

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

Student Hearing Office
810 1st Street, N.E., 2nd Floor
Washington, DC 20002

STUDENT,¹
through the Parent

Petitioner,

v

District of Columbia
Public Schools,

Respondent.

Date Issued: April 22, 2011

Hearing Officer: James Gerl

Case No:

Hearing Date: April 11, 2011

Room: 2006

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STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

BACKGROUND

The due process complaint was filed on February 8, 2011. The matter was assigned to this hearing officer on February 10, 2011. A resolution session was convened on April 1, 2011. The due process hearing was convened at the Student Hearing Office on April 11, 2011. The hearing officer decision is due on or before April 22, 2011. The hearing was closed to the public. The student's parent attended the hearing, and the student did not attend the hearing. Six witnesses

¹ Personal identification information is provided in Appendix A.

testified on behalf of the Petitioner and zero witnesses testified on behalf of the Respondent at the due process hearing. Petitioner's Exhibits 1-31 were admitted into evidence at the hearing. Respondent's Exhibits 1-4 were admitted into evidence at the hearing.

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 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.

A Notice to Appear was issued to one of Respondent's social workers. Petitioner made a motion to compel the testimony of the witness. After finding that the Petitioner had established that the witness would likely have relevant testimony and that she was not going to appear voluntarily, the hearing officer recommended and the chief hearing officer ruled that a Notice to Appear would be issued. Said witness did provide testimony at the hearing. Petitioner and Respondent both elicited testimony from this witness in their cases-in-chief

ISSUES PRESENTED

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

1. Did Respondent fail to timely evaluate the student based upon a request for a functional behavioral assessment and a vocational assessment?
2. Was the student's IEP dated November 16, 2010 inappropriate because it failed to provide a residential placement, or because the present levels of performance and goals were not appropriate?

FINDINGS OF FACT

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

1. The student was born on March 28, 1994. (P-29) (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. At an MDT/IEP meeting convened on November 16, 2010, the Respondent agreed to authorize an independent functional behavioral assessment of the student. (P-29)

3. At an MDT/IEP meeting convened on November 16, 2010, Petitioner's counsel requested on behalf of the student that he be given a vocational assessment. (P-29)
4. The student's mother signed a consent to evaluate on Respondent's form for the vocational assessment on November 16, 2010. (R-2)
5. As of the date of the due process hearing, Respondent had not yet conducted a functional behavioral assessment of the student. At the hearing, counsel for Respondent announced that Respondent would authorize an independent educational evaluation for a functional behavioral assessment of the student. (Stipulation of counsel on the record)
6. As of the date of the hearing, the requested vocational assessment had not occurred. (T of Petitioner's educational advocate)
7. The delay by Respondent in failing to conduct the vocational assessment was unreasonable in view of the student's disability, an emotional disturbance, and the student's age. He is years old and he will need transition services soon. (T of the student's mother, T of Petitioner's educational advocate)

8. Over the last several years and until recently, the student has not made much, if any, academic progress. The student was recently informed that he would be repeating the 9th grade for the third time. (T of the student's mother)
9. The student has an extreme problem with regard to absenteeism. He frequently refuses to attend class. For the period of the current school year, from August 16, 2010 to February 17, 2011, the student has a total of 296 absences of which 294 are unexcused. In addition, during the same period of time, the student has been late to class on seven occasions. (R-4; T of the student's mother)
10. The student's behavior problems reflected in his refusal to attend class are part of a larger pattern of behavior problems that the student exhibits. He "does what he wants to do." He refuses to "crack a book," and he becomes violent and shoves his mother. He is currently in trouble with the criminal/juvenile authorities as a result of a theft crime. The student's misbehaviors in failing to attend class and in becoming violent and committing theft crimes

are not related to his disability. (T of the student's mother; record evidence as a whole)

