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,	Date Issued:	August 21, 2011
	Hearing Officer:	James Gerl
v	Case No:	
District of Columbia Public Schools,	Hearing Dates:	August 3 and 4, 2011
Respondent.	Room:	2006

HEARING OFFICER DETERMINATION

BACKGROUND

The due process complaint was filed on June 22, 2011. The matter was assigned to this hearing officer on June 24, 2011. A resolution session was convened on July 12, 2011. The due process hearing was convened on August 3 and 4, 2011 at the Student Hearing Office. The hearing was closed to the public. The parent of the student attended the hearing, the student did not attend the hearing. Six witnesses testified on behalf of the Petitioner and one witness testified on behalf

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

of the Respondent. Petitioner's exhibits 1-42 were admitted into evidence with the following exceptions: Petitioner withdrew Exhibits 5, 6 and 9. Relevant objections were sustained to Petitioner's Exhibits 7, 25, 26, 27 and 28. Petitioner's Exhibit 43 (a videotape of an observation of the student which contained images of other students) was excluded based on relevance and privacy concerns because Petitioner had not obtained the permission of the parents of the other students prior to videotaping them. Respondent's exhibits 1-8 were admitted into evidence. The due date for the hearing officer decision to be issued is August 26, 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.

Prior to the hearing, counsel for Respondent filed a motion to continue the hearing or keep the record open because one of Respondent's witnesses was out of the country. After hearing argument on the motion at the hearing, the hearing officer denied the motion. Because Respondent had received plenty of notice of the hearing dates for the due process hearing and because of the importance of timely decisions without unnecessary delay under IDEA, see 34 C.F.R. § 300.515(a), it was concluded that Respondent had not stated good cause for the motion. Accordingly, the motion was denied.

ISSUES PRESENTED

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

1. Did Respondent improperly deny a request for an independent educational evaluation?
2. Did Respondent change the student's educational program at the beginning of the 2010-2011 school year without convening an IEP team meeting?
3. Does the IEP developed for the student by Respondent on March 4, 2011 provide a free and appropriate public education?

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-26) (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 Respondent found the student eligible for special education and related services on August 7, 2009. (P-31)

3. The student suffers from a seizure disorder. The student experiences generalized tonic-clonic seizures. The student's seizure disorder causes him to periodically be hospitalized; the most recent hospitalization for the student was in July 2011 for two or three days. The cause of the student's seizure disorder has not been determined. (T of Petitioner's nurse practitioner)

4. Respondent conducted a comprehensive developmental evaluation on the student on May 18, 2009. The evaluation found the student to be considerably delayed in each of the three domains studied: adaptive domain; personal-social domain; and cognitive domain. The evaluator found an area of relative strength in adult interaction and found areas of weaknesses in attention and memory; perception and concepts; and reasoning and academic skills. (R-1)

5. On March 10, 2009, Respondent conducted a speech and language evaluation of the student. The evaluator concluded that the student should receive speech and language services. (R-2)

6. On June 16, 2011, the student was evaluated by a psychologist who testified at the due process hearing. The evaluator was not able to test the student because of his severe limitations. Accordingly, the evaluator concluded that a traditional evaluation was impossible. Based upon discussions with the student's mother and the evaluator's observations of the student, the evaluator concluded that the student had a mixed receptive-expressive language disorder, developmental coordination disorder and epilepsy. The evaluator also suggested that both mild mental impairment and cerebral palsy should be ruled out as possible diagnoses for the student. The evaluator recommended a full-time special education program in a small classroom setting for the student. The evaluator recommended speech language, physical therapy and occupational therapy, as well as behavioral therapy. The evaluator's report notes that the behavioral therapy would address the student's emotional reactivity and help him to settle in more easily to a classroom setting. (P-24)

7. On May 19, 2011, counsel for Petitioner requested that Respondent authorize an independent psychological evaluation for the student. (P-8)

8. On July 7, 2011, Respondent authorized an independent educational evaluation for a psychological assessment of the student that had been requested by Petitioner's counsel. (P-10)

