

(Cite as 18 D.o.E. App. Dec 327)  
IOWA DEPARTMENT OF EDUCATION

In re: Gabriel S.	)	
	)	
Eric and Susan S.	)	
Appellants	)	HEARING DECISION
	)	
	)	Admin. Doc. SE- 222
v.	)	
Mason City Community School District	)	
And Northern Trails AEA 2, Appellees	)	#123
	)	

The above entitled matter was heard by Administrative Law Judge Carla A. Peterson on April 4, and May 12, 2000 in Mason City, IA. The hearing was held pursuant to Iowa Code 281.6 of the Rules of the Department of Education found in Iowa Administrative Code Section 281.6 and the Rules of the Iowa Department of Education (281-41) and the applicable regulations found within the Individuals with Disabilities Education Act (IDEA).

The parties in this matter agreed, during a conference call on March 10, 2000, that the following issues would be resolved within these proceedings: (1) Appropriateness of the implementation and/or need for adaptation of Gabriel S.'s current IEP, (2) appropriateness of and/or need for an interim alternative placement for Gabriel S., and (3) appropriateness of and/or need for an independent evaluation for Gabriel S.

### I. Findings of Fact

The Administrative Law Judge finds that she and the State board of Education have jurisdiction over the parties and the subject matter involved in the appeal.

What follows here is a chronology of the programs and services provided for Gabriel up until the time of the appeal. Particular attention will be given to services provided during the 1999-2000 school year as those services are the subject of the appeal.

#### Chronology of Services

1991-92 School Year. Gabriel was first referred for screening in February, 1991. Screening was completed, but further evaluation was not done at that time. Gabriel's mother referred him for screening again on 8/14/91 because of concerns regarding his behavior, which was noted to be "hyper". Screening was completed by Northern Trails AEA on 8/23/91; that same day parents gave consent for an evaluation to be completed in the following areas: adaptive behavior, hearing, intellectual, observation, social/behavior, other (health). Evaluations were completed during September and October, 1991.

Based on evaluations completed, Gabriel was classified as a child with a behavior disability and early childhood special education services were initiated on his third birthday. The Individualized Education Plan (IEP) established one goal, "Gabriel will demonstrate compliance in large and small group activities during the routine of the preschool day". Gabriel attended Discovery Time Preschool two afternoons per week with ECSE services monitored by the LRE facilitator and school psychologist from NTAEA. Gabriel's program was reviewed on 3/20/91. No change was made in the IEP goal, but it was decided that ECSE services would be provided via attendance at a "2.4" preschool program where Gabriel would be in attendance on a 4 day/week basis. Gabriel's program was reviewed again on 5/29/91 with the recommendation made that Gabriel attend the "2.4" preschool classroom on a full-time basis the next school year.

1992-93 School Year. Gabriel was enrolled in a "2.4" ECSE classroom during the 1992-93 school year. The IEP (10/30/92) included the following goals: (1) Gabriel will successfully participate in routines and activities in small groups of 2-8 and large groups of 8-20 children within ECSE and Head Start, (2) Gabriel will increase his successful group participation by using individual skills in group activities in ECSE and Head Start, (3) Gabriel will improve his fine motor skills with pencil grasp and paper/pencil activities, scissors, and puzzles. Beginning on 11/4/92, Gabriel was also enrolled in Head Start for 2 days/week with the LRE facilitator monitoring the IEP in Head Start.

1993-94 School Year. Gabriel was enrolled in a "2.4" ECSE classroom, as well as in Head Start for 2 days/week during the 1993-94 school year. An IEP, developed on 9/27/93, contained 2 goals: (1) Gabriel will improve his fine motor skills with paper/pencil activities, painting, chalk, crayons, and scissors, and (2) Gabriel will successfully participate in routines and activities in small groups (3-8) and large groups (10-20).

Year end progress reports document many good skills and progress with developing appropriate behaviors. Gabriel was assigned to a kindergarten program at Madison School for the 1994-95 school year.

1994-95 School Year. Gabriel began kindergarten at Madison Elementary School in September, 1994. The IEP (dated 9/27/93) was still in effect. Gabriel was integrated into regular education activities for 2 ½ hours per day. On 9/29/95 the integration stopped due to behavior concerns, and a staffing was scheduled. An annual review staffing has held on 11/7/95. The IEP developed at that time listed the following goals for Gabriel: (1) will follow school rules, (2) will maintain positive peer relationships, (3) will maintain on task behaviors during group times, (4) will demonstrate a positive self-image, (5) will accept feedback and help from adults. Gabriel's placement was in an SCI classroom at Madison School. An attendance report documents that Gabriel did not attend school on 40 days between 11/8/94 and 1/24/95.

