**DISTRICT OF COLUMBIA**
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**
Student Hearing Office
810 1st Street, N.E., 2nd Floor
Washington, DC 20002

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| STUDENT,[1] through the Parent | | |
| Petitioner, | Date Issued: | July 20, 2011 |
| | Hearing Officer: | James Gerl |
| v. | Case No: | |
| District of Columbia Public Schools, | Hearing Date: | July 7, 2011 |
| Respondent. | Room: | 2006 |

2011 JUL 29 AM 10:29 STUDENT HEARING OFFICE

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# HEARING OFFICER DETERMINATION

## BACKGROUND

The due process complaint was filed on May 5, 2011. The matter was assigned to this hearing officer on May 6, 2011. A resolution session was convened on May 27, 2011. A prehearing conference was convened on June 7, 2011. Petitioner filed one unopposed motion for continuance which was granted, extending the deadline for the Hearing Officer's decision by nine days. The due process hearing was convened at the Student Hearing Office on July 7, 2011. The hearing was closed

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

to the public. The student's parent did not attend the hearing and the student did not attend the hearing. Five witnesses testified on behalf of the petitioner and one witness testified on behalf of the Respondent. Petitioner's exhibits 1-16 were admitted into evidence. No exhibits were offered into evidence by Respondent. The decision of the Hearing officer is due to be issued on or before July 20, 2011.

## 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.

Despite a directive by the Hearing officer that both counsel immediately inform the Hearing Officer of any resolution session meeting or any other action that might result in a change to the deadline for decision in this case, neither attorney informed the Hearing Officer of the fact that the resolution session meeting occurred for more than a week after it had occurred. The Hearing Officer only learned of the resolution meeting when he inquired as to the status of the case. As a result of counsel's failure to comply with the Hearing Officer's directive in this regard, it became difficult to timely convene the due process hearing and issue a decision. See the federal regulations governing the timeline for decision, 34 C.F.R. §§ 300.515, 300.510(c). As a result, the Hearing Officer imposed as a sanction against both lawyers that each party would be limited to no more than four hours, plus a

reasonable amount of time for closing argument, to present its case. An IDEA hearing officer is charged with running the hearing process. See, Letter to Anonymous 23 IDELR 1073 (OSEP 1994). Appropriate sanctions may be imposed where lawyers or parties fail to comply with the reasonable directives of the Hearing Officer. Stancourt v. Worthington City Sch. Dist. Bd. of Educ. 44 IDELR 166 (Ohio App. Ct. October 27, 2005); JD by Davis v. Kanawha County Bd of Educ 53 IDELR 225 (S.D. W.Va. 11/4/2009), aff'd on other grounds, JD by Davis v. Kanawha County Bd of Educ 54 IDELR 184 (4th Cir. 4/27/2010) (Unpublished). Failure to comply with directions necessary to convene timely hearings and issue timely decisions is particularly serious in the District of Columbia, where timeliness of decisions has historically been a problem. See, Blackman, et al v. District of Columbia 28 IDELR 1053 (D.DC June 3, 1998).

In other prehearing activity, Respondent made a motion to dismiss asserting that it could not be the appropriate Local Education Agency (LEA) and therefore no relief could be granted against this Respondent. Petitioner filed a written response. In addition, both parties were afforded the opportunity to provide oral argument on the

matter during a telephone conference call. After hearing argument, it became apparent that numerous genuine issues of material fact existed, and as a result, the Hearing Officer concluded that dismissal was not warranted and the motion was denied. Respondent was given leave to make the argument as a defense at the due process hearing.

Counsel for Petitioner requested four notices to Appear to compel the testimony of witnesses. After discussion during a telephone conference call, Petitioner withdrew one of the requests. The Hearing Officer recommended and the Chief Hearing Officer issued three Notices to Appear. Only one of the witnesses to whom the Notices were issued testified at the due process hearing. No explanation was provided at the due process hearing as to why the other two witnesses did not testify although prehearing correspondence indicated that there were allegations of difficulties that were not raised at the due process hearing.

