

**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: September 23, 2011

Hearing Officer: James Gerl

2011 SEP 23 AM 10:40
STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

BACKGROUND

The due process complaint was filed on July 20, 2011. The matter was assigned to this hearing officer on July 22, 2011. A resolution session was convened on August 3, 2011. One six day continuance was granted upon the unopposed request by counsel for Petitioner. A prehearing conference was convened on August 10, 2011. The due process hearing was convened by agreement of the parties at the on September 12 & 13, 2011. The

¹ Personal identification information is provided in Appendix A.

hearing was closed to the public. The student's mother attended the hearing and the student attended the hearing (on the first day only because of a medical appointment at the

on the second day of the hearing). Four witnesses testified on behalf of the Petitioner. Seven witnesses testified on behalf of the Respondent. Petitioner's exhibits 1-39 were admitted into evidence. Respondent's exhibits 1-12 were admitted into evidence. The decision of the hearing officer is due to be issued on or before September 23, 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.

ISSUES PRESENTED

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

1. Did Respondent violate IDEA by failing to provide services to the student while he was _____ from March 24, 2010 to September 27, 2010 and/or did Respondent violate a settlement agreement to provide compensatory education therefor?

2. Did Respondent deny FAPE to the student because the IEPs that it proposed on December 15, 2010 and February 2, 2011: contained an insufficient number of hours of special education; failed to provide speech language therapy as a related service; and failed to include certain accommodations, a transition plan, and group counseling?
3. Did Respondent fail to provide FAPE to the student because the December 17, 2009 IEP for the student: contained an insufficient number of hours of special education; does not contain a behavior intervention plan; because the IEP team failed to have a general education teacher present; and because there was no transition plan?
4. Did Respondent deny FAPE to the student by failing to substantially implement his December 17, 2009 IEP?

FINDINGS OF FACT

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

1. The student's date of birth is (R-1) (References to exhibits shall hereafter be referred to as "P-1," etc. for the petitioner's exhibits, "R-1," etc. for the respondent's exhibits and "HO-1," etc. for the hearing officer exhibits; references to testimony at the hearing is hereafter designated as "T".)

2. The student's IEP team convened on December 17, 2009. Participating in the meeting were Respondent's social worker, Respondent's special education teacher, Respondent's special education coordinator and an additional special education teacher of Respondent. The student's category of eligibility is specific learning disability. The IEP documents that attempts were made to contact the parent and that the parent had agreed to attend the meeting but that she did not show up for the meeting. The parent was telephoned during the meeting, but she did not respond. Said IEP contains present levels of educational performance, as well as a number of goals in the areas of mathematics, reading, and written expression. The IEP calls for ten hours per week of specialized instruction outside the general education setting. In the areas of accommodations, the IEP requires simplification of

oral directions, interpretation of oral directions, calculators, location with minimal distraction, tests administered over several days and extended time on subtests. The IEP does not contain a behavioral intervention plan. The IEP includes a post-secondary transition plan. (R-1; P-31)

3. The December 17, 2009 IEP developed for the student was implemented by Respondent. All substantial and material provisions of said IEP were implemented. (T of Respondent's special education coordinator)
4. Prior to being _____ in September 2010, the student had been chronically and excessively absent from school. While attending Respondent's school during the 2009-2010 school year, the student was absent 115 days. In the same school year, he had a total of 486 classroom absences. (P-13; R-9)
5. The student's absenteeism is not related to his disabilities. The student was absent because of problems with his uniform, because he was avoiding the _____ because his misconduct at school resulted in frequent _____ and because he wanted to hang

out with his friends. (T of student; T of Respondent's school psychologist)

6. The student was _____ and disciplined by Respondent on a number of occasions during the 2009-2010 school year. The student was _____ on December 14, 2009 for damaging property/writing graffiti on walls. The student was _____ on January 18, 2010 for writing graffiti on school walls. The student was _____ on April 19, 2010 for _____ and _____ another student. The victim of said _____ identified the student from a video of the incident, and a staff member identified the student as being at the scene. The manifestation determination review committee determined that the _____ was not a manifestation of the student's disabilities. (T of student; P-26, P-28, P-29, P-30; R-2)

7. The student was suspended and/or expelled from school by Respondent from March 24, 2010 through September 27, 2010 as a result of the _____ incident. Respondent provided no educational services to the student during said period of time. (T of student; T of student's mother; P-12)

