

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 1st Street, N.E., 2nd Floor
Washington, DC 20003

STUDENT,¹
through the Parent

Petitioner,

v

District of Columbia
Public Schools,

Respondent.

Date Issued: April 10, 2011

Hearing Officer: James Gerl

Case No:

Hearing Date: March 31, 2011

Room:

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STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

BACKGROUND

The due process complaint was filed on February 11, 2011. The matter was assigned to this hearing officer on February 15, 2011. A resolution session was convened on February 24, 2011. A prehearing conference by telephone conference call was convened on March 3, 2011. The due process hearing was convened on March 31, 2011 at the Student Hearing Office. The Hearing Officer Determination is due to be issued on April 10, 2011. The hearing was closed to the public. The

¹ Personal identification information is provided in Appendix A.

student's parent attended the hearing, the student did not attend the hearing. Three witnesses testified on behalf of the Petitioner, and zero witnesses testified on behalf of the Respondent. Petitioner's Exhibits 1-26 were admitted into evidence at the hearing. Respondent's Exhibits 1-5 were admitted into evidence.

JURISDICTION

This proceeding was invoked pursuant to the provisions of the Individuals With Disabilities Education Act (hereafter sometimes referred to as "IDEA"), 20 U.S.C. Section 1400 et seq.; Title 34 of the Code of Federal Regulations, Part 300; Title 5-E of the District of Columbia (hereafter sometimes referred to as "District" or "D.C.") Municipal Regulations (hereafter sometimes referred to as "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.

Counsel for the parties stipulated that although a manifestation determination review issue was presented by this case that the parties were not challenging a current disciplinary change of placement, and therefore, that an expedited hearing was not required for this matter.

ISSUES PRESENTED

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

1. Did Respondent violate IDEA by failing to implement the student's March 17, 2010 IEP by providing some of his classes in the general education environment and by failing to provide some of the related service of counseling or emotional support services required by said IEP?

2. Did Respondent violate IDEA by failing to provide an appropriate school/location that could implement the student's March 17, 2010 IEP?
3. Did Respondent violate IDEA by failing to conduct a manifestation determination review when Respondent allegedly changed the student's placement for disciplinary reasons by suspending him for 20 school days during the current school year?
4. Did Respondent breach the December 1, 2010 Settlement Agreement entered into with Respondent by failing to discuss compensatory education in good faith?

FINDINGS OF FACT

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

1. The student attends one of Respondent's junior high schools for the current school year. (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 parties entered into a Settlement Agreement which was signed and executed by the second party on December 1, 2010. (Stipulation by counsel on the record; P-19; R-5)
3. The student's most current IEP was developed on March 17, 2010. (Stipulation by counsel on the record; P-7)
4. Respondent has authorized and Petitioner has accepted that the student be given tutoring two hours per week up to a total of 32 hours of tutoring. This agreement was made after the current due process complaint was filed, but did not involve any admission of liability by Respondent. (Stipulation by counsel on the record; P-24)
5. The student's date of birth is (P-7)
6. The student's March 17, 2010 IEP requires that the student receive 26.5 hours per week of specialized instruction outside the general education environment and that the student receive behavioral support services as a related service in the amount of 60 minutes per week. (P-7)

7. The Respondent provided some of the student's classes this school year in the general education environment. (T of the student's mother; T of the Petitioner's educational advocate; R-1)
8. In the first advisory or marking period for the current school year, the student received grades of B in English language arts, social studies, math, and science and art and a grade of D in adaptive physical education. In the second advisory or marking period for the current school year, the student received grades of B in English language arts, social studies, math, science and adaptive physical education, and a grade of F in art. (R-2)
9. The student made substantial academic progress at school this school year. The student is on grade level. (T of Petitioner's educational advocate)
10. Respondent did not provide the counseling sessions or behavioral support services required as a related service under his March 17, 2010 IEP. Said service was to be provided at the rate of 60 minutes per week. (T of student's mother; T of Petitioner's educational advocate; P-7)