11. The student received an independent psychological evaluation that was conducted on September 28 and 30 and October 1, 2010, the report for which was issued on October 12, 2010. The evaluator did not observe the student in the educational setting, but instead interviewed him and reviewed past evaluation documents, and administered a series of assessment. The psychologist recommended a therapeutic full-time special education setting for the student. The reason for the recommendation was that the student requires access to a psychiatrist, medication, family therapy, and individual therapy because of his psychiatric conditions. (P-25; T of Petitioner's psychologist)
12. The evaluations of the student's cognitive ability conducted by Petitioner's psychologist in the October 12, 2010 report were not different on the basis of statistical significance from the previous findings in a psychological evaluation of the student conducted by

Respondent in a report that was issued on March 31, 2009. (P-24;
T of Petitioner's psychologist)

13. The psychologist who evaluated the student on September 28 and 30 and October 1, 2010 as described in a report that was issued on October 12, 2010 found that the student will "function better if he can get out of the general education setting." (P-25)
14. An IEP that was developed for the student on March 18, 2010 notes that at that time the student needed a full-time therapeutic setting to address his academic and emotional needs. (P-26)
15. On March 24, 2010, the social worker who provides counseling to the student at school wrote an addendum to some unidentified document that states in part that the student is in need of a therapeutic placement. (P-16)
16. On October 6, 2010, the student's mother and Respondent entered into a settlement agreement as to a previous due process complaint. Included within the terms of said settlement agreement is a waiver stating that the settlement agreement "...is in full satisfaction and settlement of all claims contained in the pending complaint, including those claims under IDEA and

Section 504 the parent now asserts or could have asserted within the statute of limitations as of the date of the signed settlement agreement. The parent signed said settlement agreement on October 12, 2010. (R-3)

17. On November 16, 2010, Respondent developed an IEP for the student. Present at the IEP team meeting were the student, the student's mother, the student's attorney, Respondent's psychologist, Respondent's social worker who provided counseling services to the student, Respondent's special education coordinator, and Respondent's compliance specialist. The IEP notes that the student's primary disability is an emotional disturbance. Said IEP denotes present levels of educational performance by stating the functioning levels of the student on various educational testing that was done on June 29, 2010, and includes current information with regard to absences and grades in his current courses. In addition, the IEP develops two goals in the area of mathematics, two goals in the area of reading, one goal in the area of written expressions, and three goals in the area of emotional, social and behavior development. The IEP requires

19.5 hours per week outside the general education environment for specialized instruction, contains a typo that seems to require 6.5 hours per day of mathematics instruction outside the general education environment, and requires behavioral support services in the amount of 120 minutes per week outside the general education environment. The IEP provides for full-time special education for the student. The IEP includes a transition plan and states that an interest inventory and a self-directed search were assessment tools that were administered on November 1, 2010. The IEP includes two transition goals and includes post-secondary activities, including job shadowing, career planning and RSA-transition service. (P-29)

18. In recent weeks, the student has been making some progress with regard to his behaviors. Specifically, the student now seeks out the social worker who provides counseling to him before he engages in misconduct. This is a dramatic improvement over past months. (T of Respondent's social worker)
19. As a result of the student's change in now seeking out the social worker when he experiences emotional discomfort, he is now

attending class much more frequently than he did in the past. (T of Respondent's social worker)

20. As a result of the student's increased attendance at his academic classes, it is likely that his grades will improve in the next marking period. (T of Respondent's social worker)
21. Since January of 2011, the student has only had one referral for a disciplinary incident. This is an improvement with regard to frequency of disciplinary referrals as compared to the last few years. (T of Respondent's social worker; P-8; P-9; P-10; P-11; P-12; P-13; P-14; P-15; P-17; P-18; P-19; P-20; P-21)
22. The student does not require a residential placement to meet his academic needs. (Record evidence as a whole)
23. The goals and present levels of performance stated in the IEP developed for the student on November 16, 2010 are appropriate. (P-29; record evidence as a whole)
24. The IEP developed for the student on November 16, 2010 is reasonably calculated to confer educational benefit, and likely would confer educational benefit if the student would access the

program provided to him by Respondent by attending class. (P-29; record evidence as a whole)

25. Last summer, Respondent's staff attempted to assist the Petitioner in her attempt to have the student admitted to a psychiatric hospital. The attempt was not successful because the student refused to consent to the residential psychiatric placement. (T of the student's mother)