An IEP Amendment dated 1/11/95 (referred to in ALJ ruling of 9/18/95 but not available in other school records provided in preparation for this hearing) was written. It was apparently decided that Gabriel would attend kindergarten at Hoover Elementary with classroom accommodations described on a 504 plan. Gabriel's attendance report indicates this meeting to be an exit staffing, as well as indicating 1/11/95 as his last day of enrollment at Madison Elementary. That attendance report also indicated that Gabriel continued to qualify for special education services.

A 504 plan was developed on 1/24/95 and described 4 areas of difficulty: (1) staying on task, (2) following directions, (3) appropriate social skills, and (4) transitioning activities; the plan was documented on an Adjusted Program Report (APR). The 504 Accommodation Checklist and Modifications Addendum/Supports Checklist accompanying this APR contain numerous (approximately 40) accommodations necessary "to assure participation in regular and supportive programs".

Communications between the parents, school personnel, school district attorney Chuck McManigel, and Iowa Protection and Advocacy attorney Curt Sytsma indicate that a meeting to discuss Gabriel's education was held on 3/23/95. Gabriel received home tutoring for approximately 2 hours per day through the remainder of the 1994-95 school year. At the same meeting, it was also agreed that Gabriel should not attend school until an evaluation had been completed and home tutoring would be made available for Gabriel in the interim.

These communications indicated that Gabriel should be evaluated in Iowa City and that an IEP staffing would be conducted following that evaluation. Eric and Susan Sauers consented to the evaluation and to release of information to the University of Iowa Hospitals and Clinics (5/23/95). Further communication between the parents and school personnel indicate that Mr. and Mrs. Sauers decided not to go ahead with the evaluation and it was not completed.

1995-96 School Year. A letter from Dr. Merry Maitre (8/18/95) to Mr. and Mrs. Sauers indicates that a staffing team met in regard to Gabriel's educational program on 8/16/95 to develop an IEP and discuss placement. The parents did not attend that meeting although district communications indicate they had been informed properly of the meeting and had asked for it to be changed to a different time. An IEP was developed at the 8/16/95 meeting. No goals were established, but the recommendation was made that Gabriel be placed in a self-contained special class at Madison Elementary.

Mr. and Mrs. Sauers rejected the placement recommendation and filed for a due process hearing on August 23, 1995. An ALJ decision regarding appropriate placement for Gabriel during the pendency of due process proceedings was rendered on September 18, 1995 and stated that Gabriel should be enrolled in a general education classroom at Hoover Elementary School following the plan developed 1/24/95.

During a mediation session held on 10/11/95, an IEP was developed for Gabriel. The goals established for Gabriel included: (1) Gabriel will successfully progress through the 1<sup>st</sup> grade and beginning second grade, (2) Gabriel will demonstrate age-appropriate behaviors in the school setting, (3) Gabriel's behavior will improve so that his need for additional support will not be needed or will be reduced. Extensive accommodations were also detailed on this IEP. Gabriel continued enrollment in the general education classroom throughout the school year with paraeducator support provided.

1996-97 School Year. Gabriel was again enrolled in a general education classroom at Hoover Elementary with paraeducator support provided. An IEP was developed on 9/30/96. The PLEP with this IEP indicates that Gabriel was making good academic progress, that he had lots of friends, and was doing well socially. Classroom observations indicated that Gabriel was generally on-task. Concerns noted via a teacher rating scale included: poor anger control, poor attention, and poor impulse control. It was also noted that Gabriel had been removed from the classroom 37 times during the 1995-96 school year and 2 times to that point during the 1996-97 school year.

The records made available for this hearing indicate that Mrs. Sauers attended the IEP meeting but that the parents never signed the IEP. Apparently, it was implemented throughout the remainder of the 1996-97 school year.

1997-98 School Year. An IEP meeting was held on 9/25/97. One goal – Gabriel will maintain age appropriate behavior in the school setting – was established, and he continued enrollment in a general education classroom at Hoover Elementary School with paraeducator support provided. The PLEP with this IEP indicates that Gabriel was doing well academically, that he was generally on task between 80% and 90% of the time, that his peers liked him, and that busing had been a positive experience. Positive interactions with teachers and peers were noted with the exception of two incidents for which Gabriel was put in time-out for considerable lengths of time (e.g., 20 minutes and 1 hour).

