

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

Student Hearing Office
810 1st Street, N.E., 2nd Floor
Washington, DC 20003

STUDENT,¹
through the Parent

Petitioner,

v

District of Columbia
Public Schools,

Respondent.

Date Issued: January 15, 2011

Hearing Officer: James Gerl

Case No:

Hearing Date: January 4 and 5, 2011

Room: 2008

STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

BACKGROUND

The due process complaint was filed on November 12, 2010. The matter was assigned to this hearing officer on November 15, 2010. A resolution session was held on December 1, 2010, and the parties did not reach an agreement. The hearing officer decision is due to be issued on January 15, 2011. A prehearing conference by telephone conference call was convened on December 6, 2010. The due process hearing was convened at the Student Hearing Office on January 4 and 5, 2011. The

¹ Personal identification information is provided in Appendix A.

hearing was closed to the public. The student's parent attended the hearing and the student attended the hearing. Five witnesses testified on behalf of the Petitioner and four witnesses testified on behalf of the Respondent. Petitioner's exhibits 1-11 were admitted into evidence. Respondent's exhibits 1-7 were admitted into evidence. Joint exhibits 1 – 4 were admitted into evidence.

JURISDICTION

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

PRELIMINARY MATTERS

All proposed exhibits and testimony received into evidence and all supporting arguments submitted by the parties have been considered.

To the extent that the evidence and arguments advanced by the parties are in accordance with the findings, conclusions and views stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

The Petitioner requested as relief in this case that Respondent fund a prospective private placement. The hearing officer asked the parties to submit prehearing briefs regarding the following issue: under what circumstances, if any, should a hearing officer exercise his discretion to award prospective private placement as relief? Both parties submitted briefs on the issue. The question of relief, however, was not reached in this decision because the hearing officer did not find any violation of IDEA or the federal regulations or the D.C. statute or regulations.

ISSUE PRESENTED

The following issue was identified by counsel at the prehearing conference and evidence concerning this issue was heard at the due

process hearing: were the IEPs developed for the student on June 8, 2009, July 7, 2010 and September 7, 2010 appropriate? Petitioner contends that the level of services set forth by said IEPs are inadequate and accordingly that the educational placements contained therein were inappropriate. Respondent contends that said IEPs provide a free and appropriate public education to the student and that the student, in fact, made progress under the IEPs when he did attend class.

Petitioner presented some evidence by its special education consultant that the student was deprived of a free and appropriate public education for the period from the time he enrolled in Respondent in January 2009 until the first IEP in question herein which was developed in June 2009. This matter was not raised as an issue in the due process complaint or when the issues were clarified at the prehearing conference herein. Accordingly, the argument is not considered for purposes of this decision. IDEA §615(f)(3)(B); 34 CFR §300.511(d).

FINDINGS OF FACT

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

1. The student attended _____ grade and _____ grade in another state. (Stipulation by counsel on the record). (The stipulations of fact were stated by counsel at the beginning of the second day of hearing on the record.) (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, "J-1," etc. for joint exhibits; and "HO-1," etc. for hearing officer exhibits; references to testimony at the hearing is hereafter designated as "T".)
2. The student enrolled in Respondent in January 2009 and attended one of Respondent's schools until June of 2009. He was enrolled in seventh grade. (Stipulation by counsel.)
3. From August 2009 to June of 2010, the student attended eighth grade at another of Respondent's schools. (Stipulation by counsel.)

4. From August 2010 to the present, the student has attended ninth grade at one of Respondent's high schools. (Stipulation by counsel.)
5. Respondent administered the Woodcock-Johnson III tests of achievement to the student on May 28, 2009. The evaluation concluded that the student was in the very low range with regard to his academic skills. His fluency with academic tasks and his ability to apply academic skills are both within the low range. When compared with others at his age level, his performance was average in written expression, low average in written language, low in broad reading and very low in mathematics and math calculation skills. (P-1)
6. On May 19, 2009, Respondent conducted a psychological reevaluation of the student. The evaluator found that the student was in the low average range of cognitive abilities with a full scale I.Q. score of 88. He had average ability in processing speed, verbal comprehension and perceptual reasoning. He had a borderline score in working memory. The evaluator notes that the

student's mother sees him as having more problematic behavior than the school authorities do. (P-2)