8. Subsequent to a December 15, 2010 IEP team meeting, Respondent's special education teacher prepared a draft IEP that included a portion concerning compensatory education. Because of the fact that that the student did not receive any educational services from March 24, 2010 through September 27, 2010 while he was suspended and/or expelled from school, Respondent offered to provide four hours per week of tutoring outside of the general education environment with the total number of hours not to exceed 450 hours of compensatory education. (P-12)
9. On January 7, 2011, counsel for Petitioner accepted the offer of 450 hours of compensatory education by email. (P-9)
10. Sometime in February 2011, Respondent attempted to rescind the offer of 450 hours of compensatory education for the lack of educational services during the period of suspension. Respondent subsequently offered 32 hours of tutoring and 32 hours of counseling as compensatory education for this failure to provide services. (R-8; P-6)
11. On May 11, 21, 24 and 25, 2010, the student was given an independent psychoeducational evaluation by Petitioner's expert

psychologist. The evaluator did not meet with the student's teachers or observe the student in the classroom setting. The evaluator found that the student had mixed receptive-expressive language disorder, reading disorder, mathematics disorder, disorder of written expression, and depressive disorder, with features. The evaluator found the student's intellectual functioning to be borderline. The evaluator recommended a medical workup, psychiatric treatment, and a therapy integrated school program. The evaluator also recommended a separate, therapy integrated day school, a small nurturing environment, small class sizes and a full-time special education setting. (P-1; T of Petitioner's psychologist)

12. On May 26, 2010, the student was given an independent speech language evaluation by Petitioner's expert speech language pathologist. The evaluator utilized standard speech language evaluation tests. The evaluator found that the student was moderately behind his same age peers with regard to language development. The evaluator found poor vocabulary and difficulty attending to oral narratives. The evaluator recommended that the

student receive speech language therapy 60 minutes two times per week. The evaluator recommended that vocabulary maps be used and that graphic organizers be utilized. (P-3; T of Petitioner's speech language pathologist)

13. On May 17, 2010, the student was given a comprehensive vocational evaluation. The student showed strong interest in the areas of mechanical, industrial and selling, and he showed strong abilities in spatial and perceptual aptitude and manual dexterity. (P-2)

14. The student's IEP team met on December 15, 2010. Present at the meeting were the student, the student's mother, Respondent's school psychologist, Respondent's special education teacher, Respondent's social worker, Petitioner's two attorneys, and Petitioner's student advocate. The IEP prepared as a result of that meeting includes present levels of performance and goals in the areas of mathematics, reading, written expression, emotional, social and behavioral development. Said IEP calls for ten hours of specialized instruction outside the general education environment and one hour per week of behavioral support services (counseling)

outside the general education environment. The IEP permits the use of calculators during general education math class and in specialized instruction. The IEP provides for the following classroom accommodations: simplification of oral directions, interpretation of oral directions, calculators, location with minimal distractions, tests administered over several days, and extended time on subtests. The IEP includes a post-secondary transition plan that includes life skills classes for the student 3.75 hours per week. (R-6)

15. An additional draft IEP for the student was prepared on February 2, 2011. Present at the IEP team meeting were the student, the student's mother, Respondent's special education teacher, Respondent's school psychologist, Respondent's social worker, Petitioner's two attorneys, Petitioner's student advocate, Respondent's project coordinator, and Respondent's attorney. Said IEP changed the some of the goals on the IEP. The accommodation section of this IEP included the previous accommodations, as well as a graphic organizer. At the February 11, 2011 meeting, Respondent announced that it was not

improved substantially since he has been at and he is now on the "gold tier" for purposes of obtaining potential rewards for good behavior. The student has made substantial progress in all academic areas at the under his current IEP. He is doing very well there. The student regularly attends his classes at (T of Respondent's special education teacher; T of Respondent's reading specialist; T of Respondent's science teacher; T of Respondent's social worker; T of student; T of student's mother; R-9; P-7; T of student; T of student's mother)

17. During the 2010-2011 school year, the student received grades of A in English and reading workshop and B's and C's in his other classes. The student attends his classes at the If the student fails to do his work or attend class, he is put on lockdown in his cell. The student does not have any problem with regard to attendance at the program. (R-9; T of student)

