a student to move his or her torso, arms, legs, or head freely. The term physical restraint does not include a physical escort. Physical escort means a temporary touching or holding of the hand, wrist, arm, shoulder, or back for the purpose of inducing a student who is acting out to walk to a safe location.[57]

Seclusion is also defined:

> The involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving. It does not include a timeout, which is 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.[58]

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[55] Ex. P-63.

[56] This document is cited in this Opinion as "Restraint and Seclusion" and is found at www.ed.gov/policy/restraintseclusion (accessed September 16, 2014). "This document does not set forth any new requirements, does not create or confer any rights for or on any person or require specific actions by any State, locality, or school district." Restraint and Seclusion, p. 2, n.1.

[57] *Id.* p.10.

[58] *Id.*

This document notes that "[t]here is no evidence that using restraint or seclusion is effective in reducing the occurrence of the problem behaviors that frequently precipitate the use of such techniques."[59] Moreover, "[p]hysical restraint or seclusion should not be used except in situations where the child's behavior poses imminent danger of serious physical harm to self or others and restraint and seclusion should be avoided to the greatest extent possible without endangering the safety of students and staff."[60]

The School District does not deny that staff members restrained the Student. The Parent, however, has not carried the burden of proving that the instances of restraint denied the Student a FAPE. Instead of showing that the instances of restraint denied the Student a FAPE, the Parent argues that the absence of a policy on restraint and seclusion in the School District,[61] coupled with the lack of training of School District staff, "make it *impossible* for any form of restraint on [the Student] or any other child in the [School District] to be proper."[62] The Parent restates this position again: "The use of physical restraint and seclusion by untrained school personnel, used in the absence of a specific policy for restraint and seclusion, is *always* improper."[63] In effect, the Parent's position is that restraint by an untrained staff member in the absence of a school district policy *in and of itself* means the Student was denied a FAPE.

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[59] *Id.* p.2.

[60] *Id.*

[61] The School District adopted a restraint and seclusion policy in May 2013. Ex. HO-1.

[62] Parent's Brief in Support of Due Process Hearing, p.5 (Aug. 15, 2014) (emphasis added).

[63] *Id.* at 11 (emphasis added); *see also* Parent's Rebuttal Brief in Support of Due Process Hearing, p.2 (unnumbered).

The Parent cites no authority to support her position. For example, in *CJN v s. Minneapolis Public Schools,*[64] the court of appeals held that "[b]ecause the appropriate use of restraint may help prevent bad behavior from escalating to a level where a suspension is required, we refuse to create a rule prohibiting its use, even if its frequency is increasing."[65] Moreover, the Parent did not prove by a preponderance of the evidence that the Student did not receive a meaningful educational benefit despite the instances of restraint by School District staff.

2. Did the Student's placement during the Extended School Year (ESY) in 2013 result in a denial of FAPE?

The Parent contends the School District failed to implement the Student's IEP[66] during the ESY 2013 term in three ways. First, the School District placed the Student at a high school rather than the elementary school she attended during the fall and spring. Second, the Student was the only pupil in the self-contained class, thus violating the LRE requirement in the IDEA. Finally, the ESY portion of the Student's IEP did not list the methods of measurements for her academic goals.

The Parent's first point is answered by the Fifth Circuit Court of Appeals' decision in *White vs. Ascension Parish Sch. Bd.*[67] There, the Court held that "'[e]ducational placement', as used in the IDEA, means educational program—not the particular institution where that program

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[64] 323 F.3d 630 (8th Cir. 2002), *cert. denied,* 540 U.S. 984 (2003).

[65] 323 F.3d at 639; *accord In re Student with a Disability,* 112 L.R. P.13430 (N.D. St. Educ. Ag., March 14, 2012).

[66] Ex. P-11.

[67] 343 F.3d 373 (5th Cir. 2003).

is implemented."[68] *White* cited *Sherri A.D. v. Kirby,*[69] which held that "'[a]n educational placement, for purposes of [the predecessor to the IDEA], is not changed unless a fundamental change in, or elimination of, a basic element of the educational program has occurred."[70]

The Parent's second two points raise the question whether a basic element of the Student's educational program was fundamentally changed or eliminated. A fundamental change was made to the Student's educational program during the ESY in that the School District failed to comply with the LRE requirement.[71] Here, the School District failed to provide the placement agreed to by the IEP committee. As such, the Student was deprived of an educational benefit.[72]

The LRE requirements are set forth in Mississippi's special education regulations.[73]

> (a) ***General.***
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> (1) ***Each*** public agency ***in Mississippi*** must have in effect policies and procedures to ensure the LRE requirements ***as stated below are being met.***
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> (2) Each public agency must ensure that—
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> (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

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[68] *Id.* at 379; *see T.Y. vs. New York City Dept. of Educ.*, 584 F. 3d 412, 419 (2d Cir. 2009) (construes educational placement as "the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school").

[69] 975 F.2d 193 (5th Cir. 1992).

[70] *Id.*at 206. Although the judicial treatment of the term "educational placement" is uneven, *see Eley vs. District of Columbia,* No. 14-319 (D.C.D.C.), the Fifth Circuit's position on this particular point is clear.

