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

STUDENT,[1]
through the Parent

Petitioner,

v

District of Columbia
Public Schools,

Respondent.

Date Issued: October 13, 2010

Hearing Officer: James Gerl

Case No:

Hearing Date: October 5, 2010

Room: 2008

HEARING OFFICER DETERMINATION

BACKGROUND

The due process complaint was filed on July 27, 2010. The matter was assigned to this hearing officer on July 27, 2010. A resolution session was convened on August 20, 2010. A pre-hearing conference was convened on September 7, 2010. One continuance was granted in this matter extending the decision deadline by nine calendar days to October 13, 2010. The due process hearing was convened at the Student Hearing Office on October 5, 2010. The hearing was closed to

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

the public; the adult student's parent attended the hearing and the student attended the hearing. Six witnesses testified on behalf of petitioner, and two witnesses testified on behalf of respondent at the due process hearing. Petitioner's Exhibits 1 through 26 were admitted into evidence at the hearing. Respondent's Exhibits 1 through 21 were admitted into evidence at the hearing. Respondent's Exhibit 22 was offered into evidence but not accepted on the basis of relevance, and although the exhibit was not considered in the preparation of this decision, it was included with the record in a sealed envelope marked "Respondent's Exhibit 22". Subsequent to the hearing, petitioner filed a written Motion to reopen the hearing. Said motion was denied in a written Order dated October 11, 2010.

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.

ISSUES PRESENTED

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

1. Did Respondent fail to provide FAPE to this student after she transferred from North Carolina near the beginning of the 2009-2010 school year?; and
2. Did Respondent deny FAPE to the student because the IEPs developed by Respondent on March 26, 2010 and July 19, 2010 contained an inadequate level of services to meet the student's needs?

FINDINGS OF FACT

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

1. The student was born on and the student is an adult as of the date that the due process complaint was filed herein. (P-2) (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 of witnesses at the hearing is hereafter designated as "T".)

2. The student's mother has had problems with addiction, causing the student to live with her aunt and to be a ward of the state. The student was sexually abused as a child. She has had a number of psychiatric hospitalizations, including one on April 23, 2009 for expressing homicidal thoughts toward another student and one on July 8, 2010 because of suicidal statements. (R-18; P-12; T of Petitioner's community support worker)

3. The student attended school in North Carolina for the 2008-2009 school year. The student had an IEP in place in North Carolina, where she was in grade, which placed her in a resource room for 40 to 79% of the day. The location of her services was designated as an exceptional children classroom. Her category of disability was noted as an emotional disturbance or emotional disability. She was on a modified diploma track. (P-4: T of the Student; T of student's mother.)

4. The student transferred to a high school in Respondent's school system near the beginning of the 2009-2010 school

year. The student received only inclusion setting instruction for 7 to 14 hours per week, and no pull out separate class special education instruction, from the time she re-enrolled in Respondent's school system until March 26, 2010. (T of student's mother; T of Respondent's special education coordinator)

5. Respondent did not reevaluate the student or develop and IEP for her from the time that she enrolled near the beginning of the 2009-2010 school year until March 26, 2010. (T of student's mother; T of Respondent's special education coordinator; P - 3)

6. On February 2, 2010, a psychoeducational evaluation of the student was conducted. The report of the evaluation notes that the student was moved to live with her aunt in North Carolina because of severe substance abuse problems in the mother's home. Said evaluation concludes that the student needs counseling with regard to her emotional issues and made recommendations concerning specialized instruction

with regard to verbal comprehension, processing speed and mathematics. (P-9; R -16)

7. A social adaptive functioning evaluation of the student was conducted on May 17, 2010. The report of this evaluation recommends that MDT team consider changes to the student's program because of her poor cognitive and academic functioning. (P – 11)

8. The student was given a Vocational Assessment Level II on February 1, 2010. The report of the evaluation notes that the student has a history of sexual and physical abuse and the report concludes that the student should have another assessment after her mental health issues have been resolved. (P-10; R – 15)

9. The student received a previous psychological evaluation on May 15, 2008, which concluded that she was mildly mentally retarded. (P-6)

