

DISTRICT OF COLUMBIA OFFICE OF THE STATE SUPERINTENDENT  
OFFICE OF COMPLIANCE AND REVIEW

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STUDENT,  
through the Parent,<sup>1</sup>

Petitioner,

v

James Gerl. Hearing Officer  
Case No.

DISTRICT of COLUMBIA  
PUBLIC SCHOOLS,

Respondent.

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STUDENT HEARING OFFICE  
2009 SEP -8 AM 9:15

**HEARING OFFICER DECISION**

**BACKGROUND**

The instant due process complaint was filed on June 22, 2009. This matter was reassigned to this hearing officer on August 11, 2009. A prehearing conference by telephone conference call was convened on August 25, 2009. The due process hearing was held at the Student Hearing Office on August 26, 2009. The due date for the Hearing Officer Decision is September 5, 2009.

**JURISDICTION**

This proceeding was invoked in pursuant to the provisions of the Individuals With Disabilities Education Act ("IDEA"), 20 U.S.C. Section 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title V of the District of Columbia

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<sup>1</sup> Personally identifiable information (for the student, parent and witnesses called at the hearing) is provided in Attachment A and must be removed prior to distribution of this decision. 20 USC §1232g; and 20 USC §1417(c).

("District" or "D.C.") Municipal Regulations ("DCMR"), re-promulgated on February 19, 2003; and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

### **PRELIMINARY MATTERS**

All proposed exhibits and testimony received into evidence and all supporting arguments submitted by the parties have been considered. To the extent that the evidence and arguments advanced by the parties are in accordance with the findings, conclusions and views stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

### **ISSUES PRESENTED**

The following two issues were identified by counsel at the prehearing conference and evidence concerning these issues was heard at the due process hearing:

1. Did the January 22, 2008 IEP for Petitioner contain sufficient services and was it appropriate; and
2. Whether Respondent was able to and did implement Petitioner's November 24, 2008 IEP and whether it provides an appropriate placement.

### **FINDINGS OF FACT**

Based upon the evidence in the record, the hearing officer has made the following findings of fact:

1. Petitioner was born on \_\_\_\_\_ (Testimony of mother)  
(References to testimony at the hearing is hereafter designated as "T")
2. On May 10, 2007, Petitioner was diagnosed by a psychiatrist as having oppositional defiant disorder and disruptive behavior. (Petitioner Exhibit 17) (References to exhibits shall hereafter be referred to as "P-1," etc. for the petitioner's exhibits, "R-1," etc. for the respondent's exhibits and "HO-1," etc. for the hearing officer exhibits)
3. An educational evaluation for Petitioner was conducted on November 14, 2007. The evaluation finds that the petitioner's performance, when compared with others' at his grade level, is high average in broad reading and math calculation skills, average in mathematics and written expression and low average in written language. (P-13)
4. On April 28, 2007. Petitioner was evaluated by a registered play therapist at the request of his mother. The therapist's report finds that the petitioner has displayed a recurrent pattern of negativistic defiant and hostile behaviors toward authority figures and peers as a result of displaced anger for his estranged biological father. (P-16)
5. On December 5, 2007, Petitioner was evaluated by a school psychologist of respondent. The report of the evaluation finds that the petitioner has age-appropriate cognitive and academic skills but had engaged in disruptive school behaviors. The report makes a series of recommendations for teachers, parents and the petitioner. (P-18)
6. On December 2, 2007, Respondent conducted a social history evaluation of Petitioner. The evaluation was conducted by a clinical social worker. The report recommends continued individual therapy and family therapy as

well as continuation of the petitioner's current medications to control his severe aggression towards adults and peers. (P-15)

