DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE 2nd Floor,
Washington, DC 20002

STUDENT,[1]
through the Parent

Petitioner,

v.

District of Columbia
Public Schools,
Respondent.

Date Issued: October 1, 2010

Hearing Officer: James Gerl

Case No:

Hearing Date: September 21, 2010

Room: 4A

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STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

BACKGROUND

The due process complaint was filed on July 21, 2010. The matter was assigned to this hearing officer on July 23, 2010. A resolution session was convened on August 17, 2010. A prehearing conference was convened on August 19, 2010. The due process hearing was convened at the Student Hearing Office on September 21, 2010. The hearing was closed to the public. The student's parent attended the hearing and the student attended the hearing. Four witnesses testified on behalf of the petitioner and zero witnesses testified on behalf of the Respondent.

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

Petitioner's exhibits 1-27 were admitted into evidence. Respondent's exhibits 1-9 were admitted into evidence.

JURISDICTION

This proceeding was invoked pursuant to the provisions of the Individuals With Disabilities Education Act (hereafter sometimes referred to as "IDEA"), 20 U.S.C. Section 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title 5-E of the District of Columbia (hereafter sometimes referred to as "District" or "D.C.") Municipal Regulations (hereafter sometimes referred to as "DCMR; and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

PRELIMINARY MATTERS

All proposed exhibits and testimony received into evidence and all supporting arguments submitted by the parties have been considered. To the extent that the evidence and arguments advanced by the parties are in accordance with the findings, conclusions and views stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. To the extent that the

testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

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 conduct necessary evaluations of the student?

2, Did Respondent deny FAPE to the student by failing to provide a sufficient level of services in his IEP?

FINDINGS OF FACT

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

1. The student was born on October 2, 1994. (P-13) (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 hearing officer exhibits. Testimony of witnesses shall be designated as "T of ")

2. Student has a specific learning disability and an emotional disturbance and he is eligible for special education and related services as a child with a disability. (P-6; P-7)
3. On August 19, 2010, Respondent issued an authorization for an independent educational evaluation for the student to obtain a transition/vocational evaluation. (R-2)
4. On August 25, 2010, a vocational II assessment of the student was conducted and a report was issued on August 27, 2010. (P-15)
5. A psychiatric evaluation of the student conducted on March 28, 2010 resulting in a report issued on April 6, 2010 that made a number of recommendations. One such recommendation was that the student receive a neurological evaluation to rule out organic causes for his difficulties. The Petitioner never requested a neurological evaluation of the student be conducted by Respondent either in writing or at any meeting. The purpose of the neurological evaluation recommended by the psychiatrist was

not to evaluate the student's educational needs. (P – 14; T of student's mother; T of petitioner's educational advocate.)

6. On April 14, 2009, the student's IEP team met. The mother signed her approval of said IEP on April 29, 2009. Said IEP includes five goals in mathematics, five goals in reading, five goals in academic written expression, one goal in the area of speech language and one goal in the area of emotional, social and behavioral development. The IEP requires ten hours per week of specialized instruction to be provided in the general education setting. The IEP also includes two related services: 60 minutes per week of speech language therapy and 60 minutes per week of behavioral support services, both to be provided outside the general education setting. (P-7; R-6)

7. The student received bad grades during the 2008 – 2009 school year, his first year in grade and he was required to repeat the grade. (T of student; T of student's mother)

8. The student's mother did some research and caused him to be placed at the for which the

Respondent is the local education agency, for the 2009 – 2010 school year. (T of student's mother)

9. Student did not do well at At the school's request, he began attending extra school on Saturday to try and make up for his academic difficulties, but he was not successful in doing so. (T of student; T of student's mother)

10. In approximately November, 2009, the student's mother called Respondent's special education headquarters and spoke to one of the supervisors complaining that the student was not receiving services that she felt that he needed. (T of student's mother)

11. As a result of the mother's complaint to the central office regarding the student, Respondent sent a placement specialist to observe the student for an entire school day. The placement specialist observed the student in his school environment on November 23, 2009 and recommended in her report that he receive a therapeutic setting with a small class size after noting several unusual behaviors including the student talking to himself. (P-12)