11. The student has an emotional disturbance. The student also has oppositional defiant disorder, an impulse control disorder and attention deficit hyperactivity disorder. (P-8; P-7)
12. The student has anger management problems, and he has been arrested on a number of occasions. The student is currently on probation and receives anger management counseling through the probation office. The student works with and sees a psychiatrist through the health program. The student has had a number of troubles that resulted in his being involved in the juvenile justice and court systems. The student has an extensive psychiatric history. He has difficulty with interactions with others and he has gotten into a number of fights at school. (T of student's mother; P-15; P-8)
13. The student's behavioral issues have resulted in a number of suspensions and discipline-related telephone calls to the student's mother, involving behavioral incidents he was involved in while at school. (T of student's mother; P-14; P-16; P-17)
14. Pursuant to a settlement agreement signed by the parties on December 1, 2010, that resolved a previous due process complaint,

Petitioner waived all claims that she might have brought under IDEA and Section 504, or that she could have asserted as of the date of the signed settlement agreement. (R-5)

15. Respondent suspended the student for 45 days on October 21, 2010 because he the vice principal in charge of discipline in the (T of student's mother; P-16; P-17)
16. Respondent subsequently reduced the 45-day suspension for the vice principal in the to a 10-day suspension. (R-1; T of student's mother)
17. During the current school year, the student has been suspended for approximately 20 school days. Some of the suspensions during the current school year were after the incident involving the vice principal in the and some of the incidents were very recent, two occurring within the last month. All of the disciplinary incidents involved the student's difficulties in interacting with other student's and Respondent's staff. (T of the student's mother; T of the Petitioner's educational advocate)
18. The settlement agreement entered into by the parties on December 1, 2010 required that Respondent convene a meeting to

review the independent functional behavioral assessment that was agreed to as a part of the settlement and to revise the student's IEP if necessary, discuss placement if necessary and discuss compensatory education if warranted. (R-5)

19. On February 7, 2011, Respondent convened a multi-disciplinary team (MDT) meeting with respect to the student. At said meeting, Respondent and the other members of the MDT, reviewed the independent functional behavioral assessment and discussed whether compensatory education was warranted. The members of the team that were Respondent's employees felt that based upon the student's good grades on his report card that compensatory education was not warranted at that time. The MDT discussed compensatory education in good faith but determined that it was not warranted for the student.(R-1)
20. In order to adequately compensate the student for the violation by Respondent in failing to provide counseling or emotional support services as required by the student's IEP, compensatory counseling or emotional support services in the amount of 18

hours will fairly remedy the violation. (T of Petitioner's educational advocate; records evidence as a whole)

21. An independent functional behavioral assessment of the student was conducted on December 20, 2010. The report of said independent functional behavioral analysis includes a study of the student's records, as well as interviews with teachers, of the student's parent and the student and develops a chart involving antecedents of the behaviors and consequences of behavior and demeanor involved by the student during such behavior, as well as a number of recommendations with regard to the student's behavioral intervention plan. (P-20)
22. On April 12, 2010, approximately eight months before the independent functional behavior analysis, Respondent developed a behavioral intervention plan for the student. The behavioral intervention plan is one half of one page long and does not involve analysis of the student's behaviors or antecedents or what to do with respect to consequences other than normal disciplinary actions. Said behavioral intervention plan states that it should be reviewed on approximately May 21, 2010, however, no evidence in

the record indicates that the behavioral intervention plan has been reviewed, tweaked or revised since its adoption on April 12, 2010. (R-3).

23. The private school proposed by petitioner for a prospective private placement as relief herein serves only special education students. The focus of the school is students with emotional disorders. The private school has an extensive crisis management system. The annual tuition at the private school, not including transportation, is _____ to _____ (T of Director of Transition Services at Private School)

CONCLUSIONS OF LAW

Based upon the evidence in the record, 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 has provided 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 Disability 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. In order to provide a FAPE, a school district must implement all of the substantial, or significant and material portions of a student's IEP. Catalan v. District of Columbia, 47 IDELR 223 (D.D.C. 2007); See Van Duyn v. Baker School District, 41 F.3d 770, 47 IDELR 182 (9th Cir. 2007).
3. A procedural violation of IDEA only results in actionable relief when the violation substantively affects the student by causing educational harm or where it seriously impairs the parent's right to participate in the IEP process. Lesesne ex rel BF v. District of

Columbia, 447 F.3d 828, 45 IDELR 208 (D.D.C. Cir. May 19, 2006); IDEA § 615(f)(3)(E)(ii).