1998-99 School Year. An IEP meeting was held on 9/21/98. One goal – In 36 school weeks, Gabriel will problem-solve to make decisions within school rules and teacher expectations independent of an adult 4 of 5 days over 3 consecutive weeks – was established, and he continued enrollment in a general education classroom at Hoover Elementary with paraeducator support. The PLEP with this IEP indicates that he was generally well-liked by his peers and that generally he was on-task in the classroom between 80% and 90% of the time. Several concerns regarding Gabriel's behaviors were noted. Minor problems with compliance were noted in the early part of the school year during which hallway conferences gained his compliance. On 11/3/97, Gabriel refused to work or take his medication after lunch, and time-out with physical restraint was needed to gain his compliance. It was noted that Gabriel was in time-out on 36 school days between 11/3/97 and 6/5/98, with these periods ranging in length of time from 10 to 20 minutes to "longer periods".

Conferences between district personnel and parents were held on 3/22/99, 4/26/99, and 5/24/99. Concerns were shared that Gabriel's behaviors leading to time-outs were becoming more severe and that time-outs were being used more frequently. During the 3/22/99 conference, concerns were raised as to whether Gabriel "sees them (time-outs) as positive" and that "at times, Gabe purposely gets kicked out of music or art". Information shared at the 5/24/99 conference documents that Gabriel was making good academic progress, although it also notes that "teachers have expressed concerns about his incomplete work and the accuracy/quality of his work". A behavior rating scale completed by a classroom teacher indicated elevated scores on the following scales: aggressive behavior, pre-delinquent behavior, and thought problems. This conference also notes that Gabriel was due for a comprehensive review during September 1999, that a clinical evaluation was suggested to the parents, and that the parents supported "getting a summer evaluation".

1999-2000 School Year. A multidisciplinary team meeting was held on 9/9/99 for the purpose of "problem-solving in preparation for the comprehensive re-eval". The following individuals attended that meeting: Tim Walrod, Hoover principal; Linda Schumaker, NTAEA social worker; Al Hodapp, NTAEA school psychologist; and Susan Sauers, Gabriel's mother. Concerns were noted only in the social/behavioral area, and a summary of that meeting states that "Gabe's history is to have a good start to the year with some behavior problems beginning in late October and becoming more severe and frequent around winter break through the end of the

school year." It was also noted that "the behavior intervention program will be followed with very firm and narrow parameters".

An IEP meeting was held on 9/21/99 with the following individuals in attendance: Tim Walrod, Hoover principal; Linda Schumaker, NTAEA social worker; Al Hodapp, NTAEA school psychologist; Steve DeFrance, 5<sup>th</sup> grade teacher; Susan Sauers, parent; and Gabriel Sauers, student. The PLEP with this IEP (9/21/99) (Attachment A) states that Gabriel's academic performance is generally in the satisfactory to excellent range, that he is well-liked by peers, and that he has leadership potential. Classroom observations by the school social worker and school psychologist indicated that (1) Gabriel was generally on task, with reported variance between 5% to 100% of the time, (2) the majority of his interactions with peers and adults were positive, and (3) Gabriel sometimes needed prompts to complete tasks. Concerns noted included high ratings on a behavioral rating scale in the following areas: aggression, argues, defiance, demands attention, shows off, talks out, and disrupts class. Further, the PLEP highlighted that Gabriel had been in time-out a total of 104 times between September, 1998 and June, 1999, with an average of 11 times per month and 25 days with multiple time outs and that at times physical restraint was needed before he calmed down. The PLEP also stated that an aide is assigned to Gabriel's classroom for crisis intervention and data collection of on-task and behavioral information, as well as that most students at Gabriel's grade level do not require an aide or the use of time-out or physical restraint.

Gabriel has one goal on this IEP: In 36 school weeks, Gabe will problem-solve to make decisions within school rules and teacher expectations, independent of an adult 4 of 5 days over 3 consecutive months. It should be noted that this goal is nearly the same as the one on the IEP for the previous school year. Gabriel's placement was in the regular education 5th grade classroom with a full-time aide. A behavioral intervention plan is attached to this IEP.

School records indicate numerous contacts/communications between Gabriel's parents and school personnel. Mrs. Sauers signed a conference report (11/4/99) that indicated generally satisfactory achievement in communications, social studies, mathematics, media, physical education, and art. Concerns with attitude and application were noted in the areas of science/health and music. Concerns were also noted in the areas of work habits and social growth with 7 of 11 subcategories within these two areas being marked as "Needs to Improve". There were also conferences scheduled for problem-solving and IEP review on 11/29/99, 12/13/99, and 1/31/00. It is unclear if the first two of these scheduled meetings were held, but the school records include a report of the meeting held on 1/31/99; individuals attending that meeting included Tim Walrod, Hoover principal; Linda Schumaker, NTAEA social worker; Al Hodapp, NTAEA school psychologist; Steve DeFrance, 5<sup>th</sup> grade teacher; Sue Fedders, paraprofessional; Eric and Susan Sauers, Gabriel's parents. Concerns regarding the numbers of times that Gabriel had been in time-out, and the increasing intensity of problem behaviors were discussed, and times during the day that seemed to present more than the usual numbers of problems were highlighted. It was also noted that Gabe was earning "Needs to Improve" marks on 70% of his work and that "Gabe's manipulation is a concern". It was noted that Mr. Sauers mentioned additional accommodations that might be considered, and some current accommodations were noted. However, there is no evidence that plans to modify Gabriel's current IEP or behavioral intervention plan were discussed. Possibilities for the 6<sup>th</sup> grade year were also discussed.