9. On August 7, 2009, an IEP team for the student met and developed an IEP. Present were the student's mother by telephone, a special education teacher, a speech pathologist and a second special education teacher. The IEP for the student developed goals in the areas of mathematics, reading, adaptive daily living skills, communication, speech language and emotional, social and behavior development. The IEP provided for a full-time special education IEP with 26.5 hours per week outside the general education setting and one hour per week of speech language pathology. In addition, the IEP provides for a dedicated aide for the student. The parent agreed with the contents of the IEP. (P-30)

10. The student's IEP team met again on March 11, 2010. Present at the meeting were the student's mother, Respondent's special education coordinator, an occupational therapist for Respondent, the school principal, a speech language pathologist, and a physical therapist, and an additional teacher. The student's IEP had present levels of performance stated and goals provided in the areas of mathematics, reading, daily living skills, communication speech and language, and emotional, social, behavior development, and motor skills/physical development. The IEP called for a full-time special education program at 26.5 hours per week outside the general education environment. The IEP provided one hour per week of speech language pathology as a related service, 60 minutes per week of occupational therapy as a related service and 30 minutes per week of physical therapy as a related service. The IEP provides that the student will have a dedicated aide. The parent agreed with the contents of the IEP. (P-35)

11. When the student arrived for school at the beginning of the 2010-2011 school year, the parent learned that Respondent had placed

the student in a classroom that was a partial inclusion classroom. There had been no IEP team meeting to discuss changes to the student's IEP prior to this change in the student's educational program. There had been no amendment to the student's IEP or other IEP team involvement with the change in the student's educational program. (T of student's mother)

12. The student's IEP team met on November 17, 2010. Present were the student's mother, a special education teacher, an occupational therapist and a special education coordinator for Respondent. Said IEP changed the student's services to ten hours per week of specialized instruction outside the general education environment and 16.5 hours per week of specialized instruction in the general education environment. The related services provisions of the IEP were similar to the previous IEP except that the physical therapy was increased to one hour per week. The IEP retained the dedicated aide for the student. The parent agreed with the contents of the IEP. (R-3)

13. The student's IEP team met again on March 4, 2011. Present at the meeting were the student's mother, Petitioner's educational

advocate, a special education teacher, an occupational therapist, a physical therapist, a speech language pathologist, an additional teacher, and Respondent's special education coordinator. Said IEP retains the ten hours per week of specialized instruction outside the general education and 16.5 hours per week of specialized instruction in the general education setting. Related services are provided as follows: Speech language pathology at 240 minutes per month, occupational therapy at 240 minutes per month and physical therapy at 240 minutes per month. The IEP requires that the student have a dedicated aide. The IEP also provides that the student will receive extended school year services and details specific extended school year goals for the student. The student's mother signed her agreement with the contents of the IEP. (P-36)

14. The parent was accompanied at the IEP team meeting on March 4, 2011 by educational advocate who had over 30 years of experience. The advocate recommended to the student's mother that she agree to the IEP and try it for a while. In the event that she was not satisfied with the results, the advocate advised the

parent that she could always request another IEP team meeting. (T of Petitioner's educational advocate)

15. The student's mother did not request an IEP team meeting after the March 4, 2011 IEP team meeting. (T of student's mother)

16. For the reporting period from March 26, 2011 to June 17, 2011, the student made progress on all three of his adaptive daily living skills goals in his IEP; he made progress on all three of his math goals; he made progress on all three of his reading goals; he made progress on all four of his speech language goals; he made progress on two of his three emotional, social and behavior development goals and he made progress on three of his motor skills/physical development goals. Concerning his physical therapy goals, the student made much progress in walking up stairs during this period. He also was less likely to fall down by tripping on his own feet. (R-6; T of Respondent's physical therapist)

17. The student is accompanied by a dedicated aide during the school day. The student is safe in his classroom setting, especially now

that he has improved his tendency to fall down. (T of Respondent's physical therapist)

18. The student made educational progress under his March 4, 2011 IEP. Said IEP was reasonably calculated to confer educational benefit upon the student. (Record evidence as a whole)

19. The educational harm suffered by the student as a result of the denial of FAPE by Respondent will be remedied by one hour per week of behavioral support services for a period of three months. (P-47; P-24; T of Petitioner's psychologist; 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 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 schools have complied with the procedural safeguards 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).