10. On March 26, 2010, the student's MDT team met. The team reviewed the psychoeducational evaluation of the student. The team also developed an IEP for the student. The team

discussed the student's excessive absenteeism and its impact upon her educational performance. (R-9, R-11)

11. The IEP team that met concerning the student on March 26, 2010 included the student, Respondent's social worker, Respondent's psychologist, a case manager, Respondent's special Education Coordinator, a special education teacher, Petitioner's special education advocate No. 1, and the student's mother. The IEP that was developed for the student on March 26, 2010 provided for 14 hours per week of specialized instruction to be provided as a pullout in a separate class outside the general education environment and seven hour per week of specialized instruction to be provided in the general education environment. In addition, the IEP included, as a related service, 30 minutes per week of behavioral support services. Said IEP is reasonably calculated to confer educational benefit upon the student. (P – 3; T of Respondent's special education coordinator; T of Respondent's school psychologist; record evidence as a whole)

12. On July 19, 2010, the MDT team for the student and met. Participants included Respondent's compliance case manager, a special education teacher, a social worker, a general education teacher, Respondent's special education coordinator, a behavior specialist, the student's mother, a case manager, the student's educational advocate No. 1, and Respondent's school psychologist. The adult student was telephoned by the special education coordinator at the beginning of the meeting, and the student informed the team that it was okay for her mother to make educational decisions on her behalf at this meeting. During the MDT team meeting, Respondent's school psychologist reviewed the results of a social adaptive behavior assessment of the student. The psychologist noted that the student's behavior can be controlled and she can be stabilized when she is on her medication. The social worker who works with the student noted that she is calm when she comes to see the social worker but that because of her attendance issues, she does not regularly come to see the social worker.

Respondent's behavior specialist, as well as Respondent's special education coordinator, indicated that the student's difficulties in school center around her excessive absenteeism and that she not only fails to show up for school but also often fails to attend class when she is in the school building. The team reviewed the student's baselines, goals, areas of concern, areas of need, and determined that all were sufficient. The personnel of Respondent who attended the meeting agreed that 14 hours out of general education and seven hours in the general education setting, plus one hour of counseling services would be appropriate for the student. The student's advocate and the parent disagreed, saying that they felt she needed a full-time setting. Respondent's personnel disagreed. Respondent's special education coordinator noted that the student was performing above average in reading and writing but no so well in math. (R-10; T of Petitioner's special education advocate No. 1; T of Respondent's school psychologist; T of Respondent's special education coordinator)

13. Petitioner's educational advocate No. 1 sought to have the eligibility disability classification for the student changed from emotional disturbance to mild mental retardation at the July 19, 2010 MDT meeting. Respondent's school psychologist stated at the meeting that such a change would not be appropriate because the student does not meet the criteria for mental retardation. (T of Petitioner's Educational Advocate No. 1; T of Respondent's school psychologist; R-10)

14. At the MDT meeting on July 19, 2010, an IEP was prepared for the student. Said IEP includes goals and programs, including word problems and drills recommended by the psychoeducational evaluation and reading comprehension, also recommended the psychoeducational evaluation. Moreover, the behavioral support provisions of the IEP follow the recommendation of the psychoeducational evaluation that the student shall receive social emotional counseling. The IEP provides for 14 hours per week of specialized pullout instruction, which is special education

provided outside the general education setting, as well as seven hours per week of specialized instruction in the general education setting. The IEP also provides that the student will receive 30 minutes per week of behavioral support services as a related service. The July 19, 2010 IEP is reasonably calculated to confer educational benefit upon the student. (P-2; T of Respondent's special education coordinator; Respondent's school psychologist; record evidence as a whole.)