18. The student's December 2010 and February 2011 IEPs do not include speech language therapy as a related service. Because of the student's moderate deficit, the student needed speech

compensatory education to be awarded is warranted. (Record evidence as a whole)

21. Respondent denied FAPE to the student by failing to provide educational services during the period that he was suspended from school from March 2010 through September 2010 and/or by failing to comply with the settlement agreement Respondent made to rectify such failure to provide FAPE. One hundred fifty hours of tutoring and/or counseling will properly compensate the student for the educational harm suffered as a result of the denial of FAPE by Respondent. (Record evidence as a whole).
22. Respondent denied FAPE to the student by failing to provide speech language as a related service from the December 15, 2010 proposed IEP to the present. Six hours of compensatory speech language therapy will properly compensate the student for the harm suffered as a result of the denial of FAPE by Respondent. (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 school district, such as Respondent, must provide educational services to a student even though they have been suspended or expelled from school for disciplinary reasons. IDEA § 615(k)(1)(D); 34 C.F.R. § 300.530(D). In the instant case, Respondent denied FAPE to the student by failing to provide educational services to the student while or from March 2010 through September 2010.
2. An IEP team must include as a member a representative of the school district who is qualified to provide or supervise the provision of special education, is knowledgeable about the general curriculum, and is knowledgeable about the availability of resources of the public agency. IDEA § 614(d)(1)(B)(iv); 34 C.F.R. § 300.321(a)(4).
3. Where the parties to a special education dispute enter into a settlement agreement, a court or hearing officer can enforce said

settlement agreement to the extent that the issue involves identification, evaluation, placement, or FAPE for a student with a disability. State of Missouri ex rel. St. Joseph's School District v. Missouri Department of Elementary and Secondary Education, 54 IDELR 124 (Missouri Ct. App. March 30, 2010); Springfield Local School District Bd. of Educ. v. Jeffrey B., 55 IDELR 158 (N.D. Ohio October 25, 2010); IDEA §§ 615(e), 615(f)(1)(B); and 34 C.F.R. § 300.506(b)(7), 300.510(d). In the instant case, Respondent violated a settlement agreement with Petitioner to provide compensatory education to the student because he was denied educational services while suspended or expelled from school from March 2010 to September 2010.

4. 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 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).

5. 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).
6. In determining the placement for a child with a disability, a school district is required, to the maximum extent appropriate, to ensure that the child is educated with children who are not disabled, and that any removal from the regular education environment must occur only if the nature or severity of the disability is such that

education in 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).

7. The law does not require a local education agency, such as Respondent, to close the "gap" between the achievement level of a student with a disability and the achievement level of his non-disabled peers in order to provide a FAPE. Allyson B. by Susan B. and Mark B. v. Montgomery County Immediate Unit No 23, 54 IDELR 164 (E.D. Pa. March 31, 2010); J.L. and M.L. ex rel K.L. v. Mercer Island School District, 55 IDELR 164 (W.D. Wash. October 6, 2010); M.P. by Perusse v. Poway Unified School District, 54 IDELR 278 (S.D. Calif. July 12, 2010); Montgomery Public Schools, 110 L.R.P. 28732 (SEA Md. January 14, 2010).
8. A school district must provide a related service in order to provide FAPE to a student if the service is required to assist a child with a disability to benefit from special education. IDEA § 602(26); 34 C.F.R. § 300.34.

9. Procedural violations of IDEA only result in the denial of FAPE where they 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.C. Cir. May 19, 2006); IDEA § 615(f)(3)(E)(ii).
10. 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).
11. IDEA only requires a behavior intervention plan in order to provide FAPE where a school district has proposed discipline for a student with a disability and the conduct in question is found to be a manifestation of the student's disability. IDEA § 615(k)(1)(F); 34 C.F.R. § 300.530(f).
12. A school district is required to implement all substantial and material provisions of a student's IEP. 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).

