

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

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

STUDENT,¹
through the Parent

Petitioner,

v

District of Columbia
Public Schools,

Respondent.

Date Issued: December 16, 2011

Hearing Officer: James Gerl

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STUDENT HEARING OFFICE
2011 DEC 16 AM 11:55

HEARING OFFICER DETERMINATION

BACKGROUND

The due process complaint was filed herein on October 18, 2011. The matter was assigned to this hearing officer on October 19, 2011. A resolution session was convened on November 1, 2011. Because the resolution session did not result in an agreement and the parties agreed to begin the timelines, the hearing officer's decision is due to be issued on or before December 16, 2011. A prehearing conference was convened

¹ Personal identification information is provided in Appendix A.

on November 10, 2011. The due process hearing was convened at the Student Hearing Office on December 6, 2011. The hearing was closed to the public. The student's parent did not attend the hearing, but she did testify by telephone. The student did not attend the hearing. Four witnesses testified on behalf of the Petitioner and two witnesses testified on behalf of the Respondent. Petitioner's exhibits 1-11 were admitted into evidence. Respondent's exhibits 1-5 were admitted into evidence.

JURISDICTION

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

PRELIMINARY MATTERS

All 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.

ISSUE PRESENTED

The following one issue was identified by counsel at the prehearing conference and evidence concerning this issue was heard at the due process hearing: Did Respondent deny FAPE to the student by failing to provide a full-time special education program for the student at the September 19, 2011 IEP team meeting?

FINDINGS OF FACT

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

1. The student's date of birth is (P-3) (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. On February 3, 2010, a social worker completed a referral form for a community based intervention for the student. The behaviors of concern that gave rise to the referral included truancy, runaway behaviors, homicidal threats, aggressive tendencies and involvement in illegal activities. The student's mother told the social worker that the student had begun acting out approximately two years prior to the evaluation. The student's mother informed the evaluator that she had had numerous physical altercations with the student, and that he had punched her in the face. In addition, he had made homicidal threats toward his sister and he had recently at his sister.

The student's mother was being investigated for abuse/neglect charges at the time. The week prior to the referral, the student had been arrested for unauthorized usage of a vehicle. The older friends that he was with at that time were detained, but the student was not charged and he was released due to his age. The student told the evaluator that he smokes marijuana and drinks alcohol on a regular basis, and that he didn't care about anyone or anything. The student's mother informed the evaluator that she refused psychiatric hospitalization for the student even though it was highly recommended by the evaluator, as well as another social worker and a community support worker who were working with the student at that time. (P-4)

3. On May 26, 2010, the student received a comprehensive psychological evaluation. The report of the evaluation was issued on July 14, 2010. The student told the evaluator that he had not been living at home for several years at that point and that he was currently living with his girlfriend and a six month old daughter. The student told the evaluator that he does not like school and that he finds it a waste of time. The student told the evaluator

that he usually sleeps all day and plays videogames, plays basketball in the evenings, and stays up all night drinking and smoking with his friends. The evaluator noted the student's legal problems with regard to stealing a car in 2009, as well as the fact that the student drinks almost every day and smokes cigarettes and occasionally smokes marijuana. The student informed the evaluator that he was expelled while in 8th grade for threatening to physically harm a teacher. The evaluator found the student's overall intellectual ability to be in the low range of functioning. The evaluator noted that the student is easily distracted, excitable and restless. He has poor planning and organizing skills and struggles with academics. The evaluator found the student's overall cognitive functioning to be low and his overall economic skills to be in the very low range. The evaluator concluded that the student has a mathematics disorder, a reading disorder, a disorder of written expression, a conduct disorder and attention deficit hyperactivity disorder combined type. The evaluator recommended a separate full day school to effectively address the student's educational needs, a small classroom size, low

teach/student ratio and individual psychotherapy for at least one hour per week. (P-2)

