

NOV 22 2010

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

Student Hearing Office
1150 5th Street, S.E.
Washington, DC 20003

STUDENT,¹
through the Parent

Petitioner,

v

District of Columbia
Public Schools,

Respondent.

Date Issued: November 2, 2010

Hearing Officer: James Gerl

Case No:

Hearing Dates: October 20 & 22, 2010

Room: 2008

HEARING OFFICER DETERMINATION

BACKGROUND

The due process complaint was filed on August 13, 2010. The matter was assigned to this hearing officer on August 17, 2010. A resolution session was convened on August 31, 2010. One continuance in this matter was granted for a total of 18 calendar days extending the decision deadline to November 2, 2010. The due process hearing was convened at the Student Hearing Office on October 20 and 22, 2010. The hearing was closed to the public; the student's parent attended the

¹ Personal identification information is provided in Appendix A.

hearing and the student did not attend the hearing. Five witnesses testified on behalf of Petitioner, and six witnesses testified on behalf of Respondent at the due process hearing. Petitioner's Exhibits 1 through 12, 15 through 18, 21 through 26, and 30 through 36 were admitted into evidence at the hearing. Relevance objections were sustained to Petitioner's Exhibits 13, 14, 19, 27, 28 and 29. Petitioner's Exhibit 20 was admitted for the sole purpose of the description of a classroom observation contained therein. Respondent's Exhibits 1 through 18 were admitted into evidence at the hearing. The exhibits that were not admitted into evidence based on relevance objections were included with the administrative record in an envelope that has been marked and sealed for purposes of review by any reviewing court. However, the exhibits that were excluded were not considered in terms of the preparation of this Hearing Officer Determination.

JURISDICTION

This proceeding was invoked in pursuant to the provisions of the Individuals With Disabilities Education Act ("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 ("District" or "D.C.") Municipal Regulations ("DCMR"), re-promulgated on February 19, 2003; 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 two issues were identified by counsel at the pre-hearing conference and evidence concerning these issues was heard at the due process hearing:

1. Did Respondent violate IDEA by failing to provide transportation for the student to attend summer camp during summer 2010 pursuant to a May 1, 2010 Hearing Officer Determination?
2. Did Respondent deny FAPE to the student because the IEP developed on July 2, 2010 did not provide for a full-time special education program?

FINDINGS OF FACT

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

1. The student was born on _____ and was _____ years old at the time of the due process hearing. (R-6; stipulation by counsel 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 and "HO-1," etc. for the hearing officer exhibits; references to testimony of witnesses at the hearing is hereafter designated as "T".)

2. The student attends one of Respondent's elementary schools (stipulation by counsel on the record).
3. The IEP team for the student met on July 2, 2010 and agreed that the student's disability classification should be multiple disabilities, including both other health impaired and speech language impairment. The student's IEP called for 15 hours of specialized instruction in the general education environment, plus related services of one hour per week of speech language services, one hour per week of behavioral support services and one hour per week of consultation for behavioral support services. The IEP provides for extended school year services for the student (stipulation by counsel on the record).
4. A previous Hearing Officer Determination concerning this student was issued by this hearing officer on May 1, 2010. Among the issues identified in said due process hearing were whether Respondent violated its child find obligations under IDEA and whether an IEP developed for the student on October 7, 2009 was inappropriate because it did not contain

a full-time special education program. Said Hearing Officer Determination concluded that the student did not need a full-time special education placement. The testimony of Petitioner's witnesses to the contrary was discounted in part because they applied a potential maximizing standard and because they ignored the least restrictive environment provisions of IDEA. The hearing officer in said Hearing Officer Determination found in favor of Petitioner with regard to the issue of a child find violation and ordered as relief that Respondent provide two hours per week of academic tutoring in pre-academic areas for the student for a period of 13 months, minus the day or summer camp and that Respondent pay for a day camp or summer camp program for the student during the summer 2010 to address some of her cognitive, pre-academic or adaptive needs. Said Hearing Officer Determination did not specifically require Respondent to provide transportation to and from the summer camp for the Petitioner. The May 1, 2010 Hearing