7. On June 8, 2009, there was a meeting of the student's IEP team. Present for the meeting were the student's mother, a social worker, a school psychologist, two special education teachers, a special education specialist, and two other individuals whose titles were not identified. (R-2; P-3)
8. The June 8, 2009 IEP states present levels of educational performance, develops a number of goals for the student in the areas of mathematics, reading and emotional and social behavior development. Said IEP calls for 15 hours per week of specialized instruction outside the general education environment and an additional 30 minutes per week of behavioral support services, or counseling, outside the general education environment. In addition, the IEP provides for the following classroom accommodations: small group work, tests administered over several days, breaks between subtests, extended time on subtests, preferential seating, computers, calculators and reading of test questions in mathematics only. The student's mother signed the

June 8, 2009 IEP and checked the box noting that she agreed with the contents of the IEP. (P-3; R-2)

9. On June 15, 2009, the student received a seventh grade report card in which he received B's in health and physical education; C's in library, media, art, mathematics and English; and D's in science and world history and geography. His history teacher noted that he lacks initiative. The student was absent a total of nine days, 7½ of which were unexcused. He was also tardy 37 times and one of his teachers noted his excessive tardiness on the report card. (P-6)
10. On April 21, 2010, an IEP progress report was issued for the student. In said progress report, it is noted that the student was progressing on 10 of 13 IEP goals. Two of the comments on the progress report reflect that the student's multiple absences were adversely affecting his educational progress. (R-5)
11. In May and June of 2010, the student was given an independent psychoeducational evaluation. The report of the evaluator found that the student had significant academic delays as compared to his non-disabled peers of the same age. The evaluator

recommended that the student be placed in a separate full-time special education school with a small class size and small student/teacher ratio. The report recommended that the student be presented with information in context rather than memorization tasks. In addition, the report indicated that the student receive a psychiatric consultation to determine whether psychotropic medication would be helpful. The report contained a diagnosis that the student suffered from attention deficit hyperactivity disorder; and an adjustment disorder with depressed mood. (J-1)

12. On June 18, 2010, the student received an eighth grade report card from Respondent. In it, he received an A in physical education, a B in advisory MS, C's in art, U.S. history and geography and French language and culture, a C- in science, a D+ in English and D's in algebra and choral music. He had a total of 29 absences, 3 of which were unexcused and 15 tardies. His math teacher noted that he lacks initiative. His choral music instructor noted excessive absences from class. (P-5)

13. On July 5, 2010, Respondent's school psychologist performed a review of the independent educational evaluation provided by the student that occurred in May and June 2010. The reviewer notes that the student's IEP has mistakenly listed that the student's disability classification as speech and language impairment. The reviewer noted that this was an error, and that his disability should be coded as a specific learning disability. It was recommended that the coding on the IEP be corrected from SLI to SLD. Respondent's school psychologist notes that the evaluator, in the independent psychological evaluation, made no classroom or school observation of the student in preparing the evaluation. The school psychologist also notes that the evaluator failed to interview or speak with any of the student's teachers in assessing his educational environment. The reviewer recommends that the student continue to receive social-emotional/behavioral support from the school's social worker or psychologist to address self-esteem and anger management deficits. The psychologist also recommended that the student's teachers maintain the student's attention by presenting him with a variety of tasks and by

breaking longer tasks down into smaller parts. The report also recommends positive reinforcement for the student. In addition, the reviewer noted that the student's poor school attendance has been impacting the student's educational performance. (R-3)

14. The student's IEP team met on July 7, 2010. Present at the meeting were the student's mother, Petitioner's attorney, Petitioner's investigator, a special education coordinator, a psychologist a special education teacher, a general education teacher, and a social worker. One of the purposes of the meeting was to review the results of the independent psychological evaluation furnished by the parent. Respondent's school psychologist explained her review of the independent psychological evaluation to the IEP team. She noted that the evaluator failed to contact the teachers of the student and that the evaluator failed to observe the student at school. She also noted that the evaluator used 2005 assessment data that was not available to the team to compare. The IEP team discussed the student's history of poor attendance at school. The parent and her representatives requested a full-time special education setting.