A detailed chronology of daily activities and occurrences was recorded by the paraprofessional assigned to Gabriel's classroom and reviewed by the classroom teacher. These

anecdotal records apparently contributed to the behavioral summaries provided at various points during the 1999-2000 school year, but it is unclear when and if the entire record was made available to all team members. The record provides examples of accommodations made for Gabriel (e.g., 10/1/99 – Gabe's chair was placed in back for chorus). The record refers to several instances of Gabriel "choosing to misbehave" (e.g., 9/14/99, 10/11/99, 10/19/99), as well as several instances of Gabriel being told that he needed an "attitude change" or that he was "reamed" (e.g., 9/29/99, 10/20/99, 11/12/99). This record also details instances of Gabriel using inappropriate and/or obscene language (e.g., calling a teacher a bitch 10/12/99, saying that he hated his teacher and that his teacher was an "asshole" on 10/20/99, saying that he was going "to kill Mr. DeFrance" on 12/16/99) and instances of becoming very agitated and developing a nosebleed while being restrained in time-out (e.g., 12/16/99). These records were made available for this hearing (see Attachment B).

Pursuit of an independent evaluation for Gabriel was also discussed on 1/31/00, and apparently agreement was reached that Gabriel would be referred to Dr. Michael Hopkins from Two Rivers Psychological Services in Des Moines. Following this meeting, Eric and Susan Sauers were provided with forms for Consent for Evaluation and Authorization for Exchange of Information. Eric and Susan Sauers returned these forms to school personnel, but they had changed (added and deleted) several items on these forms and explicitly stated that several pieces of information (including reports regarding Gabriel's social/behavioral and academic/educational progress) could not be shared. Communication from the NTAEA (2/23/00) noted that NTAEA would be willing to authorize payment for the indicated independent evaluation only contingent upon Mr. and Mrs. Sauers' agreement to authorize exchange of information with Dr. Hopkins.

A meeting for the purposes of IEP review, discussion of current program, independent evaluation, implementation of IEP, and future planning was held on 2/28/2000. The following individuals were in attendance: Tim Walrod, Hoover principal; Linda Schumaker, NTAEA social worker; Al Hodapp, NTAEA school psychologist; Steve DeFrance, 5<sup>th</sup> grade teacher; Robert Boone, Roosevelt Middle School principal; Joan Hodapp, NTAEA sector coordinator; and Eric and Susan Sauers, Gabriel's parents. According to school records and testimony at the due process hearing, continued concerns with Gabriel's behavior at school including frequent need for time-outs and concerns with his academic progress were discussed and detailed information regarding these concerns are available in the PLEP portion of the IEP dated 2/28/00 (see attachment C). The PLEP states that, "the parents and staff are in agreement that the behavior plan of IEP dated 9/21/99 is no longer effective and that Gabe is manipulating the program to gain control". It continues to state that the parents expressed concerns regarding whether appropriate accommodations for a child with ADHD were being made on Gabriel's behalf. Change in placement for Gabriel was discussed; the parents left the meeting at that point. The professional team members continued the meeting and discussed three placement options for Gabriel: (1) continuation in the current placement with the IEP of 9/21/99, (2) an interim placement with a teacher to work with Gabe on a one to one basis which would be implemented without waiving the parents' "stay put" rights, and (3) a change in placement to a small group setting with social skill and anger management training. The third option was chosen as "the most appropriate placement to meet Gabriel's educational needs". The IEP was completed calling for the third placement option and containing the same goal and behavioral intervention plan as those attached to the IEP of 9/21/99. Eric and Susan Sauers were notified on 2/29/00 that the MCCSD would implement the IEP dated 2/28/00 as of 3/13/00.

Eric and Susan Sauers requested a due process hearing before an administrative law judge; this request was officially filed on 2/28/00, and apparently Gabriel has not attended school since that date.

