IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No. 11-1447

RIDLEY SCHOOL DISTRICT,
Appellee,

v.

M.R. AND J.R., PARENTS OF E.R., A MINOR,
Appellants.

On Appeal from the February 14, 2011 Judgment of the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 09-cv-2503-MSG

BRIEF OF *AMICI CURIAE* EDUCATION LAW CENTER OF PENNSYLVANIA AND LEARNING DISABILITIES ASSOCIATION OF PENNSYLVANIA IN SUPPORT OF APPELLANTS, M.R. AND J.R.

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO Fed. R. App. P. 26.1

The Education Law Center of Pennsylvania and the Learning Disabilities Association of Pennsylvania state that they do not have any parent corporation, they issue no stock, and that there is no publicly held corporation that is not a party to this proceeding which has any financial interest in the outcome of the proceeding.

Dated: July 21, 2011

s/Leonard Rieser
Leonard Rieser

I. INTERESTS OF AMICI CURIAE

The Education Law Center of Pennsylvania (ELC) is a 35-year-old, non-profit legal advocacy organization dedicated to ensuring that all of Pennsylvania's children have access to a quality public education. ELC has devoted many years to the development of the law concerning the educational rights of children with disabilities. Our goal, ever since our first appearance in this Court as *amicus* on behalf of the Delaware Valley Association for Children with Learning Disabilities in *Frederick L. v. Thomas*, 557 F.2d 373 (3d Cir. 1977) (requiring identification of children with learning disabilities), has been to promote interpretations of applicable law that would enable children with disabilities to become educated, productive citizens.

The Learning Disabilities Association of Pennsylvania (LDAPA) is the Pennsylvania State Affiliate of the Learning Disabilities Association of America, a national organization. LDAPA is an advocacy organization dedicated to helping children and adults with learning disabilities and other related neurological disorders. LDAPA believes that every individual with a learning disability has the right to a quality education; that every individual with a learning disability can succeed at school and work; and that early identification, intervention, and remediation are important for each individual.

One of the issues presented in the instance case involves a question of first impression in this Circuit, *i.e.*, the interpretation of the provision of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. § 1400, *et seq.* (West 2011), added to the statute in 2004, that special education services be "based on peer-reviewed research to the extent practicable." 20 U.S.C.A. § 1414(d)(1)(A)(i)(IV) (West 2011). ELC and LDAPA submit the current brief in order to share their views on the proper interpretation of this important provision of the IDEA which has the potential to impact many children with disabilities and public schools.[1]

II. INTRODUCTION

A. Summary of Argument

In 2004, Congress amended the IDEA to require that the special education, related services, and supplementary aids and services provided to a child with a disability in accordance with an Individualized Education Program (IEP) must be based on "peer-reviewed research to the extent practicable." In this case, the district court concluded that the qualifying phrase "to the extent practicable" essentially relieves school districts of any requirement to provide a peer-reviewed researched-based special education services as part of a child's "free appropriate public education" under the IDEA.

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[1] This Brief of *Amici Curiae* has been authored solely by attorneys for the Education Law Center. Neither Appellant nor Appellee contributed any money to fund the preparation or submission of this brief. No other person contributed any money to fund the preparation or submission of this brief.

This Court has not considered when, or whether, the lack of special education services based on peer-reviewed research will render an IEP deficient. This Court's decision regarding the interpretation of this provision has the potential to impact the special education program of hundreds of thousands of children with disabilities (there are over 270,000 children with disabilities in Pennsylvania alone identified as being eligible for special education services)[2] and public school systems. As *amici*, ELC and LDAPA argue that the district court committed an error of law when it held that the IDEA does not require a child's IEP to include special education "based on peer-reviewed research to the extent practicable" for the child to receive a free appropriate public education. In addition, ELC and LDAPA maintain that the district court failed to give the hearing officer's factual determination that Appellee had not in fact provided E.R. with specialized instruction in reading based on peer-reviewed research the deference to which it was due.

[2] Pennsylvania Special Education Data Report School Year 2008-2009, *available at* http://penndata.hbg.psu.edu/BSEReports/SD_Reports/2008_2009/PDF_Documents/Speced_Data_Report_State_2008-2009_Final.pdf.

III. ARGUMENT

A. The IDEA Requires a Child's IEP to Include Special Education Services "Based on Peer-Reviewed Research to the Extent Practicable" for the Child to Receive a Free Appropriate Public Education.

The district court in this case committed an error of law when it held that the IDEA does not require a child's Individualized Education Program (IEP) to include "a research based program" in order for the child to receive a free appropriate public education. Appendix of Appellant at A-26, A-29. The court ignored the plain language of the IDEA which requires that a child's IEP "*must include* . . . a statement of the special education and related services and supplementary aids and services, *based on peer-reviewed research to the extent practicable, to be provided to the child.*" 20 U.S.C.A. § 1414(d)(1)(A)(i)(IV) (West 2011) (emphasis added). Congress added this peer-reviewed research provision to the IDEA in 2004 to improve the educational performance of children with disabilities by ensuring that children receive special education programs based on effective instructional techniques. The district court also ignored the legislative history regarding Congress' intention for including this language in the Individuals with Disabilities Education Improvement Act of 2004 (IDEA 2004), 20 U.S.C.A § 1400, *et seq.* (West 2011).

Since its initial passage by Congress in 1975, the enduring purpose of the IDEA has been to ensure that all children with disabilities receive a free

appropriate public education "designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C.A. § 1400(d)(1)(A) (West 2011). *See also Rowley v. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist.*, 458 U.S. 176, 179 (1982) (the IDEA represents "an ambitious federal effort to promote the education of [children with disabilities]."). This free appropriate public education – known as a FAPE – is to be delivered through the provision of special education and related services designed to help eligible children meet the goals set out in their Individualized Education Programs (IEPs). 20 U.S.C.A. § 1401(9) (West 2011); 20 U.S.C.A. § 1414(d)(1)(A) (West 2011). *See, e.g., G. v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 298 (4th Cir. 2003) ("The primary vehicle for delivery of a FAPE to students with disabilities is the IEP."). The law defines "special education" as "specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability." 20 U.S.C.A. § 1401(29) (West 2011); 34 C.F.R. § 300.39(a)(1) (2010).

The original version of the IDEA contained no indication of what the substantive standard for the provision of an appropriate program would be or what services would form the basis of an appropriate program. Indeed, this was the issue confronted by the Supreme Court in *Rowley* when it held that, absent any further Congressional direction, an appropriate program is one that is developed in compliance with the IDEA's procedural requirements and offers an IEP

"reasonably calculated to enable the child to receive educational benefits[.]" *Rowley*, 458 U.S. at 206-07.

Despite the IDEA's stated purpose of "improving educational results for children with disabilities," 20 U.S.C.A. § 1400(c)(3) (West 2011), and the "educational benefit" standard articulated in *Rowley*, many students with disabilities have not achieved up to their potential. The President's Commission on Excellence in Special Education, established by President George W. Bush to recommend policies for "improving the educational performance of students with disabilities," Exec. Order No. 13,227, 66 Fed. Reg. 51,287 (Oct. 5, 2001), presented the following alarming statistics related to the poor educational performance of children with disabilities:

- Young people with disabilities drop out of high school at twice the rate of their peers.
- Enrollment rates of students with disabilities in higher education are still 50 percent lower than enrollment among the general population.
- Of the nearly three million children in special education due to "specific learning disabilities," 80 percent are there simply because they haven't learned how to read. . . . Sadly, few children placed in special education close the achievement gap to a point where they can read and learn like their peers.

President's Commission on Excellence in Special Education, *A New Era: Revitalizing Special Education for Children and their Families* 3 (2002). The Commission found that special education too often "becomes an end-point – not a gateway to more **effective instruction**," and that the current special education

system "does not always embrace or implement **evidence-based practices** once established." *Id.* at 7-8 (emphasis in the original). [3] To address these problems, the Commission's recommended that the special education system move toward early identification and swift intervention "using *scientifically based instruction and teaching methods.*" *Id.* at 8 (emphasis added).

The changes that Congress made to the IDEA three years later reflected the Commission's findings and recommendations. When the IDEA was reauthorized in 2004, Congress found that achieving the law's purpose of "improving educational results for children with disabilities" had been "impeded by low expectations, and an insufficient focus on applying applicable research on proven methods of teaching and learning for children with disabilities." 20 U.S.C.A. § 1400(d)(4) (West 2011). IDEA 2004 altered the way in which teachers are required to work with children with disabilities in two major ways: 1) special education services must now be based on peer-reviewed research, and 2) educators must monitor and report on the educational progress of students receiving special

[3] The educational performance of students with IEPs in Pennsylvania still lags behind that of their nondisabled peers. Of the students who were assessed in 2009-2010 using Pennsylvania's statewide assessment systems, 72% of all students achieved Proficient or above in reading in Grades 3-8 and 11, while only 35% of students with IEPs achieved Proficient or above in reading. 75% of all students achieved Proficient or above in mathematics in Grades 3-8 and 11, but only 45% of students with IEPs achieved Proficient or above in mathematics in 2009-2010. *See* Commonwealth of Pa., *State Report Card 2009-2010, available at* http://paayp.emetric.net/Content/reportcards/RC10M.PDF).

education. *See* Jean B. Crockett & Mitchell L. Yell, *Without Data All We Have Are Assumptions: Revising the Meaning of A Free Appropriate Public Education*, 37 J.L. & Educ. 381, 387 (2008).