[71] The third aspect to the Parent's claim is therefore not addressed.

[72] 20 U.S.C. § 1415(f)(3)(E)(ii)(III).

[73] State Policies Regarding Children with Disabilities under the Individuals with Disabilities Education Act of 2004, State Board Policy 7219, § 300.114. Mississippi's regulations mirror the federal regulations. The Foreword to the Mississippi regulations notes that the italicized words in the regulations are "Mississippi specific deviations from" the federal regulations.

(ii) Special classes, separate schooling, or other removal of children with disabilities from the ***general*** educational environment occurs only if the nature or severity of the disability is such that education in ***general education*** classes with the use of supplementary aids and services cannot be achieved satisfactorily.
(b) ***Omitted***

These regulations also address a school district's responsibilities regarding a continuum of alternative placements for a disabled child.

(a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.
(b) The continuum ***of alternative placements available to meet the needs of children with disabilities for special education and related services*** must—
(1) Include the alternative placements listed in the definition of special education under § 300.39 (instruction in regular classes, special classes, schools, home instruction, and instruction in hospitals and institutions); and
(2) Make provision for supplementary services (such as resource room or instruction) to be provided in conjunction with ***general education*** class placement;
(3) ***Provide access to general State-wide and district-wide assessment programs, with appropriate accommodations, where necessary.***[74]

A placement decision must be "made in conformity with the LRE provisions of" the special education regulations.[75] The United States Department of Education has stated that the LRE regulations are "sufficiently clear that placement decisions must be based on the individual needs of each child with a disability. Public agencies, therefore, must not make placement decisions based on a public agency's needs or available resources, including budgetary considerations and the ability of the public agency to hire and recruit qualified staff."[76]

The School District acknowledges that the Student's "ESY placement was more restrictive than her placement during the regular academic year."[77] Nevertheless, the School

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[74] *Id.* § 300.115.

[75] *Id.* § 300.116(a)(2).

[76] 34 C.F.R. 300, 71 No. 156, at p.46587 (Aug. 14, 2006).

[77] School District's Main Brief, p.15.

District argues that it should prevail on this issue because the Student received a meaningful education benefit and because the Parent presented no evidence that "another ESY placement was available that was less restrictive and appropriate."[78] In connection with the School District's second point, it contends that it "was not required to create a general education summer program for elementary school students to satisfy [the Student's] LRE."[79] The School District's arguments are without merit.

In *T.M. by A.M. and R.M. vs. Cornwall Central Sch. Dist.,* the Second Circuit Court of Appeals rejected the position advocated by the School District here. The lack of a regular education elementary summer school program does not relieve the School District of its obligation to satisfy the LRE requirement. The LRE requirement is not limited in the ESY context "by what programs the school district already offers."[80] "Under the IDEA, a disabled student's least restrictive environment refers to the least restrictive educational setting consistent with that student's needs, not the least restrictive setting that the school district chooses to make available."[81] "This interpretation of the LRE requirement flows directly from the text of the statute," and "does not permit a school district to escape that broad duty in the ESY context just by choosing to offer only restrictive ESY environments."[82] The LRE provision places the "focus on the child's abilities, not the school district's existing programs."[83]

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[78] *Id.* p. 16.

[79] *Id.*

[80] 752 F.3d 145, 163 (2d Cir. 2014).

[81] *Id.*

[82] *Id.*

[83] *Id.*

The Second Circuit's holding in *T.M.* applies with equal force here:

> We therefore conclude the IDEA's LRE requirement is not strictly limited by the range of ESY programs that the school district chooses to offer. Instead, the LRE requirement applies in the same way to ESY placements as it does to school-year placements. To meet that requirement, a school district first must consider an appropriate continuum of alternative placements; it then must offer the disabled student the least restrictive placement from that continuum that is appropriate for his or her needs.[84]

A school district "cannot avoid the LRE requirement just by deciding not to operate certain types of educational environments; instead, it must provide a continuum of alternative placements that meet the needs of the disabled children that it serves."[85] In *T.M.* the court "agree[d] with both parties that the IDEA does not require a school district to create a new mainstream summer program from scratch just to serve the needs of one disabled child."[86] School districts have options in meeting the LRE requirement. "[T]he school district may choose to place the child in a private mainstream summer program, or a mainstream summer program operated by another public entity. Each school district thus has broad discretion over how it structures its alternative ESY placements; it can choose to operate its own educational ESY programs, or to offer the disabled children alternative placements in outside programs."[87]

In addition to its position that it did not operate a summer ESY program, the school district in *T.M.* also argued that there were no public mainstream ESY programs in the area and that a state law prohibited it from offering the student a placement in a private mainstream ESY program. The Second Circuit rejected these arguments. "[E]ven assuming those facts are true,

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[84] *Id.*at 165. The U.S. Department of Education's Amicus Curiae's Letter Brief, dated July 14, 2014, supports the 2nd Circuit's decision.

[85] *Id.*

[86] *Id.*at 166.