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 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 FAPE, a school district is not required to maximize the potential of a child with a disability; instead, the school district is required to provide a basic floor of opportunity. Bd. of Educ, etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); Kerkam v. Superintendent D.C. Public Schools, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).
3. After a parent request for a reevaluation, a school district must either provide the evaluation or issue a prior written notice within a reasonable period of time. IDEA § 614(c); 34 CFR § 300.303, 300.305; See, Analysis of comments on federal regulations 71 Fed. Register No 156 at page 46640 (August 14, 2006). Here

Respondent failed to provide a vocational assessment within a reasonable time after a request by the parent.

4. Where a Respondent has provided the relief requested in a due process complaint, the issue becomes moot and the due process hearing need not proceed as to said issue. District of Columbia v. Strauss 590 F.3d 898, 53 IDELR 250 (D.C. Cir. 01/08/2010). Here the parent's request for a functional behavioral assessment was mooted by respondent's agreement to authorize an independent educational evaluation for such an assessment.
5. A local education agency, such as Respondent, will not be ordered to provide a residential placement for a student with a disability unless there has first been a showing of a denial of FAPE by the local education agency. McKenzie v. Smith 771 F.2d 1527, 557 IDELR 119 (D.C. Cir. 8/30/05); Richardson Independent Sch Dist v. Michael Z & Carolyn Z ex rel Leah Z, 580 F.3d 286, 52 IDELR 286 (5th Cir. 8/21/2009). Here there has been no showing that Respondent failed to provide FAPE.
6. Although a local education agency is responsible for meeting the educational needs of a student with a disability, the LEA is not

required to meet the medical, psychiatric or medication needs of a student. IDEA § 614(b); 34 C.F.R. §300. 304; Harris v. District of Columbia, 561 F. Supp. 2d 63, 50 IDELR 194 (D.D.C. 6/23/2008); Forest Grove School District vs. TA, 109 LRP 77164 (D. Oregon 12/08/2009); Ashland School District v. Parents of Student R.J., 53 IDELR 176 (9th Cir. 12/7/2009); Christopher B. by Joanne B. and Ray B. v. Hamamoto, 50 IDELR 195 (D. Hawaii 6/19/2008).

7. Where a student does not avail himself of the benefits of his IEP because he is frequently absent from his classes, a local education agency cannot be found to have denied FAPE to the student. Nguyen v. District of Columbia 681 F.Supp.2d 49, 54 IDELR 18 (D DC 2/1/10); See, Middleboro Public Schs 110 LRP 50021 (SEA Mass 3/11/10); In re Student with a Disability 55 IDELR 25 (SEA NY 6/11/10); Harrisburg City Sch Dist 55 IDELR 149 (SEA Penna 5/26/10); Dept of Educ, State of Hawaii 54 IDELR 271 (SEA HI 4/30/10); Corpus Christi Independent Sch Dist 110 LRP 49276 (SEA TX 7/2/10).
8. IDEA does not require that a local education agency, such as Respondent, close the gap between the achievement of a student

with a disability and the achievement levels of his non-disabled peers. Allyson B By Susan B & Mark B v. Montgomery County Intermediate Unit # 23 54 IDELR 164 (ED Penna 3/31/10); JL & ML ex rel KL v. Mercer Island Sch Dist 55 IDELR 164 (WD Wash 10/6/10); MP by Perusse v. Poway Unified Sch Dist 54 IDELR 278 (SD Calif 7/12/10); Montgomery Public Schs 110 LRP 28732 (SEA Md 1/14/10).

- 9 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.) 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).

10. All relief under IDEA is equitable in nature. The behavior of the parties, and other equitable considerations, are always relevant. School Committee, Town of Burlington v. Department of Education, 471 U.S. 358, 556 IDELR 389 (1985); 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); See, Garcia v. Board of Education of Albuquerque Public Schools, 530 F.3d 1116, 49 IDELR 241 (10th Cir. 3/25/2008) in re student with a disability; 52 IDELR 239 (Sea WV 04/08/2009).