1. The District Court Ignored The Plain Language Of The IDEA Which Requires That An IEP Must Include A Statement Of Special Education Services "Based On Peer-Reviewed Research To The Extent Practicable."

The first major change – the use of peer-reviewed research – is at issue in this case. As stated above, the amended IDEA requires that IEPs "must include . . . a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child." 20 U.S.C. § 1414(d)(1)(A)(i)(IV) (West 2011); 34 C.F.R. § 300.320(a)(4) (2010). The law does not equivocate; the plain language of the statute states that special education included in an IEP *must* be "based on peer-reviewed research to the extent practicable."[4] While the IDEA does not require that special education must be based on peer-reviewed research in *every single instance*, it does make the use of specially designed instruction based on peer-reviewed research mandatory for the provision of FAPE through inclusion in a

[4] The U.S. Department of Education has provided resources for educators about using research-based practices. In 2003, it published *Identifying and Implementing Educational Practices Supported by Rigorous Evidence: A User-friendly Guide*, *available at* http://www2.ed.gov/rschstat/research/pubs/rigorousevid/index.html) and it established the What Works Clearinghouse (WWC) in 2002 to provide a central source for research about "what works in education." *See* http://ies.ed.gov/ncee/wwc/.

child's IEP "to the extent practicable" – meaning where it is possible to provide special education with a peer-reviewed research basis, then it must be so provided. The United States Department of Education's Analysis of Comments and Changes to the 2006 IDEA regulations supports this position, explaining that "to the extent practicable" generally means that "services and supports should be based on peer-reviewed research to the extent that it is possible, given the availability of peer-reviewed research." 71 Fed. Reg. 46,540, 46,665 (Aug. 14, 2006).

The district court ignored the plain language of the statute when it held that "peer-reviewed research services are in no way mandated as Parents urge." Appendix of Appellant at A-26. The role of the courts in interpreting a statute is to give effect to Congress's intent. *See Idahoan Fresh v. Advantage Produce, Inc.*, 157 F.3d 197, 202 (3d Cir.1998). When interpreting a statute, courts must try to give meaning to every word which Congress used and "*should avoid an interpretation which renders an element of the language superfluous*." *Rosenberg v. XM Ventures*, 274 F.3d 137, 141 (3d Cir. 2001) (emphasis added). The preferred construction of a statute is one that gives meaning to all provisions. *Id.* at 142. In this case, the district court interpreted the phrase "to the extent practicable" to mean "not required," when in fact, the phrase meant just what it says; if it possible to provide special education based on peer-reviewed researched, then that research-

based specially designed instruction *must* be provided for the child to receive a FAPE.

2. The District Court Ignored The Legislative History Of IDEA 2004.

Even if this Court finds that Congress' intention in including the requirement that special education be based on peer-reviewed research to the extent practicable is ambiguous, the legislative history of the IDEA 2004 makes it clear that Congress meant for a child's IEP to include special education, related services, and supplementary aids and services based on peer-reviewed research to the extent practicable as a part of that child's free appropriate public education. In introducing the proposed amendments to the IDEA in 2003, Senate Report 108-185 stated that the phrase "scientifically based" was "added to align IDEA with the No Child Left Behind Act, and its meaning is the same as defined under that Act." S. Rep. No. 108-185, at 26 (2003). When the bill to reauthorize the IDEA was introduced in the House of Representatives on March 19, 2003, the phrase "based on peer reviewed research" was included in the provision governing the selection of special education, related services, and supplementary aids and services. H.R. 1350, 108th Cong. (2003) (enacted). The phrase was adopted from the fourth criterion defining "scientifically based reading research" in No Child Left Behind, which states that such research "has been accepted by a peer-reviewed journal or

approved by a panel of independent experts through a comparably rigorous, objective, and scientific review." 20 U.S.C.A. § 6368(6)(B)(iv) (West 2011).[5]

One of the main thrusts of NCLB was to ensure a focus on the use of educational interventions that have been shown to improve student performance. As a result, when Congress was charged with aligning IDEA with NCLB, it was also charged with "focusing on doing what works." S. Rep. No. 108-185, at 4 (2003). *See also* Susan Etscheidt & Christina M. Curran, *Peer-Reviewed Research and Individualized Education Programs (IEPs): An Examination of Intent and Impact*, 18 Exceptionality 138, 140 (2010) ("The legislative history of the IDEA 2004 and its peer-reviewed research requirement reveals that the intent of the PRR provision was to ensure that selection of special education services reflected sound practices that have been validated empirically whenever possible.") and 71 Fed. Reg. 46,540, 46,665 (Aug. 14, 2006) (explanation of United States Department of Education that the PRR provision means that "States, school districts, and school personnel must . . . *select and use methods that research has shown to be effective*,

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[5] We recognize that "scientifically based research" and "peer-reviewed research" do not have the same meaning and are not interchangeable phrases. *See* Perry A. Zirkel and Tessie Rose, *Scientifically Based Research and Peer-Reviewed Research under the IDEA: The Legal Definitions, Applications, and Implications*, 22 J. of Special Educ. Leadership 36-50 (2009). However, both concepts are driven by the same underlying rationale – that educational techniques that have been shown to be effective through critical research should be used to instruct children.

to the extent that methods based on peer-reviewed research are available.")(emphasis added).[6]

3. The District Court Misinterpreted and/or Ignored Existing Case Law Considering the Peer-Reviewed Research Provision.

The district court relied primarily on *Joshua A. v. Rocklin Unified Sch. Dist.*, 2008 WL 906243 (E.D. Cal. Mar. 31, 2008), to support its proposition that the IDEA does not mandate the provision of peer-reviewed research and the failure to provide a student with special education that does not have a peer-reviewed basis does not result in a *per se* denial of a FAPE. In *Joshua A.,* the district court's total analysis of the issue of "peer review research" (as the court describes it) consists of the following:

> It does not appear that congress [sic] intended that the service with the greatest body of research be used in order to provide FAPE. Likewise, there is nothing in the Act to suggest that the failure of a public agency to provide services based on peer-reviewed research would *automatically* result in a denial of FAPE.

Joshua A., 2008 WL 906243, at *3 (emphasis added). On consideration of the issue on appeal, the Ninth Circuit, in an unpublished decision, simply stated that the school district's "eclectic" approach to the provision of special education

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[6] We note that neither the statute nor the regulations actually define "peer-reviewed research." The United States Department of Education has advised that "'[p]eer-reviewed research' generally refers to research that is reviewed by qualified and independent reviewers to ensure that the quality of the information meets the standards of the field before the research is published." 71 Fed. Reg. 46,540, 46,664 (Aug. 14, 2006).

services to the student in that case, while not peer-reviewed itself, "was based on 'peer-reviewed research to the extent practicable.'" 319 Fed. Appx. 692 (9th Cir. 2009).

Joshua A. 's analysis of the meaning of the PPR provision at the district court level or at the circuit court level is not inconsistent with our position. We do not argue that the failure to provide special education services based on peer-reviewed research would result in a denial of FAPE in every instance; certainly, there will be some situations in which a particular service is appropriate to address a child's needs, but there is no peer-reviewed research on the effectiveness of that service. *See* 71 Fed. Reg. 46,540, 46,665 (Aug. 14, 2006). In addition, the Ninth Circuit found that services provided to the child in *Joshua A.* actually were based on peer-reviewed research *to the extent practicable*; the court did not determine that it did not matter to the FAPE calculation if services were not based on peer-reviewed research, as the district court did in the instant case.

The district court also failed to consider a decision where lack of a peer-reviewed research basis for a child's special education program was found, in part, to result in a denial of FAPE to a child. *See Waukee Cmty. Sch. Dist. v. Douglas & Eva L.,* 51 Individuals with Disabilities Educ. L. Rep. 15 (S.D. Iowa Aug. 7, 2008) (a copy of this decision is provided in the Supplemental Appendix to this brief). In *Waukee*, the district court affirmed the ALJ's decision that the excessive

duration of "time-outs" used to control a child's behavioral difficulties was inconsistent with "peer-reviewed research to the extent practicable" and therefore had a bearing on "the question of whether the implementation of her IEP was 'reasonably calculated' to enable her to receive an educational benefit." The court held that "an IEP which relies on behavioral interventions which are not supported by, or are contrary to, the relevant research may be such that it is not 'reasonably calculated' to provide an educational benefit." Two months after the district court in the instant case issued its opinion, a different district court held that a school denied a student a FAPE, in part, because there was no evidence in the record that there was "any scientific basis [or peer-reviewed research] for the point system [that the school district wanted to include in the student's IEP]," but that there were other peer-reviewed methods appropriate for the student. *See B.H. v. West Clermont Bd. of Educ.*, 2011 WL 1575591, at *11 (S.D. Ohio Apr. 26, 2011).