Officer Determination denied all other relief sought by Petitioner in said due process complaint. (R-9; P-8)

5. The student did attend a summer camp pursuant to the May 1, 2010 Hearing Officer Determination. While there, she made progress and improvements and she received educational benefit. Because a school bus did not come for her on four days, she missed four days of the camp. In addition, she was late to the camp on three other occasions. (T of student's mother; T of Respondent's compliance case manager; T of Petitioner's witness - summer camp provider)
6. Respondent has taken responsibility for providing transportation of the student to the summer camp pursuant to the May 1, 2010 Hearing Officer Determination. Thirty hours of speech language services would be appropriate to remedy the educational harm suffered by the student for not receiving transportation to the summer camp pursuant to the May 1, 2010 Hearing Officer Determination. (T of R's compliance case manager; T of P's witnesses director of the summer program and director of the private school; R-10)

7. On March 22, 2010, Petitioner's expert psychologist evaluated the student. His psychological/psychoeducational evaluation report concludes that the student has attention deficit hyperactivity disorder, an adjustment disorder, and a communication disorder. Petitioner's expert psychologist recommended that the student begin individual psychotherapy and that if behavioral interventions and psychotherapy prove ineffective, that she be started on psychostimulant medicine. With regard to school, Petitioner's expert psychologist recommended a full-time special education program with an enhanced level of therapeutic support and psychotherapeutic service. In addition, the report recommends that the student receive individual counseling and speech language services. Said psychologist did not observe the student in school before issuing his report. (P-16; T of Petitioner's expert psychologist)
8. On March 10, 2010, the student was given an independent speech and language evaluation. The evaluator found that

the student showed moderately delayed receptive language skills and severely delayed expressive language skills. The evaluator recommended that the student receive speech language therapy and that she be placed in a special education classroom with a low student/teacher ratio. (P-18)

9. Respondent's school psychologist analyzed the report by Petitioner's psychologist on June 9, 2010. Respondent's school psychologist found that the conclusion of Petitioner's psychologist that the student had an adjustment disorder was not supported by the data. In addition, Respondent's school psychologist noted that Petitioner's psychologist failed to mention anything about the student's home environment and whether or not behavioral issues might be related to the home environment. Respondent's school psychologist also took issue with the recommendation that the student have a full-time special education therapeutic program. She states in her report that that this conclusion is not warranted by the data provided. In particular, Respondent's school psychologist noted that the Petitioner's psychologist did not

observe the student in school prior to his finding that the student periodically shows aggression toward her peers. In addition, Respondent's school psychologist pointed out that the student was just beginning school after having attended preschool and that she had not yet received any specialized instruction. Accordingly, Respondent's school psychologist recommended that the student's IEP include ten hours of specialized instruction. The report of Respondent's school psychologist notes that if additional support is needed, it could gradually be added and that the student could continue to benefit from peer modeling and support from her typically developing peers. (R-14; T of R's school psychologist)

10. An IEP team meeting was convened for the student on July 2, 2010. Present at the meeting were the student's mother, the student's educational advocate and the student lawyer, as well as Respondent's special educator who served as case manager), Respondent's speech language pathologist, an FCC, and Respondent's school psychologist. The student's

mother and Respondent's school psychologist both participated in the meeting by telephone. At the meeting, Respondent's school psychologist reviewed the independent psychological evaluation and disagreed with its conclusions explaining why to the participants. Respondent proposed ten hours of specialized education for the student. Petitioner's representatives on the IEP team stated that they wanted a full-time special education placement for the student. As a result of the input provided by Petitioner's representatives, Respondent's representatives agreed to increase the number of hours of specialized instruction to 15 hours in the general education setting. After reviewing all other evaluations, all team members agreed to present levels of performance for the student and to annual goals and other contents of the IEP except the level of services. The July 2, 2010 IEP goals were changed to include certain speech goals requested by Petitioner's representatives at the IEP team meeting. The July 2, 2010 IEP calls for 15 hours per week of specialized instruction in the general education setting, as

