

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM**

IN THE MATTER OF:

Docket No.: 18-011357

**M.R. o/b/o C.R.,
Petitioner**

Case No.: 18-00049

v

Agency: Education

**River Valley School District,
Respondent**

Case Type: ED Sp Ed Regular

Filing Type: Appeal

**Issued and entered
this 30th day of August 2018
by: Eric J. Feldman
Administrative Law Judge**

DECISION AND ORDER

PROCEDURAL HISTORY

This matter concerns a due process hearing request/complaint under the Individuals with Disabilities Education Act (IDEA) 20 USC 1400 et seq. On or about May 24, 2018, Petitioner M.R. filed a Due Process Hearing Request with the River Valley School District (Respondent) on behalf of her child (Student)¹. However, Petitioner M.R. did not file the due process request/complaint with the Michigan Department of Education (MDE) until May 30, 2018. MDE forwarded the Due Process Hearing Request to the Michigan Administrative Hearing System (MAHS) for hearing. It was assigned to the undersigned Administrative Law Judge (ALJ) Eric J. Feldman.

On June 1, 2018, the undersigned issued an Order Regarding Timeliness, and an Order Scheduling Prehearing Conference, which scheduled a Prehearing Conference for June 20, 2018.

On June 8, 2018, Attorney Ms. Jessica E. Baker submitted an Appearance and Notice of Appearance, and a Response to Petitioner's Due Process Complaint, on behalf of Respondent.

On June 20, 2018, the Prehearing Conference was held as scheduled. As part of the Prehearing Conference, August 7 through 8, 2018, were selected as the dates for the hearing and the deadlines for the exchange of witness and exhibit lists were

¹ Student will be used in place of child's name to protect the minor child's identity.

established. On June 22, 2018, the undersigned issued an Order Following Prehearing Conference, Order Extending Hearing Deadline, and Notice of Hearing.

On July 31, 2018, Ms. Jessica E. Baker submitted Respondent River Valley School District Exhibit List, and Respondent River Valley School District Witness List. On July 31, 2018, Petitioner M.R. also submitted her exhibit list.

On August 7, 2018, the hearing was convened as scheduled². The undersigned ALJ, Eric J. Feldman, presided. M.R. appeared on behalf of Petitioner. Attorney Ms. Michele Eaddy, Attorney Ms. Jessica E. Baker, and Coordinator of Special Education Services, Michelle Sykora, appeared on behalf of Respondent.

The following exhibits were offered by Petitioner M.R. and admitted into evidence unless otherwise indicated:

1. Petitioner Exhibit 1 is a Helen Devos Children's Hospital After Visit Summary, dated June 30, 2014.³
2. Petitioner Exhibit 2 is a Mary Free Bed Rehabilitation Hospital Consultation Notes, dated March 16, 2018.
3. Petitioner Exhibit 3 is a Lakeland Medical Center Emergency Room Notes, dated April 14, 2018.
4. Petitioner Exhibit 4 is Student's Individualized Education Program (IEP) Amendment, dated April 19, 2018.
5. Petitioner Exhibit 5 are Notes kept from Incident and Phone Calls from Respondent.⁴
6. Petitioner Exhibit 7 is a List of Concerns given to Psychologist.
7. Petitioner Exhibit 8 is an E-mail from Ms. Heidi Clark, Principal of River Valley Elementary School.

Petitioner M.R. offered Exhibit 6⁵, but it was not admitted based on relevance. Petitioner M.R. offered Exhibit 9⁶, but it was not admitted for lack of foundation and

² The hearing concluded on August 7, 2018, and did not proceed to August 8, 2018.

³ Medical record contains Student's birth name, prior to being adopted by Petitioner, M.R.

⁴ Exhibit 5 was admitted over Respondent's foundation objection.

⁵ Proposed Exhibit 6 was a local news article on recent death of child due to PICA.

⁶ Proposed Exhibit 9 was an article on PICA and potential risks of the disorder.

hearsay. Petitioner M.R. offered Exhibit's 10⁷ and 11⁸, but were not admitted because she failed to provide copies of the proposed exhibits to Respondent as required by the June 22, 2018 Order and 34 CFR 300.512(a)(3).

The following exhibits were offered by Respondent and admitted into evidence unless otherwise indicated:

1. Respondent Exhibit A is Student's IEP Team Report, dated May 22, 2018.
2. Respondent Exhibit B is Student's IEP Amendment, dated April 19, 2018.
3. Respondent Exhibit C is Student's IEP Amendment, dated March 1, 2018.
4. Respondent Exhibit D is Student's IEP Team Report, dated November 20, 2017.
5. Exhibit E was not offered.
6. Respondent Exhibit F is Student's Review of Existing Evaluation Data (REED) and Evaluation Plan, dated April 9, 2018.
7. Respondent Exhibit G is Student's REED and Evaluation Plan, dated March 1, 2018.
8. Exhibits H, I, J, K, and L were not offered.
9. Respondent Exhibit M is Student's Safety Plan and Schedule.
10. Respondent Exhibit N is Student's Student Attendance Report for 2017-2018 School Year.
11. Exhibit O was not offered.
12. Respondent Exhibit P is Social Stories.
13. Respondent Exhibit Q is Student's Report Card for 2017-2018 School Year.