7. On January 22, 2008, Respondent convened an IEP team meeting and the team developed an IEP for the student. The IEP provides for a combination setting of general education and a resource classroom, including five hours per week of special education instruction and one-half hour per week of counseling or psychological services. The IEP includes an intervention behavior plan. The IEP team members present, including Petitioner's father, agreed with the IEP. (R-1)
8. Petitioner was performing academically on grade level and was receiving adequate grades during this timeframe but his behaviors began to deteriorate. (T of R's first witness – special education coordinator; P-9)
9. On May 12, 2008, Respondent convened a multi-disciplinary team meeting for Petitioner concerning his behavioral episodes. At said meeting the petitioner's mother stated that there had been a recent change in the petitioner's medication. The team decided to monitor Petitioner's behaviors for a period of time. (P-9)
10. On November 24, 2008, Respondent convened the student's IEP team and the team developed a new IEP for the student. The November 24, 2008 IEP team meeting was attended by the special education coordinator, Respondent's first witness, who had been working with Petitioner; Petitioner's father; a special education teacher and a general education teacher. Petitioner's mother did not attend the November 24, 2008 IEP team meeting. The IEP notes in two places that the student's anxiety attacks affected his ability to perform in a combination setting and notes

- the need for behavior intervention for Petitioner. The IEP team members present, including Petitioner's father, agreed with the IEP. (R-3)
11. The form for the November 24, 2008 IEP has the box for separate school checked, but that option was not discussed by the IEP team. The intention of the IEP team was to move the student from a combination setting to a self-contained special class. (R-3; T of R's first witness – special education coordinator; Rebuttal T of P's father)
  12. Respondent's procedural error in checking the incorrect box on the IEP form did not result in educational harm to the petitioner. Petitioner continued to make academic progress and made acceptable grades, and he made progress in or mastered all of his IEP goals and objectives. (T of R's first witness – special education coordinator; R-4)
  13. Petitioner's behaviors continued to be disruptive. Especially after March, 2009, when his teacher left the school and after April, 2009, when the social worker who provided counseling to Petitioner left the school, his behavioral meltdowns and episodes increased and he was hospitalized for such behaviors in May, 2009. (T of P's mother; T of R's first witness – special education coordinator; P-19 and P-20)
  14. With the exception of the period of time after March, 2009, when the teacher and social worker left and Respondent failed to implement Petitioner's IEP, the petitioner's IEPs at issue were reasonably calculated to provide educational benefit to the student and the respondent provided FAPE to the student.
  15. The educational harm to Petitioner resulting from the denial of FAPE by Respondent in failing to implement his IEP after the personnel left his

school in March and April of 2009 is best addressed by additional counseling or art therapy sessions.

### CONCLUSIONS OF LAW

1. The January 22, 2008 IEP for Petitioner was reasonably calculated to provide educational benefit and it provided Petitioner with a free and appropriate education in the least restrictive environment. The Individuals with Disability Education Act, 20 U.S.C. §§1400 et seq. (hereafter sometimes referred to as "IDEA") §§612(a)(1) and (5); 34 C.F.R. §§300.101, 300.114; Bd. of Educ. etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982). See Braham ex rel Braham v. District of Columbia, 427 F.3d 7, 44 IDELR 149 (D.C. Cir. 10/25/2005).
2. A procedural violation is viable only if it affects a student's substantive educational rights. Lesesne ex rel BF v. District of Columbia, 447 F.3d 828, 45 IDELR 208 (D.C. Cir. 5/19/2006); See IDEA §615(f)(3)(E)(ii).
3. Respondent's procedural violation in checking the wrong box on Petitioner's November 24, 2008 IEP did not cause Petitioner any educational harm or other impairment of his substantive rights and therefore is not a violation of IDEA. Lesesne ex rel BF v. District of Columbia, 447 F.3d 828, 45 IDELR 208 (D.C. Cir. 5/19/2006); See IDEA §615(f)(3)(E)(ii).
4. The placement provided by Petitioner's November 24, 2008 IEP was appropriate. IDEA §614(d); 34 C.F.R §300.116.
5. Respondent denied FAPE to Petitioner by failing to implement his November 24, 2008 IEP after his teacher and the social worker who provided him with counseling services left his school in March and April of 2009. IDEA §612(a);

Bd. of Educ. etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034; 553 IDELR 656 (1982).