B. The District Court Committed An Error Of Law By Failing To Afford The Proper Deference To The Hearing Officer's Critical Factual Finding That The IEP For E.R. Lacked Appropriate Specially Designed Instruction In The Form Of A Peer-Reviewed Reading Program.

When considering an appeal from a state administrative decision under the IDEA, district courts must apply a nontraditional standard of review, which is often referred to as "modified de novo" review. *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 564 (3d Cir. 2010). Under this standard, a district court must give "due

weight" and deference to the findings in the administrative proceeding. "'Factual findings from the administrative proceedings are to be considered prima facie correct,' and if the reviewing court does not adhere to those findings, it is 'obliged to explain why.'" *S.H. v. State-Operated Sch. Dist. of Newark*, 336 F.3d 260, 270 (3d Cir. 2003). "The issue of whether an IEP is appropriate is a question of fact." *Id.* at 271.

Before the district court decided to overturn the hearing officer's decision, the court claims to have afforded due deference to the hearing officer's factual finding that Appellee denied a free appropriate public education to E.R. because her IEP lacked specially designed instruction in reading based on peer-reviewed research. However, the court substituted its own judgment in this case and failed to give "due weight" to the hearing officer's critical factual finding that "[t]he IEP that the IEP team developed between March 18, 2008 and June 9, 2008 lacked appropriate specially designed instruction in the form of a research based, peer reviewed reading program, and therefore was insufficient and denied E. a FAPE." The hearing officer found that *Project Read*, the reading program offered by the District to E.R., "was designed to be research based and the students made progress in reading [using that program] *but there were flaws in the research* that made it impossible to attribute the reading growth the students experienced to *Project Read* alone." H.O. Decision at 8-9 n.10 (emphasis added).

In comparison, the hearing officer found that the Wilson Reading System, the program proposed by E.R.'s parents as appropriate for her, "*is a research based reading and writing program.* It is a complete curriculum for teaching decoding and encoding (spelling) ...." H.O. Decision at 9 n.11 (emphasis added). In spite of these findings, the district court noted that the District's Director of Special Education testified that "*Project Read* is a 'research based' program premised upon 'how children learn.'" The district court chose to credit this testimony, while the hearing officer, who actually took the testimony, chose to discredit it. In addition, the district court ignored the Director of Special Education's acknowledgement on cross-examination that the research she found on *Project Read* was limited to a review of *Project Read* research by the Florida Center for Reading Research, and that even that research was limited to the effectiveness of *Project Read* for children who in regular education and not receiving special education services. N.T. at 709. On the issue of whether the reading program was research-based, the court was required to defer to the hearing officer, and the court failed to do so.

IV. CONCLUSION

For the reasons stated above, this Court should find in favor of Appellant and overturn the district court's decision.

Dated: July 21, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I, Leonard Rieser, hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 3,886 words of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using MS Word font size 14 Times New Roman.
3. The hard copy and the electronic copy of this brief are identical.
4. A virus check was run on the electronic version of this brief using AVG Antivirus Scan 2011.

Dated: July 21, 2011

s/Leonard Rieser
Leonard Rieser

CERTIFICATE OF BAR MEMBERSHIP

The undersigned hereby certifies that I have been admitted before the bar of the United States Court of Appeals for the Third Circuit, and that I am a member of good standing of the Court.

Dated: July 21, 2011

s/Leonard Rieser
Leonard Rieser

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has caused to be served a copy of the foregoing Brief of *Amici Curiae* in Support of Appellants M.R. and J.R. upon the following by filing it with the Court's Electronic Case Filing System (ECF) and by serving one (1) copy by United States First Class Mail, postage pre-paid:

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The Brief is being filed on the same date with the Court by the Court's Electronic Case Filing (ECF) System in a PDF format and by the filing of an original and ten (10) hard copies with the Clerk of the Court of Appeals.

Dated: July 21, 2011

s/ Leonard Rieser
Leonard Rieser

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RIDLEY SCHOOL DISTRICT, Appellee, v. M.R. AND J.R., PARENTS OF E.R., A MINOR, Appellants.	:	Docket No. 11-1447

SUPPLEMENTAL APPENDIX TO BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLANTS, M.R. AND J.R.

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108 LRP 51596

WAUKEE COMMUNITY SCHOOL DISTRICT and HEARTLAND AREA EDUCATION AGENCY, Plaintiffs, v. DOUGLAS and EVA L., individually and on behalf of ISABEL L., a child, Defendants

U.S. District Court, Southern District of Iowa

4:07-cv-00278-REL-CFB

August 7, 2008

Related Index Numbers

50.010 Development of Plan

50.015 In General

200.040 Reasonably Calculated to Provide FAPE

Judge / Administrative Officer

RONALD E. LONGSTAFF

See related decision reported at 48 IDELR 26

Case Summary

The fact that a student's parents agreed to the use of time-outs and hand-over hand interventions to manage their daughter's problem behaviors did not excuse a district's over-reliance on those techniques. The District Court ruled that the behavior interventions were excessive and inappropriate. The court recognized that the district made a "considerable effort" to address the child's behavioral needs. Nonetheless, the interventions applied were not reasonably calculated to manage the student's behavioral problems. The court pointed out that the student's noncompliant behaviors were escapist in nature, while her aggression against peers was an effort to seek attention. "Both parties' experts ... testified that the use of break time activity in response to non-compliance -- an escape-based behavior -- and the use of hand-over-hand intervention in response to peer aggression -- an attention seeking behavior -- would serve to reinforce the problem behavior and was contraindicated by the research," U.S. District Judge Ronald E. Longstaff wrote. Moreover, the interventions were excessive and inappropriate as applied. Although the district indicated that it would apply "age-appropriate" time-outs, lasting one minute for each year of the student's age, the evidence showed that the student sometimes spent several hours in isolation. The parents were also unaware that district staffers regularly used restraint when applying hand-over hand interventions. By failing to develop and implement appropriate behavioral interventions, the district denied the student FAPE.

Full Text

Appearances:

Order

THE COURT HAS BEFORE IT Waukee Community School District's and Heartland Area Education Agency's (the "Appellants") complaint pursuant to the Individuals with Disabilities Education Act (the "IDEA"), 20 U.S.C. § 1415(i)(2)(A). The Appellants seek a declaration from this Court that they offered Isabel L. a free appropriate public education ("FAPE") in the least restrictive environment, with behavioral interventions and supports in accordance with the IDEA and the special education laws of Iowa.[1] In their response to the Appellants' complaint, Douglas & Eva L. ("the Parents") seek a ruling sustaining the opinion of the Administrative Law Judge that the Appellants did not educate Isabel in the least restrictive environment and that the Appellants implemented behavioral interventions with Isabel that were inconsistent with the IDEA and Iowa law.[2] The Parents further seek an award of attorneys' fees pursuant to the provisions of 20 U.S.C. § 1415, as the prevailing party in the proceedings below. The issues have been extensively briefed and are considered fully submitted.

I. Procedural Background

The Parents filed a Request for Due Process Hearing with the Iowa Department of Education pursuant to 20 U.S.C. §§ 1415(b)(6), 1415(b)(7)(A) and 1415(f) on August 21, 2006, alleging that Isabel had not been educated in the least restrictive environment, and that the Appellants implemented

behavioral interventions with Isabel that were inconsistent with the IDEA and Iowa law. A hearing was held before an administrative law judge appointed by the Iowa Department of Education over several days during the months of November and December of 2006 and January of 2007. The ALJ issued a ruling on March 29, 2007 in favor of the Parents on both issues.

The Appellants filed the present complaint with this Court on June 6, 2007, pursuant to 20 U.S.C. § 1415(i)(2)(A). They argue that the ALJ erred as a matter of law in finding: (1) that Isabel was not educated in the least restrictive environment; and (2) that the Appellants implemented behavioral interventions that were inconsistent with the IDEA and Iowa law.

II. Factual Background

Isabel L. was born on July 31, 1996. She was diagnosed with mild mental retardation at a young age, while also exhibiting some characteristics of autism. She has experienced behavioral difficulties since an early age, including aggressive and violent outbursts. In 2005 she was diagnosed with PDD-NOS ("Pervasive Developmental Disorder -- Not Otherwise Specified"), which is a condition in which some, but not all, features of autism or another explicitly identified Pervasive Developmental Disorder are identified. Her IQ has been assessed to be between 50 and 60.

