DC OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
State Enforcement and Investigation Unit
Office of Review and Compliance

STUDENT HEARING OFFICE
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CONFIDENTIAL

In the Matter of: STUDENT, Case Petitioner, v. LOCAL EDUCATIONAL AGENCY, Respondent.	No. (LSD) **HEARING OFFICER DECISION**

I. PROCEDURAL BACKGROUND

Petitioner, by and through his parent, filed a due-process complaint on October 31, 2008. Petitioner waived the resolution session. A month later, on December 1, 2008, Respondent filed a combined Response, Notice of Insufficiency, and Motion to Dismiss.

The parties failed to appear at the prehearing.

On December 5, 2008, and February 24, 2009, I held a due-process hearing[1] under the applicable sections of the Individuals with Disabilities Improvement Act of 2004 (*see* 34 C.F.R.

[1] On December 5, 2008, Petitioner moved to continue the hearing because one of its witnesses suddenly could not appear due to a family medical emergency. Respondent did not oppose the motion because, even if Petitioner's witness had testified, there was not sufficient time left in the day for Respondent to complete the examination of its witnesses. I, therefore, granted the motion to continue. I directed the parties to agree on a continued hearing date and inform me by email. The parties' first available date was January 22, 2009, which was nearly a month after the forty-fifth day Petitioner initiated this due-process proceeding. Petitioner requested a copy of that day's transcript in preparation for the remainder of the hearing. Apparently, the Student Hearing Office was not able to provide the transcript before the continued hearing date, so Petitioner requested another hearing date, which I set with the

§§ 300.1-300.718) and of the District of Columbia municipal regulations (*see* 5 DCMR §§ 2500-3033). At the hearing, both parties were represented by counsel. Petitioner entered into evidence, without objection, sixty documents marked P-1 to P-60. Four witnesses testified on Petitioner's behalf, including his mother. Three of those witnesses (Witnesses 1, 2, and 3) were certified as experts. Respondent entered into evidence, without objection, five documents marked R-1 to R-5. Three witnesses testified on its behalf.

II. PRELIMINARY MOTIONS

Respondent's combined responsive filing sought dismissal of the due-process complaint on procedural and substantive grounds.

As to the procedural motion, Respondent's Notice of Insufficiency is denied for procedural reasons as Respondent filed it untimely.

As to the substantive motion, Respondent's Motion to Dismiss is denied. Petitioner's factual allegations are deemed true in analyzing a dismissal motion. In *Bell Atlantic v. Twombly*, __ U.S. __, 127 S. Ct. 1955 (2007), the Supreme Court reaffirmed the requirement that a complaint state a claim for which relief may be granted. A complaint "does not need detailed factual allegations" but, instead, need only meet the "threshold requirement" of Federal Rule of Civil Procedure 8(a) that the statement of the claim "show [ ] the pleader is entitled to relief." Petitioner's claim must be "plausible" based on the facts alleged in the complaint. As always, on a dismissal motion, I am constrained to assume the truth of the complaint allegations and draw all inferences in favor of Petitioner. Under this rubric, Petitioner's due-process complaint suffices, despite Respondent's unsupported argument to the contrary.

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consent of the parties for February 24, 2009. On that day, I asked both parties if either objected to the hearing proceeding after the forty-fifth day of the due-process proceeding was initiated. In any event, Petitioner's counsel indicated that Petitioner had waived any objection; therefore, I proceeded with the hearing.

III. ISSUES RAISED AND RELIEF SOUGHT

In the due-process complaint, Petitioner alleged Respondent denied him a free and appropriate education ("FAPE") by failing to (1) include necessary sections in his individualized education program ("IEP"), (2) develop an appropriate IEP; (3) place him in an appropriate educational setting, and (4) place him at School A. *See* Due-Process Complaint at 4.

For these lapses, Petitioner requests that Petitioner be placed at Respondent's expense at School A and that he be reimbursed for the tuition and services he has received there since his parent's placed him there at the beginning of this school year.

IV. FINDINGS OF FACT

Based on the witnesses' testimony, the documentary evidence presented by the parties, the arguments made by counsel, and my own observations at the due-process hearing, I find:

1. Petitioner is a seven-year old, learning-disabled student who attends School A. He suffers from Attention Deficit Hyperactivity Disorder with executive dysfunction

2. On June 12, 2008, an IEP Team placed Petitioner at School B.

3. Petitioner's parents refused that placement and placed him at School A at the beginning of this school year where he remains.

V. CONCLUSIONS OF LAW

Petitioner shoulders the burden of proof in this due-process proceeding, *see* 5 DCMR § 3030.3, and must carry it by a preponderance of the evidence. *See* 20 U.S.C. § 1415 (i)(2)(c).

