

**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: October 5, 2011

Hearing Officer: James Gerl

OSSE
STUDENT HEARING OFFICE
2011 OCT -5 PM 12:38

HEARING OFFICER DETERMINATION

BACKGROUND

The due process complaint was filed on July 22, 2011. The matter was assigned to this hearing officer on July 25, 2011. A resolution session was convened on August 3, 2011. The resolution meeting did not result in a resolution, but the parties continued to negotiate throughout the 30-day resolution period. The due process hearing was convened on September 23, 2011 at the Student Hearing Office. The hearing officer decision is due to be issued on or before October 5, 2011.

¹ Personal identification information is provided in Appendix A.

The hearing was closed to the public. The student's parent attended the hearing, and the student did not attend the hearing. Six witnesses testified on behalf of the Petitioner and three witnesses testified on behalf of the Respondent at the due process hearing. Petitioner's exhibits 1-8, 12, 15, 16-30, 33-35, and 37-48 were admitted into evidence. Relevance objections were sustained to Petitioner's exhibits 9-11, 13-14, 31-32, and 36. Respondent's exhibits 1, 4-6, 8-14, and 17-25 were admitted into evidence at the hearing. Relevance objections were sustained to Respondent's exhibits 2-3, 7, and 15-16. To the extent that exhibits have been excluded, they will be retained in a sealed envelope with the administrative record for possible use by any reviewing court although they will not play any part in the hearing officer's decision in this case.

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.

Petitioner filed a motion for stay put protection prior to the hearing. The motion was resolved by separate written order which is incorporated herein by reference.

Because of the late hour when evidence was finished being received at the hearing, counsel for the parties requested leave to file written closing arguments. The motion was granted and each party

filed a written closing argument herein. Said arguments have been considered.

ISSUES PRESENTED

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

1. Did Respondent deny FAPE by failing to provide a residential placement for the student?
2. Did Respondent deny FAPE by failing to provide a dedicated aide for the student?
3. Did Respondent deny FAPE by failing to appropriately respond to the student's behavioral issues?

In Petitioner's closing statement, a new issue was raised concerning whether the parent was afforded meaningful participation and new relief was raised in terms of certain evaluations. Because these issues were not identified or discussed at the pre-hearing conference and not included in the pre-hearing order, they were not considered herein.

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-23) (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 March 6, 2009, the student was given a comprehensive psychological evaluation. The evaluator noted that the student had a new home environment and a new school environment at the time of the evaluation. The evaluator noted that the student needed behavior management techniques to control her behaviors that result from her anger. The evaluator noted that according to the student's mother the student threatened others and talked about violence frequently. The evaluator determined that the student is of average cognitive ability. The evaluator recommended that the student's ADHD appears to be the greater source of impact upon her performance at school. The report

recommended improving self-regulation skills of the student through counseling. The evaluator did not recommend a residential placement for the student. (P-25)

3. The student was given a diagnostic assessment by a psychiatrist on December 11, 2009. The evaluator noted a previous psychiatric hospitalization of the student in March 2009, and concluded that the student was not a danger to herself or others. The evaluator provides diagnoses of bipolar (rule out), ADHD and ODD, and he changed the student's medications. The evaluator did not recommend a residential placement for the student. (P-29, P-28)
4. The student was given a psychiatric evaluation on May 1, 2010. Approximately two weeks prior to the evaluation, the student was hospitalized at a psychiatric institute for a two week period. During the psychiatric hospitalization, she was diagnosed with attention deficit hyperactivity disorder and bipolar disorder. The evaluator diagnosed the student as having attention deficit hyperactivity disorder, combined type; disruptive behavior disorder; and rule out bipolar disorder. The evaluator recommended that the student's medications be increased or

changed and that the student continue medication management with mood stabilizers. Concerning school, the evaluator recommended that the student keep a separate pair of eyeglasses and store them at school, that the student continue her IEP in the current setting with a reward system that will engage and motivate the student. The evaluator also recommended family therapy and a full schedule of afternoon activities for the student. The evaluator did not recommend a residential placement for the student. (P-30)