Another IEP meeting was held on 3/24/00 for the purpose of discussing options for an interim alternative educational setting for Gabriel's education program. Individuals present for this meeting included: Tim Walrod, Hoover principal; Linda Schumaker, NTAEA social worker; Al Hodapp, NTAEA school psychologist; Steve DeFrance, 5<sup>th</sup> grade teacher; Hal Minear, supervisor of special education for the MCCSD; and Mark Feustel, NTAEA representative. This IEP states that options considered for this placement included: (1) tutoring in the home for between 7 and 10 hours per week, (2) tutoring at an alternative placement building for 7 to 10 hours per week, and (3) programming at Madison Elementary as recommended by the IEP team on 2/28/00. The team concluded that the third option was most appropriate and completed the IEP in this manner; again the same goal and behavioral intervention plan developed at the IEP meeting of 9/21/99 were attached to this IEP. The IEP also noted that "this Interim Alternative Education Setting does not supercede the stay put provision for the rights of the parents". Notice of this meeting and decision was sent to Eric and Susan Sauers on 3/24/00, making special note that this placement was proposed for the length of time it would take for the ALJ to make a decision in the scheduled due process hearing.

#### Hearing Testimony

The following representatives of Mason City community School District and Northern Trails Area Education Agency testified on April 4: Steve DeFrance, 5<sup>th</sup> grade teacher at Hoover; Linda Jensen, music teacher at Hoover; Tim Walrod, Hoover principal; Linda Schumaker, NTAEA social worker; Al Hodapp, NTAEA school psychologist; Hal Minear, supervisor of special education for the MCCSD; Joan Hodapp, sector coordinator for NTAEA; Jerry Stremel, Special Education Director for NTAEA. All witnesses testified that they were in agreement with the need for an independent evaluation for Gabriel, as well as in agreement with the placement recommendations of the IEP team (2/28/00).

Steve DeFrance testified that he has had other students with ADHD and that he doubted the correctness of that classification for Gabriel. He also testified that Gabriel could be focused and on task "when he wants to be". Mr. DeFrance testified that some students in his classroom receive other types of special education services. He said that he has tried a variety of strategies with Gabriel, and that things were going well in September but that he has spent increasing amounts of time on behavior management as the school year progressed. He confirmed that a log of activities was recorded by the paraprofessional and reviewed by him daily. He also said that he and the paraprofessional discussed accommodation strategies informally but that no formal training had been completed.

Tim Walrod testified that he feels Gabriel may be experiencing other challenges in addition to ADHD. Mr. Walrod also stated that Gabriel's IEP of 9/21/99 was developed in an effort "to sustain successful experiences" he had had in 4<sup>th</sup> grade. He also stated that the paraeducator assigned to the classroom had found it necessary to restrain Gabriel several times during time outs but because he had concerns about safety during those periods he had taken over the task of

providing physical restraint when it was needed. Mr. Walrod said he felt the district had done what it could to minimize harm in Gabriel's current placement, but that he continued to have concerns about the possibility of injury.

Linda Schumaker testified that she was the case coordinator for Gabriel during the current school year. She also said that she has worked with Gabriel for several years, and that she and other professional team members working with him had conducted monthly meetings to monitor his progress for several years.

Dr. Meindl testified via telephone conference on May 12, 2000. He stated that he, and/or his colleagues, had seen Gabriel on a frequent basis to monitor his prescription for and reactions to Ritalin. He said that he had never been asked to address issues regarding Gabriel harming any of his siblings or himself and that in his office Gabriel is "very in control of his activity level" and is "very reasonable". Dr. Meindl stated that he has had no recent contact with the MCCSD on behalf of Gabriel, and that it seems reasonable to pursue additional evaluation if there are questions regarding how to proceed with his educational programming.

## II. Conclusions of Law

The issues presented to this hearing officer will be addressed in turn. First, the issue of a request for an interim alternative placement will be addressed. IDEA Section 300.521 (of the regulations of 20 U.S.C. 1415 (k) (2)) established criteria through which a hearing officer may order a change in placement for a child with a disability to an appropriate interim alternative educational setting for not more than 45 days. This section refers to expedited due process hearings; however, this section delineates criteria appropriate for consideration in the present matter. The first criterion that must be met before a hearing officer can order a change to an interim alternative placement is that it must be determined that the public agency has demonstrated by substantial evidence that maintaining the current placement of the child is substantially likely to result in injury to the child or to others. In the current case, Gabriel's behavior was definitely not appropriate; district personnel and school records indicate instances that were very disruptive, verbally abusive (there is no evidence that Gabriel ever acted on any threats), and also "violent" (these instances were not described in detail or clearly specified and it is not clear that anyone was hurt). District personnel testified and district records documented that Gabriel had been put in time-out on numerous occasions. They also testified that during some of these instances Gabriel had developed a bloody nose by banging his head, and further that when this happened, he had sometimes tried to "blow his nose on adults" and/or smear blood on walls and furniture. However, district personnel testified that this happened while he was being restrained physically (which is not indicated as a part of Gabriel's behavioral intervention plan). District personnel also testified that Gabriel had run from the school premises on at least a couple of occasions.