Isabel was educated at Buffalo Ridge Elementary in Castle Rock, Colorado for the 2002-2003 and 2003-2004 school years. She was identified as a student with multiple disabilities and cognitive impairment. Isabel's academic development was reported as very delayed and her communication skills were significantly below average for her age group. Her Individualized Education Plan ("IEP"), developed on May 5, 2004, identified several behavioral concerns including problems with aggression and coping with social demands. During her time at Buffalo Ridge, Isabel was integrated into the general education classroom in excess of 60% of her day, with direct instruction being provided to her in the special education setting for an hour or two per day.[3] While in the general education setting, Isabel worked with a one-on-one aide on tasks which were modified from the general education curriculum. The record shows that Isabel made academic progress during her time in Colorado.

Isabel and her family moved into the Waukee Community School District in the summer of 2004. Isabel was scheduled to repeat the second grade at the request of the Parents. Based on a review of Isabel's records from Colorado, the Appellants decided to place Isabel in a functional skills classroom in the Waukee School District. During their initial meetings, the Appellants told Isabel's parents that the typical integration for children in the functional skills classroom would include "activities that we felt they could participate actively in with their general education peers." Hearing Tr. at 1255.[4] For Isabel, this included the morning routine (Daily Oral Language and Daily Oral Math), a science-discovery class, "specials" including art, music, and physical education, library time, lunch, recess, and field trips and parties. After one week in the district, Isabel was transferred to a more advanced functional skills classroom for students with higher academic skills.

An interim IEP was developed for Isabel on September 15, 2004, pending the results of a full and individual evaluation of eligibility. Although there was some concern about Isabel's behavioral needs at the time, a behavioral support plan was not developed due to Isabel's success at the school up to that point. However, a number of the behavioral accommodations from Isabel's Colorado IEP were included in the interim IEP. Under the interim IEP, Isabel was to be removed from the general education setting approximately 61% of her day, including for the receipt of all of her instruction in reading, writing, and arithmetic. The reason given for this interim placement decision was that "Isabel is significantly below instructional level according to second grade standards and benchmarks. She needs small group instruction in all academic areas, behavior,

communication, and fine motor skills to make adequate progress." Rec. at 84.

Isabel's behavioral problems began to increase within a few weeks of the start of school, with the data and anecdotal evidence showing an increase in aggressive and non-compliant behavior.[5] A functional behavioral assessment (FBA) was conducted in late October and early November of 2004.[6] The School District was exploring possible functions[7] for Isabel's two areas of problem behavior non-compliance with adult demands and aggression with peers. It was determined that Isabel's non-compliance was maintained by an escape function, and her aggressive behavior was maintained by an attention-seeking function. Rec. at 157.

A full and individual evaluation of eligibility was reported on November 8, 2004. In addition to identifying Isabel's social and behavioral problems, the evaluation reported that Isabel was significantly behind her 2nd grade peers in all academic areas. Specifically, Isabel was functioning below the 1st percentile in comparison to her peers in reading, math and writing. *Id.* at 133-136. The evaluation stated that "Isabel needs small group or one-on-one instruction with repeated practice in all academic areas to be able to learn and retain academic skills." *Id.* at 138. In the area of behavior, the evaluation found that "Isabel's progress in the area of behavior is significantly slower than peers even with special education instructional supports in place. Isabel is functioning at a pre-kindergarten to kindergarten level in her ability to interact with peers, follow teacher directions, and complete academic tasks independently." *Id.* at 133.

A new IEP was implemented for Isabel on November 22, 2004 (the "2004 IEP"). Included as a part of the 2004 IEP was a behavioral support plan (the "2004 BSP"). This plan included a wide variety of different strategies to be implemented with Isabel, and alternative skills to be taught to help manage her significant behavioral needs. *See Id.* at 179-81. Of the many different behavioral strategies contained in the plan, two are at issue in this case: (1) the use of a sensory break "to calm her down when Isabel becomes non-compliant or will not keep her hands to herself;" and (2) the use of "hand-over-hand[8] if Isabel refuses to complete a task or demand and a break activity does not change her behavior." *Id.* at 157-58. Under the 2004 IEP, Isabel was to be removed from the general education setting approximately 71% of her day, including the receipt of all of her instruction in reading, writing, and arithmetic. This placement decision was based on the results from the full and individual evaluation of eligibility conducted several weeks prior, and the Appellants' assessment that Isabel would not be able to actively participate with her general education peers in the areas of core academic instruction.

Isabel continued to have significant behavioral problems in November and December of 2004. The record shows that Isabel missed some of her time in the general education classroom during this time due to behavioral problems in the special education setting. Isabel was transferred to a new program and classroom for students with behavioral concerns that needed a more structured environment, a change the Appellants deemed necessary in order to get Isabel's behavior under control. The record shows that hand-over-hand interventions were used several times in December 2004 through early February 2005, with significant physical restraint being used to effectuate the intervention on December 15, 2004. Sensory breaks were frequently offered to Isabel in an attempt to deal with her non-compliance. Isabel's behavioral problems began to improve in early 2005, and there is no indication that they presented any significant problems for the remainder of the 2004-2005 school year. Although Isabel did not meet the academic goals set out for her in the 2004 IEP, the record shows that she made academic progress during the 2004-2005 school year. *See id.* 700-02.

The 2005-2006 school year was more difficult almost from the start. The record shows that Isabel's behavioral problems began to increase while she was at home during the summer. She began to have significant behavioral problems shortly after the school year began in the fall of 2005, which impacted

her ability to receive an appropriate education. The use of hand-over-hand intervention was becoming more frequent, and regularly escalated into the use of restraint in response to Isabel's non-compliant behavior. There were multiple uses of hand-over-hand intervention coupled with physical restraint from September 20 through October 7, 2005. After a brief improvement in Isabel's behavior, the record again shows the frequent use of hand-over-hand interventions coupled with restraint, at times for significant periods of time, during November and early December of 2005. Isabel's mother observed portions of several of the interventions. Isabel's teachers were aware of and concerned about the evolution of the hand-over-hand intervention into the frequent use of restraint, and had begun discussing different ways to address Isabel's behavioral concerns.

Isabel's IEP team met again on November 18, 2005 to present a new IEP (the "2005 IEP"). The integration schedule called for in the 2005 IEP was largely the same as before, although her time away from the general education setting was reduced from 71% to 55% of her day, again with all of her instruction in reading, writing, and arithmetic taking place in the special education setting.[9] The new behavioral support plan proposed at the meeting continued to implement the use of breaks in response to Isabel's non-compliance, with some modifications to the activities being used, and modifications to some of the other antecedent strategies to be utilized. The significant change in the proposed 2005 BSP was the removal of the hand-over-hand intervention, and the addition of a "time-out" procedure.[10]

The time-out procedure set forth two situations where a time-out would be used with Isabel. First, when she was being non-compliant, Isabel would be given a choice between working or taking a break. She would be given three "prompts" to choose. If she did not choose, she would be given a time-out. Second, any aggressive acts would result in a time-out. Once in time-out, Isabel would be prompted once per minute and told she needs to sit in body basics for five minutes.[11] After meeting this requirement, Isabel would be required to complete an arbitrary compliance task -- i.e. pulling apart socks -- to show that she was ready to work. At that point, the time-out would end. See Rec. at 712f-712g. The proposed plan also called for Isabel to be instructed in a 1:1 setting away from other students "until she is able to work through each portion of the day without escalating for 5 consecutive days (3 consecutive days for specials)." Rec. 712f-712g. In addition, when Isabel was in a setting with other students and escalates she would be returned to the 1:1 setting to start the process over again. *Id.*

Isabel's parents were concerned with several aspects of the proposed BSP, and requested that none of the proposed changes be implemented. Another IEP team meeting was held on December 2, 2005, at which time the final draft of the 2005 BSP was presented. The final draft reduced Isabel's time in the 1:1 setting to one day, and began the program with her attendance in all of her scheduled time in the general education setting. If she experienced behavioral problems in any of her general education activities, she would be removed from that period for only the next day "to practice appropriate behaviors." Rec. at 754. The Parents agreed to the 2005 IEP presented at the December 2, 2005 IEP meeting.