DISCUSSION

Merits

Issue No. 1: Did Respondent fail to timely conduct a functional behavioral assessment and a vocational assessment of the student?

After a parent request for a reevaluation, a school district must either provide the evaluation or issue a prior written notice within a reasonable period of time. IDEA § 614(c); 34 CFR § 300.303, 300.305; See, Analysis of comments on federal regulations 71 Fed. Register No 156 at page 46640 (August 14, 2006).

Concerning the functional behavioral assessment, Respondent stipulated on the record at the due process hearing that it would issue an authorization for an independent functional behavioral analysis. Because the relief sought by the Petitioner has been provided, the issue is moot. District of Columbia v. Strauss 590 F.3d 898, 53 IDELR 250 (D.C. Cir. 01/08/2010). Petitioner contends that the issue is not moot because Petitioner wants an order that Respondent failed to timely conduct the functional behavioral assessment. Since the relief has been granted, however, the issue is clearly moot. Proceeding with a hearing where the relief has been given would be an extreme waste of scarce resources. Petitioner's argument is rejected. The issue as to the functional behavioral assessment is moot.

Concerning the vocational assessment, the record evidence shows that the Petitioner requested a vocational assessment at the November

16, 2010 MDT/IEP meeting. The Petitioner signed a consent to evaluate on the same day, November 16, 2010.

Respondent contends that there was a previous transition evaluation conducted for the student as evidenced by references in his prior IEP. Respondent called no witnesses to testify to or explain the previous transition assessment, however, and it is clear that whatever transition evaluation was conducted on the student is now stale and needs to be redone. Particularly in view of the student's emotional disturbance and defiant attitude, it appears crucial that further transition evaluations should be done. The delay by Respondent in failing to conduct the vocational assessment was unreasonable in view of the student's disability, and emotional disturbance, and the student's age. He is 17 years old and he will be needing transition services soon. Accordingly, Respondent violated IDEA by not conducting the vocational assessment within a reasonable period of time.

Respondent will be ordered to conduct a vocational assessment of the student and to consider developing transition goals therefrom at a meeting of the student's IEP team.

Petitioner has met its burden with respect to a portion of this issue. Petitioner has prevailed on this issue as it pertains to the vocational assessment. Respondent has prevailed on this issue as it pertains to the functional behavioral assessment.

Issue No. 2: Is the student's November 16, 2010 IEP inappropriate because it fails to provide a residential placement for the student and because the student's IEP fails to develop transition goals or include proper present levels of performance?

Concerning whether the student needs a residential placement, the legal standard varies somewhat among the various federal circuits. See analysis in Richardson Independent Sch Dist v. Michael Z & Carolyn Z ex rel Leah Z 580 F.3d 286, 52 IDELR 286 (5th Cir. 8/21/2009). Although a school district such as Respondent is required to provide for the educational needs of a child with a disability, it is not required to provide medical treatment, medication, or psychiatric treatment. IDEA § 614(b); 34 C.F.R. §300.304; Harris v. District of Columbia, 561 F. Supp. 2d 63, 50 IDELR 194 (D.D.C. 6/23/2008); Forest Grove School District vs. TA, 109 LRP 77164 (D. Oregon 12/08/2009);

Ashland School District v. Parents of Student R.J., 53 IDELR 176 (9th Cir. 12/7/2009); Christopher B. by Joanne B. and Ray B. v. Hamamoto, 50 IDELR 195 (D. Hawaii 6/19/2008). However, the prerequisite to a residential placement is a showing by the Petitioner that the student's current IEP, and the placement therein, is not appropriate. McKenzie v. Smith 771 F.2d 1527, 557 IDELR 119 (D.C. Cir. 8/30/05); Richardson Independent Sch Dist v. Michael Z & Carolyn Z ex rel Leah Z, supra.