While the administrative law judge recognizes that these behaviors have been on-going over a period of time, the school district has not provided convincing evidence that these behaviors are serious enough to warrant an interim alternative placement on the basis that maintaining Gabriel's current placement is substantially likely to result in injury to himself or to others. This conclusion is consistent with previous rulings. [See *Cabot Sch. Dist.*, 27 IDELR 304, (SEA AK 1997) (ruled



that a high school had not demonstrated that maintaining the placement of a high school student who was disruptive, verbally abusive and insubordinate, and very defensive was likely to result in injury to the student or others]. Courts have granted interim injunctive relief in instances of far more serious behaviors. [See *Light v. Parkway C-2 Sch. Dis.* 21 IDELR 933 8<sup>th</sup> Cir., 1994 (for a student who had been engaged in an average of fifteen violent acts a week such as biting, hitting, and kicking others, throwing objects at other students' eyes and faces and placing toxic objects in her own mouth); *Texas City Ind. Sch. Dist. v. Jorstad*, 17 EHRLR 554, S.D. Tex., 1990 (ordered a change in placement because of an on-going threat of imminent danger where a student had been involved in more than thirty assaults and had attempted to jump from a 20 foot high window)].

It is also important to remember that interim alternative placements are intended to provide school districts injunctive relief on a short-term basis when that is needed to maintain the safety of the children and staff members involved. The assumptions underlying this current ruling should not be taken to suggest that verbally abusive behaviors and/or violence are condoned or that inappropriate educational programming arrangements should be maintained without revision until some minimum level of danger is reached. Rather, attention should be turned to consideration of the appropriateness and implementation of Gabriel's current educational program and placement (which would be the IEP of 9/21/99), including the adequacy of the behavioral intervention plan.

IDEA addresses several issues relevant to the development, review, and revision of IEPs, as well as to IEP implementation and educational placement. IDEA Section 300.346 (of the regulations of 20 U.S.C. 1414 (d) (3 and (4) (B) and (e)) states that:

In developing each child's IEP, the IEP team shall consider the strengths of the child and the concerns of the parents for enhancing the education of their child; the results of the initial or most recent evaluation of the child; and as appropriate, the results of the child's performance on any general State or district-wide assessment programs . . . and The IEP team also shall in the case of a child whose behavior impedes his or her learning or that of others, consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior.

IDEA Section 300.350 (of the regulations of 20 U.S.C. 1414 (d)) states that:

each public agency (1) provide special education and related services to a child with a disability in accordance with the child's IEP; and (2) make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP.

Together, these provisions underscore the right of a child with a disability to a FAPE and make it incumbent on a district to make every effort to work with parents to establish an appropriate educational plan, as well as to make every effort to implement that plan with integrity. The IEP developed for Gabriel on 9/21/99 states that Gabe has had a history of behavioral concerns during his elementary school years. The IEP contains only one goal which is in the social/behavioral domain and is aimed at increasing his independent participation in school activities, and a behavioral intervention plan is attached to the IEP. This plan states that its goal "is to help Gabe be a successful, responsible 5<sup>th</sup> grade student and to help him prepare for his middle school

experience". However, the behavioral intervention plan is not satisfactory; it fails to provide instructive and/or supportive steps that could be provided to assist Gabe learn appropriate behaviors and/or when those behaviors could be used. Rather, the plan appears punitive and details "steps", ranging from verbal or non-verbal communication cueing Gabe to return to task, to "hallway conferencing", to time-out, to "other consequences due to the severity of his behavior" (e.g., giving up recess, going to detention) to be used in instances of inappropriate behavior. The plan states that these "steps" are to be used in the following situations: (1) intentionally disrupting student learning, (2) inappropriate language, (3) disrespect toward adults of other students, (4) non-compliance to a direction given by a school adult. It appears this plan was developed in a perfunctory manner, perhaps to satisfy a "need for a behavioral intervention plan". Rather, the intended purpose of the law's requirement for a behavioral intervention plan is that it should be designed in a manner consistent with providing the child with positive behavioral interventions, strategies, and supports to address the behaviors of concern. Similarly, *Hempfield Sch. Dist.* 28 IDELR 509 (SEA PA 1998), held that regardless of other accommodation efforts, a behavior plan that responds negatively to inappropriate behaviors arising from the disability condition/s and ignores teaching alternative coping skills cannot be endorsed.