The other members of the IEP team did not agree that the student needed such a restrictive setting. The representatives of Respondent on the IEP team recommended that the student improve his attendance. The team changed the student's primary disability to multiple disabilities, inasmuch as he was eligible under the categories of both specific learning disability and other health impairment because of his attention deficit hyperactivity disorder. The student's present levels of educational performance and goals were changed to reflect the results of the independent psychological evaluation. The IEP requires 15 hours per week of specialized instruction outside the general education environment and 30 minutes per week of behavioral support services outside the general education environment. In addition, the IEP requires a number of classroom accommodations, including: interpretation of oral directions, repetition of directions, simplification of oral directions, translations of words and phrases, reading of test questions, provision of calculators, preferential seating, a location with minimal distractions, small group testing, tests administered

over several days, breaks between subtests and extended time on subtests. The IEP also includes a transition plan. (J-2; R-1)

15. On September 7, 2010, the student's IEP team met for a "30-day" review of his previous IEP. Present at the meeting were the student's mother, the Petitioner's attorney, Petitioner's investigator, a general education teacher, a special education teacher, a special education coordinator, a social worker, and an IEP coordinator. The staff of Respondent on the IEP team recommended that the goals remain the same and that the number of hours of service be maintained but provided in a less restrictive setting with 7.5 hours in the general education setting and 7.5 hours outside the general education setting. The parent and her representatives disagreed with the team's decision to provide the services in a less restrictive setting, wanting a full-time special education program instead. The IEP team adopted the recommendations of the staff of Respondent over the disagreement of Petitioner and her representatives. (J-3, J-4)
16. On October 28, 2010, the student received a ninth grade report card for the first advisory (or marking period). On the report card,

the student received F's in biology and comprehensive development and extended literacy. He received D's in algebra, U.S. history, English and math resource. Four of the student's teachers made comments that the student is excessively absent from class, and two of them stated that he does not complete class assignments, and two of them stated that he lacks initiative. (P-4)

17. On December 1, 2010, a resolution meeting was conducted for this due process complaint. Present at the meeting were the student's mother, Petitioner's attorney, Petitioner's investigator, Respondent's compliance case manager, Respondent's special education coordinator, Respondent's special education case manager and Respondent's social worker. At the meeting, Petitioner and her representatives again requested a full-time special education IEP placement. The social worker noted that the student had not attended any of the counseling sessions at school, but that she would like to encourage him to go back. The social worker stated that when she goes to his classes, he is not present in the classes. The student's mother noted that he is in outside counseling now, but the special education case manager

noted that counseling was available to the student at the school. Respondent's representatives noted that they had offered tutoring at the school, but that the student had refused it. Respondent's representatives stated that they did not want to increase the number of hours of special education while the student, because of his absences, was not utilizing the resources and supports that Respondent had put in place for him. The special education case manager recommended an attendance sheet to encourage the student to attend class and let his mother know if he was attending classes. Petitioner's position was that only a nonpublic school would be acceptable as a settlement. The complaint was not resolved at the resolution meeting. (R-7)

18. When the student attended his classes at Respondent, he did make some educational and academic progress. (T of Respondent's special education teacher for 8th grade; T of Respondent's special education teacher/case manager for high school; R-5)
19. The student has a severe attendance problem. He frequently did not attend class even though he was generally in the school

building. He also failed to attend his counseling sessions. For the period from August 16, 2010 to November 17, 2010, the student had a total of 222 absences, of which 149 were unexcused. In addition, he was late to class an additional 36 times. The student's extreme problem with regard to absenteeism adversely affected his academic progress, and it has prevented him from accessing his education (R-6; T of student's mother; T of Respondent's special education coordinator; T of Respondent's special education teacher for 8th grade; T of Respondent's special education teacher/case manager for high school; T of Respondent's school psychologist; R-1; R-5; R-7; P-4; P-5)

20. On the day that Petitioner's expert special education consultant observed the student at school, the student was absent from two of the three classes that she observed. The student was present at the third class because the teacher went out into the hall, found the student and brought him back. (T of Petitioner's special education consultant)
21. The student applied to the same private school that he now seeks to have Respondent fund during the summer of 2010. The student

was denied admission at that time because he failed to attend the second day of mandatory classes because he was absent. (T of Petitioner's witness, the associate head of the private school)

22. The private school at which Petitioner requests that Respondent fund a placement for the student has only full-time special education students. The private school has admitted the student provided that there is an order funding it. If the student attended said school, he would have no interaction with his non-disabled peers while he was there during the school day. (P-7; T of the associate head of the private school).