15. The student has been receiving approximately 21 hours of pullout special education services in a separate class outside the general education setting format since the July 19, 2010 IEP was developed. When the student was not absent from school or cutting classes, she made progress under her IEP. (T of Respondent's special education coordinator)

16. In the 2009-2010 school year, the student received mostly grades of "F" in her academic courses. She received a "C-" in English III and a "D" in Algebra I, but in all other courses she received a grade of "F". The student continued to do

badly in her academic courses in the 2010-2011 academic year. (R-20; P-15; T of the student; T of the student's mother)

17. During the 2009-2010 academic year, the student was absent 96.5 days. During the same school year, she was present 85.5 days. (R-20)

18. During the period from August 16, 2010 to September 28, 2010, the student had 16 unexcused absences. (R-21)

19. The student's academic performance is much better when her attendance is better. (T of Respondent's special education coordinator; T of Respondent's school psychologist; R-10)

20. The reasons that the student would skip school and not attend class while she was at school include the following: she sometimes did not like the warm temperature of the classrooms, the teachers made her mad, other students would get into fights, occasionally teachers would not let her have permission to leave the classroom and her classes were not sufficiently entertaining. (T of student)

21. The student did better academically when she was attending classes. When the student was not absent, she was received some educational benefit from her educational program. (T of Respondent's special education coordinator)

22. The student suffered educational harm as the result of the failure of Respondent to provide a free and appropriate public education from the beginning of the 2009-2010 school year until March 26, 2010. In order to remedy the educational harm suffered by the student as a result of the denial of FAPE by Respondent, the student should receive as compensatory education two hours per week of mentoring services and three hours per week of tutoring one on one in her academic subjects until the remainder of the current school year. (T of Respondent's special education coordinator; T of student)

23. The private school in which Petitioner seeks to have the student placed does not accept any non-disabled students. All students at said private school have as one of their disability categories an emotional disturbance. Said private

school is not an appropriate placement or the least restrictive environment appropriate for this student. (T of educational director of private school; record evidence as a whole)

24. There was an incident approximately two weeks prior to the due process hearing in which the student was teased and bullied by some of the other students. The student had refused to answer a question from teacher. When confronted, the student said that she was an adult legally and did not need to do anything the teacher said. The student's response prompted other students to ask her how old she was, and when she informed the other students of her age, they referred to as "stupid" and "retarded". When informed of the incident, Respondent convened a meeting with the student, the student's mother, the special education coordinator of Respondent and the student's community support worker. Respondent offered to modify the student's class schedule and dealt with the students appropriately. (T

of student; T of community support worker; T of Respondent's special education coordinator)

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 provides a free and appropriate public education (hereafter sometimes referred to as "FAPE") to a student with a disability. There must be a determination as to whether the school district has complied with the procedural safeguards as set forth in the Individuals With Disabilities Education Act, 20 U.S.C. §§ 1400 et. seq. (hereafter sometimes referred to as "IDEA") and an analysis of whether the student's 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. When a student transfers from another state, the new school district must, in consultation with the parent, provide the child with FAPE, including services comparable to those described in the child's IEP from the previous school district, until the new school district either reevaluates the student or develops its own IEP. IDEA §614(d)(2)(C)(i)(II); 34 C.F.R. §300.323(f).

3. Respondent denied FAPE to the student by failing to provide her comparable services to the IEP that was in effect in North Carolina when she moved to Respondent's school district near the beginning of the 2009-2010 school year until such time as Respondent developed an IEP for the student on March 26, 2010. IDEA §614(d)(2)(C)(i)(II); 34 C.F.R. §300.323(f).

4. The IEPs developed by Respondent for the student on March 26, 2010 and July 19, 2010 were reasonably calculated to and did confer educational benefit upon the student when she elected to attend school and avail herself of the services offered by respondent. The student's excessive absenteeism adversely affected her

education. 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).

4. All relief available under IDEA is equitable in nature. A hearing officer and a court have broad powers to remedy violations of IDEA. Reid ex rel. Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. March 25, 2005). See Forest Grove School District v. TA, 129 S. Ct. 2484, 52 IDELR 151 (U.S. June 22, 2009).

5. Any award of compensatory education under IDEA should be qualitative in nature rather than based on a cookie cutter formula replacing an hour of lost services with an hour of compensatory education. In order to receive compensatory education, a Petitioner must demonstrate the educational harm that was suffered by the student as a result of a violation of the Act, as well as demonstrate that the proposed compensatory education is designed to rectify the harm to the student. Reid ex rel. Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. March 25, 2005).

6. In the instant case, the record evidence reveals that Petitioner is entitled to compensatory education as a result of the

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

7. A hearing officer or court may award a prospective private placement as relief to ensure that a child receives the education required by the 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 such relief: the nature and severity of a 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. 10/25/05).