4. On April 24, 2011, a Hearing Officer Determination was issued in a previous due process complaint brought by the Petitioner regarding the student. In that case, the Hearing Officer considered the July 14, 2010 report of the comprehensive psychological evaluation of the student, as well as the other evidence offered by Petitioner. The Hearing Officer concluded that Respondent's failure to provide a full-time special education program for the student was not a denial of a free and appropriate public education for the student. In particular, the Hearing Officer noted that the student had been absent from or missed classes for a substantial portion of the school year which "almost certainly affected his grades and ability to make academic progress." The Hearing Officer noted that the student's attendance was affected by complications in the student's home and personal life. The Hearing Officer concluded that Respondent had provided the basic floor of opportunity required by IDEA and rejected the Petitioner's argument. The Hearing Officer went on

to conclude that Respondent had improperly denied a neuropsychological evaluation of the student and ordered Respondent to authorize an independent neuropsychological evaluation of the student. (R-1)

5. On June 13, 2011, the student's IEP team was convened. The IEP that was then developed states the student's present levels of educational performance and lists a number of goals in the areas of mathematics, reading, written expression, communication speech language, and emotional, social and behavioral development. The IEP calls for 14 hours per week of specialized instruction in the general education environment, as well as related services in the amount of one hour per week of behavioral support services outside the general education setting and 120 minutes per month of speech language therapy inside general education. The IEP includes the following accommodations for the student: interpretation of oral directions, repetition of directions, simplification of oral directions, calculators, location with minimal distractions, preferential seating, tests administered at best time of day for student, and breaks between subtests. The IEP also

includes a secondary transition plan, including a number of transition goals. The June 13, 2011 IEP is the most current IEP for the student. (P-5; stipulation by counsel on the record.)

6. On July 15, 2011, the student received an independent neuropsychological evaluation. The evaluator noted that after dialoging with the student for a short while, it had become apparent that the student generally lacks motivation as it pertains to school and or to future vocational aspirations. The student demonstrated sustained attention, did not appear to be particularly restless, off task or easily distracted. The student appeared to have good concentration and to give a genuine effort. The evaluator noted that the student, who was 16 years old, lives with is 19 year old girlfriend, and his one year old daughter and a four month old daughter, although the oldest daughter was not the student's biological child. The student informed the evaluator that he is "okay with 'chillin' for the rest of his life." His daily routine involves sleeping most of the day while he typically plays video games all night. The student reported a history of marijuana and alcohol abuse. The student also informed the

evaluator that he had been adjudicated as a juvenile and placed on probation. At school, the student had had a series of behavior issues, suspensions and a long history of poor attendance. The evaluator noted that the student has a number of neurocognitive strengths, including good visuospatial and constructive abilities and that his executive functions were fairly well developed. He demonstrates robust planning and creativity processing abilities. In addition, his general memory abilities are quite strong. The evaluator noted that the student's primary weaknesses appear to be related to verbal processing ability. The evaluator concluded that the student appears to have a nonspecific learning disability. The evaluator pointed out that this does not preclude prior diagnoses of emotional disturbance or other health impaired/attention deficit hyperactivity disorder. The evaluator recommended that the student's academic needs "may be best attended to in a small classroom setting with a low teacher to student ratio." Moreover, the evaluator stated that an out of general education setting, such as a school with curriculum developed to deal with students with an E.D. is likely to be the

"most appropriate setting" where his emotional and learning issues can be adequately serviced. The evaluator specifically mentioned the student's very poor attendance record and stated that "it is essential that he regularly attend class so that he can receive instruction as well as any services that may be put in place for him." The evaluator recommended extended time to complete tests, quizzes and assignments and check to make sure that the student is processing and understanding instruction. The evaluator noted that the student may benefit from shorter periods of learning, longer breaks, and a behavior modification program.

(P-3)

7. The student's IEP team met on September 19, 2011. Present at the meeting were the student, the student's mother, the student's guardian ad litem, the assistant to the guardian ad litem, Petitioner's educational advocate, Respondent's case manager, Respondent's psychologist, Respondent compliance manager, Respondent's social worker, Respondent's speech language pathologist, Respondent's special education aide and Respondent's Special Education Coordinator. Respondent's psychologist

reviewed the report of the recent independent neuropsychological evaluation of the student. The team discussed the student's processing problems as well as his neurocognitive strengths. The student's IEP team discussed his attendance issues. The student's educational advocate argued that the student's attendance issues were impacted by his disability. The advocate requested a full-time special education program. The team rejected the advocate's request noting that the problem was not just getting from class to class but that the student actually did not come to school. Respondent's compliance manager stated that if the student attended school and made himself available, Respondent could review the request for a more restrictive placement at a thirty day review. Respondent's case manager noted that there are things going on at home that affect the student academically. He noted that the student does not attend school and that there has to be a partnership, but that staying up all night, smoking marijuana and other outside behaviors are impacting his learning. The student's guardian ad litem agreed that the student's outside behaviors were impacting his learning, and requested a full-time placement