4. A party to a due process hearing is precluded by the doctrines of res judicata and/or collateral estoppel from asserting claims that have previously been litigated or resolved through a settlement agreement. JG by Stella G v. Baldwin Park Unified Sch Dist 55 IDELR 2 (CD Calif 8/11/10); Theodore ex rel AG v. District of Columbia 55 IDELR 5 (D DC 8/10/10); See also UNPUBLISHED Davis v. Hampton Public Schs 55 IDELR 122 (4th Cir 10/1/10)(Note this decision is unpublished, and although on point may not have precedential value.)
5. When a school district disciplines a student in such a manner as to constitute a change of placement, the school district is required to convene the manifestation determination review team for the student within ten days of the decision and determine whether or not the conduct for which the student has been disciplined is a manifestation of his disability. IDEA §615(k)(1)(E); 34 C.F.R. §300.530(e). A disciplinary action constitutes a change of placement where a series of removals totals more than 10 school

days in a school year constitutes a pattern involving similar behaviors given factors such as the length or removals, the total amount of time of the removals and the proximity of the removals. 34 C.F.R. §300.536(a)(2). Where the behavior is a manifestation of the child's disability, the school district must conduct a functional behavioral assessment and develop a behavioral intervention plan for the student, or if a behavioral intervention plan already exists, review the plan and modify it as necessary to address the student's behavior. IDEA §615(k)(1)(F); 34 C.F.R. §300.530(f).

6. When the parties to an IDEA due process complaint enter into a settlement agreement, the parties must comply with the terms of said settlement agreement. State of Missouri ex rel St Joseph's Sch Dist v. Missouri Dept of Elementary & Secondary Educ 54 IDELR 124 (Missouri Ct App 3/30/10); Springfield Local Sch Dist Bd of Educ v. Jeffrey B 55 IDELR 158 (ND Ohio 10/25/10). See, IDEA §§ 615(e), 615(f)(1)(B); and 34 CFR §§300.506(b)(7), 300.510(d).
7. Awards of compensatory education or compensatory services under IDEA should be qualitative and flexible in nature and must

be based upon a showing by petitioner that the relief requested will properly remedy the violation of the Act by the respondent.

Reid ex rel Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32, (D.C. Cir. March 25, 2005).

8. Relief under IDEA, including compensatory services, is equitable in nature. A hearing officer has wide discretion to award relief that is appropriate under all of the facts and circumstances of a particular case. Forest Grove School District vs. TA, 129 S.S. Ct. 2484, 52 IDELR 151 (U.S. June 22, 2009); Reid ex rel Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32, (D.C. Cir. 3/25/2005).
9. Under IDEA the clear preference is for a placement in public school; placement in a private school is the exception. RH by Emily H & Matther H v. Plano Independent Sch Dist 54 IDELR 211 (5th Cir 5/27/10) A hearing officer or court should only award prospective private placements as relief to ensure that a child receives the education required by IDEA in the future where a balance of the relevant factors justifies such a placement. In addition to the conduct of the parties, which is always relevant in

fashioning equitable relief, the following factors must be balanced before awarding prospective private placements: the nature and severity of the student's disability; the student's specialized individual educational needs; the link between those needs and the services offered by the private school; the private school placement's costs; and the extent to which the placement represents the least restrictive environment. Branham ex rel. Branham v. District of Columbia, 427 F.3d 7; 44 IDELR 149 (D.C. Cir. October 25, 2005).

DISCUSSION

Merits

Issue No. 1: Did Respondent fail to implement the student's March 17, 2010 IEP?

A local education agency, such as Respondent, must implement the substantial or material portions of a student's IEP. Catalan v. District of Columbia, 47 IDELR 223 (D.D.C. 2007); See Van Duyn v. Baker School District, 41 F.3d 770, 47 IDELR 182 (9th Cir. 2007). In

the instant case, Petitioner alleges that Respondent failed to implement the student's IEP by providing some of his classes in the general education setting without amending or convening an IEP team meeting, and by not providing the related service of counseling as required by the student's IEP. Petitioner presented the testimony of the student's mother and the student's educational advocate to the effect that the student received some of his services in the general education setting despite a full-time special education IEP. Respondent did not call any witnesses during the hearing, so there was no testimony from Respondent to contradict the Petitioner's testimony. The only exhibit supporting a contrary position was the notes of a February 7, 2011 MDT team meeting in which it is stated that the student and his parent agreed that some of his classes would be given in the general education setting as a reward for good behavior by the student. The student's mother testified that she did not agree to this change. The un rebutted testimony of Petitioner's witnesses is credible and persuasive in this regard. Accordingly, it is concluded that the Respondent provided some of the student's classwork in the general education setting despite the

fact that the student's IEP calls for a full-time special education program.