8. In determining the placement of a child with a disability, a school district is required to the maximum extent appropriate to ensure that the child is educated with children who are not disabled and that any removal from the regular education environment must

occur only if the nature or severity of the disability is such that the education in a regular classroom with the use of supplemental aids and services cannot be satisfactorily achieved. IDEA § 612(a)(5); 34 C.F.R. §§ 300.114, 300.115. The prospective private placement proposed by the Petitioner in the instant case would violate the least restrictive environment provisions of IDEA.

9. After balancing the relevant factors, it is concluded that a prospective private placement would not be appropriate relief for the student in this case. Branham ex rel. Branham v. District of Columbia, 427 F. 3d 7; 44 IDELR 149 (D.C. Cir. 10/25/05).

10. IDEA does not concern itself with labels, but whether a student with a disability is receiving a free and appropriate public education. A disabled child's IEP must be tailored to the unique needs of that particular child. Heather S. v. State of Wisconsin, 125 F.3d 1845, 26 IDELR 870 (7th Cir. 1997). After a student is identified as eligible, the child's disability category becomes irrelevant; it is the child's identified needs and not the child's disability category that determines the services that must be provided to the child. Letter To Brumbaugh 108 LRP 33562 (OSEP

1/15/8); Letter to Anonymous, 48 IDELR 16 (OSEP 2006). See also, Analysis of comments (pertaining to proposed federal regulations) 71 Fed. Register 156 p. 46586, 46588 (OSEP August 14, 2006); In Re Student With A Disability 52 IDELR 239 (SEA WV 4/8/9); In re Student with a Disability, 108 LRP 25080 (SEA WV 11/12/2007); Pohorecki v. Anthony Wayne Local School District, 637 F. Supp. 2d 547, 53 IDELR 22 (N.D. Ohio 7/23/2009); Anoka-Hennepin Indep Sch Dist 50 IDELR 147 (SEA Minn 4/28/8)

DISCUSSION

Merits

1. Did Respondent fail to provide a free and appropriate public education to the student after she transferred from North Carolina near the beginning of the 2009-2010 school year?

IDEA requires that when a student transfers from another state, the new school district must provide FAPE to the student, including services comparable to those described in the previously held IEP until such time as the school district conducts an evaluation or

develops a new IEP for the student. IDEA § 614(d)(2)(C)(i)(II); 34 C.F.R. § 300.323(f).

In the instant case, it was the testimony of Petitioner's educational advocate No. 1 and Petitioner's mother that the student was placed in some inclusion classes and that there was no effort on the part of Respondent to implement the previous IEP or to develop an educational program approximating the previous IEP.

Respondent's witnesses noted that the student was on a modified diploma track in North Carolina and that no similar track exists in Respondent's school system. Respondent offers only a diploma track and a certificate track. The lack of a modified diploma track may have been relevant if Respondent had attempted to approximate the North Carolina IEP but had to make a few changes. Here, however, there was no attempt by Respondent to approximate the student's program in North Carolina. Accordingly this difference is not an excuse for Respondent's inaction.

Respondent's special education coordinator conceded that there was no effort to approximate the services under the IEP that the student had in North Carolina when she moved to Washington, D.C.

The student was placed in inclusion classes for a portion of her day, but she received no separate class or pullout, special education classes. Respondent's special education coordinator conceded that Respondent's failure to provide appropriate services to the student approximating her previous IEP was wrong and that the student is entitled to some compensatory education as a result thereof.

It is concluded, based upon the evidence in the record, that the student was denied FAPE from the time she arrived from North Carolina near the beginning of the 2009-2010 school year until such time as Respondent developed an IEP for her, which was March 26, 2010.

The Petitioner has met her burden with regard to this issue and she has prevailed thereupon.

2. Are the IEPs developed for the student on March 26, 2010 and July 19, 2010 inappropriate because they provide an insufficient level of services?

Petitioner contends that the IEPs developed by Respondent were inappropriate because they did not provide for a full-time special education placement. In support of its position, Respondent called

two educational advocates as witnesses. Educational Advocate No. 1 attended both of the IEP meetings and objected to the level of services provided. Educational Advocate No. 2 reviewed the student's records and argued that because the student was of borderline intellectual functioning that she needed a full-time special education program.