5. On May 11, 2010 and May 18, 2010, the student was given a functional behavioral assessment by Respondent. (R-12)
6. On July 28, 2010, the student's IEP team developed a behavioral intervention plan for the student. The bad behaviors that were targeted by the behavioral intervention plan included behaving improperly when becoming frustrated by not respecting others, verbally and physically; not remaining on task; and having poor self-esteem. The behavioral intervention plan provides a list of rewards and reinforcement and positive behavior supports and

actions that can be taken when the student engages in such improper behaviors. (R-13)

7. The student's IEP team met on July 28, 2010. Present at the meeting were the student's mother, Petitioner's educational advocate, the director of School No. 1, an LEA representative for Respondent, a social worker for Respondent, a teacher for Respondent, and a clinical psychologist. The student's mother and the clinical psychologist participated by telephone. During the course of the meeting, the mother entered the meeting in person. The clinical psychologist reviewed the May 1, 2010 independent psychiatric evaluation. The Team determined that the student was eligible with multiple disabilities because she qualifies for emotional disorder, as well as attention deficit hyperactivity disorder. The psychologist told the committee that the report of the psychiatric evaluation was consistent with the reports of past evaluations and meeting notes. The IEP team also reviewed the results of the functional behavioral analysis and the team reviewed and approved a behavioral intervention plan for the student at this meeting. Petitioner's educational advocate

requested that the team consider a dedicated aide. The team determined that it would see how the student did after she consistently took her medication and would possibly discuss the dedicated aide at a subsequent meeting. The IEP team approved present levels and goals in the areas of mathematics, reading, written expression, and emotional, social and behavioral development. The IEP that was developed as a result of the meeting calls for 25 hours per week of specialized instruction outside the general education environment and 2.5 hours per week of behavioral support services for the student. The IEP includes numerous classroom and assessment accommodations. The IEP provides that the student will receive extended school year services and develops a number of goals therefor. The student's mother agreed with the contents of the IEP. (P-19, P-20, P-21)

8. The student's IEP team met on September 28, 2010. Present were the student's mother by telephone, Respondent's progress monitor, the director of School No. 1, Respondent's special education teacher, and Respondent's social worker. The student's advocate

was not able to attend the meeting despite having confirmed the meeting. The parent was not present at the beginning of the meeting but called in at approximately 10:35 a.m. and was brought up to speed at that point. The notes of the meeting reveal that the team concluded that the student needs one on one, personalized attention, and that if someone is seated near her, she will work well and complete her work. If not, she becomes easily distracted and will seek out attention from either staff or classmates. The student's mother informed the team that she had had a [redacted] with the student the previous night in which the student

The team agreed to the student's mother's request for a dedicated aide. Because she responds well to personalized instruction, the team agreed that the student would have a dedicated aide for a trial period of 90 days. After said trial period, it was agreed that the team would come back to the table and make adjustments if necessary. (P-22)

9. The student ran away from home from approximately November 21, 2010 to approximately March 28, 2011. During this period of

time, she did not attend school at all. (R-21; T of Petitioner's psychologist)

10. The student's IEP team met on May 9, 2011. Present at the meeting were the student's mother, the Petitioner's educational advocate, a court appointed attorney for the student, the director of School No. 1, Respondent's LEA representative, Respondent's social worker, Respondent's special education coordinator (who participated by telephone), Respondent's compliance case manager, and Respondent's teacher. At the meeting, Petitioner's educational advocate asked if the student had a dedicated aide, and Respondent's staff stated that she did not have a dedicated aide. During the meeting, the director of School No. 1 questioned whether the student needed a residential placement. He noted that there had been difficulties at home, as well as at school. Petitioner's educational advocate spoke in favor of a residential placement stating that she did not want the student to have more opportunities to run away from home. Respondent's members on the IEP team stated that a more restrictive setting was not necessary if the student's home problems were not impacting her

education. It was determined that the student's IEP would be implemented at School No. 3. (P-23, P-24, P-25; R-20)