to prevent the outside behaviors. Respondent's compliance manager stated that the current IEP hours of special education would remain in place until the student came to school so that the team could make assessments based upon observations of the student in the school setting. Although the student's mother and her representatives at the IEP team meeting disagreed, the representatives of Respondent at the IEP team meeting determined to keep the student's levels of service the same as were provided on the June 13, 2011 IEP until the student was able to attend school for a period of time and Respondent was able to assess him and determine whether any changes to the IEP were necessary. Respondent's staff at the September 19, 2011 IEP team meeting felt that the student would be successful under his existing IEP if he attended school. Respondent's representatives on the IEP team felt that the current IEP was the least restrictive environment that was appropriate for the student. (R-2; T of Respondent's social worker; T of Respondent's case manager)

8. The student has an extremely poor school attendance record. For the period between August 1, 2011 and November 29, 2011, the

student was present for a total of four school days out of a total of 57 school days. On the days that he was present, he was late to class two times. During that period of time, he had a total of 195 absences of which 188 were unexcused. The student has had a long history of poor school attendance. (R-3, R-2; P-3; R-1; T of Respondent's social worker; T of Respondent's case manager; T of student's mother; T of student's guardian ad litem.)

9. The student's problems with attendance are not caused by his disabilities. The student stated to Respondent's social worker that he felt that school was "just not the place for him." The student's drug abuse, his poor motivation and problems in his home environment likely affected the student's failure to attend school. (T of Respondent's social worker; T of Respondent's case manager; R-2; P-3)
10. Respondent's staff made numerous attempts to get the student to attend school. In addition to numerous telephone calls to the student's mother, Respondent's social worker and Respondent's case manager attempted a home visit on September 15, 2011, but the address for the student provided by Petitioner was not correct

and the student and his family were not at the building at the address given, which was a vacant building. Respondent's staff also contacted a community social worker who was working with the student, and the community social worker stated that the student had been avoiding the community social worker as well. During a telephone contact with the student's mother by Respondent's staff on October 6, 2011, the student's mother stated that she was surprised that the student had not been attending school because she was unaware that he had not been attending school. When Respondent's case manager talked to the student's mother at a parent/teacher night, she stated that she stated that she had thrown the student out of the house and refused to give him food. (R-5; T of Respondent's social worker; T of Respondent's case manager)

11. The student made no progress towards any of his IEP goals for the period between August 22, 2011 and October 28, 2011. In each subject area on his progress report, there are comments by teachers or related services providers noting that the student's poor attendance caused his lack of progress or that the student's

poor attendance impacted his ability to take advantage of the educational resources of the school. (R-4, R-2; T of Respondent's social worker; T of Respondent's case manager)

12. The IEP developed for the student by Respondent on June 13, 2011 is reasonably calculated to provide some educational benefit. The educational environment created by the June 13, 2011 IEP is the least restrictive environment appropriate 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. A party to a due process hearing is precluded by the doctrines of res judicata and/or collateral estoppel from asserting claims that have previously been litigated. Theodore ex rel. AG v. District of Columbia 55 IDELR 5 (D.C.C. August 10, 2011); J.G. by Stella G. v. Baldwin Park Unified School District, 55 IDELR 2 (C.D. Calif.

August 11, 2010); see also (UNPUBLISHED) Davis v. Hampton Public Schools, 55 IDELR 112 (4th Cir. October 1, 2010) (note this decision is **unpublished** and although on point may have no precedential value).

2. The United States Supreme Court has established a two-part test for determining whether a school district has provided a free and appropriate public education (hereafter sometimes referred to as "FAPE") to a student with a disability. There must be a determination as to whether the 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 Individualized Education Plan (hereafter sometimes referred to as "IEP") is reasonably calculated to enable a child with a disability 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).