13. Where a student does not avail himself of the benefits of his IEP because he is frequently absent from classes, 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); 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, 54 IDELR 271 (SEA HI April 30, 2010); Corpus Christi Independent School District, 110 L.R.P. 49279 (SEA TX July 2, 2010).
14. A due process hearing officer has broad equitable powers to issue appropriate remedies when a local education agency violates IDEA. School Committee Town of Burlington v. Department of Educ., 471 U.S. 358, 369, 105 S. Ct. 1996, 556 IDELR 389 (1985); Forest Grove Sch. Dist. v. T. A., 129 S. Ct. 2484, 52 IDELR 151 n11 (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); Garcia v. Board of Education of Albuquerque Public Schools, 530 F.3d 1116,

49 IDELR 241 (10th Cir. March 25, 2008); Los Angeles Unified School District v. DL, 548 F. Supp. 3d 815, 46 IDELR 252 (C.D. Calif. March 10, 2008); Bishop v. Oakstone Academy, 47 IDELR 125 (S.D. Ohio 2007); In re Student With a Disability, 108 L.R.P. 45824 (SEA WV June 4, 2008).

15. All relief under IDEA is equitable in nature. Compensatory services or compensatory education for a violation of IDEA should be flexible and designed to remedy the harm caused by the violation of the Act. Relief under IDEA should be tailored to the specific facts and circumstances of a particular case, the nature and severity of the violation and the nature and severity of the student's disability. Reid ex rel. Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. March 25, 2005).

DISCUSSION

Merits

Issue No. 1: Did Respondent violate IDEA by failing to provide services to the student while he was suspended from March 24, 2010 to September 27, 2010, and did Respondent violate a settlement agreement to provide compensatory education for such deprivation?

Petitioner contends that Respondent failed to provide any educational services to the student while he was [redacted] from school from March of 2010 to September of 2010. The law provides that a special education student who is [redacted] shall continue to receive educational services. IDEA § 615(k)(1)(D); 34 C.F.R. § 300.530(d).

In this case, Respondent concedes that it failed to provide educational services to the student while he was [redacted] from school from March 2010 to September 2010. After the December 15, 2010 IEP team meeting, Respondent's special education teacher at the [redacted] Program prepared and sent to counsel for Petitioner a draft IEP which included a provision that the student would receive 450 hours of compensatory education as compensatory education for the

services he lost while he was Counsel for Petitioner accepted the offer of 450 hours of compensatory education by email on January 7, 2011.

Prior to the due process hearing, the hearing officer directed the parties to file prehearing briefs concerning whether a special education hearing officer has the authority to enforce a settlement agreement between the parties to a special education dispute. Each party filed such a brief, and such briefs have been considered with regard to this issue.

Although the case law is not consistent with regard to this point, it seems that the better view among the courts that have interpreted this question is that courts and hearing officers can and should enforce the provisions of a settlement agreement made by parties to a special education dispute. State of Missouri ex rel. St. Joseph's School District v. Missouri Department of Elementary and Secondary Education, 54 IDELR 124 (Missouri Ct. App. March 30, 2010); Springfield Local School District Bd. of Educ. v. Jeffrey B., 55 IDELR 158 (N.D. Ohio October 25, 2010); IDEA §§ 615(e), 615(f)(1)(B); and 34 C.F.R. § 300.506(b)(7), 300.510(d). Accordingly, the hearing officer concludes

that he does have the authority to enforce settlement agreements pertaining to the issues of the identification, evaluation, educational placement, or provision of a free and appropriate public education to a child with a disability. IDEA § 615(b)(6)(A).

In the instant case, Respondent made an offer of 450 hours of compensatory education for purposes of tutoring in response to its failure to provide educational services to the student while he was suspended. Counsel for Petitioner accepted the offer, and the result was an agreement between the parties to resolve their dispute concerning services for the student during his suspension.

Respondent contends that there was no settlement in this case, and that the offer was merely a mistake. The problem with Respondent's analysis in this case is that it stands IDEA on its head. Respondent's argument overlooks the fact that the offer of compensatory education was made through the IEP team process. The law requires that every IEP team include a representative of the public agency who is qualified to provide or supervise the provision of special education, is knowledgeable about the general curriculum, and is *knowledgeable about the availability of resources of the public*

agency. IDEA § 614(d)(1)(B)(iv); 34 C.F.R. § 300.321(a)(4) (emphasis added). Thus, because the offer of compensatory education in this case was made by the LEA representative through the IEP team process, it must be assumed that the representative of Respondent was knowledgeable about special education and the general curriculum, and more importantly was knowledgeable about the resources available to the LEA. The local education agency representative at an IEP team meeting must be knowledgeable about such things as offers of compensatory education. IDEA does not envision such a mistake.