⁷ Proposed Exhibit 10 was a flash drive containing surveillance footage of Student.

⁸ Proposed Exhibit 11 was a picture of Student – head injury.

The following individuals testified in this matter:

1. M.R., Petitioner
2. Ms. Heidi Clark, Principal of River Valley Elementary School
3. Mr. Andrew Mark Gallagher, Kindergarten Teacher
4. Ms. Heather Dellay, Special Education Teacher

The record closed at the conclusion of the hearing.

ISSUE

Did the May 2018 IEP Team Report fail to provide Student a free appropriate public education (FAPE), specifically, a one on one personal aide for Student throughout the school day?

APPLICABLE LAW

The petitioner-parent, as the party challenging Respondent's determination or implementation of special education and related services, has the burden of proof by a preponderance of the evidence for all claims raised in this matter. *Schaffer v Weast*, 546 US 49; 126 S Ct 528; 163 L Ed 2d 387 (2005); *Doe v Defendant I*, 898 F2d 1186 (CA 6, 1990).

As the Michigan Supreme Court has stated, "[p]roof by a preponderance of the evidence requires that the fact finder believe that the evidence supporting the existence of the contested fact outweighs the evidence supporting its nonexistence." *Blue Cross and Blue Shield of Michigan v Milliken*, 422 Mich 1; 367 NW2d 1 (1985). A "preponderance of evidence" is best described as that evidence having the greatest weight.

The Code of Federal Regulations, 34 CFR 300.39 defines "special education" as follows:

Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including—
(i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (ii) Instruction in physical education.
34 CFR 300.39.

Michigan Administrative Rule for Special Education, R 340.1701c(c) defines "special education" as follows:

"Special education" means specially designed instruction, at no cost to the parents, to meet the unique educational needs of the student with a disability and to develop the student's maximum potential. Special education includes instructional services defined in R 340.1701b (a) and related services.

The Federal Regulations define "specially designed instruction" as follows:

Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

- (i) To address the unique needs of the child that result from the child's disability; and
- (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 CFR 300.39(b)(3)

Students protected by the provisions of IDEA are entitled to be appropriately identified, evaluated, placed, and provided a free appropriate public education (FAPE) that includes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 20 USC 1400(d); 34 CFR 300.1.

Under 20 USC 1415(f)(3)(E), it may be found that FAPE has been denied to a disabled student based on either substantive or procedural violations of the Individuals with Disabilities Education Act (IDEA or Act). To find a denial of FAPE based on procedural violations of the Act, it must also be found that the procedural violation impeded the student's right to FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to their child, or caused a deprivation of educational benefits

In *Board of Education of Hendrick Hudson Central School District v Rowley*, 458 US 176, 102 S Ct 3034, 73 L Ed 2d 690 (1982), the U.S. Supreme Court articulated the two bases for assessing the provision of FAPE. The first was whether the school district had complied with the procedural requirements of the Act, and the second was whether the student's Individualized Educational Program (IEP) was "reasonably calculated" to enable the student to receive educational benefits. *Id.*, at 206-07.

In assessing whether a student's IEP was reasonably calculated to enable the student to receive educational benefits under *Rowley's* second basis above, our Sixth Circuit Court of Appeals noted that nothing in *Rowley* precludes the setting of a higher standard than the provision of "some" or "any" educational benefit, and held that the IDEA requires an IEP to confer a "meaningful educational benefit gauged in relation to the potential of the child at issue." *Deal v Hamilton County Bd of Ed*, 392 F3d 840, 862 (CA 6, 2004).

Nevertheless, the IDEA requirement that school districts provide disabled children with a free appropriate public education does not require that a school either maximize a student's potential or provide the best possible education at public expense. *Doe v Tullahoma City Schools*, 9 F3d 455 (CA 6, 1993); *Fort Zumwalt Sch Dist v Clynes*, 119 F3d 607, 612 (CA 8, 1997), *cert den*, 523 US 1137 (1998). In *Andrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (U.S. 2017), the US Supreme Court expanded its explanation of FAPE in *Rowley* and stated that in order to provide a FAPE, the IDEA requires an educational program "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.*

The primary responsibility for formulating the education to be accorded a disabled child, and for choosing the educational method most suitable to the child's needs, was left by IDEA to state and local educational agencies in cooperation with the parents or guardians of the child. Reviewing courts may not substitute their own notions of sound educational policy for those of the school authorities which they review. *McLaughlin v. Holt Pub Schs*, 320 F3d 663 (CA 6, 2003).