Prior to the hearing, Counsel for petitioner filed a motion to strike. The basis of the motion was that counsel for Respondent filed its prehearing brief (concerning the issue of whether the respondent was the LEA that owed a duty of FAPE to the student) at 2:12 pm the day

after it was due. The only harm or prejudice alleged by Petitioner was that the Respondent had had the Petitioner's brief for nearly a day before filing its brief rather than filing the briefs simultaneously as ordered. The motion to strike respondent's brief was denied, but in order to cure the potential unfairness caused by Counsel for Respondent having the brief of Petitioner before filing its brief, the Hearing Officer ordered that Petitioner was given leave to file a supplemental brief on the topic by 2:12 pm the day after the hearing. Petitioner has not filed a supplemental brief on the topic.

## ISSUES PRESENTED

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

Issue No. 1: Is Respondent responsible for developing and implementing an IEP or for providing an educational placement for the student?

Issue No. 2: Did Respondent fail to implement an IEP for the student?

Issue No. 3: Do the January 25, 2011 and May 18, 2011 IEPs developed by LEA No. 2 provide FAPE to the student?

## FINDINGS OF FACT

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

1. The student is a ward of the District of Columbia. By Order of the Superior Court of the District of Columbia (Family Court) dated August 27, 2010, the student was removed from the custody of his parents and placed in foster care with his aunt in Maryland. (P-11; T of guardian ad litem)(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 student's biological parents retain educational decision making rights for the student. (T of guardian ad litem.)

3. The student's biological father has filed an appeal of the aforesaid custody order. As a result it is unclear who will have custody of the student in the Fall. (T of guardian ad litem.)

4. On October 13, 2010, LEA No. 2 developed an IEP for the student. Said IEP provided 8 hours per week of special education in the general education environment and 20 hours per week of extended school year services. (P-6)

5. On November 3, 2010, LEA No. 2 developed an IEP for the student. Said IEP provided 15 hours per week of special education in the general education environment and one hour per month of speech/language therapy as a related service and 20 hours per week of extended school year services. (P-5)

6. On January 25, 2011, LEA No. 2 developed an IEP for the student. Said IEP provided 15 hours per week of special education in the general education environment and one hour per month of speech/language therapy as a related service and 20 hours per week of extended school year services. (P-3)

7. The student's teachers at LEA No. 2 determined that the student was making progress under his January 25, 2011 IEP. However,

they were concerned that his level of progress in his core academic courses could be better. (T. of Respondent's Program Manager.)

8. On January 20, 2011, Petitioner filed a separate due process complaint against Respondent. The complaint settled when the Respondent issued an authorization for an independent educational evaluation (comprehensive psychological) on February 2, 2011. (P-15; P-16)

9. On February 24 and 25, 2011, the independent comprehensive psychological evaluation of the student was conducted. The evaluator reviewed the November 30, 2011 IEP, but not the January 25, 2011 IEP, in preparing the report of the evaluation. The evaluator assessed the student's cognitive ability as extremely low. The report of the evaluation notes that the student's level of achievement is behind that of his same-aged non-disabled peers. The evaluator recommends full-time special education services because of his low academic achievement. The report also recommends individual play therapy, and that the student should participate in structured recreational activity outside of school. (P-8).

10. As a part of the implementation of the settlement of the previous due process complaint, Respondent's Program Manager contacted LEA No. 2's Special Education Supervisor. Said Special Education Supervisor was excited to hear from Respondent saying that she felt that her team had "dropped the ball" concerning this student. Respondent's Program Manager asked that she and other representatives of Respondent be invited to future meetings concerning this student. (T. of Respondent's Program Manager.)

11. The following participated in the IEP meeting during which the May 18, 2011 IEP was developed for the student by LEA No. 2: the student's biological parents, the student's foster parent, the student's guardian ad litem, the student's educational advocate, a school psychologist, a speech/language pathologist, two special education teachers, a general education teacher, an assistant principal, Respondent's program manager, at least three other individuals from respondent's staff, and four other participants who were not identified on the record. At the meeting the report of the independent educational evaluation (psychoeducational) was reviewed by the team. The student's teachers gave reports

stating that the student was making progress in his classes, but they were concerned that he continued to struggle in his core academic courses. They suggested that the student should receive a full-time special education IEP. The staff of respondent present at the meeting brought up their concerns that the least restrictive environment for the student that would be appropriate would include less than a full-time special education IEP. Respondent's staff suggested that the student receive only his core academic courses where he was said to be struggling in special education (or twenty hours per week). The staff of LEA No. 2 rejected the suggestion and issued a full-time special education IEP for the student. (T of Respondent's Program Manager, P-1)