well as related services of speech language pathology one hour per week in the general education setting and behavioral support services of 60 minutes per week in the general education setting. In addition, the IEP for the student developed on July 2, 2010 requires 60 minutes per week of consultation services for behavioral support services. The IEP includes the following classrooms aids and services: preferential seating, the use of visual cues and instruction, repeated directions/instructions, small group instruction when needed, extra time to complete assignments, pairing with other students when working on tasks. The IEP also provides that the student will receive extended school year services of one and a half hours per day from July 6, 2010 to August 6, 2010. (R-6; R-5; P-24; P-25; T of Respondent's school psychologist; T of Respondent's special educator; T of Respondent's speech language pathologist)

11. The student's mother and Petitioner's other representatives at the IEP team meeting on July 2, 2010 disagreed with the level of services provided to the student but agreed with the

present levels of performance, the goals contained in the IEP and the other contents of the IEP. On July 2, 2010, Respondent issued a prior notice to the student's mother that the student was being placed at an elementary school pursuant to the July 2, 2010 IEP. (T of student's mother; R-4; P-26; R - 6)

12. The student has made educational progress and is receiving educational benefit under her July 2, 2010 IEP. The student remains distractible, but she is very subject to redirection. She is easily redirected. The student accepts redirection when the teacher finds her to be distracted. After the first two weeks under her new July 2, 2010 IEP, the student has been much less distractible than she was during the first two weeks of the new program. The student's learning and educational progress has greatly improved since the first two weeks of school. (T of Respondent's general education teacher; T of Respondent's school psychologist)
13. The student's interactions with her non-disabled peers in her classroom under the July 2, 2010 IEP are appropriate for her

age. The student is improving her ability to model the behavior of her non-disabled peers. The student is also getting better at picking up cues from non-disabled peers. The student interacts nicely with her peers. (T of Respondent's general education teacher)

14. The elementary school that the student is currently attending is capable of implementing the student's IEP, and said school is implementing the student's July 2, 2010 IEP.

(T of Respondent's special education coordinator; T of Respondent's general education teacher)

15. The July 2, 2010 IEP developed for the student by Respondent is reasonably calculated to confer educational benefit. Said IEP has conferred educational benefit upon the student. (Record evidence as a whole)

16. The July 2, 2010 IEP constitutes the least restrictive environment that is appropriate for this student. (Record evidence as a whole)

17. The elementary school that the student attends participates in a reform initiative known as "SAM." As a result of this

program and a Response-to-Intervention program that is in effect at the school, the student is sometimes pulled out of her class. The Response-to-Intervention program is a tiered program and is used for both general education and special education students. The pull out services that the student sometimes receives is a part of the Response-to-Initiative or SAM programs and is not a special education pull out class or resource room. (T of Respondent's special education coordinator.)

18. On two occasions, the student has left her classroom at her current elementary school by herself. On neither occasion was the student or anyone else harmed or injured. Safety issues do not prevent the student from receiving benefit under her IEP. (T of the student's mother; record evidence as a whole)
19. On one occasion, Respondent's special education coordinator said to the student's mother that she knew that the mother had legal representation, and "...tell me what more we can do." The mother smiled in response but did not say

anything. Respondent's special education coordinator did not advise the mother to get rid of her attorney. (T of Respondent's special education coordinator)

CONCLUSIONS OF LAW

Based upon the evidence in the record and 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 provides a free and appropriate public education (hereafter sometimes referred to "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 comply with the orders issued pursuant to a hearing officer decision unless the order is altered by a reviewing court. IDEA §615(f)(3)(E), 615(i)(A).

3. When reviewing an IEP for appropriateness, hearing officers and courts must view the IEP as a snapshot and not a retrospective. In judging the appropriateness of an IEP, the IEP must be considered in terms of what was objectively reasonable when the snapshot was taken, that is at the time that the IEP was promulgated and developed. S.S. ex rel. Shank v. Howard Road Academy, 585 F.2d 56, 51 IDELR 151 (D.D.C. November 12, 2008).