2. A school district such as Respondent is not required to maximize the potential of a child with a disability. Instead, IDEA requires that a basic floor of educational opportunity be provided to a student with a disability. 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. When a parent requests an independent educational evaluation at public expense, a school district must either provide the

evaluation at public expense without unreasonable delay or else file a due process complaint to prove that its evaluation was appropriate. 34 C.F.R. § 300.502(b). See, Harris v. District of Columbia, n.1, 561 F.Supp.2d 63, 50 IDELR 194 (D.DC June 23, 2008). In the instant case, Respondent properly responded to Petitioner's request for an independent educational evaluation for a psychological evaluation of the student by authorizing an independent educational evaluation without undue delay.

4. Where a respondent has provided the relief requested in the due process complaint, the issue becomes moot. District of Columbia v. Strauss, 590 F.3d 898, 53 IDELR 250 (D.C. Cir. January 8, 2010). Here the parent's request for an independent educational evaluation for a psychological evaluation of the student was mooted by Respondent's agreement to authorize an independent educational evaluation for such an assessment.

5. Changes to the student educational program, or other significant alterations of the student's IEP, must be made by the student's IEP team through the IEP development process. IDEA § 614; 34 C.F.R. §§ 300.320 to 300.324. Failure by the school district to

include the parent in any decision making about the education of a child with a disability is a violation of the parent's right to meaningful participation in the process. Paoella ex rel Paeolla v District of Columbia 210 F.Appx 11, 46 IDELR 271 (D.C. Cir 12/06/06) JN v. District of Columbia 110 LRP 2529 (D. DC January 11, 2010); TT v. District of Columbia, 48 IDELR 127 (D.D.C. July 23, 2007). In the instant case, Respondent denied FAPE to the student and violated the parent's right to meaningful participation from the beginning of the school year in August 2010 to November 17, 2010, by changing the student's educational program without utilizing the IEP procedures required by IDEA.

6. The process of the development of an IEP under IDEA requires a collaborative relationship between the parent and the school district. Shaffer v. Weast, 546 U.S. 49; 44 IDELR 150 (U.S. S. Ct. November 14, 2005).

7. The IEP developed by respondent on March 4, 2011 provides FAPE to the student.

8. All relief under IDEA is equitable in nature. The behavior of the parties, and other equitable considerations, are always relevant.

Town of Burlington v. Department of Education, 471 U.S. 358, 556 IDELR 389 (U.S. 1985); Forest Grove Sch. Dist. v. T. A., 129 S. Ct. 2484, 52 IDELR 151 (U.S. June 22, 2009); Reid ex rel Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. March 25, 2005); See, Garcia v. Board of Education of Albuquerque Public Schools, 530 F.3d 1116, 49 IDELR 241 (10th Cir. March 25, 2008); In re Student with a Disability, 52 IDELR 239 (SEA WV April 8, 2009).

9. Under IDEA the clear preference is for a placement in public school; placement in a private school is the exception. RH by Emily H & Matther H v. Plano Independent Sch Dist 54 IDELR 211 (5th Cir 5/27/10). 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 the student's disability; the student's specialized individual

educational needs; the link between those needs and the services offered by the non-public 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. October 25, 2005).

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 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 supplemental aids and services cannot be satisfactorily achieved. IDEA § 612(a)(5); 34 C.F.R. §§ 300.114, 300.115. The prospective non-public placement proposed by Petitioner in the instant case would violate the least restrictive environment provisions of IDEA.

DISCUSSION

1. Merits

Issue No. 1: Did Respondent improperly deny a request for an independent educational evaluation?

Petitioner contends that Respondent failed to properly evaluate the student. In support of this allegation, Petitioner points to a request made by Petitioner's counsel to Respondent on May 19, 2011 requesting a neuropsychological evaluation of the student in the form of an independent educational evaluation.

Respondent points out that it authorized the requested independent educational evaluation on July 7, 2011. Documentary evidence supporting the authorization of the independent educational evaluation is included in the record.