6. Except as aforesaid, Petitioner's November 24, 2008 IEP was reasonably calculated to provide educational benefit and resulted in a free and appropriate public education for Petitioner. IDEA §612(a); Bd. of Educ. etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034; 553 IDELR 656 (1982).
7. Awards of compensatory education should be flexible and qualitative in nature so that they compensate a student for the educational harm caused by a deprivation of FAPE. An award of compensatory education consisting of additional counseling or art therapy will rectify the harm to Petitioner and address the increase in his behavioral issues caused by the denial of a free and appropriate education by respondent by not properly implementing Petitioner's IEP after the teacher and social worker left the school in March and April of 2009. Reid ex rel Reid v. District of Columbia, 43 IDELR 32, 401 F.3d 516 (D.C. Cir. 3/25/2005)

### DISCUSSION

Issue No. 1: Did the January 22, 2008 IEP for Petitioner contain sufficient services and was it appropriate.

IDEA requires a school district, such as Respondent, to provide children with a disability, such as the petitioner, with a free and appropriate public education (hereafter sometimes referred to as "FAPE,") in the least restrictive environment. IDEA §§612(a)(1) and (5); 34 C.F.R. §300.101, 300.114.

The United States Supreme Court has established a two-part test for determining whether a school district has provided FAPE to a student. There

must be a determination as to whether the schools have complied with the procedural safeguards set forth in the IDEA and whether the IEP is reasonably calculated to enable the child to receive educational benefits. Bd. of Educ. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 555 IDELR 656 (1982)

In the instant case, Petitioner argues that his January 22, 2008 IEP was not appropriate because it did not provide sufficient services in view of the student's behavioral problems. The record evidence does not support this argument.

The only alleged procedural violation pertaining to this issue is Petitioner's contention that the respondent was slow to change the student's IEP when the student displayed behavioral issues. The record, however, does not support the contention. A meeting of Petitioner's multi-disciplinary team was held on May 12, 2008. At said meeting the petitioner's mother stated that a recent change in the petitioner's medication might be the cause of changes in his behavior. It was decided to wait for a period of time to see if his behaviors returned to the level that they had been at before the change in medication.

When Petitioner's behaviors continued, the IEP team was reconvened on November 24, 2008 and modified his IEP. The record evidence does not support Petitioner's contention that Respondent was too slow to modify the petitioner's IEP.

Moreover, Respondent argues that it was obligated under IDEA to attempt a less restrictive environment prior to the more restrictive environment now sought by the parent. Respondent's point is well taken. IDEA requires that, to the maximum extent appropriate, children with disabilities are educated with children who are not disabled. 34 C.F.R. §300.114(a)(2)(i); See, Braham v.

District of Columbia, 427 F.3d 7, 44 IDELR 149 (D.C. Cir. 10/25/2005). Before trying a more restrictive setting Respondent wished to try the least restrictive environment. Petitioner's IEP team members agreed that a combined setting was appropriate. There is merit to this argument.

Concerning the substantive adequacy of the IEP, it was the unrebutted testimony of the special education coordinator, the first witness called by Respondent, that Petitioner was academically on grade level and that he was making acceptable grades. This testimony is corroborated by the documentary evidence. The notes of the May 12, 2008 MDT meeting quote the student's teacher as reporting that academically the student is on grade level and that he is on the honor roll. It is clear that the student's IEP was reasonably calculated to, and in fact did, provide educational benefit.

To the extent that the testimony of the parents' witnesses may be viewed to contradict the testimony of the schools' witnesses, the testimony of the schools' witnesses is found to be more credible and persuasive and more consistent with the documentary evidence as to this issue. The case law cited by the petitioner's due process complaint is inapposite inasmuch as there has been no showing that the petitioner's IEP is inappropriate or that the IEP was based upon evaluations that were not comprehensive.

Issue No. 2: Whether Respondent is able to and did it implement Petitioner's November 24, 2008 IEP and whether it provides an appropriate placement.