23. The student was not the victim of bullying on the basis of his disability or any other basis while he attended Respondent's high school. The student did have some type of adverse encounter with another male student. The other student believed that the student was flirting or otherwise inappropriately talking to the first student's girlfriend. The other boy instructed the student not to do so in the future. Aside from this one altercation, there is no other evidence in the record that the student was bullied or subjected to an unsafe environment while at school at Respondent.

(T of student's mother; T of Petitioner's special education consultant; T of Respondent's special education coordinator)

24. The IEPs developed by Respondent for the student on June 8, 2009, July 7, 2010, and September 7, 2010 were reasonably calculated to provide some educational benefit for the student. When the student attended school and availed himself of the supports and resources made available for him by Respondent, he did make some educational progress. (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 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); Kerkham v. Superintendent, D.C. Public Schools, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

2. IDEA does not require that a school district maximize the potential of a child with a disability; rather, it requires that an IEP be reasonably calculated to confer some educational benefit. Bd. of Educ. etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); Kerkham v. Superintendent, D.C. Public Schools, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).
3. 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 the education in the regular classroom with use of supplementary aids and services cannot be achieved satisfactorily. IDEA § 612(a)(5); 34 C.F.R. §§ 300.114; 300.115.

4. The IEPs developed by Respondent for the student on June 8, 2009, July 7, 2010, and September 7, 2010 are appropriate and provide a free and appropriate public education to the student in the least restrictive environment. Said IEPs are reasonably calculated to provide some educational benefit to the student.
5. Where excessive absenteeism by a student prevents him from accessing his education, there can be no claim for a denial of FAPE. In re student with a Disability 55 IDELR 25 (SEA NY 6/11/2010); Middleboro Public Schs 110 LRP 50021 (SEA Mass. 6/11/2010); Harrisburg City Schs 55 IDELR 149 (SEA Penna. 5/26/2010). In the instant case, the student's excessive absenteeism prevented him from accessing his education.
6. Where a school district fails to stop improper bullying, or otherwise fails to provide a safe learning environment, the result

may be a denial of FAPE if it prevents the student from receiving benefit from his IEP. Shore Regional High School Bd. of Educ. v. P.S., 381 F.3d 194, 41 IDELR 234 (3d Cir. 8/30/2004); Stringer v. St. James R-1 Sch. Dist., 45 IDELR 179 (8th Cir. 5/3/2006); Gagliardo v. Arlington Central Sch. Dist., 489 F.3d 105, 48 IDELR 1 (2d Cir. 5/30/2007); Lillbask ex rel. Mauclaire v. State of Connecticut, Dept. of Educ., 397 F.3d 77, 42 IDELR 230 (2d Cir. 2/2/2005). In the instant case, the student was not subjected to bullying or an unsafe environment while at school.

DISCUSSION

Merits

Issue No. 1: Were the IEPs developed for the student on June 8, 2009, July 7, 2010 and September 7, 2010 appropriate? The question in this case is whether three specific IEPs for the student were in violation of IDEA. Petitioner and her witnesses testified that the three IEPs in question were inappropriate because they did not provide the student

with a sufficient level of services. Petitioner and her witnesses testified that the student needs a full-time special education placement.

In contrast, Respondent's witnesses testified that the IEPs in question were appropriate and that the student made progress under said IEPs when he in fact attended his classes.

The U.S. Supreme Court has established a two part test for determining whether a school district has provided a free and appropriate public education to a student as required by IDEA. A school district must comply with the procedural safeguards set forth in IDEA and there must be an analysis of whether the IEP is reasonably calculated to enable the child to receive some educational benefit. Bd. of Educ., etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); See Kerkham v. Superintendent, D.C. Public Schools, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991). In the instant case, the testimony and evidence produced by Respondent is more credible and persuasive than the testimony and evidence presented by the Petitioner for the reasons set forth below.