4. IDEA does not require a school district to 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); Kerkam v. Superintendent, D.C. Public Schools, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

5. The July 2, 2010 IEP for the student developed by Respondent was properly developed through IDEA procedures and was reasonably calculated to confer educational benefit upon the student.

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 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); Daniel R.R. v. El Paso School District, 874 F.2d 1036, 441 IDELR 433 (5th Cir. June 12, 1989).

7. The July 2, 2010 IEP for the student constitutes the appropriate least restrictive environment placement for this student.

8. Awards of compensatory education for violations of IDEA are equitable in nature and should be flexible and qualitative so that they compensate a student for the educational harm suffered.

Although “cookie cutter” or hour per hour replacement of services is frowned upon, such prohibitions do not apply where a respondent concedes that a certain level of compensatory education or services is appropriate. Reid ex rel. Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. March 25, 2005)

9. An award of 30 hours of compensatory speech language services is appropriate to rectify the harm to the student caused by Respondent’s failure to provide transportation services to the summer camp pursuant to the May 1, 2010 Hearing Officer Determination.

10. All relief available under IDEA is equitable in nature. A hearing officer and a court have broad powers to remedy violations of IDEA. Reid ex rel. Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. March 25, 2005). See, Forest Grove School District v. T.A., 129 S. Ct. 2484, 52 IDELR 151 (U.S. June 22, 2009).

11. A hearing officer or court should only award prospective private placements as relief to ensure that a child receives the education required by IDEA in the future where a balance of the relevant factors justifies such a placement. In addition to the

conduct of the parties, which is always relevant in fashioning equitable relief, the following factors must be balanced before awarding prospective private placements: the nature and severity of the student's disability; the student's specialized individual educational needs; the link between those needs and the services offered by the private school; the private school placement's costs; and the extent to which the placement represents the least restrictive environment. Branham ex rel. Branham v. District of Columbia, 427 F.3d 7; 44 IDELR 149 (D.C. Cir. October 25, 2005).

12. In balancing the appropriate factors, it is concluded that a prospective private placement would not be appropriate relief for the student in this case. Branham ex rel. Branham v. District of Columbia, 427 F.3d 7; 44 IDELR 149 (D.C. Cir. October 25, 2005).

DISCUSSION

Merits

1. Did Respondent fail to implement a previous hearing officer decision by failing to provide transportation for the student to a summer camp in the summer of 2010?

Petitioner contends that Respondent failed to implement a Hearing Officer Determination by this hearing officer issued on May 1, 2010. Specifically, Petitioner argues that Respondent failed to provide transportation on certain days and that transportation was late on certain days for the student to attend summer camp. Said HOD required Respondent to pay for a day camp or summer camp program for the student during the summer of 2010 that would address some of her needs in the cognitive, pre-academic or adaptive skills categories.

Respondent argues that because the Hearing Officer Determination did not specifically provide for transportation, it was not obligated to provide transportation. Respondent's argument in this regard is mooted by the fact that Respondent has agreed to take responsibility for the transportation of the student in this case. The testimony of Respondent's compliance case manager at the due process hearing and the corresponding documentary exhibits indicate that Respondent has taken responsibility for transportation to the summer camp for the student and that Respondent has made an offer to compensate the student for the days that she missed and

hours she was late by offering compensatory speech language services. The testimony of Respondent's compliance case manager indicates that the student missed four days of summer camp and was late on three other days for an unspecified number of hours.

The Petitioner has met her burden with regard to this issue and she has prevailed thereupon.

2. Is the July 2, 2010 IEP developed by Respondent for the student inappropriate?

Petitioner contends that the July 2, 2010 IEP for the student is inappropriate because it does not contain a full-time special education placement. Respondent contends that the July 2, 2010 IEP is appropriate.

The United States Supreme Court has established a two part test for determining whether a school district provides a 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 IDEA and an analysis of whether the 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).

In the instant case, Petitioner does not raise any procedural violations under IDEA. Accordingly, the analysis revolves around whether the student's IEP dated July 2, 2010 was reasonably calculated to confer educational benefit.