Respondent concedes that it did not implement the counseling provisions of the student's IEP for the period of time after the school counselor and teacher

left the school attended by the petitioner in March and April of 2009 and Respondent has agreed to provide compensatory education therefor. The hearing officer finds that in so doing, Respondent denied FAPE to the Petitioner.

The gravamen of Petitioner's complaint, however, is that the box on the November 24, 2008 IEP for "separate school" is checked and that the schools attended by the petitioner since November 24, 2008 have not been separate schools.

Although it is true that the separate school box on the IEP form is checked, it is clear that the intention of the Petitioner's IEP team on November 24, 2008 was to place him in a special class and not a separate school. Respondent called, as its first witness, the special education coordinator who attended the IEP team meeting. She testified credibly that the IEP team did not decide that a separate school was needed for Petitioner. Instead, she testified that the team felt that a self-contained classroom or special class was warranted.

This testimony is contradicted by the testimony of the Petitioner's mother. However, her testimony in this regard is not as credible or persuasive as the testimony of the witnesses for the Respondent. The Petitioner's mother did not attend the IEP team meeting on November 24, 2008. Instead, her testimony is based upon the IEP document which contains the mistakenly checked box.

The testimony of Respondent's witnesses in this regard is corroborated by the documentary evidence. The IEP resulting from the November 24, 2008 meeting notes twice that Petitioner's "constant anxiety attacks impact his ability to perform in a *combination setting*." (emphasis added). It is clear that the IEP team was removing the student from the general education "combination setting" and placing him in a separate class.

Moreover, the testimony of Respondent's witnesses is also corroborated by the testimony of Petitioner's father, who was called as a rebuttal witness by Petitioner. Petitioner's father testified that there was no discussion of the student needing a separate school at the November 24, 2008 IEP team meeting. This testimony was credible and persuasive.

To the extent that Respondent may have failed to comply with the procedural protections of IDEA by checking an incorrect box on the IEP form, procedural violations are viable only if they affect the petitioner's substantive rights. Lesesne ex rel BF v. District of Columbia, 447 F.3d 828, 45 IDELR 208 (D.C. Cir. 5/19/2006); See IDEA §615(f)(3)(E)(ii).

In the instant case, there has been no showing that the petitioner suffered any harm or educational loss as a result of the checking of an incorrect box on the IEP form. Petitioner continued to make academic progress and made acceptable grades, and he made progress in or mastered all of his IEP goals and objectives. Accordingly, Petitioner's argument that Respondent failed to implement the November 24, 2008 IEP is rejected, except to the extent that Respondent concedes that proper personnel were not in place after March of 2009 to implement the IEP. The record evidence shows that Petitioner's teacher left in March, 2009 and that the social worker who provided counseling to Petitioner left in April, 2009. The petitioner has had difficulty with such transitions and his behavioral outbursts and issues increased after those personnel left the school. Petitioner was hospitalized for behavioral issues in May, 2009. Respondent concedes that the failure to implement the IEP for Petitioner after March, 2009 constitutes a denial of FAPE and that compensatory education for this violation is appropriate.

Petitioner also argues that the November 24, 2008 IEP contains an improper placement. The basis of this contention, however, also appears to be that Respondent had not placed Petitioner in a separate school. There is no evidence in the record, however, to establish that Petitioner needs a separate school in order to receive educational benefit. The components of an IEP must be designed to meet the child's educational needs. 34 C.F.R. §§300.320(a)(2)(i)(A) and (B). The function of an IEP is to tailor the free and appropriate education guaranteed by IDEA to the unique needs of a child with a disability. Bd. of Educ. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 555 IDELR 656 (1982)