12. As a further result of the student's mother's conversation with the special education office, a committee meeting was called by Respondent on December 4, 2009 to review the student's present levels of performance and his placement. At the meeting, the representative of Respondent with whom the student's mother had spoken on the telephone noted that was a choice school and that an IEP for the student could not be implemented at that school. At the meeting, Respondent's representatives suggested other schools that could implement a full-time IEP for the student. (R-5; T of the student's mother)

13. On January 14 and February 4, 2010, a school psychologist of Respondent conducted a comprehensive psychological reevaluation of the student. The report of that evaluation was issued on February 10, 2010. The evaluator made a number of recommendations including that the student be reclassified as having an emotional disability because he has not responded to interventions and has displayed an inability to build or maintain satisfactory interpersonal relationships with peers and teachers. The report also recommended that given the student's "...limited

response to interventions and the impact it has had on his learning, the MDT should consider increasing his level of services as he has not responded well to the inclusion setting." (P – 13; R - 3)

14. On February 23, 2010, the student's IEP team met and developed a new IEP for the student. The mother signed her agreement to the IEP on February 26, 2010. At this point, the mother was represented by an educational advocate. The goals on said IEP are substantially identical to the goals on his previous April 14, 2009 IEP. The services page of the IEP provides that the student will receive 10 hours per week of specialized instruction in the general education setting and two related services: behavioral support services 60 minutes per week outside the general education setting and speech language pathology 60 minutes per week outside the general education setting. (P-6)

15, On his 2009 – 2010 school year final report card, the student received grades of B- in Capstone, C- in Music, B+ in Art, but he received grades of F in all of his core academic subjects (Algebra I,

Algebra I Concepts, World History II, English II, Language and Composition II and Earth Science). (P-24)

16. On May 19, 2010, Respondent convened a Manifestation Determination Review meeting concerning the student. Discipline had been proposed for two infractions committed by the student. The first involved misbehavior on a field trip and his forging of his mother's signature for the permission slip. The second incident involved the student's throwing a book at a student who was in the front of a class giving a presentation. The Manifestation Determination Review Committee concluded that the student's behavior in both instances was a manifestation of his disability, in part because his IEP was inappropriate. The report of the committee meeting notes in particular that "(a)ll team members agree that the amount of services is inappropriate, ...". (P-5; R – 8; T. of Petitioner's educational advocate; T. of student's mother)

17. At the end of the meeting on May 19, 2010, the Manifestation Determination Review Committee determined that Respondent's staff would draft an IEP with suggested changes and email it to the educational advocate for Petitioner. The advocate agreed that

she would respond with her suggestions within 24 hours thereafter. (P-5; R – 8; T. of Petitioner's educational advocate)

18. On June 1, 2010, Petitioner's educational advocate received a draft IEP from Respondent. Said IEP contained substantially identical goals to the previous two IEPs for the student. The services page for said draft IEP provided for 10 hours per week of specialized instruction in the general education setting and two related services each for 60 minutes per week outside the general education setting for both behavioral support services and speech language pathology. The draft IEP was substantially identical to the two previous IEPs for the student. (P-4; T of Petitioner's educational advocate)

19. On June 8, 2010, Petitioner's educational advocate sent a response to the draft IEP to Respondent. The educational advocate felt that the proposed goals were appropriate for the student, but that they should be more measurable. Said response discussed both concerns regarding various goals as well as the fact that the team had discussed full-time special education hours for the student based on his lack of success under the previous IEPs.