In determining whether the District provided a free appropriate public education in the least restrictive environment for the student in this case, it must first be asked whether the District has complied with the procedures set forth in the IDEA in developing the IEP, and second, whether the IEP developed through those procedures was reasonably calculated to enable the student to receive a meaningful educational benefit gauged in relation to the student's potential. *Rowley*, 458 US at 206-07; *Deal*, 392 F3d at 862.

The Code of Federal Regulations provides for determining educational placement as:

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that-

(a) The placement decision-

- (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

- (2) Is made in conformity with the LRE provisions of this subpart, including §§ 300.114 through 300.118;
- (b) The child's placement-
 - (1) Is determined at least annually;
 - (2) Is based on the child's IEP; and
 - (3) Is as close as possible to the child's home;
- (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;
- (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and
- (e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. 34 CFR §300.116.

Additionally, the Regulations provide that each public agency must ensure that (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 (ii) special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR § 300.114(a)(2).

FINDINGS OF FACT

Based on the entire record in this matter, including the testimony and admitted exhibit, the following findings of fact are established:

1. Student is 6-years-old. [Resp. Exh. A, p. 1.]
2. Petitioner M.R. is the adoptive parent of Student. Petitioner M.R. adopted her daughter, Student, in 2015. [Tr. Vol. I, p. 29.]
3. Student is eligible for special education services as a student with an Other Health Impairment (OHI), R. 340.1720. [Resp. Exh. A, p. 1.]

4. Student has been diagnosed with Cerebral Palsy and Dysphagia, by history; Other Unspecified Persistent Mental Disorder due to known Physiological Condition (Cerebral Palsy); Speech Sound Disorder; Pica⁹; Disinhibited Social Engagement Disorder; Attention-Deficit/Hyperactivity Disorder (ADHD), Combined type; and Adjustment Disorder with Disturbance of Conduct. [Pet. Exh. 2, pp. 6-7.]
5. Student was in kindergarten during the 2017 to 2018 school year. She has been attending River Valley School District, specifically, River Valley Chikaming Elementary (Chikaming Elementary). [Resp. Exh. A, p. 1.]
6. During the 2017 to 2018 school year, Mr. Andrew Mark Gallagher was Student's kindergarten teacher. [Tr. Vol. I, p. 23.]
7. Since Student was 4-years-old, Petitioner M.R. began noticing that Student would place inappropriate objects in her mouth. [Tr. Vol. I, p. 31.]
8. On or about August or September of 2017, Petitioner M.R. notified Mr. Gallagher that Student would place inappropriate objects in her mouth. [Tr. Vol. I, pp. 31-32.]
9. In August or September of 2017, Mr. Gallagher was notified by Petitioner M.R. about the concerns of Student, which included her Cerebral Palsy, falling, and balance. Mr. Gallagher immediately went to Ms. Heidi Clark, Principal of Chikaming Elementary, to express concerns raised by Petitioner M.R. regarding Student's conduct/actions and to begin data collection. [Tr. Vol. I, pp. 87-88.]
10. On November 16, 2017, an IEP team meeting was held in regard to Student's IEP reevaluation of eligibility for special education programs or services. Participating as team members were Mr. Gallagher (Teacher); Michelle Sykora (Special Education Coordinator); Jamie Ely (Psychologist); and Cathy Levy (Physical Therapist). [Resp. Exh. D, pp. 1-11.]
11. The IEP team determined that Student was eligible for Special Education as a Student with Physical Impairment, R. 340.1709. The IEP noted that Student needs assistance in communication (speech); and physical therapy including accessibility within facilities/community. The IEP developed short-term objectives and annual goals to address her needs. The IEP contained Supplementary Aids/Services/Personal Support, such as providing extra hands-on clues, paraphrase/simplify directions, and providing extra time to answer questions and formulate response. The Special Education Programs/Services

⁹ Pica is "given due to [Student's] history of eating non-food items. The etiology of this is likely stems from reported early childhood abuse by starvation." [Pet. Exh. 2, p. 6.]

listed in the IEP included physical therapy 30-100 minutes per month; occupational therapy 40-100 minutes per month; and speech and language therapy 120 to 180 minutes per month. The IEP noted that Student's Least Restrictive Environment (LRE) would be to fully participate with students who are nondisabled in the general education setting, except for the time spent in separate special education programs/services provided outside of the general education classroom. [Resp. Exh. D, pp. 1-11.]

12. While Student attended kindergarten in 2017, Petitioner M.R. indicated that Student had an increase in placing inappropriate objects in her mouth. Petitioner M.R. documented calls from the District of instances of Student placing inappropriate objects in her mouth and indicated these instances occurred during the period of on or about September or October 2017 through April 2018. [Pet. Exh. 5, p. 1; Tr. Vol. I, pp. 31-34.]