Accordingly, it is concluded that the parties entered into a settlement agreement to provide for 450 hours of tutoring as compensatory education because of Respondent's failure to provide educational services to the student from March 2010 to September 2010 while he was from school. The order portion of this decision will provide an award of compensatory education in the amount the parties agreed to, less the adjustment for equitable factors to be discussed in the relief section that follows.

Petitioner has met her burden with respect to this issue. Petitioner has prevailed with regard to this issue.

Issue No. 2: Did Respondent deny FAPE to the student because the IEPs it proposed in December 15, 2010 and February 2, 2011 had an insufficient number of hours of special education, failed to provide speech language services, and failed to provide necessary accommodations, transition services, and group counseling?

a. Number of Hours of Special Education Services

Petitioner contends that Respondent's proposed IEPs deny FAPE to the student because they do not provide a sufficient number of hours of special education. Petitioner contends that the student must have a full-time special education program.

In support of its position, Petitioner presented the testimony and report of its expert psychologist. She testified that the student needs a full-time special education program. An evaluator, however, may not simply prescribe a special education program for a student. Marshall Joint Sch Dist No 2 v. CD by Brian & Traci D 616 F.3d 632, 54 IDELR 307 (7th Cir August 2, 2010).

The standard for determining whether an IEP provides a FAPE is whether the student's IEP is reasonably calculated to confer educational benefit. Bd. of Educ., etc. v. Rowley, 458 U.S. 178, 102 S.

Ct. 3034, 553 IDELR 656 (1982); Kerkam v. Superintendent, D.C. Public Schools, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

In the instant case, it is clear that the student is making significant educational progress and he is receiving educational benefit in his current educational program at the _____ Program pursuant to the contested IEPs. His educational program at _____ is much less restrictive than the full-time special education program sought by Petitioner. The documentary evidence shows that the student is making mostly passing grades in his current program. His teachers in his current program testified that he is reading on grade level, that he has shown a big improvement in reading and that he is making progress in his other classes as well. He is currently performing well in his academic classes and not exhibiting behavior issues. The student himself testified that he is learning in his current educational program. The student's mother also testified that he is doing well in his current program and that she feels good about it. All witnesses for both parties testified that the student is making educational progress in his current educational program.

The credible and persuasive evidence in the record reveals that the student is making progress under his IEP and he is receiving educational benefit. Accordingly, it is clear that he is receiving a FAPE at this time, although his IEP does not call for a full-time special education program. To the extent that the testimony of Petitioner's psychologist suggests otherwise, it is rejected.

It appears that the testimony of the psychologist called by Petitioner is impaired by the fact that she has ignored the least restrictive environment requirement. Respondent and other school districts are required to educate a student with disabilities in the least restrictive environment that is appropriate. Because the student is clearly currently receiving FAPE in a much less restrictive environment than that suggested by the psychologist, it is clear that the current environment in which the student is receiving his education is the least restrictive environment that is appropriate for him.

It appears that the testimony of Petitioner's psychologist is also impaired by virtue of the fact that she has applied "gap" analysis. A school district is not required to reduce the gap between the achievement levels of students with disabilities and their non-disabled

appropriate speech language services. In support of its claim, Petitioner provides the testimony of an expert speech language pathologist, as well as her report with regard to her findings that the student has moderate speech language deficits. In response, Respondent contends that the student can receive the help he needs in his classes without additional speech language therapy and that two times per week for an hour is an excessive amount of time to be removed from class. In addition, Respondent provided the testimony of a speech language therapist that the student does not currently demonstrate the deficits that the evaluator found. The testimony of Respondent's speech language therapist in this regard is not credible or persuasive. Respondent's speech language pathologist based her conclusion upon one single 70-minute interview of the student while he was not in the classroom. Although this observation may indicate that the student has made some progress since he was evaluated, it does not indicate that he does not need speech language services in order to benefit from his special education.

A school district must provide a related service, such as speech language pathology, where the service may be required to assist the

child to benefit from special education. IDEA § 602(26); 34 C.F.R. § 300.34(a).

In the instant case, Petitioner has shown that the student has a moderate deficit. Respondent's evidence in response is fairly weak. Because Respondent's observation of the student was brief and not in an educational setting and because no evaluation instruments other than observation were used, the testimony of the Respondent's speech language pathologist in this regard is not credible or persuasive. However, it is concluded that two hours per week is an excessive amount of time for the student to be removed from his academic setting, particularly now that he is making progress.