When a parent requests an independent educational evaluation, a school district such as Respondent must either agree to provide the evaluation at public expense or else request a due process hearing to prove the appropriateness of its evaluation. 34 C.F.R. § 300.502(b)(2). See, Harris v. District of Columbia, n.1, 561 F.Supp.2d 63, 50 IDELR 194 (D.DC June 23, 2008). In the instant case, that is precisely what

Respondent did. Respondent authorized an independent educational evaluation of the student's psychological needs at public expense without unreasonable delay. Accordingly, Respondent has complied with the provisions of the law in this regard.

The only other evidence in the record concerning evaluations was testimony by the Petitioner's psychologist to the effect that the psychological needs of the student need to be frequently evaluated because of his disabilities. However, as stated above, Respondent has authorized an independent educational evaluation of the student's psychological needs. Where a school district has provided the relief requested in a due process complaint, the issue becomes moot. District of Columbia v. Strauss, 590 F.3d 898, 53 IDELR 250 (D.C. Cir. January 8, 2010). In the instant case, Petitioner's request for a psychological evaluation was mooted by Respondent's agreement to authorize an independent educational evaluation for such an evaluation.

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

Issue No. 2: Did Respondent change the student's educational program at the beginning of the 2010-2011 school year without convening an IEP team meeting to discuss the changes?

It was the unrebutted, credible and persuasive testimony of the student's mother that when she brought him to school to begin the 2010-2011 year, the student was placed in an inclusion classroom even though his IEP at the time required a full-time special education placement. Respondent placed no contrary evidence into the record.

Changes to a student's educational placement, or other significant alterations to the student's educational program must be made by the student's IEP team through the IEP development process. IDEA § 614; 34 C.F.R. §§ 300.320 to 300.324. Failure by the school district to include the parent in any decision making about the education of a child with a disability is a violation of the parent's right to meaningful participation in the process. Paoella ex rel Paeolla v District of Columbia 210 F.Appx 11, 46 IDELR 271 (D.C. Cir 12/06/06) JN v. District of Columbia 110 LRP 2529 (D. DC January 11, 2010); TT v. District of Columbia, 48 IDELR 127 (D.D.C. July 23, 2007).

In the instant case, the only evidence in the record with regard to this point is that provided by Petitioner's mother. Her testimony in this regard is credible and persuasive. Thus, it is concluded based on the evidence in the record that Respondent changed the student's educational program without even attempting to convene his IEP team. The student's educational program was unlawfully constituted from the beginning of school in August 2010 until it convened his IEP team and developed an IEP on November 17, 2010. Said IEP reflected a change to ten hours per week of special education outside the general education environment and 16.5 hours per week of specialized instruction in the general education setting. The student's mother noted her agreement to said IEP on the IEP document.

It should be noted that the violation in this case by Respondent was not a procedural violation which might require more for a showing of a denial of FAPE. Instead, it was a substantive violation. By completely subverting the IEP team process, Respondent stood the IDEA on its head. The resulting violation of the law was clearly a substantive violation because Respondent completely ignored the IEP team process for a period of a number of months. Even assuming that

the violation could be considered procedural in nature, however, it clearly impaired the parent's right to meaningful participation in the process, and therefore, constitutes a denial of FAPE. IDEA §615(f)(3)(E).

It should be noted that Respondent had made a motion prior to the hearing requesting that the hearing be continued to obtain the testimony of the special education coordinator. Among the things that counsel for Respondent stated that the special education coordinator would testify to was that the parent orally agreed to the changes in the student educational program. The motion was denied because of the strict timelines governing IDEA cases. 34 C.F.R. § 300.515, and the fact that Respondent had had sufficient notice of the hearing dates. Even if such testimony had become a part of the record, however, the result with regard to this issue would not change. In order to make such a dramatic change to the student's IEP, moving from a full-time special education IEP to an inclusion setting IEP for most of the student's educational program, Respondent would have had to have followed the requirements of IDEA to convene an IEP team meeting, or else to go through the process of amending the IEP, as provided by the statute.

Mere oral agreement by the mother to such an unusual change without an IEP team meeting would not be consistent with the requirements of the law.

It is concluded that Respondent denied a student a free and appropriate public education from the beginning of the school year in August 2010 until November 17, 2010 by changing his educational placement without convening an IEP team meeting. Petitioner has met her burden with respect to this issue. Petitioner has prevailed with regard to this issue.