12. The student's biological parents and the student's foster parent agreed with the contents and the program offered by the IEP developed for the student on May 28, 2011 by LEA No. 2. (T of Respondent's Program Manager, T of Petitioner's Educational Advocate)

13. During the IEP meeting during which the May 18, 2011 IEP was developed for the student by LEA No. 2, the representatives of

Respondent who were present at the meeting offered to enroll the student in a specific school operated by Respondent. The student's biological parent and his foster parent refused the offer stating that they did not want the student to attend any school in Washington, DC because of a bad experience by the student and his siblings while attending a charter school operated by LEA No. 3. Instead, the student's biological parent and his foster parent stated that they wanted the student to attend the same private school attended by his siblings. (T of Respondent's Program Manager)

14. The staff of LEA No. 2 is implementing and has been implementing the IEPs that it has developed for the student. (Record evidence as a whole)

15. LEA No. 2 is reimbursed for the student's education by the Office of the State Superintendent of Instruction. (T of Respondent's Program Manager)

16. The principal of the school attended by the student in LEA No. 2 has never contacted any representative of respondent regarding the student. (T of Principal)

17. The IEPs developed for the student by LEA No. 2 on January 25, 2011 and May 18, 2011 were reasonably calculated to and have provided educational benefit to the student. (Record evidence as a whole)

## 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 local education agency that has administrative control or direction over the school system where the student is receiving his education is the local education agency responsible for making FAPE available to a student. See, IDEA §602(19); 34 C.F.R. § 300.28. In the instant case, Respondent did not have a duty to make FAPE available to the student or a duty to develop or implement an IEP for the student.

2. An LEA is responsible for making FAPE available to a student. In the event that an LEA fails to make FAPE, the state education agency, or SEA, is responsible for ensuring that FAPE is made available to a student. IDEA § 1412; 34 C.F.R. § 300.101; Letter to Covall, 48 IDELR 106 (OSEP 12/22/2006). In the instant case Respondent made FAPE available to the student.

3. The United States Supreme Court has established a two-part test for determining whether a student with a disability has received a free and appropriate public education (hereafter sometimes referred to as "FAPE"). There must be a determination as to whether there has been compliance 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 Individualized Education 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).

4. In order to provide a 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 only a basic 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).

5. IDEA does not require a local education agency to close the gap between the achievement of a student with a disability and the achievement levels of this non-disabled peers. Allyson B. by Susan B. and Mark B. v. Montgomery County Immediate Unit No 23, 54 IDELR 164 (E.D. Penna. 3/31/2010); J.L. and M.L. ex rel K.L. v. Mercer Island School District, 55 IDELR 164 (W.D. Wash. October 6, 2010); M.P. by Perusse v. Poway Unified School District, 54 IDELR 278 (S.D. Calif. July 12, 2010); Montgomery Public Schools, 110 L.R.P. 28732 (SEA Md. January 14, 2010).

6. In determining the placement for a child with a disability, a school district is required to the maximum extent appropriate to ensure

that the student is educated with children who are not disabled, and that any removal from the regular educational 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 aids and services cannot be achieved satisfactorily. IDEA § 612(a)(5); 34 C.F.R. §§ 300.114, 300.115.

7. The IEPs developed by LEA No. 2 for the student on January 25, 2011 and May 18, 2011 were reasonably calculated to and did provide educational benefit for the student. LEA No. 2 provided FAPE to the student.

8. An IDEA hearing officer is charged with efficiently and fairly running the hearing process. See, Letter to Anonymous 23 IDELR 1073 (OSEP 1994). Appropriate sanctions may be imposed where lawyers or parties fail to comply with the reasonable directives of the hearing officer. Stancourt v. Worthington City Sch. Dist. Bd. of Educ. 44 IDELR 166 (Ohio App. Ct. October 27, 2005); JD by Davis v. Kanawha County Bd of Educ 53 IDELR 225 (S.D. W.Va. 11/4/2009); aff'd on other grounds, JD by Davis v. Kanawha County Bd of Educ 54 IDELR 184 (4th Cir. 4/27/10)(Unpublished).