Petitioner's witnesses, including the student's mother, Petitioner's educational advocate, Petitioner's expert psychologist, all testified that the student needs a full-time special education placement. In addition, a report of a speech language pathologist also in evidence stated that the student needs a full-time special education placement.

By contrast, Respondent's witnesses, including Respondent's expert school psychologist, Respondent's speech language therapist, Respondent's special education coordinator, Respondent's special education teacher and Respondent's general education teacher, testified that the July 2, 2010 IEP is reasonably calculated to confer educational benefit and that the student is receiving educational benefit under her IEP.

The testimony of Respondent's witnesses is more credible and persuasive than the testimony of Petitioner's witnesses as to this point. The testimony of Petitioner's witnesses is less credible because of the witness' demeanor, as well as because of the factors described below. First, petitioner's witnesses applied a potential maximizing standard and frequently changed their testimony in this regard. Under IDEA, a school district is not required to maximize the potential of a student with a disability. Rather, all that is required of a school district is to provide an IEP that is 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); Kerkam v. Superintendent, D.C. Public Schools, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

Nonetheless, Petitioner's witnesses, for the most part, made it clear that they were applying a potential-maximizing standard in their assessment that the student "needs" a full-time special education placement. A number of witnesses were coaxed by Petitioner's counsel to alter their testimony after revealing their use of a potential-maximizing standard. For example, Petitioner's expert

psychologist testified that the student's July 2, 2010 IEP would not give the student "what she really needs to succeed." The witness backed off from this testimony after Petitioner's attorney asked leading questions; however, it was clear from the earlier testimony of Petitioner's expert psychologist that he was really applying a much higher standard than is legally mandated. It should be noted that although the rules of evidence that govern court trials do not apply, in terms of admissibility, at administrative hearings such as those conducted under IDEA, the rules of evidence remain useful for the purpose of weighing evidence. Here, because the testimony based upon the correct standard was elicited only through highly leading questions after the witness had previously testified to the contrary, it is clear that the witness was employing a potential maximizing standard and the testimony is entitled to little weight.

Similarly, the director of a private school called as a witness by Petitioner testified that the student would be "better served" in a full-time program and would derive the "greatest educational benefit" from a self-contained classroom. In both of these instances,

the witness again changed her testimony when confronted by Petitioner's attorney with leading questions; however, the changes of testimony elicited only through leading questions are once again discounted. It was clear that Petitioner's witnesses were applying a potential maximizing standard in concluding that the student "needed" a full-time special education placement.

In addition, the testimony of the mother that the student "needed" more hours of services on the IEP provided was also only elicited through leading questions after the witness failed to give this testimony through proper questions. It is concluded that the testimony of Petitioner's witnesses is impaired by the fact that they were clearly applying a potential maximizing standard. It should be noted that this is not a criticism of the mother. All parents want what is best for their children. Unfortunately, the law does not require school districts to provide the best possible education to students with a disability.

In addition, the testimony of Petitioner's witnesses is impaired by a number of other contradictions. In addition to the contradictory testimony cited above that was changed as a result of leading

questions, the following examples illustrate some of the inconsistencies in the testimony of Petitioner's witnesses.

The testimony of the summer camp provider called as a witness by Petitioner that the student needed a one on one aide was contradicted by her testimony on cross-examination that the student only needed one on one assistance after being tardy or absent to the summer camp as a remedial measure.

Moreover the testimony of Petitioner's expert psychologist and Petitioner's advocate that the student does not interact with her non-disabled peers is contradicted by the testimony of the student's mother that the student does play with two of her classmates at school.

In addition, the testimony of Petitioner's expert psychologist is also impaired by the fact that he requested a therapeutic placement for the student. The un rebutted testimony of Respondent's expert school psychologist was that a therapeutic placement is a near hospitalization level of placement. There is absolutely no evidence in the record to justify such an extreme placement for the student. The

testimony of Petitioner's expert witness in this regard is inherently non-credible.

