DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
1150 5th Street, S.E.
Washington, DC 20003

STUDENT,[1]
through the Parent

Petitioner,

v

District of Columbia
Public Schools,

Respondent.

Date Issued: November 12, 2010

Hearing Officer: James Gerl

Case No:

Hearing Date: November 1, 2010

Room: 2006

HEARING OFFICER DETERMINATION

BACKGROUND

The due process complaint was filed on September 24, 2010. The matter was assigned to this hearing officer on September 29, 2010. A resolution meeting was convened on October 1, 2010. No agreement was reached at the resolution meeting, but no complaint disposition form was signed by the parent. The hearing officer's decision is due to be issued on or before December 8, 2010. The due process hearing was convened at the Student Hearing Office on November 1, 2010. The

[1] Personal identification information is provided in Appendix A.

hearing was closed to the public; the student's parent attended the hearing; and the student did not attend the hearing. Two witnesses testified on behalf of Petitioner, and five witnesses testified on behalf of the Respondent. Petitioner's Exhibits 1 through 12 were admitted into evidence, and Respondent's Exhibits 1 through 12 were admitted into evidence.

JURISDICTION

This proceeding was invoked 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, Title 5-E of the District of Columbia ("District" or "D.C.") Municipal Regulations ("DCMR"); 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.

ISSUE PRESENTED

The following one issue was identified by counsel at the pre-hearing conference and evidence concerning this issue was heard at the due process hearing: Is the October 1, 2010 IEP inappropriate because it does not provide a sufficient level of services?

FINDINGS OF FACT

After considering all the evidence, as well as the arguments of counsel, I find the following facts:

1. The student was born on August 18, 2001. (R-3; stipulation by counsel on the record). (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; references to testimony at the hearing is hereafter designated as "T".)

2. The student attends one of Respondent's elementary schools. (Stipulation by counsel on the record.)

3. The student's MDT team met and reviewed current evaluations on September 17, 2010 and October 1, 2010. Among the evaluations reviewed were a comprehensive psychological evaluation; two speech language evaluations; and a social history evaluation. (Stipulation by counsel on the record.)

4. Respondent developed an IEP for the student on October 1, 2010. The parent disagreed with said IEP. (Stipulation by counsel on the record.)

5. On April 12, 2010, Respondent conducted a speech language evaluation of the student. Said evaluation concluded that the student had moderate language needs due to significant problems attending and responding appropriately to language. (R-9)

6. On August 20, 2010, an independent speech language evaluation of the student was conducted. Said evaluation concluded that the student needed direct speech language services for 60 minutes weekly to increase his receptive and expressive vocabulary and language skills. (P-11; R-10)

7. On August 30, 2010, the student received an independent social history evaluation. The report of said evaluation notes the student's problem behaviors during the 2009-2010 school year. The report notes that the student's father was incarcerated in February 2009. The report also notes that the student was removed from his mother's custody when she spanked him in approximately October 2007 and that the student's mother participated in parenting classes in order to regain custody of the student in May 2008. The social history report also notes that the student suffered a number of serious traumatic events in a relatively short period of time. In addition to the incarceration of his father, the student suffered three significant deaths in his family. In September 2008, a young cousin of the student died in a car

accident. In November 2008, a young cousin of the student was shot by a police officer and died. In January 2009, an uncle who acted as a surrogate father figure for the student died of a heart attack. The report notes the effects of these traumas upon the student's behaviors. (T-12; R-12)

8. The student was given an independent comprehensive psychological evaluation on August 28, 2010. The report of said evaluation notes that the student was born two months premature and remained in the hospital for a month after he was born until he weighed 5 pounds. The report of said evaluation concludes that the student has a mood disorder, oppositional defiant disorder and attention deficit hyperactivity disorder, as well as borderline intellectual functioning. The report recommends that the student have a highly structured special education program. The report recommends that the student receive individual therapy and family therapy as treatment for his disorders. The report recommends a functional behavioral analysis and that the student participate in a social skills group. Under