Issue No. 3: Did Respondent violate IDEA because the IEP developed for the student in March 2011 contained an insufficient number of hours of special education?

The witnesses called by Petitioner contend that the student requires a full-time special education IEP. Respondent contends that the student made educational progress under his March 2011 IEP and that said IEP was reasonably calculated to confer educational benefit.

It should be noted that the parent agreed with the IEP developed by the IEP team in March 2011. At said IEP team meeting, the parent was accompanied by an educational advocate with over 30 years of

experience. After conferring with her educational advocate, the parent agreed with the IEP, as written, in March 2001. It would not be consistent with the collaborative relationship required by IDEA to permit a parent to contest an IEP after knowingly agreeing to the contents of said IEP. See, Shaffer v. Weast, 546 U.S. 49; 44 IDELR 150 (U.S. S. Ct. November 14, 2005). It was the testimony of Petitioner's educational advocate that she advised the parent that she could agree with the IEP and that if things did not turn out well, the parent could always request another IEP team meeting to refine or tweak the services being received by the student. The parent testified that she never requested an IEP team meeting after the March, 2011 IEP team meeting. It would be inconsistent with the collaborative relationship required by IDEA to permit parents to pursue due process complaints without first giving a school district a chance to cure whatever problems the parent has with an IEP.

In any event, the standard for determining whether an IEP is appropriate is whether it complies with the standard articulated by the Supreme Court in the seminal Rowley decision, that is, is the IEP reasonably calculated to confer educational benefit? In the instant case, it is clear that the March 2011 IEP for the student was reasonably calculated to confer educational benefit.

Indeed, the IEP progress report for the student for the reporting period from March 26, 2011 through June 17, 2011, reveals that the student was progressing on

most of his IEP goals during the period of time under the IEP in contest. Specifically during the relevant period of time, the student progressed on all three of his adaptive daily living skills goals; the student progressed on all three of his mathematics goals; the student progressed on all three of his reading goals; the student progressed on all four of his communication/speech language goals; the student progressed on two of his three emotional, social and behavior development goals and the student progressed on three of his eight motor skills/physical development goals. The documentary evidence regarding this point is buttressed by the credible testimony of Respondent's physical therapist that the student was making good progress on walking up stairs and that he has improved with regard to reducing incidents involving him falling down.

In contrast, some of Petitioner's witnesses testified that the student is not making educational progress under his IEP. For example, the student's mother testified that he has made no progress at all under his March 2011 IEP. The testimony of the student's mother in this regard was not credible or persuasive. In particular, it is abundantly clear that the mother was using a potential maximizing standard. IDEA does not require a school district to maximize the potential of a student with a disability; rather, a school district is required only to provide the 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). That the student's mother was using a potential maximizing standard was made clear by her testimony that the March 2011 IEP was not giving the student what he needed "to excel" and to "reach his potential." Petitioner's counsel attempted to cure the potential maximizing testimony through the use of leading questions, but the Petitioner's testimony made it clear that she was expecting Respondent to do a lot more than is required by the law with regard to the student's IEP.

Similarly, the evaluation by Petitioner's psychologist concludes that the student needs a full-time special education program. An evaluator may not, however, simply prescribe a particular special education program. See, Marshall Joint Sch Dist No 2 v. CD by Brian & Traci D 616 F.3d 632, 54 IDELR 307 (7th Cir 8/2/10). Instead, the educational program must be created by a team as provided in IDEA. Significantly, the psychologist did not testify that the student's IEP would not provide educational benefit.

The credible and persuasive evidence in the record demonstrates that the March 2011 IEP was reasonably calculated to confer educational benefit and that

said IEP did confer educational benefit upon the student. Thus, it is concluded that the March 2011 IEP provided the student with a free and appropriate public education as required by the law.

Petitioner also provided some testimony that the student was not safe in his educational program at Respondent. This matter is beyond the scope of this hearing because it was not stated as an issue at the prehearing conference, and, therefore is beyond the scope of this due process complaint. IDEA §615(f)(3)(B). It should be noted, however, that the evidence in the record does not support a contention that the student was unsafe at school.