Evidence that the behavior plan was not implemented in a manner consistent with providing positive behavioral intervention was also presented. Anecdotal records (recorded by the classroom paraprofessional and reviewed by the classroom teacher) do not provide indications that the behavioral intervention plan was implemented in a consistent manner. Rather, this record indicates that on numerous occasions Gabriel was informed at the beginning of the school day that he "owed work" that had not been completed the previous day, that he was "reamed" at the beginning of the day, and that he was told that he needed an "attitude change". Finally, general disregard of Gabriel's needs and the behavioral intervention plan were indicated by testimony from district personnel that on some occasions Gabriel simply chooses not to make appropriate choices but rather to misbehave during the school day.

Finally, district personnel apparently made no systematic effort to revise Gabriel's behavioral intervention plan even though it is clear changes were warranted. District personnel provided documentation that (1) Gabriel's behavior had been a concern prior to the 1999-2000 school year, (2) behavioral issues were a concern early in the 1999-2000 year, (3) Gabriel's behavior had deteriorated over the course of the 1999-2000 school year, and (4) these concerns had been discussed at school and with the parents on numerous occasions. Despite this, there is no evidence that this information was used to adjust the behavior plan in any way. In fact, the behavior plan is attached to the IEPs of 2/28/00 and 3/24/00 in exactly the same form that it was originally presented at the IEP meeting of 9/21/99.

District personnel also made substantive violations of the IDEA during their efforts to change Gabriel's placement. The IDEA provides several points of guidance regarding placement decisions on behalf of children with disabilities. IDEA Section 300.552 (of the regulations of 20 U.S.C. 1412 (a) (5)) states that: the child's placement is based on the child's IEP.

IDEA Section 300.550 (of the regulations of 20 U.S.C. 1412 (a) (5)) states that:  
to the maximum extent appropriate, children with disabilities . . . are educated with children who are nondisabled; and that special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

IDEA Section 300.551 (of the regulations of 20 U.S.C. 1412 (a) (5)) states that:  
each public agency shall ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services . . . and . . . make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

These provisions make it clear that placement decisions are to be made based on the child's IEP; they also provide the presumption of placement in a general education classroom, although clearly they do not dictate that. The placement decision made at the 9/21/99 IEP meeting was to provide Gabriel's program in a general education 5<sup>th</sup> grade classroom with a paraprofessional assigned to the classroom; the attendant IEP goal and behavioral intervention plan were developed to be implemented in that setting. The IEP of 2/28/00 states that the "parents and staff are in agreement that the behavior plan of the IEP dated 9/21/99 is no longer effective"; despite this, that IEP contains the same one goal established on the IEP of 9/21/99, as well as having the same behavior plan attached. While it may be possible to address the IEP goal (Gabe will problem-solve to make decisions within school rules and teacher expectations, independent of an adult 4 of 5 days over 3 consecutive day) in the proposed setting/s, the behavior plan with the goal "to help Gabe be a successful, responsible 5<sup>th</sup> grade student and to help him prepare for his middle school experience" is clearly written for a general education setting. No other goals were established, and concerns with the behavioral intervention plan have been detailed above.

In addition, the placement proposed at the 2/28/00 IEP meeting appears to be overly restrictive, as well as proposed without due consideration of the potential appropriateness of a continuum of placements. At the IEP meeting of 2/28/00, consideration was given to 3 placement options: continuing in the current placement, an interim placement in which a teacher who would work with Gabe one-on-one, and placement in a small group setting that could provide social skills and anger management training at Madison Elementary. General education placement was considered, and the district has expended substantial resources on Gabriel's educational program by providing a one-on-one educational assistant to assist Gabriel in the general classroom over several years. However, it does not appear that less restrictive placements than the one recommended and/or consideration of education in the general education setting to the maximum extent possible were considered adequately during this IEP meeting.

The third issue placed before this administrative law judge is the appropriateness of and/or need for an independent evaluation for Gabriel. The IDEA addresses several issues relevant to evaluation and reevaluation procedures, as well as issues related to use of evaluation data in

making educational programming and placement decisions. Particularly relevant to the issues presented here, IDEA Section 300. 532 (h) (of the regulations of 20 U.S.C. 1412 (a) (6) (B), 1414 (b) (2) and (3)) states that:

In evaluating each child with a disability . . . the evaluation is sufficiently comprehensive to identify all the child's special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified.