In the instant case, Petitioner has not demonstrated that the student's current IEP and the placement contained therein is inappropriate. The test to determine whether or not an IEP provides FAPE to a student is whether the IEP is reasonably calculated to confer some educational benefit. Bd. of Educ. etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); Kerkam v. Superintendent D.C. Public Schools, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

In the instant case, it is the un rebutted testimony of Petitioner's witnesses that the student has not progressed academically having now been told that he will be repeating the 9th grade for the third time. It is clear that he has not made academic progress for a long time. It is also clear, however, that the student has been chronically absent from class.

Because the student has not availed himself of the opportunities afforded him under his IEP, the student himself has made it impossible to determine with certainty whether or not the IEP is appropriate. During the current school year, from August 16, 2010 through February 17, 2011, the student had a total of 296 absences of which 294 were unexcused. In addition, during the same period of time, the student was late to class on seven occasions.

The student's excessive absences have sabotaged his education. Given that the student has not availed himself of the opportunities presented, it would not be equitable to hold Respondent accountable for the student's failure to make academic progress. A student cannot make academic progress if he fails to attend school. Nguyen v. District of Columbia 681 F.Supp.2d 49, 54 IDELR 18 (D DC 2/1/10); See, Middleboro Public Schs 110 LRP 50021 (SEA Mass 3/11/10); In re Student with a Disability 55 IDELR 25 (SEA NY 6/11/10); Harrisburg City Sch Dist 55 IDELR 149 (SEA Penna 5/26/10); Dept of Educ, State of Hawaii 54 IDELR 271 (SEA HI 4/30/10); Corpus Christi Independent Sch Dist 110 LRP 49276 (SEA TX 7/2/10).

It should be noted that Petitioner has not persuasively argued that the student's absences are the result of his disability. Indeed, the student's mother testified that the student simply does what he wants to do; that is, that the student has a bad attitude. Moreover, on cross-examination, the student's mother noted that the student's current criminal troubles stem from theft, which is clearly not related to the student's emotional disability. As his mother describes him, the student simply misbehaves, refuses to "crack a book" and refuses to attend class.

In addition, the credibility of the witnesses called by Petitioner to support the argument that the student needs a residential placement is impaired by the fact that said witnesses applied the wrong legal standard. A school district need not maximize the potential of a child with a disability; all that is required is that the school district provide the basic floor of opportunity. Bd. of Educ, etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); Kerkam v. Superintendent D.C. Public Schools, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991). In the instant case, however, Petitioner's witnesses clearly employed a potential maximizing standard. For example, Petitioner's educational

advocate testified that different goals would be “better suited” for the student.

Moreover, the report and the testimony of the psychologist who evaluated the student also make it clear that the psychologist also employed the wrong standard. She testified that the student would “do better” in a full-time special education environment. That the educational advocate and the psychologist called to testify on behalf of Petitioner employed the wrong standard is also evidenced by their testimony concerning closing the gap between where the student was functioning and where his non-disabled peers are functioning. School districts are not required to “close the gap.” Allyson B By Susan B & Mark B v. Montgomery county Intermediate Unit # 23 54 IDELR 164 (ED Penna 3/31/10); JL & ML ex rel KL v. Mercer Island Sch Dist 55 IDELR 164 (WD Wash 10/6/10); MP by Perusse v. Poway Unified Sch Dist 54 IDELR 278 (SD Calif 7/12/10); Montgomery Public Schs 110 LRP 28732 (SEA Md 1/14/10).

In addition, the testimony of the psychologist called as a witness by Petitioner is impaired with regard to credibility and persuasiveness by virtue of the fact that the witness would require a school district, such as Respondent, to perform medical and psychiatric functions.

Indeed, the psychologist testified that the student needed a therapeutic environment. When asked to explain what a therapeutic environment meant on direct examination, the psychologist included the following components: medication, access to a psychiatrist; family therapy; and individual therapy. Because the witness was describing a medical treatment environment, rather than an educational environment, it is clear that her testimony requires more of the school district than it is legally bound to provide. Accordingly, it is concluded that the testimony of Petitioner's witnesses with regard to the student's need for a residential placement is not credible or persuasive.