11. On June 8, 2011, Respondent issued a prior written notice stating that the student's program would be implemented at School No. 2. It noted that School No. 2 has an ED program that can meet the student's needs and provide her with FAPE. (P-42)
12. Respondent never provided a dedicated aide for the student. (T of Petitioner's educational advocate; P-25)
13. The program at School No.2, with the addition of a dedicated aide, will provide the opportunity for educational benefit for the student in the least restrictive environment. (Record evidence as a whole)
14. The student was disciplined by Respondent for fighting at school on August 30, 2011 and September 6, 2011. (P-44, P-45)
15. During the 2010-2011 school year, the student was absent 63.5 days and tardy an additional four days. A few of the absences were the result of the student's smelling like marijuana and not being allowed to ride the school bus or the result of her assaulting a police officer, but most of the student's absences were due directly to either problems at home or the student having run

away from home. The student ran away from home from approximately November 15, 2010 through approximately March 28, 2011. During that timeframe, she did not attend school. (R-21)

16. The student received grades of D and C in the first two quarters of the 2010-2011 school year. In the fourth quarter of the 2010-2011 school year, however, she received a B in math and grades of A in four classes: reading, science, social studies and spelling. Her report cards reflect that she does well in her work when an adult sits in close proximity to her. For the fourth quarter of the 2010-2011 school year, the student made the honor roll. The student made good progress in her educational program when she was present and attending school. (R-22, R-23; T of Respondent's school psychologist)
17. The student's behavioral problems are primarily issues involving her home life and her life in the community. The student's behavioral problems are not primarily educational problems. (T of Petitioner's psychologist; T of director of School No. 1; T of student's mother)

18. The student does not require a residential placement for educational reasons. The student has not displayed behaviors severe enough or for a long enough period of time to justify a residential placement for educational purposes. There exist programs in less restrictive environments that can meet the student's educational needs. (T of Respondent's LEA representative; T of Respondent's school psychologist; T of Respondent's residential program manager)
19. The student makes educational progress when an adult is seated nearby. The student requires the services of a dedicated one on one aide to receive educational benefit. (P-22; T of Respondent's school psychologist T of Petitioner's educational advocate)
20. Respondent has appropriately addressed the student's behaviors to the extent that they may impede her learning. (R-12; R-13; P-24)
21. The student would benefit from additional individual counseling. (T of Respondent's school psychologist)
22. Six hours of individual counseling will appropriately compensate the student for the loss of educational benefit as a result of

Respondent's denial of FAPE by failing to provide a dedicated aide despite the determination by her IEP team that the student needed a dedicated aide. (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 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 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 Educational Plan (hereafter sometimes referred to as "IEP") is reasonably calculated to enable a child to receive some educational benefit. Bd. of Educ, etc. v. Rowley, 458 U.S. 178, 102

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

2. A school district must provide a residential placement for a student if a residential placement is essential in order for the child with a disability to receive meaningful educational benefit and primarily oriented toward enabling the child to obtain an education. Richardson Independent School District v. Leah Z, 580 F.3d 286, 52 IDELR 277 (5th Cir. August 21, 2009); McKenzie v. Smith, 771 F.2d 1527, 557 IDELR 119 (D.C. Cir. August 30, 2005); 34 C.F.R. § 300.104.
3. 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); Forest Grove Sch. Dist. v. T. A., 109 L.R.P. 77164 (D. Oregon December 8, 2009); Ashland School District v. Parents of RJ, 53 IDELR 176 (9th Cir. December

7, 2009); Christopher B by Joanne B and Ray B v. Hamamoto, 50 IDELR 195 (D. Hawaii June 19, 2008).

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 the regular classroom with the use of supplementary aids and services cannot be satisfactorily achieved. IDEA § 612(a)(5); 34 C.F.R. §§ 300.114, 300.115; Hinson v. Merritt Educational Center, 51 IDELR 65 (D.D.C. 2008).
5. A school district is required to provide a dedicated aide, or other related service, when such service may be required to assist a child with a disability to benefit from special education. IDEA § 602(26); 34 C.F.R. § 300.34(a); Jaccari J by Sandra J v Bd. of Educ. City of Chicago, Dist. No. 299, 54 IDELR 53 (N.D. Illinois February 23, 2010).
6. IDEA only requires a behavioral 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). An IEP team must, however, consider whether any necessary modifications should be made to a student's IEP, including any intervention, supports or other strategies to address behavior problems that impede the learning of the student or the learning of others. IDEA § 614(d)(4)(A); 34 C.F.R. § 300.324(b)(1) and (2).