The record reflects that the Parents were concerned with how the time-out plan may be implemented. The Appellants presented the Parents with a form entitled "Using Timeout in an Effective and Ethical Manner," which the Parents signed on November 18, 2005. See Rec. at 3745. This form states that the "length of a timeout is generally one minute per year of age of the child." *Id.* A letter dated November 20, 2005 from the Parents to Principal Deb Snider states that they "agreed *only* to the use of time-outs for Isabel for an age-appropriate duration." Rec. at 723 (emphasis in original); see also Hearing Tr. at 244-45.[12]

The time-out intervention began to be implemented on December 7, 2005, and was used almost every day through December 21, 2005, Isabel's last day attending school in the district. On December

7, 2005, Isabel was given a time-out for non-compliance lasting approximately 3 1/2 hours.[13] Isabel was prompted every minute, but was unable to sit in body basics for the required five minutes. After observing the December 7, 2005 time-out, the Appellants reduced the time required in body basics to one minute. On December 12, 2005, Isabel was given a time-out in response to non-compliance which lasted 2 hours and 10 minutes. On December 13, 2005 Isabel was placed in multiple time-outs in response to non-compliance for a total of 5 hours and 10 minutes. On December 14, 2005 Isabel was placed in multiple time-outs in response to peer aggression and non-compliance for a total of 1 hour and 16 minutes. On December 15, 2005, Isabel was given multiple time-outs in response to repeated peer aggression and noncompliance totaling 2 hours and 49 minutes. On December 16, 2005, Isabel was given a time-out in response to peer aggression which lasted 17 minutes. On December 19, 2005, Isabel was placed in multiple time-outs for a total of 1 hour and 17 minutes in response to aggression and non-compliance. On December 20, 2005, Isabel received multiple time-outs for aggression and non-compliance for a total of 50 minutes. On December 21, 2005, her last day in school, Isabel was placed in multiple time-outs for a total of 1 hour and 30 minutes in response to peer aggression and non-compliance.

Isabel's parents withheld her from returning to school following the winter break. The parties continued to have discussions in late December and January of 2006. On January 24, 2006 the Parents requested a Preappeal Conference with the Iowa Department of Education and requested support in establishing a home program until the issues were resolved. Isabel never returned to school in the district.

III. Standard of Review

Under the IDEA, a party may seek review of an administrative decision by bringing an action in federal district court. 20 U.S.C. § 1415(i)(2)(A). The IDEA requires that the Court "(i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate."[14] *Id.* at § 1415(i)(2)(c). "When reviewing a school district's compliance with the IDEA's requirements after an administrative hearing, the district court should make an 'independent decision,' based on a preponderance of the evidence, whether the IDEA was violated." *Pachl v. Seagren,* 453 F.3d 1064, 1068 (8th Cir. 2006) (internal quotation omitted). While the Court must make an "independent decision," its review is not complete de novo, as "[t]he court must nonetheless give 'due weight' to the administrative proceedings and should not 'substitute [its] own notions of sound educational policy for those of the school authorities' which it is reviewing." *Id.* (internal quotations omitted). "Because judges are not trained educators, judicial review under the IDEA is limited." *Id.*

IV. Applicable Law and Discussion

A. Least Restrictive Environment (LRE)

The first issue on appeal is whether the Appellants failed to educate Isabel in the "least restrictive environment" in violation of 20 U.S.C. § 1412(a)(5)(A) and Iowa Administrative Rules of Special Education § 281-41.3(5) (superceded Nov. 14, 2007). The Parents maintain that the Appellants gave insufficient consideration to supplemental aids and services to support Isabel's greater inclusion into the general education setting, and that Isabel was fully capable of benefitting from greater integration into the general education setting. The Appellants argue that Isabel was integrated into the general education setting to the extent that was appropriate given her academic, social, and behavioral needs, and that the Parents have not met their burden to show that Isabel's placement was not appropriate.

1. Governing Law

The IDEA requires that disabled children be educated with non-disabled children "to the maximum extent appropriate," or in other words, in the least restrictive environment. See 20 U.S.C. § 1412(a)(5).

The underlying purpose of the LRE requirement is to ensure that the "removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."[15] *Id.*

The IDEA "creates a preference for mainstream education, and a disabled student should be separated from her peers only if the services that make segregated placement superior cannot 'be feasibly provided in a non-segregated setting.'" *Pachl,* 453 F.3d at 1067 *(quoting Roncker v. Walter,* 700 F.2d 1058, 1063 (6th Cir.1983)). "The proper inquiry is whether a proposed placement is appropriate under the Act." *Roncker,* 700 F.2d at 1063. "In a case where [removal from general education] is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in [the segregated setting] would be inappropriate under the Act." *Id.* Deference is due to the placement decisions of IEP teams, provided that (1) the student receives an educational benefit; and (2) the student is educated with her non-disabled peers to the maximum extent appropriate. *Gill v. Columbia 93 Sch. Dist.,* 217 F.3d 1027, 1038 (8th Cir. 2000).

Central to the IDEA's "least restrictive environment" mandate is the requirement that prior to removing a disabled student from the general education setting, a school district must give consideration to "whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily." *Daniel R.R. v. State Board of Education,* 874 F.2d 1036, 1048 (5th Cir. 1989). "If the school has given no serious consideration to including the child in a regular class with such supplementary aids and services and to modifying the regular curriculum to accommodate the child, then it has most likely violated the Act's mainstreaming directive." *Oberti v. Board of Educ. of Borough of Clementon Sch. Dist.,* 995 F.2d 1204, 1216 (3rd Cir. 1993).

2. Discussion

There is no dispute in the present case that Isabel was unable to perform academic work at the same level as her peers, and that full integration into the general education setting would not have been an appropriate placement.[16] However, the record supports the ALJ's finding that the Appellants relied on a standard of inclusion that was based on Isabel's ability to perform "on par" with her peers, and that insufficient consideration was given to ways in which the specialized instruction Isabel required could be provided in the general education setting.

Isabel's level of integration into the general education setting was determined primarily based on the Appellants' assessment of her "ability to actively participate with general education peers." Appellants' Br. at 21; see also Hearing Tr. at 1255-56. Testimony shows that the Appellants did not consider a disabled student's time in the general education setting to be "integration" unless that student could work on the same activities as his or her non-disabled peers. Hearing Tr. at 1353. Based on the assessment data, the Appellants determined that Isabel's academic discrepancy with her second grade peers was so great that she would not be able to meet this standard of "active participation" or "integration" in the general education setting, and accordingly, proposed that her academic instruction take place in the special education setting to allow her to receive one-on-one instruction and small group instruction at a level which the Appellants felt Isabel could actively participate.

Isabel's teachers determined that "placing [Isabel] in a general education room to work in isolation on parallel activities that would be significantly different from the activities of the rest of the class" would not have been an appropriate placement decision. Appellants' Br. at 24; see Hearing Tr. at 949-50, 1095-96, 1351-53. The Appellants list a number of benefits the special education setting provided to address Isabel's needs in ways which

were not available in the general education setting, particularly the opportunity to provide one-on-one and small group instruction at a level which Isabel could understand. Appellants' Br. at 24-25. The opinions of Isabel's educators are entitled to due weight. *See Pachl,* 453 F.3d at 1069 ("With so many educators agreeing that the amount of mainstream time proposed in Sarah's IEP was adequate and appropriate, we find no error in the conclusion of the district court, giving due weight to the views of the School District on matters of sound educational policy, that the IEP provided the least restrictive environment for Sarah's education within the meaning of the IDEA.").

Once the Appellants determined that Isabel would not be able to "actively participate" in the general education setting, however, the record does not show that any consideration was given to what supplementary aids and services could have been provided to allow Isabel to receive some of her core academic instruction in the general education setting. The fact that a student is significantly behind her peers does not relieve a school district of its burden to consider ways to allow that student to be included in the general educational setting to the maximum extent appropriate. *See Daniel R.R.,* 874 F.2d at 1047 ("If the child's individual needs make mainstreaming appropriate, we cannot deny the child access to regular education simply because his educational achievement lags behind that of his classmates."). By relying on a standard of "active participation," while failing to first consider what could be done to allow Isabel to be included in the general education setting, the Appellants effectively relied on an "on par" standard of integration, which is prohibited under the IDEA.[17] *See id.* ("[W]e cannot predicate access to regular education on a child's ability to perform on par with nonhandicapped children.").

The Court recognizes that the failure to consider supplemental aids and services which "may" have made a more inclusive placement possible does not necessarily result in a conclusion that Isabel's placement was not appropriate. The Appellants argue that the Parents did not present testimony, expert or otherwise, to demonstrate that Isabel's placement was not appropriate given her needs, or that other supplementary aids or services would have allowed for greater integration while still providing a satisfactory education, nor did the ALJ find that a more inclusive placement would have been appropriate. However, Isabel's successful placement in Colorado (>60% of her day in the general education setting) strongly suggests that a more inclusive placement was both possible and appropriate for Isabel in Waukee. Under such circumstances, the Court agrees with the ALJ that the reliance on Isabel's inability to "actively participate" with her non-disabled peers to determine her level of integration without first considering how the special services Isabel required could be provided in the general education setting was a violation of the LRE mandate of the IDEA and the Iowa Rules.

B. Failure to Provide Isabel With FAPE

The second issue on appeal is whether the Appellants failed to provide Isabel with a free appropriate public education ("FAPE") in violation of the IDEA and the Iowa Rules. The Parents maintain that the Appellants implemented behavioral interventions that were inconsistent with substantive rights under the IDEA and the Iowa Rules. Specifically, the Parents argue that interventions used with Isabel were not supported by the Appellants' own functional assessment of Isabel, were not consistent with her IEPs, were not consistent with the applicable research or appropriate educational practices, were excessive in length and inconsistent with Isabel's individual needs, and were inconsistent with the positive behavioral supports mandated by the IDEA and the Iowa Rules. The Appellants argue that the record does not establish (nor did the ALJ find) that Isabel's IEPs were not reasonably calculated to provide her with an educational benefit, and that the interventions used with Isabel are not barred by state or federal law, and are within the bounds of professional judgment.