The advocate asked that the draft IEP be revised to reflect said changes. The educational advocate never received a response from Respondent concerning her email and concerns (P-25; P-26; T of Petitioner's education advocate)

20. The IEP goals on the draft IEP dated May 19, 2010 sent by Respondent to the student's educational advocate had some problems with regard to measurability. Said problems did not cause the student any educational harm or impair the ability of the parent to meaningfully participate in the process. Said draft IEP which was sent to Petitioner's educational advocate on June 1, 2010, even though it was dated May 19, 2010. The draft IEP was substantially identical to the previous two unsuccessful IEPs for the student. (P-4; P – 6; P – 7; T of Petitioner's educational advocate)

21. The student requires a full-time special education program, or 27.5 hours per week, of specialized instruction in the special education setting in order to receive academic benefit from his IEP. (T of Petitioner's educational advocate; P – 5; P -25; P - 26)

22. The student does not require a special school for special education students only in order to receive academic benefit. The private school that Petitioner seeks as relief admits only students with disabilities. (Record evidence as a whole; T of Petitioner's witness Education Director of private school.)

23. After the May 19, 2010 meeting, the student began attending The student has attended during the current academic year, 2010 – 2011. During the 2010-2011 academic year to date, student has received no special education or related services from Respondent. (T of student; T of student's mother)

24. The student's IEP since May 19, 2010, or the services offered during the same timeframe to the student by Respondent without an IEP, are not reasonably calculated to confer educational benefit for 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 United States Supreme Court has established a two-part test for determining whether a school district provides a free and appropriate public education 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. A local education agency must provide an evaluation that is requested by the parent if the purpose of the evaluation is to

determine eligibility of the student or to assess the student's educational needs. Respondent did not violate the Act by failing to provide a neurological evaluation that was never requested by the Petitioner and that was not needed for the purpose of assessing the student's academic needs. IDEA § 614; 34 C.F.R. §§ 300.303(a)(2); 300.305(d)(2); 300.304(b)(2); 300.305.

3. Respondent denied a free and appropriate public education to the student by failing to provide him with a sufficient level of special education services. The IEP offered to the student for the 2010 – 2011 school year was not 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).

4. A procedural violation of IDEA only results in actionable relief when the violation substantively affects the student by causing educational harm or where it seriously impairs the parent's right to participate in the IEP process. To the extent that Respondent's proposed IEP dated May 19, 2010 contained procedural violations

with regard to the measurability of the goals therein, Petitioner has not established that said procedural violations caused the student to receive educational harm or substantially impaired the right of the parent to participate in the process. Lesesne ex rel BF v. District of Columbia, 447 F.3d 828, 45 IDELR 208 (D.D.C. Cir. May 19, 2006); IDEA § 615(f)(3)(E)(ii).

5. In order to provide a free and appropriate public education, a local education agency, such as Respondent, must implement all substantial and material provisions of a student's IEP. Respondent has failed to implement material and substantial provisions of the student's IEP since the beginning of the 2010 – 2011 school year. Catalan v. District of Columbia, 47 IDELR 223 (D.D.C. 2007); See VanDuyn v. Baker School District, 481 F.3d 770, 47 IDELR 182 (9th Cir. 2007).

7. All relief available under IDEA is equitable in nature. A hearing officer and court have broad powers to remedy the violations of IDEA. See Reid ex rel Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32, (D.C. Cir. 3/25/2005). See Forest Grove School

District vs. TA, 129 S.S. Ct. 2484, 52 IDELR 151 (U.S. June 22, 2009).

8. 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 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. 3/25/2005).

9. A hearing officer or court should only award prospective private placements as relief to ensure that a child receives the education required by IDEA in the future where a balance of the relevant factors justifies such a placement: In addition to the conduct of the parties which is always relevant in fashioning equitable relief, the following factors must be balanced before awarding 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 placement's cost; and the extent to which the placement represents the least restrictive educational environment. A prospective private placement is not appropriate relief 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. 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 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 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 Petitioner in the instant case would violate the least restrictive environment provisions of IDEA.

DISCUSSION

Merits

Issue No. 1: Did Respondent violate IDEA by failing to conduct necessary evaluations?

The complaint herein alleges that Respondent violated the law by failing to provide two evaluations for the student: a transition evaluation and a neurological evaluation.

With regard to the transition or vocational assessment, the parties agreed on the record that Respondent had issued an authorization for an Independent Educational Evaluation for the student to receive a vocational assessment, and that the assessment was completed. Accordingly, the issue with regard to the transition evaluation is moot pursuant to the agreement of the parties to that effect on the record herein.