Moreover, the testimony of Petitioner's witnesses appears to completely misunderstand and misapply the concept of least restrictive environment. IDEA requires that in determining the placement of a child with a disability, a school district must, to the maximum extent appropriate, 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 supplemental aids and services cannot be satisfactorily achieved. IDEA § 612(a)(5); 34 C.F.R. §§ 300.114, 300.115.

In this case, Petitioner's witnesses are requesting a full-time special education program for a student who has not yet attended school. The testimony of Petitioner's expert psychologist was instructive. He testified that it is "better" to give a student too much special education services and then take some away if not needed. This testimony stands the LRE requirement on its head. Petitioner's

expert psychologist would have Respondent do the opposite of what is required under IDEA concerning least restrictive environment.

The mainstreaming of students requiring special education is not just a laudable goal but also a requirement of IDEA. Hinson v. Merritt Educational Center, 51 IDELR 65 (D.D.C. 2008). In determining the least restrictive environment appropriate for a student, the IEP team must first consider accommodating a student in the regular education environment with appropriate accommodations first. Daniel R.R. v. El Paso School District, 874 F.2d 1036, 441 IDELR 433 (5th Cir. June 12, 1989).

In closing argument, Petitioner's attorney cited Sacramento City Unified School District v. Holland, 14 F.3d 1398, 20 IDELR 812 (9th Cir. 1994). That case establishes a four part test for determining compliance with least restrictive environment. Applied to the facts of this case, it is clear that the least restrictive environment for this student would be the general education classroom with appropriate supports and accommodations. The record evidence showed that the student received educational benefit and non-academic benefits, such as modeling of her peers. The testimony of Respondent's general

education classroom teacher was that the student behaved appropriately with her non-disabled peers and that there was no disruptive effect. There was no evidence introduced concerning the factor of costs of educating the student in the general education classroom. Thus applying the factors in the 9th Circuit case cited by the Petitioner also yields a conclusion that the IEP developed on July 2, 2010 was the least restrictive environment appropriate for this student.

Accordingly, the misapplication of the least restrictive environment requirement by Petitioner's witnesses further diminishes their credibility and persuasiveness.

It seems to be the position of Petitioner in this case that Respondent must agree with whatever level of services Petitioner and her representatives demand. The law does not permit a parent to dictate the level of services a student will receive. In the instant case, the record is clear that the Respondent duly considered the reports and evaluations provided by Petitioner and her representatives on the IEP team, but disagreed with them.

The record evidence reveals that Respondent's members of the student's IEP team on July 2, 2010 considered the evaluations submitted by Petitioner's representatives. Respondent then proposed ten hours of specialized instruction for the student. Petitioner's witnesses countered by again requesting a full-time special education placement. At this point, the student had never been in a school situation; she had previously only been in a preschool setting. Respondent's school psychologist testified that putting the student in a full time special education setting without ever trying a less restrictive environment would be like going from zero to one hundred.

Respondent's members of the student's IEP team agreed to increase the specialized instruction to 15 hours per week after considering the input of Petitioner's representatives. In addition, Respondent changed some of the goals on the IEP as a result of the input of Petitioner's representatives. Petitioner's representatives noted that they agreed with the contents of the IEP other than the level of services.

At the time it was written, it is clear that the student's July 2, 2010 IEP was reasonably calculated to provide education benefit.

Moreover, it was the testimony of Respondent's general education classroom teacher that the student is making progress under her IEP and receiving educational benefit. This testimony is corroborated by Respondent's special education coordinator, Respondent's speech language therapist, and Respondent's expert school psychologist. The classroom teacher in the general education setting testified that especially after the first couple of weeks, the student is less distractible, although she still needs frequent redirection, but that she is highly responsive to that redirection and she is progressing. She is also getting better at peer modeling and picking up on cues from her non-disabled peers. She testified that the student's interaction with her non-disabled peers in the class was appropriate for a child of her age.

The testimony of the witnesses of Respondent that the student was making progress in her general education classroom is contradicted by the testimony of Petitioner's witnesses. Many of the observations made by Petitioner's witnesses, however, were in the

first two weeks of school when the student was struggling much more than later. In addition, the testimony of Respondent's witnesses is impaired by the factors outlined previously in this decision. It is concluded that the testimony of Respondent's witnesses concerning the student's progress and receipt of educational benefit under the July 2, 2010 IEP is more credible and persuasive than the contrary testimony of Petitioner's witnesses.