The United States Supreme Court has established a two part test for determining whether a school district provides FAPE to a student with a disability. There must be a determination as to whether the school district has complied with the procedural safeguards as set forth in IDEA and an analysis of whether the student's IEP is reasonably calculated to enable a child to receive some educational benefit. Bd. of Educ., etc. v. Rowley 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); Kerkam v. Superintendent, D.C. Public Schools, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991). In this case, there is no allegation of a procedural violation.

The two IEPs that were developed by Respondent contained goals and related services that closely tracked the recommendations made by the psychoeducational evaluation of the student conducted on

February 2, 2010. Both IEPs provide for 14 hours of pullout special education services, seven hours of specialized instruction to be provided in the general education environment and 30 minutes per week of behavioral support services for the student. The testimony of Petitioner's witnesses was contradicted by the testimony of two witnesses called by Respondent. Respondent's school psychologist and Respondent's special education coordinator both testified that the level of services provided by the student's IEP was appropriate. The testimony of Respondent's witnesses was more credible and persuasive than the testimony of Petitioner's witnesses in this regard.

In addition, the credibility of the testimony of Petitioner's Educational Advocate No. 2, to the effect that the student needed a full-time special education program, is also impaired by the fact that the witness appears to have applied a potential maximizing standard. IDEA does not require that a school district provide an education for a student that will maximize her potential, rather IDEA only requires an appropriate education. Bd. of Educ., etc. v. Rowley 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982).

Specifically, the testimony of Educational Advocate No. 2 that it was "better" for the student to be with other student's of her same disability appears to be applying a potential maximizing standard that is inappropriate under IDEA. The credibility of this witness is diminished because of the application of that standard.

Much of the criticism of the IEPs by Petitioner's Advocate Number 1 involves the student's category of disability. He felt that the student should have been reclassified as mentally retarded instead of having an emotional disturbance. This argument is not consistent with the requirements of IDEA. Once a student is eligible, disability categories are not relevant. An eligible child is entitled to have her needs met regardless of category or label. Heather S. v. State of Wisconsin, 125 F.3d 1845, 26 IDELR 870 (7th Cir. 1997). Letter To Brumbaugh 108 LRP 33562 (OSEP 1/15/8); Letter to Anonymous, 48 IDELR 16 (OSEP 2006). See also, Analysis of comments (pertaining to proposed federal regulations) 71 Fed. Register 156 p. 46586, 46588 (OSEP August 14, 2006); In Re Student With A Disability 52 IDELR 239 (SEA WV 4/8/9); In re Student with a Disability, 108 LRP 25080 (SEA WV 11/12/2007); Pohorecki v. Anthony Wayne Local School

District, 637 F. Supp. 2d 547, 53 IDELR 22 (N.D. Ohio 7/23/2009); Anoka-Hennepin Indep Sch Dist 50 IDELR 147 (SEA Minn 4/28/8). The misunderstanding of the role of disability categories under the law impairs the credibility of Petitioner's Advocate Number 1. Petitioner's argument regarding the student's disability category is rejected.

The witnesses called by Respondent testified that the student's problems with regard to absenteeism were a large part of the cause of her lack of academic success. The witnesses noted that when the student was not at school, her work suffered and that when she was present, she did better and made progress. Indeed, by missing more school days that she was present, the student put herself in a position where she could not benefit from her IEP.

Respondent's witnesses also brought up problems that the student was having at home as a factor in her poor educational performance. Included in these problems at home were difficulties in getting the student to take her prescribed medication. Petitioner objected to these considerations, claiming that a school district may not consider whether a student takes medication. The federal regulations provide

that a school district may not require parents to obtain a prescription for certain controlled substances as a condition for a child attending school. 34 C.F.R. § 300.174(a); IDEA § 612(a)(25)(A). In the instant case, however, it is clear that Respondent was not making any effort to require the student to obtain any type of prescription for medication. Instead, Respondent was noting that there may be alternative explanations for Petitioner's academic failures. The Petitioner's argument regarding medication is rejected.