3. 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 only required to provide a basic floor of educational 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).
4. 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 the regular educational environment must occur only if the nature or severity of the disability is such that education in a 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; Hinson v. Merritt Educational Center, 51 IDELR 65 (D.D.C. 2008).
5. Although a local education agency is responsible for meeting the educational needs of a student with a disability, the LEA is not required to meet the medical, psychiatric, medication, community

mental health, or other needs of a student. IDEA § 614(b); 34 C.F.R. § 300.304; Harris v. District of Columbia, 561 F. Supp. 2d 63, 50 IDELR 194 (D.D.C. June 23, 2008); D.C. Public Schools, 111 L.R.P. 60125 (SEA DC April 22, 2011); Ashland School District v. Parents of R.J., 53 IDELR 176 (9th Cir. December 7, 2009); Forest Grove Sch. Dist. v. T. A., 109 L.R.P. 77164 (D. Oregon December 8, 2009); Christopher B by Joanne B and Ray B v. Hamamoto, 50 IDELR 195 (D. Hawaii June 19, 2008).

6. Where a student does not avail himself of the benefits of his IEP because he is frequently absent from class, a local education agency cannot be found to have denied FAPE to the student. Nguyen v. District of Columbia, 681 F. Supp. 2d 49, 54 IDELR 18 (D.D.C. February 1, 2010); D.C. Public Schools, 111 L.R.P. 24663 (SEA DC January 15, 2011); Middleboro Public Schools, 110 L.R.P. 50021 (SEA Miss. March 11, 2010); In re Student with a Disability, 55 IDELR 25 (SEA NY June 11, 2010); Harrisburg City School District, 55 IDELR 149 (SEA Penna. May 26, 2010); Department of Educ., State of Hawaii, 55 IDELR 271 (SEA HI

April 30, 2010); Corpus Christi Independent School District, 110 L.R.P. 49279 (SEA TX July 2, 2010).

7. The IEP developed for the student by Respondent on June 13, 2011 provides FAPE in the least restrictive environment appropriate for the student.

DISCUSSION

Issue No. 1: Did Respondent deny a free and appropriate public education to the student when it failed to create a full-time special education program at the IEP team meeting convened on September 19, 2011?

Preliminarily, it should be noted that a number of the allegations made by Petitioner in this case were the subject of a previous due process hearing before the student hearing office. On April 24, 2011, a Hearing Officer Determination was issued by an impartial hearing officer. The Hearing Officer found that the Petitioner had not demonstrated that Respondent had failed to provide FAPE to the student by not providing a full-time special education program. The

Hearing Officer found that the student's absenteeism and complications in his personal and home life adversely affected his educational progress. The Hearing Officer did, however, grant Petitioner's request for an independent educational evaluation with regard to a neuropsychological evaluation.

A party to a special education due process hearing is precluded by the doctrines of res judicata and/or collateral estoppel from asserting claims that have previously been litigated. J.G. by Stella G. v. Baldwin Park Unified School District, 55 IDELR 2 (C.D. Calif. August 11, 2010); Theodore ex rel. AG v. District of Columbia 55 IDELR 5 (D.C.C. August 10 2010); see also (UNPUBLISHED) Davis v. Hampton Public Schools, 55 IDELR 112 (4th Cir. October 1, 2010) (note this decision is **unpublished** and although on point may not have precedential value).

Thus, in the instant case, only evidence that came into being after the date of the hearing officer decision on April 24, 2011 may be used to demonstrate that Respondent allegedly denied FAPE. In specific, a psychological evaluation report dated July 14, 2010 which was offered by Petitioner as an exhibit in this case and which a number of Respondent's witnesses relied upon in their testimony, may not be used

to prove that the student needed a full-time special education placement. This evidence was expressly considered by the previous Hearing Officer, and the conclusion that Petitioner draws from the exhibit and the testimony based upon it was specifically rejected by the previous Hearing Officer. The Hearing Officer found that Respondent had not denied FAPE to the student by failing to provide a full-time special education program. This issue has previously been decided in a recent due process hearing with the same parties. Accordingly, the July 14, 2010 psychological evaluation report, as well as other documentary evidence dated before April 24, 2011 offered as exhibits herein, and the testimony of Petitioner's witnesses with regard thereto, is accorded no weight.