Certain other arguments made by counsel for Petitioner in closing argument are addressed here. Petitioner's counsel argues that because of one of Petitioner's observers saw the student pulled out of the general education classroom for services that Respondent was, in fact, not even implementing the general education setting IEP developed on July 2, 2010, and therefore, said IEP was inappropriate. The record evidence does not support this contention. First, Respondent's special education coordinator testified that the general education setting can include pull out services for special education. More importantly, however, Respondent's special education coordinator testified credibly and persuasively that the pull out of the student that was being observed was for the purpose

of a Response-to-Intervention type tiered intervention program involving all students, both general education and special education. Thus, it is clear that the pull out services were not in contravention of the student's IEP and clearly not an admission that the IEP was inappropriate. Petitioner's argument in this regard is rejected.

Petitioner's counsel also argued in closing argument that the student is not safe under IEP because she left the classroom on two occasions. Although not cited by Petitioner, there is case law to support the proposition that where a student is so unsafe in her school situation that she cannot receive educational benefit from her IEP, safety concerns could constitute a violation of IDEA. See, Lillbask ex rel. Mauclaire v. State of Connecticut, Dept. of Educ., 397 F.3d 77, 42 IDELR 230 (2d Cir. February 2, 2005).

In the instant case, however, no safety issue is contained in Petitioner's due process complaint and no safety issue was discussed at the pre-hearing conference held herein. Accordingly, the issue is not properly before the hearing officer, and Petitioner's argument is rejected. IDEA § 615(f)(3)(B). Moreover, as has been discussed previously, it is clear from the record evidence in this case that the

student has benefited from her IEP dated July 2, 2010. The argument is rejected.

Also in closing argument, Petitioner asserts that Respondent's special education coordinator put undue pressure on the student's mother to get rid of her lawyer. The student's mother testified that the special education coordinator, on approximately four occasions, suggested that she "get rid of" her lawyer. This testimony was denied by the testimony of the special education coordinator. The special education coordinator admitted that she inquired of the mother as to whether she was represented, but the special education coordinator went on to ask what more the school could do for the student. The special education coordinator specifically denied advising the student's mother to "get rid of" her lawyer. Because of the factors cited previously in this decision, the testimony of respondent's special education coordinator is more credible and persuasive than the testimony of the Petitioner in this regard. It should be noted, however, that the hearing officer takes these allegations seriously because if Petitioner had proven that the special education coordinator had made such statements, it could possibly

have cast doubt on the validity of the IEP. A school district that develops appropriate IEPs does not concern itself with whether parents avail themselves of their right to obtain legal counsel. Here, however, Petitioner has not proven the allegations and, therefore, the contention is rejected.

The Petitioner has not met her burden with regard to this issue and the Respondent has prevailed upon this issue.

RELIEF

Respondent has conceded that it should provide a total of 30 hours of speech language compensatory services to the student because of Respondent's failure to provide transportation to the summer camp attended by the student pursuant to the Order in the Hearing Officer Determination issued by this hearing officer on May 1, 2010. Petitioner presented no testimony concerning compensatory education with the exception of some testimony by Petitioner's director of the private school on cross-examination that appropriate

compensatory education for the time lost at summer camp would be an hour for hour replacement with speech language services.

The only other evidence in the record concerning the Petitioner's position with regard to compensatory services for the time lost due to the transportation issue is an exhibit offered into evidence by Respondent, which constitutes the resolution meeting notes for this case. There, the attorney for the Petitioner requested that summer camp be authorized for the next school year as compensatory education for the failure to provide transportation. No testimony was presented at the hearing to support this argument. All that was offered by the parties concerning Petitioner's position was this one statement by a lawyer in the middle of the resolution meeting notes. The position that summer camp for next year should be provided is not supported by anything more than a conclusory statement in the notes. No other testimony or documentary evidence was offered to support Petitioner's position in this regard. Petitioner has failed to support its request for an additional year of summer camp as compensatory services.