"school/classroom interventions," the report recommends a small class size; a structured classroom to minimize stimulus overload; avoidance of reinforcing negative behaviors; teaching of direction following skills; and a learning environment without corrective measures. The report also recommends that the student participate in community recreational activities. (P-10; R-8)

9. The MDT team for the student met on September 17, 2010. Present for the meeting were the student's mother; an educational advocate; a second advocate; Respondent's compliance manager; the Respondent's special education coordinator; the student's general education classroom teacher; the student's speech therapist; the student; and the student's special education teacher. Respondent's speech language pathologist reviewed Respondent's speech language evaluation of the student. It was determined that the student would receive one hour of speech language services. The student's general education classroom teacher for the 2010-2011 school year noted for the team that her

class is very structured, and that assignments she gives are short and usually do not last more than fifteen minutes. She reviewed the student's behaviors and stated that in the three weeks that she had had him to date as a student, she had only found it necessary to call the student's mother one time. The teacher noted that she is developing strict rules within the classroom and that assignments are short. (P–5; R-6; T of R's general education teacher.)

10. The team agreed to reconvene to review the remaining evaluations and develop an IEP for the student. (R-6; P-5)

11. The student's MDT/IEP team reconvened on October 1, 2010. Present were the student's mother (by telephone); the student's educational advocate; the student's general education classroom teacher; the students special education teacher; Respondent's school psychologist; Respondent's speech pathologist; Respondent's compliance case manager; Respondent's special education coordinator; and Respondent's social worker. Respondent's social worker reviewed the social history independent evaluation report

with the team. Because the student displayed violent and aggressive behaviors, Respondent agreed to fund an independent functional behavioral analysis and an independent educational evaluation letter was issued at the meeting. Respondent's school psychologist reviewed the independent comprehensive psychological evaluation. The team determined that the student was eligible for special education under the category of emotional disturbance. (P-4; R-5; T of R's school psychologist)

12. Respondent's speech language pathologist noted that she had reviewed the independent speech language evaluation and Respondent's speech language evaluation at the previous meeting. The team agreed that the student would receive speech language services. The Respondent's representatives on the IEP team suggested that the student receive five hours per week of specialized instruction in the general education setting. The parent and the parent's advocate disagreed with the number of hours contained in the IEP. The MDT team meeting notes indicate that

Respondent's representatives strongly disagreed that the student needed a full-time IEP. Present levels of performance were discussed and goals were developed for the student's IEP. (R-5; P-4; T of R's speech language pathologist)

13. An IEP was developed for the student on October 1, 2010. Said IEP states the student's present levels of educational performance and states goals in the areas of academic – mathematics; academic – reading; communication/speech language; emotional- social and behavioral development. Said IEP calls for five hours per week of specialized instruction in the general education setting. In addition, the IEP calls for three hours per month of speech language pathology related services in the general education setting; an additional three hours per month of speech language pathology related services outside the general education setting and 120 minutes per month of behavioral support services outside the general education setting. Said IEP provides for the following accommodations in the classroom;

interpretation of oral directions; markers to maintain place; reading of test questions; repetition of directions; simplification of oral directions; translation of words and phrases; calculators; location with minimal distractions; preferential seating; small group testing; flexible scheduling; breaks between subtests; extended time on subtests; and breaks during a subtest. (R-3; P-3)

14. The October 1, 2010 IEP developed by Respondent for the student is appropriate to meet his needs. Said IEP contains a sufficient level of services. The student is making academic progress and receiving educational benefit from said IEP in the current school year. (T of Respondent's general education teacher; T of Respondent's special education teacher; T of Respondent's speech language pathologist; T of Respondent's social worker; T of Respondent's school psychologist)

15. Although the student engaged in a series of bad behaviors in the 2009-2010 school year which impeded his academic progress after suffering a number of severe traumatic events

in a short period of time, such bad behaviors are much less frequent in this school year. The student's behavioral issues are not impeding his academic progress in the 2010-2011 school year. The school that the student currently attends is capable of implementing his IEP. (T of R's school psychologist; T of R's general education teacher; T of R's special education teacher)

16. The student's current general education teacher does not shove him, push him or otherwise physically abuse him. (Record evidence as a whole.)