It is concluded, however, that the failure to implement the student's academic portion of his IEP was not a material or substantial failure to implement. It was the unrebutted testimony of the student's educational advocate that the student is on grade level and doing well at his academic classes. The testimony of the student's educational advocate that the student suffered no educational harm is substantiated by the documentary evidence, including the student's report card on which he got B's in all academic subjects. The student did receive one F in art class, but the student received grades of B in all other classes. Indeed, the Petitioner's Advocate testified that the student is making progress and that he is academically on grade level. Given that the student is making substantial academic progress, it is concluded that the failure to implement by placing the student in some general education classes was not material or substantial.

Even assuming, arguendo, that the failure to implement was a material violation, the violation is procedural in nature. A procedural violation of IDEA only results in actionable relief when the violation

substantively affects the student by causing educational harm or where it seriously impairs the parent's right to participate in the IEP process. Lesesne ex rel BF v. District of Columbia, 447 F.3d 828, 45 IDELR 208 (D.D.C. Cir. May 19, 2006); IDEA § 615(f)(3)(E)(ii). Here the Petitioner has not made any argument or presented any evidence to support a serious impairment of the parent's right to participate. The student has suffered no educational harm; the student gets good grades and is on grade level. See discussion above.

In addition, Petitioner contends that Respondent failed to provide the student with the counseling sessions called for in the March 17, 2010 IEP. The IEP requires that the student receive 60 minutes per week of behavioral support services outside the general education setting. It was the unrebutted testimony of the student's mother and the Petitioner's educational advocate that Respondent did not provide the counseling services that the IEP requires. Respondent provided no testimony to counter the testimony of Petitioner's witnesses, and Respondent offered no documentary evidence to show that the counseling sessions had been provided. The testimony of the student's mother and the Petitioner's educational advocate in this regard is

persuasive and credible. Given the nature of the student's disability, which involves an emotional disturbance, including an extensive psychiatric history, trouble with the juvenile authorities, and severe behavior incidents while at school, it is concluded that the failure to provide counseling services was both a substantial or material failure to implement the student's IEP, as well as a substantive, that is non-procedural, violation of IDEA. In view of the student's severe emotional and behavioral issues, the failure to provide counseling was a serious violation of the law.

It is concluded that the Respondent prevailed on a portion of this issue and that Petitioner prevailed on a portion of this issue. The Petitioner carried her burden with regard to the failure to provide counseling services, but did not carry her burden with regard to the provision of classes in the general education atmosphere.

Issue No. 2: Has Respondent failed to provide an appropriate school or location with which to implement the student's IEP?

Petitioner argues that the school provided by Respondent cannot appropriately implement the student's IEP because the student needs more services outside the general education in a small structured and

therapeutic setting. In support of this argument, Petitioner cites an April 25, 2010 psychological evaluation. Concerning this issue, Respondent in its answer argued that the issue was precluded by a settlement agreement which was signed by the parties on December 1, 2010. A review of said settlement agreement reveals that said settlement agreement contains a waiver that precludes the Petitioner from asserting any claims that it could have asserted within the statute of limitations period ending on December 1, 2010.

Accordingly, it is concluded that Petitioner is precluded from raising this issue pursuant to the doctrines of res judicata and/or collateral estoppel because the matter has already been decided as of the Settlement Agreement entered into by the parties herein on December 1, 2010.

Even assuming, arguendo, that this issue was not precluded by the Settlement Agreement entered into by the parties on December 1, 2010, the allegation that the school or location is not appropriate is negated by the fact that the student is making substantial academic progress and is on grade level while attending school at the current school/location. See discussion of the previous issue above. Given the

student's good academic progress at the current school, it cannot be seriously argued that the student's current school or location is not appropriate.