1. Legal Background and the Findings of the ALJ

The IDEA provides federal funds to assist states in educating disabled children. To receive the funds, states must provide a FAPE to all of its disabled students by formulating and implementing IEPs tailored to their unique needs. See 20 U.S.C. § 1412(a). As set forth in the IDEA:

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.

Id. at § 1401(9).

A challenge to a student's IEP, or the manner in which a student's IEP is implemented ("conformity with the IEP"), begins with the two-part inquiry as set forth in *Board of Education v. Rowley,* 458 U.S. 176, 206-07 (1982):

First, has the State complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits.

Rowley, 458 U.S. at 206-07. *See also Neosho R-V Sch. Dist. v. Clark,* 315 F.3d 1022, 1027 n.3 (8th Cir.2003) (extending the rationale of *Rowley* to the implementation of a student's IEP). "If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." *Id.* at 207; *see also M.M. v. Special School Dist. No. 1,* 512 F.3d 455, 461 (8th Cir. 2008) ("A school district meets its IDEA obligations if the student's IEP is 'reasonably calculated to enable the child to receive educational benefits.'"). A "substantive" violation of the IDEA, as the Parents allege occurred in the present case, occurs when a student's IEP, or the subsequent implementation of a student's IEP, is not "reasonably calculated to enable the child to receive educational benefits."

The ALJ issued an extremely detailed forty-two page decision in this case in which she set forth a series of substantive criteria which she found the School District had not met:

(1) The interventions proposed in a behavioral support plan must be based on assessment data (Dec. at 35);

(2) The interventions proposed in a behavioral support plan must be based on research findings and appropriate educational practices as mandated by the IDEA and the Iowa Rules (Dec. at 35, 40);

(3) The effects of the behavioral interventions that are used must be "adequately monitored" (Dec. at 39);

(4) The behavioral interventions that are used must be consistent with the "positive behavioral supports" mandated by the IDEA and the Iowa Rules (Dec. at 40); and

(5) The contents of the BSP must be "individualized to address the behaviors of concern" (Dec. at 40).

Based on her finding that the School District failed to meet these criteria, the ALJ held that the School District "implemented behavioral interventions with Isabel that were inconsistent with substantive ... rights under the IDEA." Dec. at 42.

To the extent that she treated the above-mentioned criteria as "substantive rights," the ALJ was in error. In a case involving a student's challenge to the "substantive" insufficiency of his behavioral support plan, the Seventh Circuit addressed largely the same set of criteria and held that the IDEA does not set forth specific substantive criteria for a student's behavior plan, and as such, the student's "behavioral intervention plan could not have fallen short of substantive criteria that do not exist,

and so we conclude as a matter of law that it was not substantively invalid under the IDEA." *Alex R. v. Forrestville Valley Comm. Unit School Dist.,* 375 F.3d 603, 615 (7th Cir. 2004);[18] *see also T.W. v. Unified School Dist. No. 259,* 136 Fed.Appx. 122, 129-30 (10th Cir. 2005) ("To the extent plaintiff argues that the BIP is substantively deficient, he faces an uphill battle. Neither the IDEA nor its implementing regulations prescribe any specific substantive requirements for a BIP.").

Alex R. does not, however, stand for the proposition that a behavioral support or intervention plan can never be substantively insufficient or deny a student a FAPE.[19] On the contrary, Eighth Circuit precedent is clear that a school district's failure address a student's behavioral needs can result in a violation of the IDEA mandate. *See CJN v. Minneapolis Public Schools,* 323 F.3d 630, 642 (8th Cir. 2003) (finding that in order to meet the substantive criteria of *Rowley,* a student's IEP "must be responsive to the student's specific disabilities, whether academic or behavioral."); *Neosho R-V Sch. Dist. v. Clark,* 315 F.3d 1022, 1026-28 (8th Cir. 2003) ("Upon de novo review, we agree that the School District failed to provide Robert an educational benefit by not developing and implementing an appropriate behavior management plan as required by his IEPs.").

While her treatment of the criteria above as substantive rights was in error, it was not inappropriate for the ALJ to *consider* the factors that she set forth in her opinion.[20] The proper standard by which to evaluate Isabel's IEP is that set forth in *Rowley* -- were Isabel's IEPs, and the manner in which they were implemented, "reasonably calculated" to enable her to receive an educational benefit. That is the inquiry which this Court must undertake. *See Pachl,* 453 F.3d at 1068 ("the district court should make an 'independent decision' based on the preponderance of the evidence, whether the IDEA was violated.").

2. The Behavioral Strategies in Dispute

The Parents identify several behavioral interventions used with Isabel which they argue violated her substantive rights under the IDEA. Each is discussed below.

a. The Use of a Break Time Activity in Response to Non-Compliance, and a Hand-Over-Hand Intervention in Response to Inappropriate Peer Contact

Both of Isabel's IEPs called for offering Isabel a break when she became non-complaint. The record also shows that the Appellants at times used a hand-over-hand intervention in response to Isabel's inappropriate peer contact. Both parties' experts -- Dr. Keith Allen and Dr. Vincent Carbone -- testified that the use of a break time activity in response to non-compliance -- an escape-based behavior -- and the use of hand-over-hand intervention in response to peer aggression -- an attention-seeking behavior -- would serve to reinforce the problem behavior and would be contraindicated by the research. See, e.g., Hearing Tr. at 2031-32, 2061. The record is unclear as to the extent that hand-over-hand interventions were used in response to peer aggression. The use of a break in response to non-compliance, however, was used frequently with Isabel throughout her time in the school district. See, e.g., Rec. at 630-637a.

Based on the expert testimony and her review of the literature presented, the ALJ concluded the use of these behavioral interventions was "inconsistent with hypothesized function from the functional assessment data,"[21] and "inconsistent with research findings and appropriate educational practices." Dec. at 35. Conducting its own review of the record, and giving due weight to the ALJ's finding on these questions of educational policy, the Court concludes that the preponderance of the evidence supports the ALJ's finding.

b. Use of Restraint in Conjunction With the Hand-Over-Hand Intervention in Response to Non-Compliance

While the Parents take issue with the use of a hand-over-hand intervention in response to aggressive

behavior as discussed above, they do not challenge the use of the intervention in response to Isabel's non-compliant behavior. They argue, however, that the Appellants used restraint, at times for extended durations, to effectuate the hand-over-hand interventions in response to non-compliant behavior, and that this was not in conformity with the intervention called for in Isabel's IEP, is not supported by the research, and did not conform with the accepted practice of the intervention.

Isabel's 2004 IEP did not call for the use of restraint to effectuate the hand-over-hand intervention proposed, and its use was not intended when the plan was developed. See Rec. at 179-81, Hearing Tr. at 2252. The Appellants correctly argue that the use of physical restraint is not prohibited by state or federal law, and the record clearly shows that Isabel was prone to aggressive outbursts, and as such, some level of physical restraint was inevitable and necessary for her own protection, as well as the protection of other students and the staff. However, it is clear that physical restraint was regularly used in the fall of 2005 to effectuate the hand-over-hand interventions in response to Isabel's non-compliant behavior, not merely due to safety concerns. While the use of restraint with a student with dangerous behavioral problems may, at times, become necessary, the ALJ was correct in holding that the practice as implemented by the Appellants was not in conformity with Isabel's 2004 IEP.

The ALJ also found that the intervention as implemented is not supported by the research and would not conform with the accepted practice of the intervention, a finding which was supported by the testimony of both Dr. Allen and Dr. Carbone. See, e.g., Hearing Tr. at 1991. Giving due weight to the ALJ's finding on this question of educational policy, the Court finds that the preponderance of the evidence supports the ALJ's finding.[22]

c. The Implementation of the Time-Out Interventions

The Parents do not take issue with the inclusion of a time-out procedure in response to Isabel's behavioral difficulties. Rather, they argue that the time-out procedure set forth in the 2005 IEP was not implemented in a manner consistent with "applicable research and appropriate educational practices" as required by the Iowa Rules, and "peer-reviewed research to the extent practicable" as required by the IDEA. Their primary contention is that the time-outs used with Isabel were excessive in length and inconsistent with her needs.

Both experts agreed that a time-out should generally be short, and any contingent release provision that is part of the plan should be short as well. Dr. Allen testified that a time-out between 30 seconds and 4 minutes is preferable, while a range of 5 to 10 minutes "would be acceptable." Hearing Tr. at 2045. According to Dr. Allen, time-outs in excess of twenty to thirty minutes, while not necessarily damaging to a student, lose their value as a "behavior reduction technique." *Id.* At that point, "[i]t's starting to become something else." *Id.* 2046. It was his opinion that time-outs beyond this length lost any effectiveness with Isabel. *Id.* at 1995.