7. 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); 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 Christie Independent School District, 110 L.R.P. 49279 (SEA TX July 2, 2010)

8. 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 n. 11 (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 LRP 45824 (SEA WV June 4, 2008).
9. 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. Compensatory education should be qualitative and not quantitative in nature. 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 deny FAPE to the student by failing to provide a residential placement for the student?

Petitioner contends that Respondent denied FAPE to the student by failing to provide a residential placement. Respondent contends that a residential placement is not necessary for this student.

A school district must provide a residential placement for a student if a residential placement is essential in order for the child with a disability to receive meaningful educational benefit and primarily oriented toward enabling the child to obtain an education. Richardson Independent School District v. Leah Z, 580 F.3d 286, 52 IDELR 277 (5th Cir. August 21, 2009); McKenzie v. Smith, 771 F.2d 1527, 557 IDELR 119 (D.C. Cir. August 30, 2005); 34 C.F.R. § 300.104.

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); Forest Grove Sch. Dist. v. T. A., 109 L.R.P. 77164 (D. Oregon December 8, 2009); Ashland School District v. Parents of RJ, 53 IDELR 176 (9th Cir. December 7, 2009); Christopher B by Joanne B and Ray B v. Hamamoto, 50 IDELR 195 (D. Hawaii June 19, 2008).

In the instant case, it is clear that the behaviors for which Petitioner is seeking a residential placement for the student involve problems that occur at home or in the community rather than at school. The student's mother testified that the student has severe problems at home. This included the student running away from home for a period of four months, and home-based fights including one in which the student choked her mother and stabbed her brother in the hand with a knife. The director at School No. 1 testified that the student needs a residential placement because she runs away from home. The psychologist who testified as an expert witness on behalf of Petitioner

did not testify that the student needs a residential placement for educational reasons. Instead, he testified that he believed the student would benefit from a residential placement because of her difficulty in the community with the law and her difficulties at home fighting with her mother and her siblings and that in particular that the student would benefit from a residential placement because it would stop her from running away from home and from failing to take her prescribed medications.

Moreover, neither the psychological evaluation nor psychiatric assessment nor the psychiatric evaluation recommended a residential placement. None of the evaluations of the student in the record support the Petitioner's request for a residential placement.

Petitioner's evidence concerning this issue does not amount to a showing that the student should receive a residential placement to be paid for by Respondent. Petitioner's evidence consists of a description of problems that the student has experienced primarily at home and in the community. Accordingly, such issues may be community or mental health issues but they are not education issues. The primary emphasis of all of Petitioner's evidence in this regard is that the student is having

severe problems at home with her mother and siblings, and in the community. Although these problems, particularly running away from home and not showing up at school, may have an impact upon her education, the problems are primarily in realms other than education. Accordingly, it is concluded that Petitioner has not met her burden with respect to this issue.

By contrast, Respondent's witnesses testified credibly and persuasively that the student does not need the residential placement for educational reasons. To the extent that the student has displayed inappropriate behaviors in school, the frequency and severity of such behaviors has not been such as to require a residential placement in order for the student to obtain a FAPE. When the student is present at school, she is able to learn and she receives educational benefit. The documentary evidence, especially the student's grades and attendance records support the testimony of Respondent's witnesses. To the extent that the testimony of Respondent's witnesses conflict with the testimony of Petitioner's witnesses in this regard, the testimony of Respondent's witnesses is more credible and persuasive for the reasons stated above.

Moreover, Petitioner's argument also ignores the LRE requirement. IDEA requires that Respondent educate the student in the least restrictive environment. 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 the regular classroom with the use of supplementary aids and services cannot be satisfactorily achieved. IDEA § 612(a)(5); 34 C.F.R. §§ 300.114, 300.115; Hinson v. Merritt Educational Center, 51 IDELR 65 (D.D.C. 2008).