The student's mother testified that the student's current school was not appropriate because the office workers were caddy and discussed their social life in the office; whereas the staff at the private school was more professional. She also noted that the class size at the private school is smaller. The private school may well be better for the student, but Respondent is not required to provide the best school. The IEP developed by Respondent was reasonably calculated to and did provide FAPE to the student at his current school.

The student's mother also testified that the vice principal at the student's school said that the school couldn't handle him, but this was in the context of the disciplinary incident where the student the assistant principal in the This incident was before the December 1, 2010 settlement agreement, and therefore not in the relevant timeframe. In any event, the student's good grades and the fact that he is performing on grade level academically are solid evidence that the

student's school was appropriate and that the student has received FAPE. There is no merit to the Petitioner's allegation.

Respondent has prevailed on this issue. Petitioner has not carried her burden with respect to this issue.

Issue No. 3: Did Respondent violate IDEA by failing to conduct a manifestation determination review when Respondent allegedly changed the student's placement for disciplinary reasons by suspending him for 20 school days during the current school year?

At one point during the current school year, the student was suspended for 45 days for the vice principal in charge of discipline in the The suspension was subsequently reduced by the vice principal to a 10-day suspension. It was the testimony of the student's mother that the student had been suspended for approximately 20 school days during the current school year, at least some of which occurred after the suspension for the vice principal in the The testimony by the Petitioner in this regard was credible and persuasive, and it was not rebutted by any evidence offered by Respondent. Given that the suspensions totaled twenty school days for similar types of misconduct and that some of them were

recent and after the settlement agreement entered into by the parties on December 1, 2010, it is concluded that the series of suspensions constituted a disciplinary change of placement. Accordingly, Respondent was required to conduct a manifestation determination review meeting. It was the testimony of the Petitioner's educational advocate that no manifestation determination review meeting was conducted on behalf of the student. This testimony was persuasive and credible and it was not rebutted by any evidence offered by Respondent. Accordingly, it is concluded that Respondent did not convene a manifestation determination review team after changing the student's placement for disciplinary reasons.

Respondent argues that the Petitioner's testimony negated the need for Respondent to have a manifestation determination review. In particular, Respondent's closing argument cites the Petitioner's testimony that she told the school authorities to stop sending the student home and to suspend him if he had violated the rules. Although Petitioner's testimony in this regard is somewhat odd, it does not constitute a waiver of Petitioner's rights under IDEA to have a manifestation determination review for the student before his

placement may be changed for disciplinary reasons. Accordingly, it is concluded that Respondent's failure to conduct a manifestation determination review meeting given the change of placement by suspending the student for 20 school days during a school year was a violation of IDEA.

Petitioner has prevailed with regard to this issue. Petitioner has met her burden with respect to this issue.

Issue No. 4: Did Respondent breach the December 1, 2010 Settlement Agreement by refusing to discuss compensatory education in good faith?

The December 1, 2010 settlement agreement provides that Respondent would schedule a meeting to review the independent functional behavioral assessment that was agreed to in the settlement agreement and revise the student's IEP if necessary, discuss placement if necessary and discuss compensatory education if warranted.

Petitioner concedes that Respondent convened the meeting to discuss compensatory education, but Petitioner contends that it did not discuss compensatory education in good faith. Petitioner contends that good faith was implied by the agreement in the settlement

agreement that the parties would discuss compensatory education if warranted. The hearing officer agrees that the settlement agreement contemplates a good faith discussion of compensatory education. Petitioner has not demonstrated, however, that respondent acted in bad faith with regard to the issue of compensatory education.

The minutes of the MDT team meeting on February 7, 2011 show that compensatory education was in fact discussed. The Respondent's members of the MDT team felt that based upon the student's report card no compensatory education was warranted at that time. The student's report card showed that the student was making grades of B in his academic classes. When confronted with the minutes of the MDT meeting, Petitioner's educational advocate had to admit on cross-examination that there was a discussion of compensatory education at a meeting as required by the settlement agreement. It is concluded that the discussion of compensatory education on February 7, 2011 was done in good faith and satisfied the requirements of the settlement agreement. Accordingly, it is concluded that Respondent has not violated the special education law with regard to its conduct in response to the Settlement Agreement.

Respondent has prevailed with regard to this issue. Petitioner has not met her burden with regard to this issue.