17. The October 1, 2010 IEP for the student developed by Respondent is reasonably calculated to confer educational benefit. Said IEP contains a sufficient level of services. (Record evidence as a whole.)

18. The October 1, 2010 IEP developed by Respondent for the student constitutes the least restrictive environment appropriate for the student. (Record evidence as a whole.)

CONCLUSIONS OF LAW

Based upon the evidence in the record and the arguments of counsel, as well as my own legal research, I have made the following Conclusions of Law:

1. The United States Supreme Court has established a two part test for determining whether a school district provides a free and appropriate public education (hereafter sometimes referred to as "FAPE") to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the Individuals With Disabilities Education Act, 20 U.S.C. §§ 1400, et. seq. (hereafter sometimes referred to as "IDEA") and an analysis of whether the individualized educational plan (hereafter sometimes referred to as "IEP") is reasonably calculated to enable a child to receive some educational benefit. Bd. of Educ., etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); Kerkam v. Superintendent, D.C. Public Schools, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

2. IDEA does not require a school district to maximize the potential of a child with a disability; rather, it requires that an IEP

be reasonably calculated to confer some educational benefit. Bd. of Educ., etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); Kerkam v. Superintendent, D.C. Public Schools, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

3 Respondent has not violated the special education law by failing to provide therapy, in a group or individual setting, to the student. A school district is not required to provide medical treatment that is not for the purpose of meeting the student's educational or academic needs. IDEA §§ 602(26), 614(b); 34 C.F.R. §§ 300.34, 300.304; Harris v. District of Columbia, 561 F. Supp. 2nd 63, 50 IDELR 194 (D.D.C. 6/23/2008); Forest Grove School District v. T A, 109 L.R.P. 77164 (D. Oregon 12/08/2009); Ashland School District v. Parents of Student R J, 53 IDELR 176 (9th Cir. 12/7/2009); Christopher B. by Joanne B. and Ray B. v. Hamamoto, 50 IDELR 195 (D. Hawaii 6/19/2008).

4. A school district is required to provide related services to a student with a disability only where said related services are required to assist the student to benefit from special education. IDEA § 602 (26); 34 C.F.R. § 300.34

5. In determining the placement for a child with a disability, a school district is required, to the maximum extent appropriate, to ensure that the child is educated with children who are not disabled, and that any removal from the regular education environment must occur only if the nature or severity of the disability is such that education in a regular classroom with the use of supplementary aids and services cannot be satisfactorily achieved. IDEA § 612(a)(5), 34 C.F.R. §§ 300.114, 300.115; Hinson v. Merritt Educational Center, 51 IDELR 65 (D.D.C. 2008).

6. The October 1, 2010 IEP for the student developed by Respondent is reasonably calculated to confer educational benefit, and it constitutes the least restrictive environment appropriate for the student. Said IEP contains a sufficient level of services. The student has received educational benefit under his IEP.

DISCUSSION

1. Is the October 1, 2010 IEP for the student inappropriate because it does not provide a sufficient level of services?

Petitioner contends that the student needs a full-time special education class and that the student requires both individual and group therapy as part of his IEP. Respondent contends that the student's IEP developed on October 1, 2010 is appropriate.

The United States Supreme Court has established a two part test for determining whether a school district provides FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the IDEA and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. Bd. of Educ., etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); Kerkam v. Superintendent, D.C. Public Schools, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

In the instant case, Petitioner raises no alleged procedural violations. The analysis, therefore, turns upon whether the student's IEP was reasonably calculated to enable a child to receive some educational benefit.

Petitioner's witnesses, the Petitioner herself and her educational advocate, testified that the student needs much more than the five

hours of specialized instruction contained in his IEP. They also testified that the student needed both individual and group therapy as part of his IEP.