Isabel spent a significant portion of her day in time-out between the dates of December 7 and December 21, 2005, with many instances where the duration of the time-out significantly exceeded 30 minutes. While the 2005 IEP does not explicitly set forth a time limit, or even an expected duration of Isabel's time-outs, the information given to and agreed to by the Parents prior to the implementation of the 2005 IEP indicated that "length of a timeout is generally one minute per year of age of the child."[23] Rec. at 3745.

Based on her review of the record and the testimony of the experts, the ALJ concluded that the duration of the time-out interventions used with Isabel was "excessive" in length, and the interventions were not otherwise effective. Dec. at 39. While the ALJ did not set forth a standard for determining what constitutes a time-out of "excessive" duration, the preponderance of the evidence supports the ALJ's finding that the duration of Isabel's time-outs were

inconsistent with "applicable research and appropriate educational practices" and the "peer-reviewed research to the extent practicable." Dec. at 40 The amount of time that Isabel spent in time-out in December of 2005 certainly bears on the question of whether the implementation of her IEP was "reasonably calculated" to enable her to receive an educational benefit.[24]

3. Application of the *Rowley* Standard

With the review of the aforementioned behavioral strategies in mind, this Court's task is to look at the content and implementation of Isabel's IEPs and make an independent determination as to whether it was "reasonably calculated" to enable Isabel to receive a meaningful educational benefit, giving "due weight" to administrative proceedings and being mindful to "not substitute its own notion of educational policy for that of the administrative panel." *Gill v. Columbia 93 School Dist.,* 217 F.3d 1027, 1037 (8th Cir. 2000).

In fairness to the Appellants, the ALJ's decision and her review of the facts did not give sufficient recognition to the considerable effort the Appellants gave to addressing Isabel's behavioral needs. Both the 2004 IEP and 2005 IEP contain a variety of different strategies to be used with Isabel, with the record showing that most (if not all) of these strategies were implemented at various times. See, e.g., Rec. at 179-80. However, when Isabel's behavioral problems began to seriously impact her ability to receive an education in the fall of 2005 the Appellants frequently responded to Isabel's behavioral problems with intervention strategies which were not supported by, and in fact, contraindicated by the relevant research, and were inconsistent with even the Appellants' own functional assessment of Isabel. In addition to using strategies which expert testimony confirms would serve to reinforce the problem behavior, Isabel spent significant periods of time being restrained in an attempt to teach compliance, and later in an isolated time-out setting. While none of these occurrences necessarily constitutes a "substantive" violation of the IDEA standing alone, taken together they support a finding that the behavioral interventions utilized with Isabel -- both as articulated in her IEPs and the manner in which they were implemented -- were not "reasonably calculated" to adequately address her behavioral problems, and as such, to provide her with a meaningful educational benefit.[25]

C. Procedural Violations

The Parents argue that two procedural violations of the IDEA resulted in Isabel not receiving a free appropriate public education: (1) the Appellants failed to include a general education teacher at the November 22, 2004 IEP meeting, and the December 2, 2005 IEP meeting; and (2) several of the behavioral interventions used with Isabel were implemented without prior written notice and/or through false or misleading notice to the Parents.

1. Governing Law

The standard for assessing whether a procedural violation of the IDEA constitutes a denial of FAPE is set forth clearly in the statute itself:

[A] hearing officer may find that a child did not receive a free appropriate public education *only if* the procedural inadequacies ... (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.

20 U.S.C. § 1415(f)(3)(E)(ii) (emphasis added); *see also Ind. Sch. Dist. No. 283 v. S.C.,* 88 F.3d 556, 562 (8th Cir. 1996). To find that a procedural violation(s) denied FAPE to a student, "there must be some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits." *Roland M. v. Concord Sch. Committee,* 910 F.2d 983, 994 (1st Cir. 1990) (internal citation omitted).

2. Failure to Include a Regular Education Teacher at Various IEP Team Meetings

The IDEA requires that a student's IEP team include "at least one regular education teacher of such child." 20 U.S.C. § 1414(d)(1)(B)(ii). The "regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports, and other strategies, and the determination of supplementary aids and services, program modifications, and support for school personnel." *Id.* at § 1414(d)(3)(C).[26]

a. November 22, 2004 IEP Meeting

Isabel's regular education teacher was not in attendance at the November 22, 2004 IEP meeting, which finalized Isabel's 2004 IEP. There appears to be no dispute that the Appellees technically violated the IDEA by failing to include a regular education teacher at the November 22, 2004 IEP meeting. For the reasons discussed below, however, this Court finds that this procedural violation did not deny Isabel a FAPE.

The ALJ rightfully highlighted the importance of Isabel's regular education teacher in discussing her "behavioral concerns and to plan appropriate behavioral supports for integration." Dec. at 30; *see Deal v. Hamilton County Board of Educ.*, 392 F.3d 840, 860 (6th Cir. 2004) ("The input provided by a regular education teacher is vitally important in considering the extent to which a disabled student may be integrated into a regular education classroom and how the student's individual needs might be met within that classroom."). The Parents do not claim, however, nor does the record support, that the absence of Isabel's regular education teacher at this meeting affected the level of integration set forth in her 2004 IEP. As discussed above, the integration schedule proposed by the Appellants was based largely on Isabel's academic discrepancy with her peers. The extent of Isabel's integration into the general education setting, and the rationale supporting this decision, were largely the same as that of the interim IEP implemented at the September 15, 2004 IEP meeting, at which Isabel's regular education teacher was present. His input was also considered in preparing Isabel's November 8, 2004 full and individual evaluation of eligibility. There is no indication that the lack of involvement of Isabel's regular education teacher at the November 22, 2004 IEP meeting had any bearing on Isabel's placement decision.

While Isabel did miss some her scheduled time in the general education setting due to behavioral difficulties in late November and early December of 2004, the record does not show that Isabel continued to miss significant scheduled time after this brief time period, and the decision to hold her out of integration was made by her special education teachers due to her behavior outside of the general education setting. The record does not support a finding that any loss of educational benefit which resulted from this missed integration can be attributed to the absence of her regular education teacher at the November 22, 2004 IEP meeting.

b. December 2, 2005 IEP Meeting

Isabel's 2005 IEP was first introduced at the November 18, 2005 IEP team meeting with Isabel's regular education teacher present. The proposed plan presented at this meeting called for the use of a time-out intervention in response to Isabel's non-complaint and aggressive behavior, for removing Isabel from settings with other students for a set period of time when she escalated, and set forth detailed procedures for the implementation of these interventions. The Parents did not agree to the plan as proposed, so a continuation meeting was held on December 2, 2005. It is undisputed that Isabel's regular education teacher did not attend this meeting.

The primary change made to the plan at the December 2, 2005 meeting related to the way in which the time-out procedure would be implemented outside of the general education setting, specifically to the amount of time that Isabel would be required to

spend away from other students after she had escalated. The ALJ found that "since the behavior plan addressed consequences for inappropriate behavior during integration in regular education, the attendance of the regular educator would be important." Dec. at 31. While this is no doubt true, Isabel's regular education teacher was present for the November 18, 2005 meeting at which the basic structure for the "consequences for inappropriate behavior" was discussed. While some modifications were made to this plan at the December 2, 2005 meeting, the Court finds no basis to conclude that the failure to include Isabel's regular education teacher at this meeting compromised her right to an appropriate education.

3. Failure to Provide Written Notice of Changes to FAPE

The IDEA requires "written prior notice" to the parents of the child whenever the local educational agency proposes to initiate or change the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child. 20 U.S.C. § 1415(b)(3). Giving the required written notice allows a student's parents the opportunity to "present a complaint" regarding any proposed change to the provision of FAPE. *Id.* at § 1415(b)(6).

The use of restraint was not called for in Isabel's IEP, and the record shows that written notice was not provided to the Parents to inform them that it was regularly being used to effectuate the hand-over-hand intervention in the fall of 2005.[27] The Appellants argue that the Parents had sufficient notice that physical restraint was being used. Among other things, they point to the fact that Isabel's mother personally observed hand-over-hand interventions which involved restraints on at least two different occasions.[28] While the Parents may have been aware that Isabel's behavioral difficulties at times required the use of restraint, the record supports the ALJ's finding that the Parents were not informed that the planned hand-over-hand interventions were regularly being implemented with the use of restraint. The failure to provide adequate notice prevented them from having the opportunity to object to this change, and as such, "significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child." 20 U.S.C. § 1415(f)(3)(E)(ii).[29]

V. Conclusion

For the foregoing reasons, this Court finds that the Appellants failed to provide Isabel L. with a free appropriate public education in the least restrictive environment in violation of the IDEA. As discussed above, the Appellants' placement decision for Isabel did not provide her with an education in the least restrictive environment, and the behavioral interventions used by the Appellants, both as set forth in Isabel's IEPs and as implemented, were not "reasonably calculated" to provide her with a meaningful educational benefit in violation of the IDEA and the Iowa Rules. Accordingly, this Court affirms the decision of the ALJ. The Parents' request for judgment on the administrative record is GRANTED. The Appellants' request that this Court reverse the decision of the ALJ and grant judgment on the administrative record in their favor is DENIED. As the "prevailing party who is the parent of a child with a disability" in the present proceeding, this Court finds that the Parents are entitled to reasonable attorneys' fees pursuant to 20 U.S.C. § 1415(i)(3)(B)(i)(I). Counsel for the Parents is directed to submit an application for attorneys' fees within 30 days of the date of this Order. Appellants shall respond to counsel's application within 20 days thereafter.