RELIEF

Petitioner has proven two actionable violations of IDEA by Respondent: not implementing the student's IEP of March 17, 2010 with respect to providing the counseling services of 60 minutes per week provided under said IEP, and not conducting a manifestation determination review with regard to the disciplinary change of placement by suspending the student for 20 school days in the current school year for similar behaviors.

Petitioner has requested a prospective private placement as relief. Prior to the hearing, the Hearing Officer instructed counsel to brief this issue because of the novel nature of this relief. Counsel for Petitioner has filed such a brief; counsel for respondent failed to file said brief. The brief that has been filed has been duly considered.

Prospective private placements as relief for violations of IDEA are extremely rare outside the District of Columbia. In the rest of the nation, such awards are rarely made by hearing officers or courts. Indeed, under IDEA the clear preference is to educate students in

public schools; placement in a private school is the exception. RH by Emily H & Matther H v. Plano Independent Sch Dist 54 IDELR 211 (5th Cir 5/27/10) Awards of prospective private placement have been made only in egregious cases. One example is Draper v. Atlanta Independent School System, 518 F.3d 1275, 49 IDELR 211 (11th Cir. March 6, 2008), where the Eleventh Circuit specifically approved of a private school placement as a form of compensatory education where the violation of the Act by the school district was particularly egregious.

It is nonetheless clearly established that a hearing officer, as well as a court, has broad equitable powers to grant any and all appropriate relief when there has been a violation of IDEA. Forest Grove Sch. Dist. v. T. A., ___ U.S. ___, 129 S. Ct. 2484, 52 IDELR 151 (U.S. June 22, 2009); Reid ex rel Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32, (D.C. Cir. March 25, 2005); See, Garcia v. Board of Education of Albuquerque Public Schools, 530 F.3d 1116, 49 IDELR 241 (10th Cir. 2008). This clearly includes the discretion to award prospective private placements as relief.

In Washington D.C., the Circuit Court of Appeals has specifically approved of prospective private placements as relief for violations of

IDEA under certain circumstances. Branham ex rel Branham v. District of Columbia, 427 F.3d 7; 44 IDELR 149 (D.C. Cir. October 25, 2005). Specifically, the D.C. Circuit identified a number of factors which should be considered in determining whether a prospective private placement is appropriate including the following: the nature and severity of the student's disability; the student's specialized educational needs; the link between those needs and the services offered by the private school; the placement's cost and the extent to which the placement represents the least restrictive educational environment. In addition, the court noted that the conduct of the parties is always relevant when equitable relief is requested.

In the instant case, Petitioner has not demonstrated that the application of the Branham factors should result in a prospective private placement. Despite the student's disability he is performing well academically in Respondent's school. By the admission of his educational advocate, he is doing well and on grade level. It would be inconsistent with the core principles of IDEA to move him to a private school. He is receiving FAPE at respondent's public school. At the private school suggested, the student would have no contact with

nondisabled peers in violation of the principle of least restrictive environment. Based upon the facts and circumstances of this case, a prospective private placement would clearly not be appropriate relief.

Concerning the failure to provide counseling services, it was the testimony of the Petitioner's educational advocate that the relief appropriate for the violation with regard to failure to provide counseling services would be an hour for hour replacement of the counseling by Respondent. Although hour for hour replacement as compensatory education is generally frowned upon in the District of Columbia circuit pursuant to Reid ex rel Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32, (D.C. Cir. March 25, 2005), in the instant case, the compensatory services are not compensatory education but compensatory services for the related service of counseling. Given the student's emotional disturbance, and the student's severe behaviors and problems with regard to relationships with others, the counseling portion of the student's IEP is a critical component of his IEP. What is being addressed by the compensatory services is not a remedy of educational harm, but a remedy of the emotional harm to the student. A mechanical and formulaic application of the Reid anti-replacement

doctrine, is inconsistent with the equitable and flexible nature of relief under IDEA. By requiring counseling as a related service, respondent has already conceded that the student needs counseling to receive educational benefit. IDEA § 601(26); 34 C.F.R. §300.34(a). By failing to provide a service necessary for the student to obtain educational benefit, the respondent has caused harm. Accordingly, the student's emotional needs require replacement of the services lost.