First, the testimony of Petitioner's witnesses is discounted because they apply a potential maximizing standard. The law does not

require a school district to do what is most beneficial for or maximize the potential of a student with a disability; rather, IDEA requires only that an IEP be reasonably calculated to confer some educational benefit. Bd. of Educ., etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); See Kerkham v. Superintendent, D.C. Public Schools, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991). For example, the Petitioner's special education consultant described the student's needs in terms of what he needs in order to make "significant progress." Similarly, she described his needs in terms of what he needed to "succeed." This witness was clearly assessing the student's "needs" according to the wrong standard. It is clear that the educational consultant was using a potential maximizing standard to evaluate the student's needs. Similarly, Petitioner's psychologist, on cross-examination, admitted that she was describing the student's needs in terms of what would be the "best" environment or "most appropriate" environment during cross-examination. Similarly, the Petitioner's psychologist seemed to view an IEP as a guarantee that a student would make as much progress as his non-disabled peers. This is evident from her frequent mention of the gap between the student's test

scores and where he should be if he were making the same test scores as his non-disabled peers. The key witnesses presented by petitioner offered testimony regarding the student's needs as determined by the wrong standard. Accordingly, their credibility and persuasiveness is diminished.

Moreover, the testimony of Petitioner and Petitioner's witnesses is accorded less credibility and weight than the testimony of Respondent's witnesses because Petitioner's witnesses' testimony completely ignored the least restrictive environment requirement of IDEA. IDEA requires that to the maximum extent appropriate, children with disabilities be educated with children who are not disabled and IDEA requires that special classes, separate schooling or other removal of students with disabilities from the regular education environment 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 achieved satisfactorily. IDEA § 612(a)(5); 34 C.F.R. §§ 300.114 – 300.120. Indeed, Petitioner's witness, the head of the private school to which Petitioner was seeking an order to have the student attend, testified that all students at her school were in a full-time special

education placement. It is clear that the student would have no interaction with his non-disabled peers if the student was placed in said school. The evidence in the record does not justify such an extremely restrictive placement for the student. Indeed, given that the student's academic difficulties are likely the result of his non-attendance, see discussion below, it is premature to conclude that a more restrictive environment is appropriate for him; he hasn't yet tried the less restrictive environment offered by Respondent because he does not attend classes.

In addition, the testimony of Petitioner's witnesses was generally less credible than the testimony of Respondent's witnesses. This conclusion is based upon the demeanor of the witnesses as well as the following factors: Petitioner's psychologist based some of her conclusions on documents that were not in evidence and have never been shared with Respondent concerning 1995 Woodcock-Johnson scores while the student was in a school district in a different state. In addition, Petitioner's psychologist appeared to base some of her conclusions concerning what placements were available in Respondent's school system based upon her own experiences as parent of a child with

special needs rather than upon the evidence that was in the record in this hearing. Moreover, Petitioner's psychologist made her conclusions without ever observing the student at school and without having any conversations with the student's teachers.

The testimony of the Petitioner's educational consultant was diminished by the fact that she exhibited a very defensive demeanor on cross-examination particularly when questioned about the student's severe attendance problems. In addition, the testimony of Petitioner's educational consultant is diminished by virtue of the fact that she testified that the student's mother told her that Respondent had never offered any attendance plan; this testimony contradicts the documentary evidence as well as the testimony of the student's mother and Petitioner's investigator that an attendance sheet was offered by Respondent at the resolution session in this case.

The testimony of Petitioner's investigator was impaired by the fact that she changed her testimony during cross-examination – first saying that at the December 1, 2010 resolution session the student's English teacher said that the student was doing well in a general education class to saying that the student was only doing okay in that class. In

addition, Petitioner's investigator contradicted the testimony of the mother by saying that the mother agreed to consider the attendance sheet offered at the resolution session.

Also, it is significant to note that Petitioner's counsel during closing argument conceded that the student did in fact make some educational progress at Respondent's schools while in small group settings. This concession vitiates the allegation that the student's IEPs denied the student FAPE in violation of IDEA.

By contrast, it was the credible and persuasive testimony of Respondent's witnesses that the student did make some academic progress when he came to class and attended and did the work. It was their testimony further that the student did not do as well as he could in school because he did not attend class and avail himself of the services offered by Respondent.