13. On or about December 2017, Petitioner M.R. expressed concerns to Ms. Clark about Student eating non-food items. Ms. Clark never observed Student eating non-food items. [Tr. Vol. I, pp. 58-59.]

14. On or before March 2018, Petitioner M.R. provided Respondent with a list of notes/concerns regarding Student. Petitioner M.R. wrote the following in her list of notes/concerns:

Everything goes into her mouth. Fingers, hair, tags on clothes, toys etc.

Eats items that are not safe to consume: Things off of (sic) floor and out of garbage, discarded gum, toilet paper, tissues, q tips and more[.]

* * *

She plays with her spit and has an obsession with her own spit and things being in her mouth at all times.

* * *

Cannot use or be trusted with most age appropriate toys or items. With glue or scissors she will eat glue or use scissors to cut her hair or clothes.

[Pet. Exh. 7, pp. 1-3; Resp. Exh. G, pp. 1-6.]

15. Based on Petitioner M.R.'s concerns, a Review of Existing Evaluation Data (REED) was set for March 1, 2018. The REED included Petitioner M.R.'s list of notes/concerns regarding Student. Under parent's input, the REED stated Student is not thriving in the general education classroom, Student needs close

supervision, and safety is a concern. Under current strategies, the REED stated Mr. Gallagher checks Student's bookbag for objects, Student sits at the front of the room for close proximity to the teacher, and "chew" necklaces were ordered for Student. [Resp. Exh. G, pp. 1-6.]

16. On March 1, 2018, an IEP Amendment was completed for Student due to additional supports (resource room program, goal) are needed to address Student's social concerns. Participating as team members were Petitioner M.R. (parent); Roxanne Soethe (Occupational Therapist); Deedra Boehm (Teacher Consultant); Ms. Clark (Principal); Heather Dellay (Special Education Teacher); Mr. Gallagher (Teacher); Julianne Ford (Speech Pathologist); Amanda Jones (Social Worker); and Wayne Richardson (Psychologist Student). [Resp. Exh. C, pp. 1-10.]
17. The March 1, 2018 IEP team determined that Student needed additional supports, in addition to what she was already receiving from the IEP reevaluation dated November 20, 2017. Regarding Special Education Programs/Services, the IEP team added Elementary Resource Room for Student with 1 to 2.5 hours a week. Regarding Supplementary Aids/Services/Personal Support, the IEP added Consultation of Occupational Therapy Services. [Resp. Exh. C, p. 7.]
18. With the addition of Student's Elementary Resource services, she was placed with Ms. Heather Dellay, Special Education Teacher, for the assistance. Ms. Dellay has a Bachelor of Arts (BA) in Special Education with mentally impaired concentration (now known as cognitive impairment). Ms. Dellay also has an English minor and a master's degree in Regular Elementary Education. Ms. Dellay wrote up a "Social Stories" for Student as to what she can and cannot put in her mouth, such as "It is not okay to eat food that is on the floor or in the garbage. It is not okay to eat discarded gum. That food is dirty." And with each "Social Story," Ms. Dellay had pictures to show Student as to what she can or cannot eat. [Resp. Exh. C, p. 1-10; Resp. Exh. P, pp. 1-9; Tr. Vol. I, pp. 98-99 and 100-102.]
19. On March 16, 2018, Student had an Outpatient Neuropsychological Evaluation (Evaluation) conducted by Kathryn Wilson, PhD, from Mary Free Bed Rehabilitation Hospital. The psychologist assessed Student and wrote the following impression/recommendations:

Results of this neuropsychological evaluation indicate *relative* strengths with processing speed, visual memory, receptive vs. expressive language, and problem-solving when given 1:1 assistance in a calm environment. Areas of weakness include impulse control, attention, visual-spatial skills, motor skills, visual-

motor integration, articulation, expressive language, and executive functioning to self-regulate and manage behaviors independently. The etiology of [Student's]¹⁰ difficulties likely is multifaceted and stems from medical problems (cerebral palsy, dysphagia), as well as early childhood neglect and maltreatment.

[Pet. Exh. 2, pp. 1-11.]

20. The Psychologist further recommended the following in the Evaluation:

It is recommended that [the parents] share the results of this neuropsychological evaluation with [Student's] school to be incorporated into her Individualized Education Program. At this point in time, I think that [Student] *might* be able to participate in a general education classroom with some resource room support for areas of academic weakness and therapies for the specific speech and motor deficits. However, she has impulse control disorders (ADHD, Pica) and Disinhibited Social Engagement Disorder that place her at risk for both physical safety and interpersonal exploitation that necessitate constant supervision. As such, I would recommend 2 things: (1) a paraprofessional working 1:1 with [Student] who can help redirect her attention to task, monitor her for safety, and help guide her to making appropriate behavior choices throughout the day; (2) I also recommend that [Student] have a proactive behavior support plan that clearly identifies behaviors of concern, antecedents, and consequences for the behaviors.¹¹

[Pet. Exh. 2, p. 7.]