In any event, it is clear from the record that the student's excessive absenteeism resulted in her having a difficult time academically under her IEP. There is no dispute that the student was frequently absent, and that when present she often left classes and walked the halls.

There is no evidence in the record that the student's absenteeism was in any way caused by her disabilities. Petitioner's counsel does make an argument in closing argument that the student's absenteeism may have been caused in part by Respondent's previous failure to implement her IEP. There is no evidence in the record, however, to support this argument. Indeed, the student noted during

her testimony that the reasons for her failing to attend class involved her disagreements with teachers, her unwillingness to listen to the directions of her teachers, and her dislike of the caliber of students in her classes. The testimony of the student indicates that she failed to attend class simply because she did not want to attend class and not because of any reason involving her IEP. By refusing to be present at school and in her classes, the student prevented herself from obtaining benefit under her IEP.

The IEPs developed by Respondent on March 26, 2010 and July 19, 2010 were reasonably calculated to confer educational benefit upon the student. It is concluded that the IEPs developed by Respondent were appropriate for the student. 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).

Moreover, the placement desired by Petitioner's educational advocates is inconsistent with the least restrictive environment requirement of IDEA. In determining the placement of a child with a disability, the school district is required, to the maximum extent

appropriate, to ensure that the child is educated with children who are disabled and that any removal from the regular education environment must occur only if the nature or severity of the disability is such that education in a regular classroom with the use of supplemental aides and services cannot be satisfactorily achieved. IDEA § 612(a)(5); 34 C.F.R. §§ 300.114, 300.115. It was the persuasive and credible testimony of the Respondent's special education coordinator that the student did better when she was present at school and received at least some educational benefit when she did so. Accordingly, it must be concluded that if the student had attended school, she would likely have received educational benefit from the IEPs developed by Respondent on March 26, 2010 and July 19, 2010. It would, therefore, be inappropriate under IDEA to place the student in a full-time special education only program when it is apparent that she could receive educational benefit from the 14 hours of pullout special education services and seven hours of specialized instruction provided in the general education environment, accompanied by 30 minutes per week of the related service of behavioral support services.

Accordingly, it is concluded that the IEPs developed on March 26, 2010 and July 19, 2010 were reasonably calculated to confer educational benefit.

Petitioner also argued that the IEP was insufficient because Respondent actually provided more than the number of pullout services provided on the student's IEP. Petitioner's argument seems to be inconsistent- arguing at the same time that the level of services was insufficient and that the student received excessive services. In fact, Respondent should not be punished for providing extra help to the student if the student needed extra help. This fact does not prove that the student's IEPs were not reasonably calculated to provide educational benefit at the time that they were written. See, D.F. & D.F. ex rel N.F. v. Ramapo Cent. Sch. Dist. 105 LRP 57524 (2d Cir. 11/23/05).

Petitioner's closing argument also included a claim that Respondent denied FAPE to the student by failing to provide the student with a functional behavioral analysis and by failing to give family counseling to the student as a related service. These issues were not listed in the Petitioner's complaint or discussed at the

prehearing conference. Accordingly, these issues are beyond the scope of this due process hearing, and petitioner's arguments are rejected. IDEA §615(f)(3)(B). Moreover, the record evidence reveals that neither Petitioner nor her mother nor her educational advocate had ever requested that the student be given a functional behavioral analysis or that the student's IEP include family counseling as a related service. It would be contrary to the collaborative nature of the IEP process, see, Shaffer v. Weast, 546 U.S. 49, 44 IDELR 150 (November 14, 2005), to permit a party to challenge a school district for failing to provide services that a parent or adult student had never requested. These arguments by Petitioner are rejected.

The Petitioner also provided testimony concerning an incident of bullying of the student in which she was called "stupid" and "retarded" by classmates. This issue was not included in the instant complaint as a separate issue, and, therefore, Petitioner's argument is rejected. IDEA §615(f)(3)(B). To the extent that the issue regarding the bullying incident may possibly be related to the alleged denial of FAPE under the current IEP, it is concluded that Respondent dealt with the situation appropriately. After the student

called the bullying incident to the attention of school authorities, there was a meeting, including the Respondent's special education coordinator, the student, the student's mother and the student's community support worker. At the meeting, the situation was dealt with appropriately- the students were dealt with and the student was offered the option of changing some of her class schedule. Accordingly, to the extent that the bullying incident may be alleged to be involved with the issue of denial of FAPE under the current IEP, the argument by Petitioner is rejected.