Concerning the neurological evaluation, neither party offered any evidence on the record to justify or support the request that a neurological evaluation be provided. No testimony was offered in this regard, and the only reference to the neurological exam in the voluminous documentary evidence is a recommendation by a

psychiatrist who evaluated the student on March 28, 2010 to the effect that a neurological evaluation be conducted. Petitioner concedes that the parent never requested a neurological evaluation either in writing or at any meeting. Accordingly, Respondent is not required to conduct one. IDEA § 614; 34 C.F.R. §§ 300.303(a)(2); 300.305(d)(2).

In addition, there has been no showing that the purpose of the neurological evaluation would be to assess the student's educational needs. Accordingly, Respondent is not required to conduct such an evaluation. 34 C.F.R. §§ 300.304(b)(2); 300.305(a)(2)(iv). Because Petitioner has not demonstrated that a neurological evaluation was required under the law, Petitioner has not met her burden and Respondent has prevailed with regard to this issue.

Issue No. 2: Did Respondent deny FAPE to the student by failing to provide a sufficient level of services in his IEPs?

Petitioner contends that his IEPs for school years 08 – 09, 09 – 10, and the portion so far of the current school year 10 – 11 provided an insufficient level of services. There is no evidence of an IEP in the record dated earlier than the April 14, 2009 IEP, however. In addition,

the parent agreed to the April 14, 2009 and the February 23, 2010 IEPs for the student. It would be contrary to the collaborative nature of the IEP process, see, Shaffer v. Weist, 546 U.S. 49, 44 IDELR 150 (November 14, 2005), to permit a party to challenge an IEP that they had agreed to. It is significant that the parent testified at the hearing herein that she was represented by an educational advocate at these meetings.

Accordingly, it is only the May 19, 2010 proposed IEP that is currently at issue. The U.S. Supreme Court has developed a two-part test for determining whether a school district has provided FAPE to a student. There must be an analysis of whether the school district has complied with the Act's procedural safeguards and an analysis of whether an Individualized Educational Program (hereinafter referred to as "IEP") is reasonably calculated to provide 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).

Petition presented the testimony of Petitioner's educational advocate, the student's mother and the student himself to the effect that the

student was not receiving any educational benefit under his previous IEPs. Indeed the student was making terrible grades and was retained in the grade. The testimony of Petitioner's witnesses in this regard is credible and persuasive. In addition, the testimony of Petitioner's witnesses was not rebutted by any contrary testimony from Respondent.

Moreover, the testimony of Petitioner's witnesses in this regard is also corroborated by the documentary evidence in this case. A report of a classroom observation by Respondent's placement specialist on November 23, 2009 concluded that the student required a therapeutic setting with a ***small class size***. The report of a psychological examination by Respondent's school psychologist of an evaluation that took place on January 14 and February 4, 2010 recommended that given the student's ***limited response*** to interventions and the impact that this had on ***his learning***, the MDT should consider increasing his ***level of services*** as he has not responded well to the inclusion setting.

Moreover, the notes of a Manifestation Determination Review meeting on May 19, 2010 that resulted from the student getting into some disciplinary trouble concluded that the misconduct was a

manifestation of the student's disabilities in part because his IEP was not appropriate. Said report states as follows "All team members agree that the ***amount of services*** (on the student's IEP) is inappropriate."

Despite the request by the parent and the parent's educational advocate, as well as the statements made by Respondent's own personnel, to the effect that the student clearly needed an increased level of services, however, the May 19, 2010 IEP proposed by Respondent maintained the identical level of services as the two previous IEP's that were developed for the student. By failing to increase the level of services for the student under these circumstances, it must be concluded that the IEP is not reasonably calculated to confer educational benefit and constitutes a denial of FAPE for the student.

Although the May 19, 2010 IEP is labeled as a draft, Petitioner's efforts to finalize the IEP were met with silence from the Respondent. The unrebutted testimony of the petitioner's educational advocate in this regard is credible and persuasive. Given Respondent's silence, and the lack of any contrary testimony, it is concluded that the May 19, 2010 IEP was Respondent's last offer for the current school year.