[87] *Id.*

they do not change [the school district's] obligation under the IDEA to consider a full continuum of alternative placements and then offer [the student] the least restrictive placement from that continuum that is appropriate for his needs. Because [the school district] failed to consider an appropriate continuum of alternative ESY placements and place [the student] in his LRE on that continuum, the ESY component of the [applicable] IEP was substantively inadequate."[88]

The School District also faults the Parent for not producing evidence "showing another ESY placement was available that was less restrictive and appropriate."[89] In other words, the burden was on the Parent to assess the continuum of alternative placements and advise the School District of the appropriate placement. The School District has the cart before the horse. As *T.M.* demonstrates, the School District is tasked by IDEA with fulfilling the LRE obligation, and it failed to do so here.

The cases cited by the School District reinforce the holding that the School District failed to meet the LRE requirements for the ESY program. In *D.F. vs. Red Lion Area Sch. Dist.,*[90] the district court noted that the school district did not offer summer academic programs to any regular education students in the district.[91] "Accordingly, the District could not educate [the student] in a regular classroom in the District, *and properly sought an outside placement for [the student].*[92]

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[88] *Id.*

[89] School District's Main brief, p.16.

[90] No. 1:10-cv-1558 (M.D. Pa., Jan. 19, 2012).

[91] *Id.* at p. 7.

[92] *Id.* (emphasis added).

Similarly, in *T.R. vs. Kingwood Township Bd. of Educ.*,[93] the appellate court noted that "[o]f course, a district that does not operate a regular preschool program is not required to initiate one simply in order to create an LRE opportunity for a disabled child."[94] The school district's obligations, however, overrode the absence of a program, and "the District Court erred in no inquiring into whether regular classroom options were available within a reasonable distance to implement [the student's] IEP, and we remand so the District Court may consider this question."[95]

As relief for the violation of the LRE requirements, the School District is ordered to provide compensatory education in the form of a one-on-one aide for the student for one month beginning one week after issuance of this opinion. The Student was deemed eligible for ESY in part because of the extenuating circumstances that her special education teacher was out for two months on maternity leave.[96] Based on a review of the testimony of teachers, an aide is an appropriate remedy to help the Student be more engaged in her academic work.[97]

(3) What are the consequences that arise under state or federal special education law, or both, from the alleged denial of the Parent's observation of her child in the school setting?

Under the circumstances of this case, the denial of a single instance of parental observation of the Student in the school setting did not "significantly impede[] the parent['s] opportunity to participate in the decisionmaking process regarding the provision of a free

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[93] 205 F.3d 572 (3rd Cir. 2000).

[94] *Id.* at 579.

[95] *Id.* at 580.

[96] "Documentation of ESY Decision", attached as an Exhibit to Parent's Brief in Support of An Appropriate Remedy.

[97] Tr. 10/11.

appropriate public education to the parent['s] child."[98] The record reflects a dedicated parent who was completely involved in the process and details of her child's education.

The Parent had telephone calls with School District staff on average more than three times a week.[99] She met with staff at least once a week in person, and there were additional IEP meetings as well.[100] The Parent communicated by email with the staff on a regular basis.[101] In short, there were "constant" meetings and conversations between the Parent and School District staff.[102] The elementary school principal received more than 100 emails from the Parent regarding her children's experience in the School District.[103]

(4) Whether the Student was subjected to bullying to the point that she was denied a FAPE?

In effect, for every allegation concerning bullying, restraint, and seclusion the Parent relied solely on her child's version of events. The Parent did not actually witness any instance of alleged abuse. Based on the testimony and demeanor of the witnesses, the Parent did not prove by a preponderance of the evidence that her child was bullied by staff or students.

The bus drivers against whom allegations were made testified that the Student acted aggressively and put herself in jeopardy of being injured. The Parent's allegations that teachers hit the Student, improperly restrained her, and secluded her in a closet on August 31, 2012, were

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[98] 20 U.S.C. § 1415(f)(3)(E)(ii)(II).

[99] Tr. 6/27-28.

[100] *Id.*

[101] Tr. 6/28.

[102] Tr. 6/34-35.

[103] Tr. 11/23.

vigorously and persuasively denied by the teachers. The third grade teacher against whom allegations of physical abuse were made explained in detail her actions related to the Student. She restrained the Student to prevent being hit. The other instances of restraint used by School District staff were necessary because the Student was defiant and physically aggressive. These interactions between the Student and the School District staff did not constitute bullying.

In conclusion, the School District prevails on the bullying, restraint, and seclusion claims and on the denial of observation claim. The Parent prevails on the ESY claim.

A word or two is necessary to encourage the Parent and the School District staff to work to rebuild and restore trust in their relationship. A due process hearing is more often than not the result of a loss of trust and belief in the school district on the parents' part and a belief by school district staff that their best efforts will never be satisfactory to the parents. This particular case will require significant work by both the Parent and the School District staff to move forward harmoniously. That the path may be difficult should not deter them from trying.

Dated: October 22, 2014.

/s/ Perry Sansing
Perry Sansing
Hearing Officer