21. Ms. Clark indicated that no one from Mary Free Bed Rehabilitation Hospital contacted her to get a copy of Student's educational records or contact her for her input concerning the Evaluation of Student. [Tr. Vol. I, p. 62.]

22. From February 26, 2018 to March 30, 2018, Student was absent from school, which resulted in a second REED being conducted. [Resp. Exh. N, p. 2; Tr. Vol. I, p. 67.]

23. On April 9, 2018, a REED was conducted. Under parent's input, the REED stated Petitioner M.R. e-mailed Ms. Clark that Student recently had an Evaluation on March 16, 2018, and that a parapro had been recommended by the

¹⁰ The undersigned removed Student's first name from the Evaluation and replaced it with "Student."

¹¹ The undersigned removed Petitioner's name and Student's first name throughout the quotation and replaced it with "the parents" or "Student."

Psychologist for safety concerns. The REED further stated that the Evaluation was provided to Respondent. Under school-based observations, it stated that Student's IEP was recently amended to include time in the resource room, but that at the current time, Student had not been in attendance, so no data has been collected to measure the effect of this program. Under evaluation plan, the REED stated that the IEP has determined that additional evaluation is required to determine the needs of Student. [Resp. Exh. F, pp. 1-4.]

24. On April 14, 2018, Petitioner M.R. took Student to the Emergency Room (ER) at Lakeland Medical Center, in which she reported concerns for Student's ingestion of rubber cement nearly 24 hours ago. The ER report stated the following:

Patient's mother explains that the child reportedly ingested the rubber cement last night. Pt mother found the child with vomit in her bed this am. Pt. mother reports that the child eats a lot of paper products and she believed the vomitus to contain paper, however, she noted that the bits in the vomit seemed rubbery or plastic like....

[Pet. Exh. 3, pp. 1-3.]

25. On or about April 16, 2018, Petitioner M.R. states she brought Student to school and informed Ms. Clark/District that Student ate a large industrial glue. [Tr. Vol. I, pp. 20-21.]
26. On April 17, 2018, Petitioner M.R. indicated Student returned to school and ate another glue stick and came home vomiting once again. Petitioner M.R. indicated Student also admitted to eating a bookmark and brought a pencil box home from school. Petitioner M.R. did not take Student to the ER. [Pet. Exh. 5, p. 1; Tr. Vol. I, p. 49.]
27. In the spring of 2018, Ms. Clark indicated that she was contacted by Petitioner M.R. that Student swallowed rubber cement in art class and she was in the emergency room. An investigation was conducted, and an art teacher and a classroom teacher reported that no bottles of rubber cement had been moved as far as they could tell and they had not been opened. [Tr. Vol. I, pp. 68-69.]
28. Because of this incident, Respondent implemented a Safety Plan effective April 18, 2018. The Safety Plan included a detailed schedule as to how Respondent would monitor Student from the point she arrives at school, to the time she departs school, Monday through Friday. The Safety Plan included the following: (i) a one on one personal aide¹² with Student during art class; (ii) a

¹² Hereinafter referred to as "personal aide."

personal aide with Student to supervise during recess; (iii) the special education teacher sitting with Student and another student during lunch; (iv) Mr. Gallagher has to check/empty all Student's pockets prior to leaving for the day; (v) Student will begin riding a van; and (vi) other safety implementations. [Resp. Exh. M, pp. 1-3.]

29. Ms. Clark said the teachers felt the Safety Plan made a difference, including Mr. Gallagher, stating the Safety Plan was working and that he saw a decrease in Student putting things in her mouth. [Tr. Vol. I, pp. 72 and 89.]

30. On April 19, 2018, an IEP Amendment was completed for Student based on a change for transportation provision. The IEP stated that Student would have special transportation, specifically:

[Student] has difficulty maintaining her behavior. There are concerns for her safety. Transportation is needed door to door between home and school. While on the van, [Student] should not sit in proximity to any student whom she can take things from.

Other Consideration: [Student] will not have a backpack. [M.R.] will pick-up/drop-off any needed material. School staff will monitor [Student] at all times.¹³

[Resp. Exh. B, pp. 1-9.]

31. On May 21, 2018, an IEP team meeting was held regarding Student's IEP reevaluation of eligibility for special education programs or services. Participating as team members were Petitioner M.R. (parent); Julann Ford (Speech); Amanda Jones (Social Worker); Mr. Gallagher (Teacher); Deedra Boehm (Teacher Consultant); Ms. Clark (Principal); and Michelle Sykora (Supervisor). [Resp. Exh. A, p. 1.]