In addition, Petitioner argues that the goals contained in the May 19, 2010 IEP are not measurable because of inadequate baseline data. The Petitioner's educational advocate testified that the goals themselves were appropriate, but that there were procedural violations regarding their measurability. The argument by Petitioner in this regard alleges a procedural violation of IDEA. To be actionable, a procedural violation of IDEA must either cause educational harm to the student or seriously impair the parent's right to participate in the IEP process. Lesesne ex rel BF v. District of Columbia, 447 F.3d 828, 45 IDELR 208 (D.D.C. Cir. May 19, 2006); IDEA § 615(f)(3)(E)(ii). The Petitioner has failed to provide any evidence that the alleged procedural violation with regard to the goals contained in the May 19, 2010 IEP either caused educational harm to the student or impaired the parent's right to meaningfully participate in the process. Accordingly, this argument is not credited.

In addition, it was the unrebutted testimony of the student, his mother and his educational advocate that during the current school year, the student has received no specialized instruction and no related services even though his IEP requires that he receive them.

Accordingly, Respondent has denied FAPE to the student during the current school year. 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). See, Catalan v. District of Columbia, 47 IDELR 223 (D.D.C. 2007); VanDuyn v. Baker School District, 481 F.3d 770, 47 IDELR 182 (9th Cir. 2007).

Petitioner has carried her burden of persuasion and has prevailed as to this issue.

RELIEF

Petitioner has established that Respondent denied FAPE to the student by failing to adjust his IEP to provide for an increased level of services after years of lack of success under his previous IEPs with the same level of services. Petitioner has also demonstrated that Respondent failed to provide any specialized instruction or related services during this school year despite the student's IEP requiring same.

In his closing argument, counsel for Respondent conceded that if the student's IEP is inappropriate that the hearing officer's order should

change the IEP and that if services were missed or not provided, the hearing officer's order should require them to be provided. Accordingly, the order portion of this hearing officer determination will order both changes to the student's IEP and that missed services be made up.

Concerning the appropriate level of services, it was the credible and persuasive testimony of the student's educational advocate that the student should be now receiving 27.5 hours per week of specialized instruction in the special education setting. This testimony was not rebutted by any contrary testimony from Respondent. Accordingly, the student's IEP will be amended as aforesaid.

In addition, because the student has received no special education or related services during the current school year, the order portion of this hearing officer determination will require that the student receive for each week that he was denied services during the current school year an additional 10 hours of specialized instruction and an additional 60 minutes of behavior support services and an additional 60 minutes of speech language pathology. It should be noted that this is not compensatory education, but rather replacement of services that were

not implemented under the IEP pursuant to the solution proposed by counsel for Respondent in his closing argument.

Concerning compensatory education, the Petitioner called the student's educational advocate to present a compensatory education proposal at the due process hearing. The advocate's proposal involved an award of 100 hours of compensatory education at an after school program at the Lab School of Washington. The 100 hours recommended was the result of a calculation based upon the number of hours of services not provided by Respondent.

The D.C. Circuit Court of Appeals has established a standard for awards of compensatory education. In order to receive compensatory education, a Petitioner must establish through evidence that the student suffered educational harm as a result of violations of the Act and the Petitioner must establish through evidence that the nature of the compensatory education program would rectify the educational harm suffered by the student. Reid ex rel Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32, (D.C. Cir. 3/25/2005). Unfortunately, the evidence presented by Petitioner in this case does not meet the Reid standard. The advocate testified that she did not develop the

compensatory education program she proposes based upon educational harm to the student or the rectifying said educational harm. Instead, the advocate applied an hour-for-hour type of analysis which is the type of calculations specifically disapproved by the Reid decision. Specifically, the advocate testified that she deducted the 10 hours per week provided by the student's IEP from 27.5 hours per week that the student should be receiving and ended up with a deficit of 17.5 hours per week each when multiplied by the number of weeks came up with a total of 680 hours which she divided by the 5 to 8 students that should be in a class rather than the number that were in a class and came up with an average of those calculations of 107. This compensatory education formula used by the advocate is flawed in that it does not take into account the educational harm suffered by the student. As the Reid decision notes a long deprivation of FAPE could result in a relatively small amount of educational harm that could be remedied by an intensive short program. On the other hand, a relatively short denial of FAPE might result in severe educational harm that could require a relatively long educational program to rectify.