It is concluded that Petitioner has not met her burden with regard to this issue and that Respondent has prevailed with regard to this issue.

RELIEF

Petitioner seeks compensatory education for the alleged violations of IDEA. Relief under IDEA is always equitable in nature. Forest Grove School District v. TA, ____ U.S. ____, 129 S. Ct. 2484, 52 IDELR 151 (U.S. June 22, 2009); Reid ex rel. Reid v. District of Columbia, supra. On the Petitioner's side of the equity ledger in this

case, Petitioner's excessive absenteeism would normally warrant a reduction of an award of compensatory education. On Respondent's side of the ledger, however, is the inexcusable delay of seven months' time in implementing the student's IEP from North Carolina or creating a new one. These two factors cancel each other out. It is concluded that no reduction or multiplication of the compensatory education award is required as a result of equitable factors.

Petitioner's Educational Advocate No. 2 testified that the student needed 150 hours of compensatory education to make up for the educational harm suffered as a result of the violations by Respondent herein. The breakdown of these services would be 50 hours each of one to one tutoring in math, reading and writing. Although Petitioner's Educational Advocate No. 2 testified that she did not use the number of hours of lost services in calculating the amount of compensatory education, it was clear when she was confronted with the methodology of her calculation on cross-examination that her calculation was based exactly on the hours of lost services to the student as a result of the allegations in the complaint.

Any award of compensatory education under IDEA should be qualitative in nature rather than based on a cookie cutter formula replacing an hour of lost services with an hour of compensatory education. In order to receive compensatory education, Petitioner must demonstrate the educational harm suffered by the student as a result of the violation of the Act, as well as demonstrate that the proposed compensatory education will rectify the harm to the student. Reid ex rel. Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. March 25, 2005). The calculation provided by Petitioner's educational advocate No. 2 is rejected as inappropriate under the Reid standard because it was based on an hour for hour calculation. In addition, there is no breakdown for the various periods of time of the alleged denial of FAPE. It is significant that this decision finds a denial of FAPE only for the period of time from the beginning of the 2009-2010 school year until the development of the March 26, 2010 IEP for the student. Accordingly, the calculation is based upon a period of time that does not apply to the violation found herein.

In contrast, Respondent's special education coordinator suggested a compensatory education program during questions posed by the hearing officer. Respondent's special education coordinator testified credibly and persuasively that the student suffered educational harm caused by Respondent's failing to implement her North Carolina IEP from the time that she arrived at Respondent's schools until Respondent developed a new IEP for her. This period of time would be from the beginning of the 2009-2010 school year until March 26, 2010. In the professional opinion of Respondent's special education coordinator, the compensatory education that would be appropriate to address the harm for the student as a result of the denial of FAPE during this time period would be one on one tutoring in her academic subjects for three hours per week for the remainder of this school year in addition to mentoring services for one hour two times per week for the remainder of this school year. The compensatory education program proposed by Respondent's special education coordinator is designed to address the harm specifically caused by the violation found in this decision. It also would appear to be adequate to remedy the violation by Respondent of IDEA in this case.

The testimony of Respondent's special education coordinator in this regard is credible and persuasive. The calculation for compensatory education articulated by Respondent's special education coordinator is appropriate for the student given the violation of IDEA herein, and the Order portion of this decision shall so order. Because compensatory education awards should be flexible, the Order shall give the parties the option of modifying the award if both parties agree.

In addition, Petitioner seeks as relief an Order awarding a prospective private placement. Specifically, Petitioner seeks an Order requiring Respondent to pay for the student's education for the future in a private school because of violations of the Act. Because this relief was stated in the complaint and raised at the pre-hearing conference, the hearing officer requested pre-hearing briefs on the topic. The parties' briefs have been considered. The question addressed by the briefs is under what circumstances should a hearing officer exercise his authority to award appropriate relief under IDEA to award a prospective private placement when finding a violation of IDEA. Each party filed a brief in response to the pre-

hearing Order and petitioner filed a reply brief and those briefs have been considered in rendering this decision.