In this case there has been no justification for a residential education placement, one of the most restrictive placements possible. The evidence in the record shows that Respondent's program at School No. 2 can implement the student's IEP and that it constitutes the least restrictive environment that is appropriate to meet the student's individual needs. Because respondent can provide FAPE in the least restrictive environment to the student at School No. 2, a residential educational placement would be inappropriate.

It is concluded that Petitioner has not met her burden with respect to this issue. Respondent has prevailed with regard to this issue.

Issue No. 2. Did Respondent deny FAPE to the student by failing to provide a dedicated aide for the student?

Petitioner contends that the student needs a dedicated aide in order to benefit from her education. Respondent contends that the student does not need such an aide. A school district is required to provide a dedicated aide, or other related service when such service may be required to assist a child with a disability to benefit from special education. IDEA § 602(26); 34 C.F.R. § 300.34(a); Jaccari J by Sandra J v Bd. of Educ. City of Chicago, Dist. No. 299, 54 IDELR 53 (N.D. Illinois February 23, 2010).

In the instant case, the student's IEP team determined that the student works well with personalized, one to one contact. Because the student responds to well to personalized attention, the student's IEP team determined that it would provide a dedicated aide to the student

for a trial period of 90 days. The team decided this at the September 28, 2010 meeting.

Despite this decision by the IEP team, the student's IEP was never changed to reflect the addition of the dedicated aide. More importantly, Respondent never provided a dedicated aide for the student. Thus, Respondent failed to comply with the decision of the student's IEP team to provide a dedicated aide for the student.

Moreover, the testimony of Petitioner's witnesses with regard to the student's need for a dedicated aide is corroborated by the testimony of Respondent's school psychologist who reviewed the student's records. After reviewing the student's educational records, Respondent's school psychologist testified that the student appears to respond very well to one on one, personalized attention. Accordingly, it was the recommendation of Respondent's school psychologist, who testified as a witness for Respondent and not Petitioner, that the student should be provided with a one on one dedicated aide. The purpose of the recommendation was to assist with the student in sustaining her attention and not losing focus by redirecting the student and ensuring that she took enough breaks to be able to learn. This is strong evidence

indeed that the student requires a dedicated one to one aid in order to benefit from her education. The failure of respondent to provide the dedicated aide that the student's IEP Team decided that she needed was a denial of FAPE.

It should be noted that Respondent has provided no clear explanation in the record as to why it has not provided a dedicated aide for the student. Given that Respondent's own witness supports the contention of Petitioner that the student should have a one on one dedicated aide, the failure to provide an aide was clearly a denial of FAPE. The order portion of this decision will amend the student's IEP to so provide.

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

Issue No. 3: Did Respondent deny FAPE to the student by failing to appropriately respond to her behavioral issues.?

Petitioner contends that Respondent denied FAPE to the student by failing to adequately address the student's behavioral issues.

Respondent contends that it has appropriately addressed the student's behavioral issues.

An IEP team must consider whether any necessary modifications should be made to a student's IEP, including any intervention, supports or other strategies to address behavior problems that impede the learning of the student or the learning of others. IDEA § 614(d)(4)(A); 34 C.F.R. § 300.324(b)(1) and (2).

In this case, Petitioner contends that Respondent should have developed a behavioral intervention plan for the student because of her attendance and community issues. A behavioral intervention plan is only required, however, in those instances where proposed discipline for a student with a disability results in a finding of **no** manifestation. IDEA § 615(k)(1)(F); 34 C.F.R. § 300.530(f).

In the instant case, there is no showing and there is no evidence in the record that the student had a proposed disciplinary action that resulted in a finding that the behavior was a manifestation of the student's disability. Accordingly, Respondent was not required to develop a behavior intervention plan to address such behaviors.

It should be noted, however, that the student did have a behavioral intervention plan that was developed by Respondent and that addressed a number of behaviors. No evidence in the record shows that said behavior intervention plan was not being implemented or that the other interventions developed by Respondent to deter the student's behaviors were inappropriate. It is clear from the evidence in the record that Respondent appropriately addressed the student's behavioral issues. Petitioner's evidence does not support its contention with regard to this issue.