32. The IEP team determined that Student was eligible for Special Education as a student with OHI, R. 340.1720. The IEP noted that Petitioner M.R. has requested a personal aide for Student. The IEP indicated Student does well academically, and per her Gross Motor Function Measure (GMFM), it improved this year from the 82nd percentile to the 94th; but, she does demonstrate poor visual motors skills and delayed balance reactions. The IEP indicated Student area of needs include behavior, communication (speech), physical including accessibility within facilities/community (occupational therapy and physical therapy). The IEP further stated the following:

¹³ The undersigned removed Petitioner's name and Student's first name throughout the quotation and replaced it with "M.R." or "Student."

The staff has observed a decrease in the number of times throughout the day when [Student] places inappropriate objects in her mouth since she has begun using the chew jewelry. [Student] struggles to display appropriate age-level behaviors in the classroom and on the bus. She does not maintain appropriate boundaries with peers. She does not follow teacher directives. There are times when these behaviors pose a safety concern. These behaviors impact the student's (sic) ability to function independently in the general education setting[.]¹⁴

[Resp. Exh. A, pp. 1-4.]

33. The IEP further developed short-term objectives and annual goals to address her needs. The IEP contained Supplementary Aids/Services/Personal Support, such as providing behavioral support, consultation of occupational therapy services, utilize manipulative/tactile models, and provide extra hands-on clues. The Special Education Programs/Services listed in the IEP included physical therapy 30-100 minutes per month; occupational therapy 40-100 minutes per month; speech and language therapy 120 to 240 minutes per month, and elementary resource room 1 to 2.5 hours per week. The IEP also stated that Student will receive special transportation due to concerns for her safety. The IEP noted that Student's LRE would be to fully participate with students who are nondisabled in the general education setting, except for the time spent in separate special education programs/services provided outside of the general education classroom. The IEP considered but did not incorporate a personal aide for Student because "[s]chool staff has developed a safety plan for [Student]¹⁵ detailing adult supervision and times of the day. Observational data show that this plan has been effective. A personal aide is not considered to be needed." [Resp. Exh. A, pp. 1-10.]

34. Ms. Clark indicated the IEP team concluded that a personal aide is not necessary because the IEP team saw progress with the safety plan and felt it was giving Student the support she needed to thrive and be safe, while also keeping her in the least restrictive environment. [Tr. Vol. I, p. 73.]

35. Mr. Gallagher agreed that a personal aide was not necessary. He feels the safety plan was sufficient in preventing Student from eating things, the personal aide would take away her independence, and Student is very capable of doing all the activities independently. [Tr. Vol. I, pp. 89, 92, and 94-96.]

¹⁴ The undersigned removed Student's first name and replaced it with "Student."

¹⁵ The undersigned removed Student's first name and replaced it with "Student."

36. Ms. Dellay stated Student is progressing with the goals and objectives. She thinks the safety plan is effective, Student does not need a personal aide, and Student wants her independence, which a personal aide would hinder. [Tr. Vol. I, pp. 104-105.]

37. Petitioner M.R. disagrees with the May 2018 IEP and seeks a personal aide for her daughter throughout the school day. Petitioner M.R. states that safety is more important than her daughter's social life. Even with the "Social Stories" and Safety Plan, Petitioner M.R. states that Student is still putting inappropriate objects in her mouth. [Resp. Exh. A, p. 1; Tr. Vol. I, pp. 115-116.]

CONCLUSIONS OF LAW

In the instant matter, like in most due process hearings, many witnesses testified and there were numerous exhibits offered and admitted into evidence. The undersigned has reviewed the exhibits and the transcripts of the hearing in deciding this matter. It is clear from the record that Petitioner M.R. is a loving parent who wants the best for her child. She is a fierce advocate on her daughter's behalf. It is also clear from the record that Respondent staff who have worked with Student also want the best for Student.

Here, Petitioner M.R. has not established, by a preponderance of the evidence, that the May 2018 IEP failed to provide Student FAPE, specifically, a personal aide for Student throughout the school day.

All of the procedural safeguards have been met here. Student had the required IEPs, including IEP Amendments, conducted throughout and at the end of the 2017-2018 school year. And further, the IEP team consisted of the appropriate team members and Petitioner M.R. received notice of each IEP team, attended and actively participated. [See Resp. Exh. A, pp. 1-15; Resp. Exh. B, pp. 1-9; Resp. Exh. C, pp. 1-10; and Resp. Exh. D, pp. 1-11.] Having met all of the procedural safeguards, the only question remaining is whether the May 2018 IEP is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" as required by *Endrew F.* It is.