In addition, the compensatory education analysis by the advocate was based upon the faulty assumption that the student would make one full year of progress for each year of an appropriate program. This was based upon speculation rather than evidence of educational harm. Because it fails to make any analysis of the educational harm to the student caused by the denial of FAPE, the compensatory education plan provided by the advocate at the hearing is not useful.

In his closing argument, counsel for Petitioner argued that because Respondent had also failed to present evidence of educational harm, despite the request by the hearing officer in the prehearing order that both parties do so, that Petitioner's failure to present such evidence should not preclude the relief. Petitioner's argument in this regard fails to take account of the fact that Petitioner, as the party who filed the due process complaint, has the burden of persuasion. Shaffer v. Weist, 546 U.S. 49, 44 IDELR 150 (November 14, 2005) In view of the burden of persuasion, the Petitioner has failed to present evidence to justify the relief that it seeks with regard to compensatory education. In view of Petitioner's failure to present evidence justifying a compensatory

education award, no compensatory education is awarded in this decision.

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 at a private school, for the rest of this school year because of the violations of the Act. Because this issue was stated in the complaint, the hearing officer requested prehearing briefs on the topic of prospective private placements. Each party filed a brief in response to the prehearing order and those briefs have been considered in rendering this decision.

Prospective private placements as relief for violations of IDEA are extremely rare outside the District of Columbia. In the rest of the nation, such awards are rarely made by hearing officers or courts. Awards of prospective private placement have been made only in rare cases. One example is Draper v. Atlanta Independent School System, 518 F.3d 1275, 49 IDELR 211 (11th Cir. March 6, 2008), where the Eleventh Circuit specifically approved of a private school placement as a form of compensatory education where the violation of the Act by the school district was particularly egregious.

It is nonetheless clearly established that a hearing officer, as well as a court, has broad equitable powers to grant any and all appropriate relief when there has been a violation of IDEA. Forest Grove Sch. Dist. v. T. A., U.S. , 129 S. Ct. 2484, 52 IDELR 151 (U.S. June 22, 2009); Reid ex rel Reid v. District of Columbia, supra; See, Garcia v. Board of Education 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 of prospective private placements as relief for violations of IDEA under certain circumstances. Branham ex rel Branham v. District of Columbia, 427 F.3d 7; 44 IDELR 149 (D.C. Cir. October 25, 2005). Specifically, the D.C. Circuit identified a number of factors which should be considered in determining whether a prospective private placement is appropriate including the following: the nature and severity of the student's disability; the student's specialized educational needs; the link between those needs and the services offered by the private school; the placement's cost and the extent to which the placement represents the least restrictive educational

environment. In addition, the court noted that the conduct of the parties is always relevant when equitable relief is requested.

Petitioner argues that because reimbursement for a unilateral placement to a private school made by a student's parents is specifically sanctioned by IDEA, that less affluent parents who cannot afford to pay for a private school should not be penalized by being denied a prospective private placement. Petitioner's argument, however, misses the point. Reimbursement for unilateral placement is retrospective relief for the denial of FAPE that happened before a due process hearing. Where the parents prevail, they are reimbursed for the education of the student in the private school for the period up to and including the due process hearing. The Supreme Court precedent and the amendments to IDEA allowing for reimbursement for unilateral private placements involve retrospective relief not the education of the student for the future. Accordingly, such precedent does not stand for the proposition that every time a school district violates IDEA, they must be required to fund the student's private education into the future. Instead, the Branham factors must be considered in awarding or denying such relief.