Under Individuals with Disabilities Improvement Act, Petitioner is entitled to a FAPE consisting of "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction*." Bd. of Education v. Rowley*, 458 U.S. 176, 188-89, 73 L. Ed. 2d 690, 102

S. Ct. 3034 (1982). That entitlement does not mandate Respondent "maximize the potential" of Petitioner. *See Kerkam v. McKenzie*, 882 F.2d 884 886 (D.C. Cir. 1988) (noting that the Supreme court stressed the lack of any such requirement four separate times in *Rowley*). On the contrary, Respondent is charged only with providing Petitioner a "basic floor of opportunity." *See id*.

Respondent is not held to a standard of perfection in meeting its obligations under the Individuals with Disabilities Improvement Act. *See Kruvant v. District of Columbia,* 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (petitioner denied relief because, while respondent failed to timely assess petitioner, petitioner could show no harm resulting from that error).[2]

In the face of a procedural violation, a hearing officer can find Petitioner was denied a FAPE only if the violations impeded Petitioner's right to a FAPE, significantly impeded Petitioner's parent's opportunity to participate in the decision-making process regarding provision of a FAPE, or caused the child a deprivation of educational benefits. *See* 20 U.S.C. § 1415 (f)(3)(E)(ii); *see also Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (technical violations must interfere with substantive rights).

The four issues raised by Petitioner in the due-process complaint collapse into two, the first concerns the completeness and appropriateness of the IEP and the second concerns his placement.

Incomplete and Inappropriate IEP

[2] *Accord C.M. v. Bd. of Educ*., 128 Fed. Appx. 876, 881 (3d Cir. 2005) ("[O]nly those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable."); *M.M. ex rel. D.M. v. Sch. Dist*., 303 F.3d 523, 533-34 (4th Cir. 2002) ("If a disabled child received (or was offered) a FAPE in spite of a technical violation of the IDEA, the school district has fulfilled its statutory obligations."); *W.G. v. Bd. of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992) (holding that procedural flaws do not "automatically require a finding of a denial of a FAPE"); *Thomas v. Cincinnati Bd. of Educ*., 918 F.2d 618, 625 (6th Cir. 1990) (technical noncompliance with procedural requirements did not result in a "substantive deprivation" of petitioner's rights); *Roland M. v. Concord Sch. Comm*., 910 F.2d 983, 994 (1st Cir. 1990) ("[P]rocedural flaws do not automatically render an IEP legally defective.").

Petitioner alleges that his IEP, at the time it was presented to his parent, did not include the required "present levels of performance," which made the document incomplete and, therefore, inappropriate. *See* Due-Process Complaint at 3. Petitioner offered no evidence that this failure impeded his or his parents' exercise of any substantive right. Witness One testified that the absence of such information in the IEP prevented the IEP team from creating an appropriate special-education regimen for Petitioner. But Petitioner did not spend one day learning under his current IEP. Therefore, while Witness One's point is well-taken, it is based on speculation. And, under *Kruvant* and *Lesesne*, such speculation is unavailing and does not carry Petitioner's burden.

Petitioner similarly speculates that the IEP team's placement of him at School B is inappropriate because it is an inclusion school. He argues that the only reason the IEP Team placed Petitioner in an inclusion program was because School B converted to an inclusion program. He argues that the team made no specific finding that an inclusion program was appropriate to address his special needs. This claim was flatly rejected by two members of the IEP Team (Witnesses 5 and 6), who testified that Petitioner was placed at School B because he needs could be addressed there. On this point, the witnesses' testimony was more persuasive than Petitioner's speculation.

Inappropriate Placement

Petitioner also claims his needs are too great to be addressed in an inclusion program at School B. On this point, the testimony from both sides was compelling. But the decisive testimony came from Petitioner's former special-education teacher, Witness Five.

She was unique among the several witnesses. Not only had she taught Petitioner for a year before his parents placed him at School A, she formerly had worked at School A with

special needs children after she completed her graduate work and she presently teaches at School B in the new inclusion program. She was unique among the several witnesses because she knows Petitioner's needs and capabilities and she knows the competing programs. She testified that she believed Petitioner could benefit from School B and that School B can address all of his needs.

Petitioner offered no evidence that could counter her testimony. Petitioner never spent a day at School B. Petitioner offered no one from School A, even after the hearing was postponed to accommodate such a witness, to dispute Witness Five's assessment of School A. Most importantly, Petitioner failed to show that School B would not provide him with *McKenzie*'s basic floor of opportunity.

Accordingly, Respondent prevails on the four issues raised in Petitioner's due-process complaint.

VI. ORDER

It is this 6th day of March 2009–

ORDERED that Respondent's Notice of Insufficiency is DENIED, and it is further

ORDERED that Respondent's Motion to Dismiss is DENIED, and it is further

ORDERED that this case is dismissed for the reasons given above, and it is further

ORDERED that this shall be a FINAL DECISION from which the parties have ninety days from today to file an appeal in a court of competent jurisdiction, and it is further

ORDERED that this matter is closed for all purposes.

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Hearing Officer Latif Doman

Copies to: Counsel for the Parties
Student Hearing Office