Curiously, although Petitioner offered no compensatory education plan of her own for the loss of transportation services, the cross-examination by Petitioner's counsel of Respondent's compliance case manager seemed to indicate that Petitioner disputed the basis of the compensatory speech language services under Reid ex rel. Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. March 25, 2005).

Although it is true that the Reid decision does severely frown upon cookie cutter, or hour for hour, calculations of compensatory education, the Reid case is distinguishable from the facts of the instant case. Here, the Respondent has admitted that 30 hours of compensatory speech language services is appropriate to remedy the failure by Respondent to provide transportation for the summer camp as ordered under the previous Hearing Officer Determination. Given this admission, the Reid standards do not apply unless Petitioner comes forward with a request for additional services, justified by evidence as required by the Reid decision. Here, the Petitioner makes a conclusory request for an additional year of summer camp, but does not link it in any way to the educational

harm allegedly suffered by the student for the violation of the Act. Accordingly, the Reid decision negates the request by Petitioner for an additional year of summer camp, but it does not apply to the 30 hours of speech language compensatory services that Respondent has conceded is appropriate for this student.

To apply the Reid decision, when Respondent has conceded that compensatory education is appropriate, would be highly unfair and would leave a student such as the one in the instant case with no relief, although both parties have agreed that some relief is appropriate. Clearly the Reid Court did not contemplate such a result. Accordingly, Respondent's calculation of 30 hours of compensatory speech language services is accepted and Complainant's request for an additional year of summer camp is rejected.

Petitioner has also requested as relief in this case that the Respondent be required to fund a prospective private placement for the student. Said request for relief is denied. The D.C. Circuit has identified a number of factors which should be considered in determining whether a prospective private placement is appropriate.

In addition to the conduct of the parties which is always relevant in fashioning relief under IDEA, the following factors should be considered: the nature and severity of the student's disability; the student's specialized educational needs; the link between those needs and the services offered by the private school; the placement's cost and the extent to which the placement represents the least restrictive educational environment. Branham ex rel. Branham v. District of Columbia, 427 F.3d 7; 44 IDELR 149 (D.C. Cir. October 25, 2005).

In the instant case, it is clear that the prospective private placement requested by Petitioner is not appropriate. First, it should be noted that the only violation of the act found in this decision involves Respondent's failure to provide transportation to the summer camp pursuant to the Hearing Officer Determination issued by this hearing officer on May 1, 2010. The larger issue in the case was whether the student needed a full-time special education placement as argued by Petitioner. Petitioner lost on that issue. Accordingly, in applying the Branham factors, it is clear that the placement offered by Respondent in this case was the least

restrictive educational environment and that it was appropriate in that it was reasonably calculated to confer educational benefit upon the student. Accordingly, a change of placement to a more restrictive setting would not be appropriate for the student. It would not be tailored to her educational needs or the severity of her disability. There was no evidence placed on the record concerning the cost for the private school sought by the Petitioner in this case. Therefore, in applying the relevant factors from Branham, it is abundantly clear that an award of a prospective private placement would not be appropriate on the facts of this case. Prior to the hearing the Hearing Officer requested briefs from counsel for both parties on the issue of prospective private placement. Both parties submitted briefs and their arguments have been considered herein.

ORDER

Based upon the foregoing, the following is HEREBY ORDERED:

1. That unless the parties agree otherwise, Respondent is ordered to provide compensatory speech language services to the student in the amount of 30 hours of speech language

services at a rate not to exceed \$120.00 per hour, to be completed before the end of the 2010-2011 school year; and

2. Respondent is hereby ordered to take any and all actions necessary to make the compensatory education award, as described in paragraph 1, effective, and Respondent is ordered to notify all providers who will be providing the compensatory services to the student that the student is entitled to compensatory services of those types and in those amounts; and
3. That all other relief requested in the foregoing due process complaint is hereby denied.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination 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 Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: November 2, 2010

/s/ ***James Gerl***_____

James Gerl,
Hearing Officer