Accordingly, the order portion of this decision shall alter the student's current IEP to require that he receive 30 minutes of speech language pathologist services once per week. The relief portion of this decision shall also include some compensatory speech language therapy.

Petitioner has met her burden with respect to this sub-issue. Petitioner has prevailed with regard to this sub-issue.

c. Accommodations, Transition Plan, Group Counseling

Petitioner contends that the December 2010 and February 2011 IEPs proposed by Respondent denied FAPE to the student because they failed to provide certain accommodations, because they did not contain a transition plan, and because they did not contain group counseling. Said IEPs do in fact contain specific and appropriate transition plans. It is difficult to understand Petitioner's position as to this issue.

The other items were recommended by Petitioner's Psychologist. An evaluator, however, may not simply prescribe a special education program for a student. Marshall Joint Sch Dist No 2 v. CD by Brian & Traci D 616 F.3d 632, 54 IDELR 307 (7th Cir August 2, 2010). The testimony of the Petitioner's Psychologist was not credible or persuasive. See discussion of this matter above.

Petitioner has not demonstrated that the student needed any of these items in order to benefit from his IEPs. The discussion in the previous section concerning the student's substantial educational progress at is incorporated by reference herein. Accordingly, Petitioner has not demonstrated that the current educational program offered by Respondent denies FAPE to the student for these reasons.

Moreover, the allegations contained in this subsection constitute alleged procedural violations. Procedural violations of IDEA only result in a denial of FAPE where they 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.C. Cir. May 19, 2006); IDEA § 615(f)(3)(E)(ii). In the instant case, given the student's substantial progress at [redacted] it is clear that any procedural violations that may have occurred have not had an impact on his education or caused him educational harm. There has also been no showing of a serious impairment of the parent's right to participate. Accordingly, it is concluded that Respondent did not deny FAPE to the student because the December 2010 and February 2011 IEPs failed to provide certain accommodations, transition services, or group counseling.

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

Issue No. 3: Did Respondent fail to provide FAPE to the student because the December 17, 2009 IEP failed to provide a full-time special education program, does not contain a behavior intervention plan, does not contain a transition plan and because no general education teacher was present?

a. Insufficient Number of Hours

Because it is clear that the record evidence shows that the student is making substantial educational progress under his current educational program at despite the fact that he does not have a full-time special education program, Petitioner's argument with respect to this issue is rejected. The discussion of Issue No. 2a concerning the full-time special education program is incorporated by reference herein.

In addition, there are other reasons to reject this argument as it pertains to the December 17, 2009 IEP. First, Respondent had not yet received the independent educational evaluation from Petitioner's psychologist which suggests that the student should receive a full-time special education program. There is no evidence in the record to suggest that as of 2009, the student should have received a full-time special education program. An IEP is a snapshot not a retrospective; in

judging the appropriateness of an IEP, one must determine what was objectively reasonable at the time that the IEP was written. SS by Shank v. Howard Road Academy 585 F.Supp.2d 56, 51 IDELR 151 (D.DC November 12, 2008). Because Respondent had not yet seen the independent evaluation, it could not have considered it.

More importantly, the student's mother failed to attend the December 17, 2009 IEP team meeting. The December 2009 IEP for the student states that there were documented attempts to contact the parent and that the parent had agreed to attend the meeting but did not show up. She was telephoned during the meeting, but did not respond. It would be inconsistent with the collaborative nature of the special education IEP process to permit a parent to attack an IEP when she did not participate in an IEP team meeting despite reasonable efforts by the school district to attempt to obtain her participation. Shaffer v. Weast, 546 U.S. 49; 44 IDELR 150 (U.S. S. Ct. November 14, 2005).

It is concluded that the student did not need a full-time special education program in December 2009. Petitioner has failed to meet her

burden with respect to this sub-issue. Respondent has prevailed with respect to this issue.

b. Behavior Intervention Plan

Petitioner contends that Respondent's December 2009 IEP is deficient because it fails to contain a behavior intervention plan. IDEA only requires a behavior intervention plan where there has been a proposed disciplinary action and a finding that the behavior was a manifestation of the student's disability. IDEA § 615(k)(1)(F); 34 C.F.R. § 300.530(f). There has been no such showing in the instant case.