In the instant case, an analysis of the Branham factors compels a conclusion that a prospective private placement should not be awarded as relief. Of the Branham factors, the biggest problem for Petitioner involves the least restrictive environment factor. In determining the placement for 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 their 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 aids 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 director of education for the private school at which Petitioner was seeking to have the student placed, that all of their students have disabilities and that the only interaction with non-disabled peers would occur during field trips or community activities.

There is no evidence in the record to justify such a restrictive educational environment for this student. Although it is obvious that he needs an increased level of services, there has been no showing that

he requires a separate school in order to receive educational benefit. There was a reference in the report of Respondent's placement specialist after observing the student for a day recommending a "therapeutic setting with a small class size." There is no evidence in the record explaining the ambiguous phrase 'therapeutic setting". The reference to a smaller class size seems to be referring to a special education separate class with fewer students than the inclusion setting that was not working for the student. Moreover, the other documentary evidence and the testimony of Petitioner's own educational advocate reflect that the student needed a full-time special education program but not a separate school.

It is concluded from the record evidence that the student needs a separate special education class – not a separate school for special education students only. Accordingly, the LRE factor weighs heavily against placing this student in a separate school with no non-disabled peers, such as the private school proposed by the Petitioner.

Moreover, as has been stated in the compensatory education analysis, there is no analysis in the record concerning the educational harm suffered by the student as a result of the violation of the Act by

Respondent. Accordingly, it is difficult to apply the factors involving the student's individualized educational needs and whether or not the proposed private school would be suitable to meet them, except that it is clear that the student required a full time special education program as stated above. Although the violation by respondent in this case was fairly extreme, there has been no evidence presented as to educational harm. Petitioner has failed to introduce sufficient evidence to meet these Branham factors.

Moreover, there is no evidence in the record with regard to the cost of the placement at The witness from the private school was not aware of the cost of her school.

In view of the foregoing analysis, it must be concluded that the Branham factors when weighed together indicate that a prospective private placement in a separate special education school would not be appropriate as relief in the instant case.

One point in Respondent's prehearing brief on this topic, however, is specifically rejected. In particular, Respondent's brief cites certain provisions of the District of Columbia Code as well as the District of Columbia Municipal Regulations with regard to the fact that

placements should be made in public schools over private schools unless Petitioner shows that there is no public school that can meet a student's needs. The hearing officer believes that any such Code or Regulations are not applicable to awards of relief under IDEA, but apply only to placement decisions made by the Respondent in the first place. Accordingly, such provisions were not used as a reason to deny relief in this case. No Petitioner would be able to prove in a due process hearing that no public school could meet a student's needs. Despite this conclusion, it is apparent that the philosophy underlying the IDEA requires that in general, a student be educated in a public school when appropriate. See the discussion of the least restrictive environment analysis herein.

ORDER

Based on the foregoing, it is HEREBY ORDERED:

1. That unless the parties agree otherwise, the student's IEP is amended as follows: on the page entitled "Special Education and Related Services," the setting is changed from general education to

special education and the time frequency is changed from 10 hours per week to 27.5hours per week;

2. That unless the parties agree otherwise, Respondent is ordered to make up for missed services by providing for each week of missed services during the current school year (that is, each week from the beginning of school until such services are provided) 10 hours per week of specialized instruction, 60 minutes per week of behavioral support services and 60 minutes per week of speech language pathology, to be provided in addition to the services required under the student's IEP. Said services are to be delivered to the student during the 2010-2011 school year;

3. That Respondent is hereby ordered to make any other changes to the student's IEP necessary to implement the provisions ordered in paragraphs 1 and 2 above, and if necessary, Respondent is ordered place the student at a school capable of implementing the student's IEP as changed herein;

4. That Respondent is ordered to notify all personnel who shall implement the student's IEP of the changes as aforesaid;

5. That no compensatory education is awarded to the Petitioner;

6. That Petitioner's request that Respondent be ordered to fund a prospective private placement is denied;

7. That the neurological evaluation requested by the Petitioner's complaint is denied; and

8. 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 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: October 1, 2010

/s/ James Gerl
James Gerl
Hearing Officer