In contrast, Respondent's witnesses testified that the October 1, 2010 IEP developed for the student meets the student's needs and is appropriate for the student. The testimony of Respondent's witnesses is more credible and persuasive than the testimony of Petitioner's witnesses in this regard. This conclusion is based both upon the demeanor of the witnesses, as well as the factors outlined below. First, the credibility and persuasiveness of Petitioner's witnesses is diminished by virtue of the fact that it is apparent that they were applying a potential maximizing standard. Under IDEA, a school district is not required to maximize the potential of a student with a disability; rather, all that is required of a school district is to provide an IEP that is reasonably calculated to confer some educational benefit. Bd. of Educ., etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); Kerkam v. Superintendent, D.C. Public Schools, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991). Indeed, the cornerstone of Petitioner's closing argument, based upon the testimony that was

elicited at the due processing hearing, is that the student's current IEP does not give the student what he needs to be "successful." A school district is not required to guarantee success; rather it is only required to develop an IEP that is reasonably calculated to confer educational benefit. Petitioner attempts to hold the Respondent to a higher standard.

Moreover, the Petitioner's closing argument concedes that the student is making progress now but questions how we will know whether the IEP for the student will be sufficient for the future. The question posed by Petitioner's counsel in closing is essentially: Will the student continue to receive educational benefits?

As Respondent correctly points out in closing argument, however, if a problem with regard to the student's educational program develops in the future, the student's mother is free to convene his IEP team to address any problems. If the student's mother is not satisfied and believes that the IEP at some point in the future is not reasonably calculated to confer educational benefit, she may then exercise her procedural safeguards under IDEA. See, IDEA § 615. Nowhere do Petitioner's witnesses or Petitioner's counsel make any serious

argument that the October 1, 2010 IEP is not reasonably calculated to confer educational benefit upon the student. Indeed, as the later discussion will show, it is abundantly clear from the evidence provided by Respondent at the due process hearing that the student is in fact benefiting from his educational program.

Second, Petitioner's arguments with regard to the alleged inadequacies of the student's October 1, 2010 IEP disregard the requirement of the least restrictive environment. IDEA requires that in determining the placement of a child with a disability, a school district must, to the maximum extent appropriate, ensure that the child is educated with children who are not disabled and that any removal from the regular education environment must occur only if the nature or severity of the disability is such that the education of the child in a regular classroom with the use of supplemental aids and services cannot be satisfactorily achieved. IDEA § 612(a)(5); 34 C.F.R. §§ 300.114, 300.115.

In the instant case, Petitioner's witnesses are seeking a separate special education class for the student. In such a location, the student would have much more limited interaction with his non-disabled peers.

Petitioner has produced no evidence to support its argument that the student requires such an extreme placement. It is clear that the October 1, 2010 IEP placement of the student in the general education environment with five hours of specialized instruction in the general education setting is the appropriate least restrictive environment setting for the student as well as a setting in which he receives academic benefit.

Third, the request by Petitioner that the student's IEP include both group therapy and individual therapy as a related service misconstrues the obligations of a school district. A school district is not required to provide medical treatment to a student. IDEA §§ 602(26), 614(b); 34 C.F.R. §§ 300.34, 300.304; Harris v. District of Columbia, 561 F. Supp. 2nd 63, 50 IDELR 194 (D.D.C. 6/23/2008); Forest Grove School District v. T A, 109 L.R.P. 77164 (D. Oregon 12/08/2009); Ashland School District v. Parents of Student R J, 53 IDELR 176 (9th Cir. 12/7/2009); Christopher B. by Joanne B. and Ray B. v. Hamamoto, 50 IDELR 195 (D. Hawaii 6/19/2008).

In the instant case, it is clear that the independent psychological evauation report relied upon by Petitioner to support this argument

makes both treatment recommendations, such as group and individual therapy, and separate educational recommendations. Respondent is not required to meet the student's medical treatment needs.

Moreover, a school district is required to provide a related service, such as counseling, only if it is necessary for the student to benefit from his IEP. IDEA § 602 (26); 34 C.F.R. § 300.34. In the instant case, Petitioner has not demonstrated that the student could not benefit from his IEP without the individual therapy and group therapy Petitioner seeks to have included as related services in the student's IEP. There is no evidence in the record as to this point. Accordingly, Petitioner has not demonstrated that the absence of these related services from the IEP renders it inappropriate.