Because there has been no showing that the student's various disciplinary actions were the result of behavior that was a manifestation of his disability, there was no requirement that Respondent develop a behavior intervention plan for the student. Petitioner did not argue that the Respondent failed to take appropriate steps to deal with the student's behaviors other than the behavioral intervention plan, and no evidence to support such an argument is contained within the record. IDEA § 614(d)(B)(i); 34 C.F.R. § 300.324(a)(2)(i).

Petitioner has not met her burden with respect to this sub-issue. Respondent has prevailed with respect to this sub-issue.

c. No General Education Teacher; No Transition Plan

Petitioner also contends that the December 2009 IEP was deficient because no general education teacher attended the IEP team meeting and because it failed to contain a transition plan. Said IEP does contain an appropriate postsecondary transition plan. It is difficult to understand why Petitioner argues that there is no transition plan.

Moreover, these allegations with regard to the items alleged in this subsection constitute procedural violations. Procedural violations of IDEA only result in a denial of FAPE where they 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.C. Cir. May 19, 2006); IDEA § 615(f)(3)(E)(ii).

In the instant case, Petitioner has not provided any evidence that the alleged procedural violations with respect to the December 2009 IEP had any impact upon the student's education or caused him any educational harm. In addition, there has been no showing that the

parent's right to participate has been seriously impaired. Accordingly, it is concluded that said procedural violations do not constitute a denial of FAPE.

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

Issue No. 4: Did Respondent deny FAPE to the student by failing to substantially implement the student's December 17, 2009 IEP?

Petitioner contends that Respondent failed to implement the December 2009 IEP. In support of this position, Petitioner provided the testimony of the student and his mother that he did not receive any special education while he was at the public high school before he was

A school district is required to implement all material provisions of a student's IEP. 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).

Respondent contends that the student's IEP was implemented. Respondent presented the testimony of its special education coordinator

Petitioner's psychologist testified that the student's chronic and excessive absenteeism was the result of his disability, particularly his depression. This testimony was not credible or persuasive. The testimony of the psychologist, tellingly, is contradicted by the testimony of the student himself. The student testified that he was absent from school or failed to attend class because of problems with regard to his school uniform, because he was avoiding the police, because he was suspended and because he wanted to hang out with his friends. In addition, the student testified that since he has been he does not miss class or fail to do his work because the consequences of such behaviors would involve Respondent's school psychologist testified credibly and persuasively that the student's absenteeism was not the result of his disability. It is concluded based upon the evidence in the record that the student's problem with regard to absenteeism was of his own making and was not related to or caused by his disability.

Based on the evidence in the record, it is concluded that Respondent substantially implemented the student's December 2009

IEP to the extent that the student was present in school and availed himself of the opportunity to receive his education.

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

RELIEF

A due process hearing officer has brought equitable powers to issue appropriate remedies when a local education agency violates IDEA. A due process hearing officer has broad equitable powers to issue appropriate remedies when a local education agency violates IDEA. School Committee Town of Burlington v. Department of Educ., 471 U.S. 358, 369, 105 S. Ct. 1996, 556 IDELR 389 (1985); Forest Grove Sch. Dist. v. T. A., 129 S. Ct. 2484, 52 IDELR 151 n11 (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); Garcia v. Board of Education of Albuquerque Public Schools, 530 F.3d 1116, 49 IDELR 241 (10th Cir. March 25, 2008); Los Angeles Unified School District v. DL, 548 F. Supp. 3d 815, 46 IDELR 252 (C.D. Calif. March 10, 2008); Bishop v.

Oakstone Academy, 47 IDELR 125 (S.D. Ohio 2007); In re Student With a Disability, 108 L.R.P. 45824 (SEA WV June 4, 2008).

All relief under IDEA is equitable in nature. Compensatory services or compensatory education for a violation of IDEA should be flexible and designed to remedy the harm caused by a violation of the Act. Relief under IDEA should be tailored to the specific facts and circumstances of a particular case, the nature and severity of the violation and the nature and severity of the student's disability. Reid ex rel. Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. March 25, 2005).