In determining whether a school district has provided a free and appropriate public education to a student with a disability, the U.S. Supreme Court has established a two-part test. 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 as to whether the student's IEP is reasonably calculated to enable the 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 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 a basic floor of educational opportunity. Bd. of Educ, etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); Kerkam v. Superintendent, D.C. Public Schools, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991)

In the instant case Petitioner does not make any allegations concerning procedural violations. Instead, Petitioner contends that Respondent denied FAPE to the student by failing to provide a full-time special education program for him when the IEP team met on September 19, 2011.

Petitioner's witnesses testified that the student needs a full-time special education program. Respondent's witnesses testified that the program created by the student's IEP would have been effective if the student would have availed himself of the educational services offered by Respondent by attending school on a regular basis, and that the program offered by Respondent was the least restrictive environment

appropriate for the student. To the extent that the testimony of Petitioner's witnesses and Respondent's witnesses are in conflict with regard to this issue, the testimony of Respondent's witnesses is more credible and persuasive for the following reasons:

First, the testimony of Petitioner's witnesses, especially the guardian ad litem and Petitioner's educational advocate, relies upon the July 14, 2010 psychological evaluation report. The reliance upon this psychological evaluation, the conclusion of which with regard to full-time special education placement has already been rejected by another Hearing Officer in a recent due process hearing, is inappropriate and it is barred by the doctrines of res judicata and collateral estoppel. To the extent that the guardian ad litem and the educational advocate relied upon the July 14, 2010 psychological evaluation, their testimony is accorded no weight.

Secondly, it is apparent that Respondent's witnesses employed the wrong standard. Although it is laudable that the student's mother and other representatives want the best possible education for him, IDEA does not require a school district to maximize the potential of a student. For example, the July 15, 2011 neuropsychological evaluation of the

student makes recommendations including that the student's academic needs "may be **best** attended to in a small classroom setting with a low teacher to student ratio." (emphasis added). The report goes on to state that "an out of general education setting, such as a school with curriculum developed to deal with students with an ED, is likely to be the **most appropriate** setting..." (emphasis added). Similarly, the testimony of Petitioner's educational advocate was that a full-time special education out of general education setting would be the "most appropriate setting" for the student. It is clear, therefore, that Petitioner's witnesses, and the neuropsychological evaluator, were employing a potential maximizing standard. Petitioner's witnesses were describing the most appropriate education for the student rather than the education that would provide educational benefit. Clearly, Petitioner's witnesses are seeking more than the basic floor of opportunity. IDEA does not require a school district to provide the most appropriate program for a student. Rather, it only requires a program that will provide some educational benefit.

Third, the testimony of Petitioner's witnesses ignores the least restrictive environment requirement. IDEA requires school districts to

educate students with disabilities to the maximum extent appropriate with children who are not disabled. IDEA § 612(a)(5); 34 C.F.R. §§ 300.114, 300.115; Hinson v. Merritt Educational Center, 51 IDELR 65 (D.D.C. 2008). It would be inappropriate in the instant case to create a full-time special education program for the student without first trying a less restrictive program, such as the one developed by Respondent herein.

For the reasons stated above, it is concluded that the testimony of Respondent's witnesses is more credible and persuasive than the testimony of Petitioner's witnesses.

In addition, as counsel for Respondent point out in closing argument, a school district is responsible for meeting the educational needs of a student with a disability, but a school district is not required to meet the community mental health, psychiatric, or other needs of a student. IDEA § 614(b), 34 C.F.R. § 300.304; Harris v. District of Columbia, 561 F. Supp. 2d 63, 50 IDELR 194 (D.D.C. June 23, 2008); D.C. Public Schools, 111 L.R.P. 60125 (SEA DC April 22, 2011); Ashland School District v. Parents of R.J., 53 IDELR 176 (9th Cir. December 7, 2009); Forest Grove Sch. Dist. v. T. A., 109 L.R.P. 77164

(D. Oregon December 8, 2009); Christopher B by Joanne B and Ray B v. Hamamoto, 50 IDELR 195 (D. Hawaii June 19, 2008). In the instant case, the student has had numerous problems with his mother and his siblings at home which resulted in his moving out and living with his girlfriend and two children. He had also had frequent encounters with the juvenile authorities and police as well as a number of legal proceedings to contend with. In addition, he has had serious issues with regard to alcohol and drug abuse and possible psychiatric issues. The school district, however, is only responsible for addressing the student's educational needs and not the other problems he has been encountering.