Prospective private placements as relief for violations of IDEA are extremely rare outside of the District of Columbia. In the rest of the nation, such awards are rarely made by hearing officers or courts. Awards of prospective private placement have been made only in extreme cases. One example is Draper v. Atlanta Independent School System, 518 F.3d 1275, 49 IDELR 211 (11th Cir. March 6, 2008), where the 11th 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 School District v. P.A., ____ U.S. ____, 129 S. Ct. 2484, 52 IDELR 151 (U.S. June 22, 2009); . Reid ex rel. Reid v. District of Columbia, supra; See Garcia v. Bd. of Educ. Of Albuquerque Public Schools, 530 F.3d 1116, 49 IDELR 241 (10th Cir. 2008).

In Washington, D.C., the Circuit Court of Appeals has specifically approved 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. 10/25/05). Specifically, the D.C. circuit has identified a number of factors which should be considered in determining whether a prospective 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.

Petitioner's pre-hearing brief cites Diamond v. McKenzie, 602 F. Supp. 632, 556 IDELR 326 (D.D.C. 1985) for the proposition that the Petitioner in this case should be awarded a prospective placement. The Diamond case, however, is distinguishable from this case. In that case, the hearing officer ruled specifically that she did not have the authority to order a prospective private placement. In the

instant case, the hearing officer is convinced that under certain circumstances, a prospective private placement is appropriate relief. The question is whether in applying the Branham factors to this case whether a prospective private placement should be awarded as relief. In the instant case, application of the Branham factors compels a conclusion that a prospective private placement should not be awarded as relief. The biggest problem among the Branham factors for the petitioner in the instant case is the least restrictive environment factor. In determining a placement for a child with a disability, a school district is required, to the maximum extent appropriate, to ensure that a child is educated with children who are not disabled and that any removal from the regular education environment must occur only if the nature or severity of the disability is such that education in the regular classroom with the use of supplementary aides and services cannot be satisfactorily achieved. IDEA § 612(a)(5); 34 C.F.R. §§ 300.114, 300.115.

In the instant case, it was the testimony of the education director of the private school that Petitioner seeks to have the student placed that all the students at his school are special education students, and

that all students carry an emotional disturbance classification. Given that testimony, it is clear that the student would have no or very limited interaction with her non-disabled peers if she were to attend the private school selected by Petitioner. There is no evidence in the record to justify such a restrictive placement for the student. Moreover, as the discussion above reveals, it is not clear, given the student's propensity for absenteeism, that she requires a full-time special education program, let alone a separate school. The private school proposed by the Petitioner is clearly not the least restrictive environment appropriate for the education of this student.

Concerning the other Branham factors, the record evidence concerning the student's educational needs points to the fact that the program established by her current IEP is reasonably calculated to provide educational benefit. The testimony of Respondent's witnesses to the effect that the student made progress under her IEP when she attended class but did not make progress because of her excessive absenteeism is credible and persuasive. It is apparent that the school proposed by the Petitioner is not appropriate to meet the

student's educational needs because she does not need such a restrictive setting.

When weighed together, the Branham factors compel a conclusion that a prospective private placement at the school proposed by Petitioner would not be appropriate relief for the violation of IDEA found herein.

ORDER

Based upon the foregoing, the following is HEREBY ORDERED:

1. That, unless the parties agree otherwise, Respondent is ordered to provide compensatory education to the student for each remaining week of the current school year, 2010-2011, in the following amounts:

    a. Mentoring services for one hour two times per week; and

    b. One on one tutoring in the student's academic subjects for three hours per week.

2. That Respondent is hereby ordered to take any and all actions necessary to make the compensatory education award, as described in Paragraph 1, effective, and Respondent is ordered to notify all providers who will be providing the compensatory education to the student that the student is entitled to compensatory education of those types and in those amounts.

3. The Petitioner's request that Respondent be ordered to fund a prospective private placement is hereby denied.

4. That all other relief requested in the foregoing due process complaint is hereby denied.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: October 13, 2010

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