In the instant case, Petitioner has proven two violations of IDEA. The first involves the related service of speech language therapy, and the second is a violation of a settlement agreement and/or failure to provide educational services while the student was suspended from March to September of 2010. Concerning the speech language services that should have been included in the December 2010 and February 2011 IEPs, the student's current IEP will be amended to include speech language services as a related service for 30 minutes per week from here on out. Additionally some compensatory services are warranted.

Petitioner's compensatory education plan requests 144 hours of compensatory speech language services. This amount is clearly not warranted. As Respondent's counsel argues, Petitioner is apparently seeking compensation for his entire academic career. Moreover, as has been discussed above, the calculation appears to be based upon the excessive amount of speech/language services of two hours per week and includes a period much broader than the time since the 2010 IEP was implemented. In addition, it appears that the student's speech/language problems have improved since the evaluation as evidenced by the observation of the student by Respondent's speech language pathologist, and the student is now making substantial progress in his current educational program. Thus there is no clear evidence in the record concerning the amount of compensatory speech language necessary to compensate the student for this denial of FAPE. Yet the student is clearly entitled to some compensatory speech language therapy. It is concluded that given the period of denial of services and the student's improvement in speech and in his academic classes and considering the equities of the facts and circumstances of

this case, six hours of compensatory speech language services will properly compensate the student for the improper denial of services.

Concerning the compensatory education for failure to provide services during the student's _____ and/or the failure of Respondent to live up to the settlement agreement that it agreed to, the award of compensatory education should be reduced by a substantial amount because of the student's previous failure to attend class. When balancing the equities prior to making a compensatory education award, it is important to look at the behavior of the parties, particularly the student. This student has had horrendous problems showing up for class. Prior to his _____ he roamed the halls, he played with his friends, but he did not take his academics seriously. In view of the student's horrendous track record with regard to absenteeism, an award of the full amount of compensatory education would not be appropriate.

Because of the student's terrible record with regard to attending class and absenteeism during the 2009-2010 school year, the compensatory education award will be reduced by two-thirds. Given the student's track record, it is highly unlikely that he would have availed himself of any more than one-third of the compensatory educational

services offered to him during this timeframe. Accordingly, it would not be equitable to require Respondent to provide compensatory services that the student likely would not have taken advantage of.

The hearing officer notes with approval that the student has greatly improved his classroom attendance since he has been

It is apparent that the student is attempting to change his bad behaviors in this regard. When balancing all of the equities, however, it would not be fair to require Respondent to provide compensatory education that the student would not have shown up for. Accordingly, the compensatory education amount awarded will be reduced by two-thirds in view of the equitable factor that the student would likely not have taken advantage of the compensatory education had it been provided prior to his

Because the student is the Order herein shall recognize that any personnel who may implement the compensatory education or services shall meet the appropriate qualifications for entry into the facility where the student is located in the event that the student remains incarcerated.

Because compensatory education should be flexible, the parties have the option to alter the award in any way that they may agree. If the parties agree to services other than tutoring or counseling or speech/language therapy for compensatory education or services to satisfy this award, they may do so. If the parties do not so agree, the compensatory education will be as stated in the decision.

ORDER

Based on the foregoing, it is HEREBY ORDERED as follows:

1. The students current IEP is hereby amended to require that Respondent provide 30 minutes per week of speech language therapy as a related service;
2. Unless the parties agree otherwise, Respondent is hereby ordered to reimburse the Petitioner for six (6) hours of speech language therapy as compensatory services. Unless the parties agree otherwise, the cost of said tutoring and/or counseling shall not exceed the market rate for similar services in the Washington, D.C. metropolitan area.

Said compensatory services shall be provided to student within two years of the date of this decision;

3. Unless the parties agree otherwise, Respondent is hereby ordered to reimburse the Petitioner for one hundred and fifty (150) hours of tutoring and/or counseling as compensatory education/services. Unless the parties agree otherwise, the cost of said tutoring and/or counseling shall not exceed the market rate for similar services in the Washington, D.C. metropolitan area. Said compensatory education/services shall be provided to student within two years of the date of this decision;

4. If the student remains any personnel selected to provide the relief stated above must be able to meet any requirements for entry into the facility where the student is located. If the student remains the relief stated above shall be provided to the student at the correctional facility where the student is located.

5. All other relief requested by the instant 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: September 23, 2011

/s/ James Gerl
James Gerl
Hearing Officer