Petitioner also cites the federal regulations at 34 C.F.R. §300.116 to argue that respondent violated the Act by failing to convene a "placement meeting" or by failing to have placement be decided by a team. This argument is rejected. Petitioner apparently confuses the concept of placement with the concept of location. "Placement" in this sense means the point along the continuum of placement options that a school district must make available to a child with a disability, whereas "location" is the classroom or other physical surroundings where a child receives special education and related services. 156 Fed. Register 71 at page 46588. (Response to Comments on Proposed Federal Regulations, OSEP August 14, 2006). The regulation cited by the petitioner requires the Respondent to identify placement by the efforts of the IEP team. In this case, that is exactly what Respondent did, although Respondent concedes that it made a procedural error in checking the wrong box on the form. There was testimony at the due process hearing concerning a new location which might be better suited to deliver the Petitioner's IEP. The location decision, however, is not required to be made by the IEP team. If Petitioner's parents later find problems

with the new location proposed by Respondent, they may request a new IEP team meeting or exercise any of the other procedural safeguards provided to them by IDEA.

In the instant case, Petitioner did call an expert witness, who testified that Petitioner would be an appropriate candidate for the private separate school at which the expert witness was employed. The testimony of Petitioner's expert, however, did not involve in any way the educational needs of the student. In particular, the testimony of Petitioner's expert did not include any statement to the effect that Petitioner needed a separate school in order to receive educational benefit. The expert did testify that the student would do well at her school but did not testify that he needed a separate school. The testimony of said expert witness provides no basis for any violation of the Act and no basis for any relief to be awarded to petitioner.

Accordingly, it is concluded that the placement provided in the petitioner's November 24, 2008 IEP was appropriate and that said IEP was reasonably calculated to confer educational benefit for Petitioner. It is clear that the location proposed by Respondent would be appropriate and that Respondent has the staff and capabilities to implement the student's IEP.

The caselaw cited in Petitioner's due process complaint is inapposite. In said cases, the school district did not propose an appropriate placement. The facts of this case are distinguishable because the IEP and placement proposed were appropriate to meet the Petitioner's needs.

### Relief

The funding of a private placement at a separate school requested by the petitioner is not justified by the evidence presented. See previous discussion herein.

Respondent does concede, however, that unavailability of personnel caused it to fail to implement the student's IEP after March of 2009. Accordingly, Respondent concedes that it denied FAPE to the student and that compensatory education is appropriate. The evidence in the record supports a conclusion that Respondent denied FAPE to the student during this timeframe, and the Hearing Officer so concludes.

Respondent offers six months of one hour per week of either individual counseling or art therapy to be provided at a rate of ninety dollars per hour or less and to be completed by September 1, 2010. Petitioner presented no evidence at the hearing regarding compensatory education, although it was requested as relief in the complaint.

Compensatory education awards must be flexible and must be based upon a qualitative approach focusing upon the educational harm to the child caused by a denial of FAPE. Reid ex rel Reid v. District of Columbia, 43 IDELR 32, 401 F.3d 516 (D.C. Cir. 3/25/2005)

A review of the record evidence reveals that Petitioner's behavioral incidents increased after the school personnel were not available to implement his IEP. Thus, it is concluded that the offer of six months of counseling or art therapy is well-suited to make the petitioner whole for the denial of FAPE which, on these facts, included the lack of the social worker who did counseling services to help Petitioner deal with behavioral issues. The harm caused by the denial of FAPE

involved increased behavioral outbursts and incidents. Six months of counseling at one hour per week, beyond the behavioral support services already provided in Petitioner's IEP, should adequately compensate Petitioner for the harm he sustained by being denied a counselor.

**ORDER**

Based upon the foregoing, the following is HEREBY ORDERED:

1. Petitioner is awarded compensatory education as follows: unless the parties agree otherwise, Respondent shall pay for individual counseling or art therapy for Petitioner, at any qualified provider selected by Petitioner's parent, at a rate not to exceed \_\_\_\_\_ per hour, consisting of one hour per week for a period of six months, to be completed by September 1, 2010.
2. All other relief requested in the foregoing due process complaint is hereby denied.

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Decision of the Hearing Officer in accordance with 20 USC §1451(i)(2)(B).

Date Issued: September 4, 2009

s/ ***James Gerl*** \_\_\_\_\_  
James Gerl  
Hearing Officer