In addition, it was the unrebutted testimony of the Petitioner's educational advocate that with respect to related services, as opposed to tutoring or compensatory education, Respondent generally provides an hour for hour replacement of lost services. Respondent did not provide any testimony or documentary evidence to rebut this testimony from Petitioner's advocate. Accordingly, it is concluded that the appropriate remedy for the violation by Respondent in not providing counseling services to the student is to award counseling services and an hour for hour replacement of the missed time. Because compensatory services should be flexible, the parties will be given the option to modify the award by agreement.

It should be noted, however, that because Petitioner did not prove any violation of the settlement agreement that was entered into by the parties on December 1, 2010, and because said settlement agreement waves any violations of IDEA that the Petitioner might have raised before that date, that the relief awarded in this case should begin as of December 1, 2010. Accordingly, the Order portion of this Decision shall award a total of 18 hours, that is 60 minutes of counseling per week times the 18 weeks between December 1, 2010 and the issuance of this decision, of compensatory services in the form of counseling to be provided to the student by Respondent.

Concerning the manifestation determination review, Respondent argues in closing argument that no relief is appropriate for its failure to conduct the manifestation determination review meeting. In specific, Respondent argues that if the manifestation determination meeting had concluded that the student's conduct was a manifestation of his determination, the appropriate relief would have been to conduct a functional behavior assessment and develop a behavioral intervention plan if appropriate. Respondent argues that since an independent functional behavior assessment had already been conducted and that

the student already had a behavioral intervention plan, the relief has essentially already been provided. This argument is rejected.

The appropriate relief for Respondent's violation will be a requirement that Respondent convene the manifestation determination review team to determine whether the conduct for which the student had been disciplined was a manifestation of his disability. If it is a manifestation of his disability, the student should not have been disciplined in excess of either ten school days or whatever number of days that constitutes a pattern sufficient to cause a change of placement. If the student's discipline was for an action that was a manifestation of his disability, the suspensions after the point of change of placement should be reversed and expunged from his record.

In addition, if the manifestation determination team determines that the student's conduct was a manifestation of his disability, the team should analyze the results of the independent functional behavior analysis that was conducted for the student. In addition, the team should review the existing behavioral intervention plan, which was developed for the student on April 12, 2010, eight months prior to the independent functional behavior assessment, to determine whether said

functional behavior assessment requires any changes to or modifications of the behavioral intervention plan. In addition, if the behavior is a manifestation, the manifestation determination review team should determine whether any changes should be made to the student's behavioral intervention plan as a result of the subsequent conduct.

It is troubling that the student's behavioral intervention plan is barely one half of one page long. It appears that the behavioral intervention plan was prepared months before the independent functional behavioral assessment and that it resulted from a minimal amount of effort and did not take into account many of the documents, evaluations, and other educational records of the student. A thorough review of the student's skimpy behavioral intervention plan is warranted if the behavior for which he was disciplined was a manifestation of his disability.

ORDER

Based on the foregoing, it is HEREBY ORDERED as follows:

1. That, unless the parties agree otherwise, Respondent shall provide 18 hours of counseling services to the student as compensatory services for its failure to implement a substantial and material portion of the student's IEP. Unless the parties agree otherwise, the services will be provided by Respondent's staff at the student's current school during the current school year and/or the first semester of the next school year;

2. Within 15 days of this Hearing Officer Determination, Respondent shall convene a manifestation determination review team meeting to determine whether the conduct for which the student has been disciplined during the current school year was a manifestation of his disability. If the team concludes that the conduct was a manifestation of the student's disability, it shall reverse all suspensions that constitute a change of placement, and expunge the student's educational records with regard to any said unlawful suspensions. In addition, if the team concludes that the student's behavior was a manifestation of his disability, the team shall review the student's

behavioral intervention plan, the student's independent functional behavior assessment, and the student's IEP and determine whether any changes to the student's existing behavioral intervention plan or the student's IEP are required in order to address the student's behavioral issues. Any such changes that may be determined by the team to be needed for the student's behavioral intervention plan or IEP as a result of the manifestation determination review meeting shall be made at said manifestation determination review team meeting and shall be effective as of that date; and

3. All other relief requested by the Petitioner in this matter is 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: April 10, 2011

/s/ James Gerl
James Gerl,
Hearing Officer