Petitioner has not carried her burden with respect to this issue. Respondent has prevailed on this issue.

2. Relief

Petitioner has requested prospective non-public placement as relief in the instant case. Specifically, Petitioner seeks an order requiring respondent to pay for the student's education at a non-public 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. Under IDEA the clear preference is for a placement in public school; placement in a private school is the exception. RH by Emily H & Matther H v. Plano Independent Sch Dist 54 IDELR 211 (5th Cir 5/27/10). 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 and "tragic."

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., 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). Both parties agree in their prehearing briefs that a hearing officer has such authority.

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). Respondent cites the Branham factors in its prehearing brief. A review of the factors outlined by the Branham decision in the instant case reveals that a prospective non-public placement is not appropriate for the student. In particular, a review of the student's educational needs and the extent to which the non-public placement represents the least restrictive environment compel a conclusion that the non-public placement is not required for the student. It should be noted that the discussion above has found a violation of IDEA, but that the violation involves Respondent's failure to convene an IEP team to make an educational change of placement between August 2010 and November 17, 2010. Importantly, it should be noted that since March, 2011 Respondent has provided a FAPE to the student in a much less restrictive setting than the setting sought by Petitioner as relief. Because the student can clearly receive FAPE in the educational program provided by his March 2011 IEP, the non-public and more restrictive placement requested would be inconsistent with the requirements of IDEA. It is concluded that the student's educational needs can be met, and are being met, in his current public

school placement. A prospective private placement is not appropriate relief in this case.

An award of compensatory education under IDEA should be qualitative and flexible in nature rather than being based on a cookie cutter formula replacing an hour of lost services with an hour of compensatory education. The Petitioner has the burden of showing the educational harm suffered by the student as a result of a violation of the Act, as well as proposing compensatory education that will rectify the harm to the student. Reid ex rel Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. March 25, 2005).

Petitioner's compensatory education plan seeks occupational therapy and speech language services for the student. Such services do not relate to the denial of FAPE that was found in this case and are not appropriate as compensatory education for the student. The harm specifically found herein is that the student was improperly placed in an educational setting without getting the approval of his IEP team first. There is testimony in the record from Petitioner's psychologist that behavioral therapy would help the student settle in more easily in a classroom setting as well as ease his emotional reactivity. There is

similar language in the report of Petitioner's psychologist concerning his evaluation of the student which is included in the record evidence. Petitioner's compensatory education plan also requests behavioral support services. The period of denial of FAPE in this case constitutes a period of approximately three months when the student's educational placement was changed without obtaining the approval of his IEP team from August 2010 through November 2010. Accordingly, the Order portion of this decision shall require Respondent to fund an hour per week of behavioral support services for a period of three months as compensatory education for Respondent's denial of FAPE. Given the testimony documentary evidence provided by Petitioner's psychologist, it is concluded that such behavioral support services will rectify the harm done by Respondent's denial of FAPE herein.

It should be noted that the award of behavioral support services, is not a cookie-cutter, hour for hour replacement of lost services. The student's IEP does not provide for behavioral support services, but given the testimony of Petitioner's psychologist and the documentary evidence in the record, it seems that such behavioral support services

are a reasonable way to remedy the harm caused by the deprivation of FAPE by the Respondent herein.

In addition, because compensatory education awards should be flexible under the Reid doctrine, the parties will be given the opportunity to agree to amend the compensatory education award in any manner they see fit so long as both parties agree. Said flexibility is important to ensure that the compensatory education awarded fits the needs of the student as determined by the parties herein. If the parties do not make a specific agreement otherwise, the compensatory education award shall be as stated in the Order portion of this decision.

ORDER

Based on the foregoing, it is HEREBY ORDERED:

1. That unless the parties agree otherwise, as compensatory education for Respondent's denial of FAPE, Respondent shall fund one hour per week of behavioral support services at an independent provider of the parent's choice for the student for a period of three months. Said behavioral

support services shall be provided to the student by the provider at a rate not to exceed the market rate in the Washington, D.C. metropolitan area for similar services;

2. 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: August 21, 2011

/s/ James Gerl
James Gerl,
Hearing Officer