IDEA Section 505(c) (1) (of the regulations of 20 U.S.C. 1415 (b) (3); 1414 (a) (1) (C) and (c) (3)) states that:

Informed parental consent need not be obtained for reevaluation if the public agency can demonstrate that it has taken reasonable measures to obtain that consent, and the child's parent has failed to respond.

District records and testimony of several district staff members document that district personnel have requested an independent evaluation for Gabriel at several different points in time. In addition, both district documentation and statements made by Eric and Susan Sauers during the hearing indicated that the parents have consented to independent evaluation on more than one occasion but have either withdrawn consent or interrupted plans to carry out the evaluations before such evaluations could be initiated.

Along with the numerous concerns regarding issues around the development and implementation of an appropriate IEP and appropriate placement for Gabriel, an independent evaluation should be completed at NTAEA's expense. Information available from this evaluation is especially important for consideration in the development and implementation of an appropriate educational program for Gabriel as he begins middle school during the 2000-2001 school year.

### **III. Decision**

The current educational placement for Gabriel is the regular education program at Hoover Elementary School (IEP of 9/21/99). Substantive violations (namely, rushing to a very restrictive placement decision without developing appropriate goal/s and an accompanying behavioral intervention plan) in development of the IEP dated 2/28/00 render that IEP inappropriate.

However, the behavioral intervention plan with the current IEP has been deemed inappropriate by the IEP team members. School records and hearing testimony confirm that there have been problems implementing the IEP of 9/21/99 and that it has not facilitated Gabriel's progress in the general education setting at Hoover Elementary. This, along with the fact that Gabriel has not attended school for a number of weeks, makes it necessary to plan his transition back to school very carefully and ensure that an appropriate educational program is provided. Therefore, the multidisciplinary team (including staff members from Hoover Elementary School, Gabriel's parents, and other staff members deemed appropriate) must meet as soon as possible but no later than May 24, 2000 to make plans for educational programming for the remainder of the 1999/2000 school year and/or summer, 2000 that will be appropriate to address Gabriel's current

educational needs and will best facilitate his transition to middle school during the 2000/2001 school year.

It will be necessary for the multidisciplinary team to:

- (a) Review all relevant evaluation data currently available, and making use of those data, review, refine, and/or supplement the current IEP goal and objectives as appropriate to meet Gabriel's educational needs.
- (b) Develop appropriate goals and benchmarks and an appropriate behavior plan paying special attention to developing a system of positive behavioral supports designed to facilitate Gabriel's attainment of his goal(s), as well as plans regarding how these behavioral supports can be implemented.
- (c) Consider all evaluation data currently available and determine what additional information should be sought via the independent evaluation to be scheduled as soon as possible.
- (d) Consider the full range of supplemental aids and services that might be appropriate to assist Gabriel attain his goals on the IEP to be developed for the remainder of the 1999/2000 school year and/or summer, 2000. Anecdotal records available from school personnel indicate that a variety of accommodations have been attempted for Gabriel, but these records do not make it clear how consistently these were implemented. Careful consideration must be given to a variety of dimensions (including physical, instructional, social-behavioral, and collaborative dimensions) of services when planning appropriate accommodations for Gabriel. In addition, attention must be given to planning how accommodations addressing these various dimensions can be incorporated into his IEP and/or an accompanying behavioral intervention plan in a manner that will ensure they are implemented consistently.
- (e) Determine how Gabriel's progress toward attainment of IEP goal(s) can be monitored on a consistent and frequent basis, and how that progress monitoring data will inform timely revisions to the IEP and the attendant behavior plan as needed.
- (f) Determine the setting where Gabriel's educational program can best be delivered considering the full range of options for maximizing his opportunities to participate with nondisabled peers and make progress in the general education curriculum.

An independent evaluation of Gabriel will be conducted at the expense of Northern Trails AEA. As Gabriel will be age eligible for middle school during the 2000-2001 school year, planning for Gabriel's transition into middle school is of the utmost importance. Since, information available from an independent evaluation should prove invaluable as the team makes plans for Gabriel's educational programming and placement, it is important that the independent evaluation be pursued immediately. Additionally, the multidisciplinary team shall meet to develop an IEP for the 2000-2001 school year, and make appropriate plans for its implementation and careful monitoring, at least two weeks before school begins in August, 2000.

Clearly, Gabriel is a child whose performance needs to be monitored diligently in order to facilitate his progress toward goal attainment and avoid crisis situations. The team would be well advised to meet on a regular and frequent basis to review progress data and make incremental adjustments to Gabriel's educational programming as appropriate.

Carla Peterson

Carla A. Peterson, Ph.D.  
Administrative Law Judge

May 16, 2000  
May 16, 2000