Failure to comply with directions necessary to convene timely hearings and issue timely decisions is particularly important in the District of Columbia, where the issuance of timely decisions has historically been a problem. See, Blackman, et al v. District of Columbia 28 IDELR 1053 (D.DC June 3, 1998).

## DISCUSSION

Issue No. 1: Is Respondent responsible for developing and implementing an IEP or for providing an educational placement for the student?

Respondent raised as an affirmative defense that it is not responsible for developing or implementing an IEP for the student or for providing an educational placement for him. Specifically, Respondent contends that the allegations raised by the instant complaint do not state a cause of action against this Respondent.

The basis of Respondent's argument is that the student, who was removed from the custody of his parents and became a ward of the state

(that is, of the District of Columbia), was placed by another Washington, D.C. agency in the custody of his aunt, who lives in Maryland. The student's foster parent then enrolled him as a student in LEA No. 2 near her home.

Because of the novel nature of the affirmative defense raised by the Respondent in this case, the hearing officer required counsel for both parties to submit written briefs as to this issue. Both parties have done so. Said briefs have been considered in writing this decision.

Both parties cite as authority Letter to Covall, 48 IDELR 106 (OSEP 12/22/2006). The authority cited by the parties is not germane to this issue. Letter to Covall instructs that it is OSEP's opinion that where an LEA, or a local education agency, such as a school district, fails to provide FAPE to a student who was placed in a school district in another state by a public agency, it is the responsibility of the state education agency (hereafter sometimes referred to as "SEA") to ensure that a free and appropriate public education is made available to the student. Petitioner has cited no statute or case law or regulation or other authority the supports its contention an LEA, such as Respondent, must develop and implement and IEP or provide an

educational placement for a student who is enrolled in another school district after being placed in a foster home in another state. Indeed, Petitioner provides not argument or explanation as to how an LEA, such as Respondent, could force another LEA, such as LEA No. 2, to change components of an IEP that were developed and implemented by LEA No. 2 while the student was attending school there.

As additional authority, Petitioner cites Letter to Moody, 23 IDELR 833 (OSEP 10/24/1995). Said authority is also inapposite. The letter cited by Petitioner deals with a situation where a student is placed ***by*** a local education agency in a residential program in another jurisdiction. Those facts do not resemble the facts of the instant case.

It is implicit in IDEA that the local education agency that has administrative control or direction over the school system where the student is receiving his education is the local education agency responsible for making FAPE available to a student. See the use of "administrative control and direction" in the IDEA definition of "local education agency." IDEA §602(19); 34 C.F.R. § 300.28. In the instant case, Petitioner has produced no authority from which it could be concluded that Respondent is the local education agency that must

make FAPE available to the student. Petitioner also produced no facts from which it could be concluded that Respondent, rather than LEA No. 2, had administrative control or direction over the education of the student. By contrast, respondent proved through the credible testimony of its program manager, that it had no such control over the student's IEP.

In any event, it is clear from the evidence in the record that Respondent has made FAPE available to the student. Respondent sent its representatives to an IEP team meeting at LEA No. 2. At the meeting, the representatives from Respondent offered to provide FAPE to the student at a specific school in Respondent's system. It was the unrebutted testimony of Respondent's program manager that the student's biological parent and foster parent both refused this offer stating that they had had a previous bad experience at LEA No. 3, a separate LEA charter school in Washington, D.C., and that they did not want to have the student attending any school in Washington, D.C. In particular, the parent and the parent's representatives on the IEP team wanted to place the student in a specific private full-time special education school because the student had siblings attending at that

school. If the parent declines to enroll the student in one of Respondent's schools, Respondent lacks the administrative control and direction necessary to ensure that FAPE is provided. Therefore, even assuming arguendo, that Respondent had a duty to make FAPE available to the student, clearly it has done so, but the foster parent and biological parent refused the offer.

As a result, Petitioner has offered no legal basis to support the complaint filed against this Respondent as the LEA. Accordingly, Petitioner's complaint is dismissed with prejudice. Although this ruling disposes of the case, the other issues raised by Petitioner herein are discussed further in this decision so that a complete record will be established. Respondent has carried its burden of persuasion with regard to this affirmative defense. Respondent has prevailed on this issue.