Moreover, additional evidence cited by Petitioner with regard to the student's alleged need for residential placement is stale. Petitioner refers to quotes from a previous IEP that is no longer in effect, as well as an unidentified document completed by a social worker who provides counseling to the student with regard to the alleged need for a residential placement. The previous IEP was developed on March 18, 2010. The unidentified document by the social worker is dated March 24, 2010. Similarly the psychological evaluation conducted on September 28 and 30 and October 1, 2010, may not be used as evidence.

All such arguments raised by Petitioner are barred by a settlement agreement entered into by the parties with regard to a previous due process proceeding. On October 12, 2010, the student's mother signed a settlement agreement with Respondent resolving a previous due process complaint. Said agreement included a waiver of all claims that the student's parent could have raised as of the date of the signed settlement agreement. Accordingly, all claims based upon statements and documents dated before October 12, 2010 are barred by the waiver and settlement agreement.

Moreover, and more importantly, the alleged need of the student for a residential placement is negated by the testimony of the social worker who has been providing counseling to him under his IEP. Said witness testified pursuant to a Notice to Appear issued by the chief hearing officer upon the recommendation of the hearing officer and at the request of Petitioner. The social worker testified credibly and persuasively that very recently the student is making some progress in his behaviors and attendance. He now seeks out the social worker before engaging in many of the bad behaviors he had previously engaged in and discusses his reactions with the social worker. This

recent change has caused him to improve his attendance. He is going to class more often now that he self-selects, or visits the counselor on his own initiative. Moreover, it was the unrebutted testimony of the social worker that the student will likely show at least some academic progress as the result of his improved attendance at his classes. Thus, the only evidence in the record concerning the student's recent behavior and attendance and academic work shows that he is likely to have made at least some progress in these areas. Although the student obviously still has a long way to go, these developments are encouraging and signal that the student's IEP may well be appropriate if the student would in fact attend class. These changes clearly evidence the fact that a residential placement would not be appropriate for the student, as well as the fact that the student's IEP, including its goals and present levels of performance, are appropriate.

Accordingly, it is concluded that Petitioner has not proven that the student's IEP is inappropriate. Petitioner has not met her burden with regard to this issue. Respondent has prevailed with respect to this issue.

RELIEF

Because Petitioner had requested a prospective private placement with regard to this due process complaint, the hearing officer asked both parties to brief the following issue: under what circumstances should a due process hearing officer exercise his discretion to award a prospective private placement as relief in an IDEA case. Each party submitted a brief, and the hearing officer reviewed said briefs. However, because Petitioner has not proven that the student's IEP was inappropriate, no such relief will be awarded in this case.

Concerning the violation that Petitioner has proven, Respondent has already remedied the failure to provide an FBA by agreeing to authorize an independent educational evaluation for a functional behavioral assessment. Accordingly, the Order will recognize that Respondent has agreed to provide such relief.

Because Respondent has failed to provide a vocational assessment, the Order portion of this decision will require the Respondent to fund an independent vocational assessment for the student. In addition, the student's MDT or IEP team will be required to meet to discuss the results of functional behavioral assessment and the

transition assessment within 20 days of the completion of the reports for said evaluations. The MDT and/or IEP team shall make any necessary revisions to the student's IEP based upon a thorough review of said evaluation reports.

ORDER

Based on the foregoing, the following relief is ORDERED as follows:

1. Respondent has agreed to authorize an independent functional behavioral assessment of the student;
2. Unless the parties agree otherwise, Respondent shall provide to counsel for Petitioner an authorization for an independent educational evaluation for a vocational assessment of the student;
3. Unless the parties agree otherwise, Respondent shall provide said authorizations for independent educational evaluations to Petitioner within thirty days of the issuance of this Hearing Officer Determination;
4. Unless the parties agree otherwise, within twenty days of the issuance of the later of the two reports of independent educational

evaluations of the student for a functional behavioral assessment and a vocational assessment as described above, the student's MDT and/or IEP teams shall meet to discuss whether any changes are necessary to the student's IEP as the result of said evaluations, including whether any additional transition goals or transition programs should be included in said IEP; and that

5. None of the other relief requested by the due process complaint herein is awarded.

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 22, 2011

/s/ *James Gerl*

James Gerl,
Hearing Officer