Fourth, the testimony of the student's mother with regard to the alleged abusive tactics by the student's current teacher and with regard to her allegation that the student's bad behaviors are ongoing as of this date are particularly not credible. The testimony of the student's mother that the student's current teacher shoves, pushes, and physically abuses the student contradicts all other evidence in the record. It is noteworthy that counsel for Petitioner concluded in his

closing argument that the student's current teacher is an excellent and effective teacher, indeed, one of the stars of Respondent's school system.

In addition, the student's mother stated that her testimony that the student's behavioral problems continue to this day was based upon comments by the student himself, as well as progress reports from the teacher. There was no corroboration of the alleged statements by the student concerning his bad behaviors. Moreover, Petitioner failed to offer the written progress reports from the teacher that supposedly support the student's ongoing behavioral problems into evidence. The failure of Petitioner to offer said progress reports, which would be clearly relevant to the issue of a student's alleged ongoing behavior problems and which were cited by the student's mother in her testimony, requires an inference that if they were offered, they would contradict the mother's testimony. The testimony of the student's mother in particular is not credited.

Petitioner also raised an issue concerning whether the disability category of the student was correctly labeled. Petitioner abandoned this argument in closing argument, so it is not considered here. Even if Petitioner had continued with this argument, however, it would not

have been successful. Because the student is eligible, his disability category or label is not relevant. Heather S. v. State of Wisconsin, 125 F.3d 1845, 26 IDELR 870 (7th Cir. 1997). After a student is identified as eligible, the child's disability category becomes irrelevant; it is the child's identified needs and not the child's disability category that determines the services that must be provided to the child. Letter To Brumbaugh 108 LRP 33562 (OSEP 1/15/8); Letter to Anonymous, 48 IDELR 16 (OSEP 2006). See also, Analysis of comments (pertaining to proposed federal regulations) 71 Fed. Register 156 p. 46586, 46588 (OSEP August 14, 2006); In Re Student With A Disability 52 IDELR 239 (SEA WV 4/8/9); In re Student with a Disability, 108 LRP 25080 (SEA WV 11/12/2007); Pohorecki v. Anthony Wayne Local School District, 637 F. Supp. 2d 547, 53 IDELR 22 (N.D. Ohio 7/23/2009); Anoka-Hennepin Indep Sch Dist 50 IDELR 147 (SEA Minn 4/28/8)

The testimony of Respondent's witnesses included the testimony of the social worker who works with the student, the speech language pathologist who works with the student, the school psychologist who participated on the student's IEP team, the student's special education teacher who provides the specialized instruction to the student and the

student's general education classroom teacher. All of Respondent's witnesses testified credibly and persuasively that the October 1, 2010 IEP developed for the student is appropriate and reasonably calculated to confer educational benefit. In addition, Respondent's witnesses testified that the student is doing well and making progress in his current educational program. The behaviors that were detrimental to his educational progress last year, when the student suffered multiple severe family traumas, are much less frequent and much better during the current school year. Particularly persuasive was the testimony of the student's general education classroom teacher, whom Petitioner's counsel referred to as an excellent teacher and a star in Respondent's school system. She testified that the student is doing well in the structured environment in her class and that he is learning alongside his peers. She testified that he is able to do his classwork and is making educational progress in this setting.

In view of the foregoing, it is concluded that the record evidence compels a conclusion that the October 1, 2010 IEP developed for the student was reasonably calculated to lead to educational benefit for the student. The Petitioner has not met her burden in this case. The

Respondent has prevailed as to the sole issue presented by the due process complaint.

ORDER

Based upon the foregoing, it is HEREBY ORDERED that the due process complaint filed by Petitioner is dismissed with prejudice and that none of the relief requested by Petitioner is granted.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination 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 Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: November 12, 2010

/s/ *James Gerl*
James Gerl,
Hearing Officer