Issue No. 2: Did Respondent fail to implement an IEP for the student?

The discussion concerning Issue No. 1 is incorporated by reference herein.

The complaint filed herein alleges that Respondent failed to implement an IEP for the student. Petitioner has provided no evidence of any kind with regard to any issue pertaining to the student's IEP, or any portion thereof, not being implemented. None of the evidence in the record supports the allegation. It is difficult to understand why this allegation was made.

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

Issue No. 3: Do the January 25, 2011 and May 18, 2011 IEPs developed by LEA No. 2 provide FAPE to the student?

The discussion concerning Issue No. 1 is incorporated by reference herein.

The student's January 25, 2011 IEP provides that he will receive 15 hours of classroom instruction in general education per week, and that he would receive one hour per month of speech language therapy as a related service, and that he would receive extended school year services in the summer. The portion of the May 18, 2011 IEP developed by LEA No. 2 for the student concerning hours of services is not

included in the record. Although the testimony was somewhat unclear from the witnesses concerning what the May 18, 2011 IEP called for, the credible testimony reveals that said IEP provides a full-time special education program for the student. Inasmuch as the IEP being contested provides a full-time special education program, there is no basis for this complaint. Petitioner received the full-time special education IEP she was seeking for the student.

Petitioner's witnesses testified that the student needed a full-time special education IEP. Respondent's witness, on the other hand, testified that the student had made some progress under his IEPs, and that although a change to 20 hours of special education would be appropriate, a full-time IEP was not called for.

To the extent that the testimony of Petitioner's witnesses conflicts with the testimony of Respondent's witness, the testimony of the witness called by Respondent is more credible and persuasive than the testimony of Petitioner's witnesses. The reasons for the credibility determination follow. The testimony of Petitioner's educational advocate and the testimony of the student's guardian ad litem is impaired by virtue of the fact that they employed the wrong standard.

It is clear from their testimony, that Petitioner's witnesses were employing a potential maximizing standard. A school district is not required to maximize the potential of a child with a disability; instead, a school district is required to provide the basic floor of opportunity by offering an IEP that is reasonably calculated to confer 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). For example, the educational advocate testified that the student was "capable of greater progress" with a full-time IEP, and the student could not make "substantial progress" under the current IEPs. This type of analysis was also used by counsel for Petitioner in closing argument where he stated that the IEPs did not allow the student to make the "kind of progress he needed to be making."

Similarly, the educational advocate and the guardian ad litem based their conclusions with regard to the student's "needs" based upon the comparison of the gap between the student's progress and the progress of his non-disabled peers. IDEA does not require a local education agency to 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. and Mark B. v. Montgomery County Immediate Unit No 23, 54 IDELR 164 (E.D. Penna. 3/31/2010); J.L. and M.L. ex rel K.L. v. Mercer Island School District, 55 IDELR 164 (W.D. Wash. 10/6/2010); M.P. by Perusse v. Poway Unified School District, 54 IDELR 278 (S.D. Calif. July 12, 2010); Montgomery Public Schools, 110 L.R.P. 28732 (SEA Md. January 14, 2010).

The credibility of the testimony of the Petitioner's witnesses is also impaired by virtue of a misunderstanding of the least restrictive environment provision of IDEA. The LRE requirement is that removal from the regular educational environment should occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. The desire of Petitioner's witnesses to skip directly to a full-time special education IEP without first at least trying a less restrictive environment flies in the face of the LRE requirement.

Petitioner also introduced into evidence the report of the psychoeducational evaluation of the student. The evaluator recommended a fulltime special education program. The

recommendation of the evaluator suffers from many of the problems described above concerning the credibility of Petitioner's witnesses. The evaluation appears to be based upon potential maximizing and upon closing the achievement gap between the student and his non-disabled peers. The report provides no analysis why less restrictive alternatives are not appropriate. Moreover, an evaluator cannot simply prescribe or dictate a certain educational program for a child with a disability. Rather, the decision must be made by a team to be consistent with the legal requirements of IDEA. See, Marshall Joint Sch Dist No 2 v. C.D. 616 F.3d 632, 54 IDELR307 (7th Cir 2010). Accordingly, the recommendation of the evaluator is not credited.