The student's guardian ad litem testified at the hearing that a more restrictive placement would keep the student in school and eliminate some of the outside problems he was having. She made a similar statement at the September 19, 2011 IEP team meeting. It is apparent that the guardian ad litem is seeking to have the school district to resolve the student's community mental health, drug abuse, and psychiatric problems. IDEA, however, only requires a school district to address the educational needs of a student with a disability.

Accordingly, the contrary argument asserted by the guardian ad litem is rejected.

Moreover, the student in this case does not attend school. He rarely shows up for school, and he has had a long history of poor school attendance. Of the first 57 school days this school year, he was present at school on only four days, and he was late to class on two of those days. In view of the fact that the student does not attend school, it is impossible to draw any conclusion that the IEP created by Respondent denied a free and appropriate public education. Where a student does not avail himself of the benefits of his IEP because he is frequently absent from class, a local education agency cannot be found to have denied FAPE to the student. Nguyen v. District of Columbia, 681 F. Supp. 2d 49, 54 IDELR 18 (D.D.C. February 1, 2010); D.C. Public Schools, 111 L.R.P. 24663 (SEA DC January 15, 2011); Middleboro Public Schools, 110 L.R.P. 50021 (SEA Miss. March 11, 2010); In re Student with a Disability, 55 IDELR 25 (SEA NY June 11, 2010); Harrisburg City School District, 55 IDELR 149 (SEA Penna. May 26, 2010); Department of Educ., State of Hawaii, 55 IDELR 271 (SEA HI April 30, 2010); Corpus Christi Independent School District, 110 L.R.P.

49279 (SEA TX July 2, 2010). In the instant case, the student's absenteeism was extreme. He simply did not avail himself of the educational benefits of the IEP created for him by Respondent.

It should be noted that the educational advocate called by Petitioner as a witness testified that the student's problem with regard to absenteeism was caused by his disability. This argument is not supported by the evidence in the record. In particular, the report of the neuropsychological evaluation makes specific note of the fact that the student has a very poor attendance record. The independent evaluator states that "it is essential that (the student) regularly attend classes so that he can receive instruction as long as services that may be put in place for him." The evaluator would not have made this recommendation if he had any reason to suspect that the student's attendance problems were caused by his disability. There is nothing in the report from the neuropsychological evaluation conducted on July 15, 2011 that states or even implies that the student's problem with regard to absenteeism is in any way caused by his disability. The conclusion of the educational advocate is not supported by the documentary evidence.

In addition, the argument by Petitioner's educational advocate that the student's absenteeism was caused by his disability is also refuted by other evidence. The student told Respondent's social worker that school was "just not the place for him." Similarly the evaluator who conducted the independent neuropsychological evaluation of the student concluded that the student generally lacked motivation concerning school or vocational aspirations. It is clear that the student does not like school and that he is not motivated to attend school.

Also, it was the credible and persuasive testimony of Respondent's social worker and Respondent's case manager that the student's problems with attendance were more likely caused by his drug abuse, his poor motivation and the problems he was having at home. Although Respondent's social worker testified on cross-examination that attendance problems can be caused by emotional disabilities, he clarified on re-direct that in this case, the student's failure to attend school was likely caused by his drug abuse, poor motivation and the problems in his home environment. The evidence in the record reveals that the student's problems with school attendance were not caused by his disabilities.

Based upon the credible and persuasive evidence in the record, it is concluded that the IEP for the student provided by Respondent on June 13, 2011, which was reconsidered but not changed at the September 19, 2011 IEP team meeting, is reasonably calculated to provide educational benefit to the student. Accordingly, it is concluded that Respondent did not deny FAPE to the student by failing to create a full-time special education program for the student when his IEP team met on September 19, 2011.

The Petitioner has not met her burden of persuasion with respect to this issue. The Respondent has prevailed with regard to this issue.

ORDER

Based on the foregoing, it is **HEREBY ORDERED** that all relief requested by the instant due process complaint is hereby denied, and the complaint filed herein is dismissed with prejudice.

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: December 16, 2011

/s/ James Gerl

James Gerl,
Hearing Officer