Petitioner M.R. disagrees with the May 2018 IEP and seeks a personal aide for Student throughout the school day. Petitioner M.R. claims that safety is the number one priority. [Tr. Vol. I, pp. 115-116.] Petitioner M.R. claimed that she does not like the Safety Plan because Student is still placing inappropriate objects in her mouth. [Tr. Vol. I, pp. 115-116.] Even with the Safety Plan, including all her other diagnoses (i.e., adjustment disorder), Petitioner M.R. testified that Student is not capable of making the right choices. [Tr. Vol. I, p. 26.] Petitioner M.R. testified that she wants her daughter to be comfortable with where she is going to school and for the school to guarantee her

safety. [Tr. Vol. I, p. 28.] Ultimately, Petitioner M.R. seeks a personal aide because it will give her more assurances that Student will not put anything into her mouth.

Additionally, Petitioner M.R. presented evidence in attempt to support her claim that a personal aide is necessary for Student. Petitioner M.R. presented an Evaluation conducted by the Psychologist on March 16, 2018, who recommended a personal aide for Student. [Pet. Exh. 2, pp. 1 and 6-7.] It should be noted that the Psychologist did not testify as a witness. Also, the Psychologist never observed Student at school, but she did review Student's school and therapy records provided by Petitioner M.R. [Pet. Exh. 2, p. 2.] Petitioner M.R. also presented an ER report dated April 14, 2018, where she claims that Student reportedly ingested rubber cement, resulting in the ER visit. [Pet. Exh. 3, pp. 1-3.] And finally, Petitioner M.R. presented notes and a list of concerns given to the Psychologist to show proof that Student places inappropriate objects in her mouth. [See Pet. Exh. 5, p. 1; Pet. Exh. 7, pp. 1-3.]

In response, Respondent contends that a personal aide is not necessary for Student. All three witnesses who testified on behalf of Respondent claimed that Student does not need a personal aide because she is progressing in school, the personal aide would take away her independence, and the safety plan is effective. [Tr. Vol. I, pp. 73, 89, 92, 94-96, and 104-105.] Respondent contends that the May 2018 IEP took into consideration Petitioner M.R.'s request for a personal aide but concluded that one was not necessary. [Resp. Exh. A, pp. 1-10.]

Based on the totality of the hearing record, Petitioner M.R. has not established, by a preponderance of the evidence, that the May 2018 IEP failed to provide Student FAPE, specifically, a personal aide for Student throughout the school day.

Here, Petitioner M.R. failed to provide sufficient evidence and testimony demonstrating that a personal aide for Student is necessary to provide FAPE. Petitioner M.R. did provide an Evaluation report from a Psychologist claiming a personal aide is recommended for Student. However, this document alone does not justify by a preponderance of evidence that Student needs a personal aide. Petitioner M.R. failed to have the Psychologist testify as a witness to bolster Petitioner M.R.'s claim that a personal aide is needed. Petitioner M.R. did present evidence showing that her child has issues putting inappropriate objects in her mouth. However, all this evidence presented by Petitioner M.R. is dated on or before the date Respondent had fully implemented the Safety Plan, which was on April 18, 2018. [See Resp. Exh. M, pp. 1-2.] Petitioner M.R. failed to present sufficient evidence showing that the Safety Plan, dated after its implementation, does not work and therefore, a personal aide is necessary for Student to provide FAPE. For example, Petitioner M.R. did not show any documentation showing an increase in Student placing inappropriate objects in her mouth *after* the implementation of the Safety Plan, which could have possibly shown a need for a personal aide.

Nevertheless, despite Petitioner M.R.'s concerns for the Safety Plan, Respondent credibly established that the Safety Plan had in fact been working. Specifically, Respondent presented three credible witnesses, Ms. Clark, Mr. Gallagher, and Ms. Dellay, who all agreed Student does not need a personal aide because the Safety Plan is effective. Further, during Ms. Clark's direct testimony, she went through Student's daily schedule and provided thorough testimony demonstrating the safeguards Respondent had implemented to prevent Student from placing inappropriate objects in her mouth. [See Tr. Vol. I, pp. 78-82.] For example, the Safety Plan included a personal aide with Student during art class and recess because these were times in which Student would have access to inappropriate objects. [Resp. Exh. M, pp. 1-3.] However, there are other times in the Safety Plan that Petitioner did not have a personal aide because she did not have access to appropriate objects, i.e. sitting near Mr. Gallagher. [Resp. Exh. M, pp. 1-3.] These were just some of the examples of the safety implementation Respondent had implemented, which demonstrates that the safety plan works.

In addition to the Safety Plan, Ms. Dellay, the Special Education Teacher, implemented additional safety measures for Student. Ms. Dellay wrote up "Social Stories" for Student as to what she can and cannot put in her mouth, such as "It is not okay to eat food that is on the floor or in the garbage. It is not okay to eat discarded gum. That food is dirty." [Resp. Exh. P, pp. 1-9.] And with each "Social Story," Ms. Dellay had pictures to show Student as to what she can or cannot eat. [See Resp. Exh. P, pp. 1-9.] Respondent also obtained chewing beads/jewelry for Student, for her to chew on rather than place inappropriate objects in her mouth. [See Resp. Exh. P, pp. 1-9.] Again, this was an additional layer of safety measures Respondent had implemented, which therefore, shows to the undersigned that a personal aide is *not* necessary for Student to provide FAPE.