Indeed, the testimony of the student's current special education teacher and of his previous special education teacher that the student makes some progress when he attends school is corroborated by the fact that the documentary evidence from the 2009-2010 school year shows

that the student made progress on 10 of his 13 IEP goals during the first three marking periods of that school year.

Where excessive absenteeism by a student prevents him from accessing his education, there can be no claim for denial of FAPE. In re student with a Disability 55 IDELR 25 (SEA N.Y. 6/11/2010); Middleboro Public Schs 110 LRP 50021 (SEA Mass. 6/11/2010); Harrisburg City Schs 55 IDELR 149 (SEA Penna. 5/26/2010). All of the student's current teachers told Respondent's special education coordinator that the student was having extreme attendance problems. The special education coordinator learned of the attendance issues when he reviewed the allegations of this complaint.

It is perhaps an understatement to say that the student has an extreme attendance problem. The student simply refuses to go to class. For the period from August 16, 2010 to November 17, 2010, the student had 222 absences from school, 149 of which were unexcused. It is abundantly clear from the testimony of Respondent's witnesses and from the documentary evidence that the absences by the student were so extreme that they are adversely affected his educational performance.

It is significant to note that even on the day that the student was to be observed at school by his own expert witness – educational consultant; he failed to attend two of the three classes observed by the witness. He only attended the third class because the teacher went out into the hall and found him and brought him back. Moreover, when the student applied to the same private school he now seeks an order compelling Respondent to fund during the summer of 2010, the previous school year, the student was denied admission into said school because he failed to attend the required second day of class at the private school. In addition, he also fails to attend the counseling sessions that Respondent provides as a related service pursuant to his IEPs. It is clear that the student does not avail himself of the educational opportunities presented to him.

In view of the foregoing, it must be concluded that the three IEPs in question were reasonably calculated to and did provide the student some educational benefit. Bd. of Educ., etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); See Kerkham v. Superintendent, D.C. Public Schools, 931 F.2d 84, 17 IDELR 808 (D.C.

Cir. April 26, 1991). Accordingly, Petitioner's claim that said IEPs denied FAPE for the student is rejected.

One other item raised by Petitioner needs to be addressed. The student's mother testified that the student has been a victim of bullying while at Respondent's school. A number of courts have held that a school district's failure to stop bullying or failure to provide a safe environment may constitute a denial of FAPE. See Shore Regional High School Bd. of Educ. v. P.S., 381 F.3d 194, 41 IDELR 234 (3d Cir. 8/30/2004); Stringer v. St. James R-1 Sch. Dist., 45 IDELR 179 (8th Cir. 5/3/2006); Gagliardo v. Arlington Central Sch. Dist., 489 F.3d 105, 48 IDELR 1 (2d Cir. 5/30/2007); Lillbask ex rel. Mauclaire v. State of Connecticut, Dept. of Educ., 397 F.3d 77, 42 IDELR 230 (2d Cir. 2/2/2005).

In the instant case, however, when the student's mother was asked for details concerning the alleged bullying, it became clear that the student was not bullied on the basis of his disability and that in fact the dispute he was having at school appeared not to be bullying at all. Instead, the student apparently received a threat from another student after a dispute concerning whether the student had had a conversation

with the other boy's girlfriend. That alleged bullying was really only a fight over a girl and was corroborated both by the testimony of Petitioner's witness/educational consultant and by Respondent's witness/special education coordinator, who investigated the alleged bullying. This incident cannot fairly be characterized as bullying. Accordingly, it is concluded that the student was not the victim of bullying and that he was not denied FAPE by Respondent as a result of any bullying or allegedly unsafe environment.

Petitioner's complaint, as clarified at the prehearing conference, involves only a challenge to the level of services provided by the three IEPs in question. Petitioner does not pursue any procedural violations. Accordingly, it is concluded that the IEPs in question were reasonably calculated to confer educational benefit upon the student. Bd. of Educ., etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); See Kerkham v. Superintendent, D.C. Public Schools, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

The Petitioner has not carried her burden with regard to the issue alleged by the complaint. The Respondent has prevailed on the issue herein.

ORDER

Based on the foregoing, it is HEREBY ORDERED that the complaint in this matter is dismissed with prejudice. None of the relief requested by Petitioner is awarded.

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: January 15, 2011

/s/ *James Gerl*

James Gerl
Hearing Officer