It is concluded that Petitioner has not carried her burden with respect to this issue. Respondent has prevailed with regard to this issue.

RELIEF

The only violation of IDEA proven by Petitioner herein involves its failure to provide a dedicated aide which the student required. The other issues raised by Petitioner have not been proven.

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 n. 11 (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 LRP 45824 (SEA WV June 4, 2008).

The first item of relief involves the student's IEP. The student's IEP must be amended to include the provision of a dedicated aide. The order portion of this decision shall amend the student's IEP to require the provision of a dedicated one on one aide.

Concerning compensatory education, Petitioner provided the testimony of Petitioner's educational advocate and a related compensatory education plan developed by said advocate. The compensatory education plan is designed to remedy the violations alleged by Petitioner but not proven. Said compensatory education plan

requests 100 hours of independent counseling services, 40 hours of independent mentoring services and 100 hours of independent tutoring services as compensatory education. Said request is clearly excessive. As counsel for Respondent points out in its closing statement, the compensatory education plan submitted by the educational advocate is based upon extreme speculation. Indeed, the testimony of the advocate that the student may have engaged in negative behaviors or run away from home because she had no dedicated aide in the classroom is inherently non-credible. There is no evidentiary basis for this testimony, and it is based upon highly speculative and unfounded conclusions. Moreover the testimony of the advocate established no logical connection between the absence of the dedicated aide and the highly speculative conclusions he developed therefrom. The record evidence provides no support for these conclusions. The written compensatory education plan and the testimony provided by the educational advocate with respect thereto are accorded no weight.

The student is entitled to some compensatory education as a result of the denial of FAPE, however. The evidence in the record best supports an award of some individual counseling to compensate for the

educational harm to the student as a result of the denial of FAPE by Respondent. It should be noted that the dedicated aide is a paraprofessional and not a teacher so that tutoring would seem to be inappropriate as relief with respect to the violation. The evidence in the record reveals, however, that the student would benefit from some additional individual counseling. In particular, the student's need for additional individual counseling is supported by the testimony of a witness called by Respondent, Respondent's school psychologist. The school psychologist testified that from her review of the student's records that the student's educational needs include additional individual counseling. Given the period of the denial of FAPE and the student's individual educational need for individual counseling, it is concluded that nine hours of individual counseling would be appear to be appropriate. Accordingly, the order portion of this award will include additional individual counseling as compensatory education/services for the denial of FAPE committed by Respondent, subject to the modification for equitable reasons set forth below.

Because all relief under IDEA is equitable, the conduct of the student herself is relevant in determining the amount of individual

counseling she should receive as compensatory education. In this case, because the student was absent and made herself unavailable to receive her education for a long period of time during the relevant timeframe, it is concluded that the student would not have received any benefit from a dedicated aide for a substantial portion of the time that FAPE was denied because she did not show up to school for a period of over four months. The student could not benefit from the aide's presence when the student was not at school by her own choice. Accordingly, a reduction in the amount of individual counseling to be awarded to the student as compensatory education/services for equitable reasons to six hours is warranted.

It is concluded from the facts and circumstances of this case that the six hours of compensatory individual counseling will appropriately compensate the student for the educational harm she has suffered as a result of the denial of FAPE. 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 substitute other services for individual counseling or otherwise change the compensatory education

award, they may do so. If the parties do not so agree, the compensatory education will be as stated in this decision.

ORDER

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

1. The student's current IEP is hereby amended to require that the student be provided the services of a dedicated one on one aide. The student's IEP team is directed to review whether the student continues to need the services of a dedicated aide at the student's future IEP Team meetings; and

2. Unless the parties agree otherwise, Respondent is hereby ordered to reimburse Petitioner for six hours of individual counseling as compensatory services to be delivered by a provider to be selected by the Petitioner. Unless the parties agree otherwise, the cost of said counseling shall not exceed the market rate for similar services in the Washington, D.C. metropolitan area. Said compensatory services shall be provided to the student within one year of the date of this decision; and

3. 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: October 5, 2011

/s/ James Gerl
James Gerl,
Hearing Officer