As to the May 2018 IEP, Respondent considered Petitioner M.R.'s request for a personal aide; however, the IEP team determined one was not necessary. The IEP team determined that the safety implementations (i.e., Safety Plan and chew jewelry) enacted by Respondent resulted in a decrease of Student placing objects in her mouth. Specifically, the IEP stated the following:

*The staff has observed a decrease in the number of times throughout the day when [Student] places inappropriate objects in her mouth since she has begun using the chew jewelry...*¹⁶

[Resp. Exh. A, pp. 1-4 (emphasis added).]

In the end, the IEP team did not incorporate a personal aide for Student because

¹⁶ The undersigned removed Student's first name and replaced it with "Student."

"[s]chool staff has developed a safety plan for [Student]¹⁷ detailing adult supervision and times of the day. Observational data show that this plan has been effective. A personal aide is not considered to be needed." [Resp. Exh. A, pp. 1-10.]

Based on the above information, the undersigned agrees with the IEP team that a personal aide is *not* necessary for Student to provide FAPE due to the observational data showing the safety implementations have been effective. The standard in this case is whether Student's May 2018 IEP is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" as required by *Endrew F.* The undersigned finds that it does. All of Respondent's witnesses agreed that Student is progressing in school, without the presence of personal aide throughout the day. The IEP indicated that Student does well academically. For example, per her GMFM, it improved this year from the 82nd percentile to the 94th; but, she does demonstrate poor visual motors skills and delayed balance reactions. [Resp. Exh. A, pp. 1-4.] This shows to the undersigned that the IEP(s) and the IEP Amendments that had been implemented are appropriate because it shows Student is progressing in light of her circumstances.

Additionally, the May 2018 IEP team developed short-term objectives and annual goals to address her continuing needs. The IEP contained Supplementary Aids/Services/Personal Support to address Student's needs, such as providing behavioral support, consultation of occupational therapy services, utilize manipulative/tactile models, and provide extra hands-on clues. [Resp. Exh. A, pp. 1-10.] The IEP further contained Special Education Programs/Services to address Student's needs, such as physical therapy 30-100 minutes per month; occupational therapy 40-100 minutes per month; speech and language therapy 120 to 240 minutes per month, and elementary resource room 1 to 2.5 hours per week. [Resp. Exh. A, pp. 1-10.] Based on the above services being implemented, the evidence here shows that Student is receiving FAPE with the May 2018 IEP, resulting in no need of a personal aide.

Petitioner M.R. is encouraged to continue to advocate for her daughter and to ensure that all her daughter's needs are being fully meet. Based on the evidence presented at the hearing, Respondent truly wants what is best for Student and desires to fully and completely implement her IEP as best they can. All the parties are encouraged to continue to communicate their needs and desires with each other to best serve Petitioner M.R. and to educate Student. The undersigned wishes all the parties well in this important, and indeed essential, endeavor.

¹⁷ The undersigned removed Student's first name and replaced it with "Student."

CONCLUSION

- A. Student is not entitled to a one on one personal aide throughout the school day because the May 2018 Individualized Education Program provided Student with a free appropriate public education.

ORDER

IT IS ORDERED that Petitioner's due process complaint is dismissed.

IT IS FURTHER ORDERED that any claims or defenses not specifically addressed herein are dismissed with prejudice.

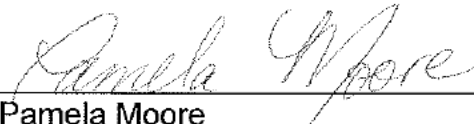
A party aggrieved by this decision may seek judicial review by filing an action in a court of competent jurisdiction within 90 days of the date of this order.



Eric J. Feldman
Administrative Law Judge

PROOF OF SERVICE


I hereby state, to the best of my knowledge, information and belief, that a copy of the foregoing document was served upon all parties and/or attorneys of record in this matter by Inter-Departmental mail to those parties employed by the State of Michigan and by UPS/Next Day Air, facsimile, and/or by mailing same to them via first class mail and/or certified mail, return receipt requested, at their respective addresses as disclosed below this 30th day of August, 2018.



Pamela Moore
Michigan Administrative Hearing System

Jessica E. Baker
Thrun Law Firm, P.C.
P. O. Box 2575
East Lansing, MI 48826-2575

Julie Markham
Department of Education
PO Box 30008
Lansing, MI 48933


River Valley School District
Michelle Sykora, Special Education Director
15480 Three Oaks Road
Three Oaks, MI 49128-9545