In addition, the credibility of the testimony of Petitioner's witnesses is also severely impaired by a serious contradiction in the testimony of the witnesses. Both Petitioner's educational advocate and the student's guardian ad litem testified that the school principal at the school in LEA No. 2 that the student currently attends contacted Respondent with regard to the student's education. The principal of the student's school at LEA No. 2, who was also called as a witness by Petitioner, denied that she had contacted Respondent with regard to the

student. The internal inconsistency among these three witnesses called by Petitioner seriously undermines their credibility.

Also the testimony of Petitioner's witnesses, and in particular the credibility of the testimony of Petitioner's educational advocate, is diminished because much of the testimony of the educational advocate was the result of leading questions propounded by counsel for Petitioner. Although leading questions are permissible under the liberal rules of evidence applied at due process hearings, the hearing officer did warn counsel for Petitioner that the use of leading questions could result in a diminishment of the credibility of the witnesses. Despite the warning, leading questions were asked particularly with regard to Petitioner's educational advocate. Accordingly the testimony of Petitioner's witnesses is afforded little credibility as a result of the leading questions propounded by counsel for Petitioner.

By contrast, the credibility of the testimony of Respondent's witness was very credible and persuasive. Respondent's witness, its program manager for residential and surrounding counties, testified that the teachers at the May 2011 IEP team meeting stated that the student had made some progress. Although he was making some

progress, the representatives on the IEP team from LEA No. 2 wanted to make his IEP a full-time IEP because he was struggling in his core courses. Respondent's program manager for residential and surrounding counties, and the other representatives of Respondent at said meeting, argued that least restrictive environment requirement would suggest that it would be better to increase the student's IEP from 15 to 20 hours of special education, so that he would receive his core courses in special education and the other courses in general education. The representatives of LEA No. 2, who were drafting the IEP and in control of the process, determined that they would nonetheless create a full-time special education IEP for the student.

During the May 2011 IEP team meeting, the representatives of Respondent offered to permit the student's biological parents and foster parent to enroll the student in a school in Respondent's school system in Washington, D.C. The parent and the foster parent refused the offer and stated that they did not want the student to attend any school in Washington, D.C. because of a previous bad experience with LEA No. 3 (a charter school). In particular, the parent and the parent's representatives on the IEP team wanted to place the student in a

specific private full-time special education school because the student had siblings attending said school. The representatives from Respondent stated that the presence of siblings would not be good enough reason to create a private placement for this student. At the close of the IEP meeting in May of 2011, the student's parent and foster parent agreed that the student would attend a school in LEA No. 2 and that they agreed to the IEP developed by LEA No. 2.

Because the student was making some educational progress under his IEP as developed by LEA No. 2, it is clear that the student received FAPE. 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). Thus the educational program as provided by LEA No.2 and the program as recommended by the staff of Respondent on the IEP team would have provided FAPE to the student.

In any event, the May 18, 2011 IEP created by LEA No. 2 is a full-time special education IEP. Petitioner received the type of IEP that she wanted from LEA No.2. The credible evidence in the record reveals that LEA No. 2 created an IEP on May 18, 2011 that provides a full-

time special education IEP. The service pages are missing from the IEP that was submitted into evidence, but it was the credible testimony of Respondent's program manager that the IEP created by LEA No.2 on May 18, 2011 was a full-time special education IEP over the objections of the staff of respondent serving on the IEP team. Inasmuch as Petitioner got what she wanted despite Respondent's objections, there is no serious basis for this complaint. The fact that the student's family wanted him to attend the same private, full-time special education school as his siblings is understandable, but there is no basis for making Respondent pay for said school unless it has first violated IDEA. Petitioner has proven no such violation.

Accordingly, Petitioner has proven no denial of FAPE or other violation of the Act with regard to the IEPs at issue. Petitioner has failed to carry her burden with respect to this issue. Respondent has prevailed with regard to this issue.

## ORDER

In view of the foregoing, it is HEREBY ORDERED that the due process complaint in this matter is dismissed with prejudice. None of the relief sought by the Petitioner 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: July 20, 2011

/s/ James Gerl
James Gerl,
Hearing Officer