IT IS ORDERED.

[1]The Appellants also request that, pursuant to 28 U.S.C. §§ 2201 and 2202, they be declared prevailing parties under the IDEA, and that they be awarded costs and disbursements in this action.

[2]Although not styled as such, the Court views both parties as effectively submitting cross-motions for judgment on the administrative record.

[3]The parties dispute the exact amount of time spent in the general education setting. Isabel's IEP from 5/5/04 indicates that time spent in the "General Classroom with Support" was ">60%." Rec. at 3067. This is consistent with the testimony of Isabel's teacher from Colorado, who recounted that, during the course of a seven-hour school day, Isabel was in the general education classroom "for all other hours except for the half-hour in the morning with me and the hour in the afternoon with me." Hearing Tr. at 78.

[4]Citations to the transcript from the administrative hearing appear as "Hearing Tr. at _____," and citations to the accompanying record appear as "Rec. at _____." Citations to the ALJ's decision appear as "Dec. at _____."

[5]In addition to many documented instances of non-compliance, the record shows that Isabel frequently used aggressive behavior towards her peers and staff, including inappropriate touching and hitting.

[6]A FBA involves defining a target behavior(s), observing the student and gathering information from those working with the student, and "developing a hypothesis about the potential function of, and effects of context on, the target behavior, and verifying the hypothesis through the manipulation of environmental variables." Dec. at 43, n.2.

[7]The "function" of a behavior is "the purpose or motivation for the student engaging in the problem behavior." Dec. at 43, n.2.

[8]A hand-over-hand intervention "is a type of physical prompt generally used to initiate and teach a behavior. The prompt hierarchy involves verbal prompts, visual prompts, demonstration or modeling prompts, and physical guidance." Dec. at 44, n.5.

[9]The basis for this decision was that "Isabel requires 1:1 or small group instruction in all areas in order to learn and maintain skills. She requires frequent reinforcement for completing work tasks and a quiet break area available to her when she is frustrated. These are not available in the general education setting." Rec. at 699.

[10]Timeout is an intervention based on behavioral theory requiring removal of the child from opportunity for reinforcement for a specific period of time following the occurrence of inappropriate behavior. Dec. at 45, n.9.

[11]Requiring a child to complete a task is known as "contingent release." Contingent release is used with timeout to assure that the child understands that appropriate behavior is required prior to release. Dec. at 45, n.10.

[12]The letter further states:

> Given that [Isabel's] functional level is somewhere near to 5 or 6 years old, a time-out period of 5 to 6 minutes would be appropriate. If you interpreted our signature as meaning anything broader than that ... this letter hereby revokes [our] earlier approval.

Rec. at 723.

[13]This timeout was videotaped, and a copy of the tape is in the record.

[14]Neither party has requested that this Court hear additional evidence. The parties have presented a record of over 7000 pages to this Court, including the transcripts from the administrative hearing and accompanying exhibits and records. The Parents initially requested oral argument, however, upon consultation with the parties, it was agreed that oral argument was not necessary.

[15]The language of the Iowa Rules is virtually identical:

> Each agency shall ensure that, to the maximum extent appropriate, children requiring special education are educated with individuals who do not require special education and that special classes, separate schooling or removal of children requiring special education from the general education environment occurs only if the nature or severity of the individual's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily ...

Iowa Rules § 281-41.3(5) (superceded Nov. 14,

2007)

[16]The Parents have never requested full integration, and acknowledge that Isabel was in need of special services which would need to take place outside of the general educational setting.

[17]Applying a standard of integration where a disabled student must be able to work at or near the level of her non-disabled peers would likely remove most disabled students from all but the most basic activities in the general education setting. This is not what the IDEA intends.

[18]The criteria urged by the student in *Alex R.* came from *Mason City Comm. Sch. Dist. and Northern Trails Area Educ. Agency 2,* 36 IDELR 50 (Dec. 13, 2001), an administrative decision written by the ALJ in the present case. The criteria used in her *Mason City* decision were: (1) the BIP must be based on assessment data; (2) the BIP must be individualized to meet the child's unique needs; (3) the BIP must include positive behavioral strategies; and (4) the BIP must be consistently implemented as planned and its effects monitored.

[19]The Appellants correctly argue that awritten behavioral support plan is not required under the IDEA. *See Sch. Bd. Of Ind. Sch. Dist. No. 11 v. Renollett,* 440 F.3d 1007, 1011 ("neither Minnesota nor federal law require a written BIP"). However, a school district must address a student's behavioral needs, and the procedures in place (whether a written plan or otherwise) must meet the requirements set forth in *Rowley.*

[20]The factors identified by the ALJ may, in many instances, be highly relevant to whether a student's IEP is "reasonably calculated" to provide an educational benefit. The Parents point, for example, to the provision of the IDEA which requires that a student's IEP include "a statement of the special education and related services and supplementary aids and services, *based on peer-reviewed research to the extent practicable,* to be provided to the child ..." 20 U.S.C. § 1414(d)(1)(A)(III) (emphasis added). An IEP which relies on behavioral interventions which are not supported by, or are contrary to, the relevant research may be such that it is not "reasonably calculated" to provide an educational benefit.

[21]As discussed above, the Appellants' functional assessment identified Isabel's noncompliant behavior as maintained by an escape function, and her aggressive behavior as maintained by an attention-seeking function.

[22]The Parents identify another conformity issue, arguing that the Appellants failed to implement the antecedent strategies contained in Isabel's IEP with integrity, specifically citing the testimony that planned "peer coaching" was not implemented. See Parents' Br. at 120 (citing Hearing Tr. at 1872). While the record shows that the behavioral interventions used by school personnel during the 2004-2005 year did not match up perfectly with those strategies identified in Isabel's IEP, school districts are afforded "some flexibility in implementing IEPs," and the alleged implementation failures identified by the Parents do not support a finding that the Appellants "failed to implement substantial or significant provisions" of Isabel's IEP. *Houston Ind. Sch. Dist. v. Bobby R.,* 200 F.3d 341, 349 (5th Cir. 2000).

[23]As previously noted, a letter dated November 20, 2005 from the Parents makes very clear that the Parents "agreed *only* to the use of time-outs for Isabel for an age-appropriate duration." Rec. at 723 (emphasis in original); see also Hearing Tr. at 244-45.

[24]The Appellants argue that the time-outs used with Isabel complied with the rules regarding time-out as set forth in Iowa Administrative Code 281-103.6. The question of whether a behavioral intervention does not exceed that allowed for in the Code is a very different inquiry from whether the use of the intervention is "reasonably calculated" to provide an educational benefit.

[25]While the ALJ did not discuss *Rowley,* she did hold that based on the interventions used, and more importantly, the manner in which they were implemented, [t]he opportunity for educational benefit would be significantly limited. Dec. at 40.

[26]The Iowa Rules are very similar, requiring that an IEP meeting shall include "[a]t least one general education teacher of the eligible individual." Iowa Rule 281-41.62(1)(b) (superceded Nov. 14, 2007).

[27]The Appellants argue that a prior written notice is not required before the implementation of every modification in a teaching strategy or intervention. While this may be true, a significant change to the implementation of a behavioral modification strategy, such as the continued use of restraint to effectuate a planned intervention, constitutes a change to the provision of a free appropriate public education to Isabel for which notice is required.

[28]The record shows that Isabel's mother came in at the end of hour-long interventions documented on December 15, 2004, Rec. at 305, and September 20, 2005, Rec. at 444-45. The Appellants also argue that Isabel's parents had access to records which documented that restraint was being used.

[29]The Parents also challenge what they call "false or misleading" notice regarding the length of the time-out procedure that was used with Isabel. Specifically, they argue that they were informed that the time-outs would last only for age appropriate durations -- "generally one minute per year of age of the child" -- while the time-outs actually implemented were significantly longer. The Court finds it unnecessary to determine whether this constitutes a "change" in the provision of FAPE for which notice was necessary, however, it notes that the implementation of a behavioral intervention in a manner so significantly different from that described to the Parents is troubling.

Statutes Cited

20 USC 1415(i)(2)(A)
20 USC 1415(i)(2)(C)
20 USC 1412(a)(5)(A)
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