

**DISTRICT OF COLUMBIA**  
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Student Hearing Office  
810 First Street NE, STE 2  
Washington, DC 20002

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[Parent], on behalf of  
[Student],<sup>1</sup>

Date Issued: December 13, 2011

Petitioner,

Hearing Officer: Jim Mortenson

v

District of Columbia Public Schools (DCPS),

Respondent.

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STUDENT HEARING OFFICE  
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**HEARING OFFICER DETERMINATION**

**I. BACKGROUND**

The complaint in this matter was filed by the Petitioner on September 30, 2011.

A response to the complaint was filed on October 11, 2011. A prehearing conference was held on October 13, 2011 and a prehearing order was issued on that date. A resolution meeting was held on October 14, 2011. No agreements were reached and the 45 day hearing timeline began on October 31, 2011.

The Respondent filed a motion to dismiss on October 27, 2011. The Petitioner replied to the motion on November 3, 2011. The decision on the motion, granting it in part and denying it in part was issued on November 8, 2011. The second issue in the complaint was dismissed.

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<sup>1</sup> Personal identification information is provided in Appendix A which is to be removed prior to public dissemination.

A second motion to dismiss was filed by the Respondent on December 1, 2011. The motion was discussed during the preliminaries to the due process hearing on December 8, 2011, and was denied on the record.

The due process hearing was convened and held on December 8, 2011, at 810 First Street NE, Washington, D.C. The hearing was closed to the public. The due date for this HOD is December 14, 2011. This HOD is issued on December 13, 2011.

## **II. JURISDICTION**

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5, Chap. 30.

## **III. ISSUE, RELIEF SOUGHT, and DETERMINATION**

The issue to be determined by the Independent Hearing Officer (IHO) is:

Whether the Respondent denied the Student a free appropriate public education (FAPE) when the Petitioner was not included in a determination to place the Student at Spectrum at School?

The substantive requested relief at the time of hearing is:

- (1) Reimbursement for Petitioner's unilateral placement of the Student at Academy.
- (2) Review and revision of the Student's individualized education program (IEP).

The Respondent has not denied the Student a FAPE because the Student's assignment to at School was not a change of placement under IDEA.

#### IV. EVIDENCE

Eight witnesses testified at the hearing, six for the Petitioner and two for the Respondent. The

Petitioner's witnesses were:

- 1) Ida Jean Holman, Educational Advocate (I.H.)
- 2) The Student's Mother, Petitioner (P)
- 3) Alana Hecht (A.H.)<sup>2</sup>
- 4) Natasha Nelson, Clinical Psychologist (N.N.) (Providing expert testimony in clinical psychology.)
- 5) Counselor,
- 6) Admissions Director,

The Respondent's witnesses were:

- 1) Nicole Garcia, Progress Monitor (N.G.)
- 2) Justine Douds, Compliance Case Manager (J.D.)

15 exhibits were admitted into evidence of 20 disclosures from the Petitioner. The

Petitioner's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 1	June 29, 2011	Due Process Complaint Notice (Case #2011-0683)
P 2	July 14, 2011	District of Columbia Public Schools' Response to Parent's Administrative Due Process Complaint Notice (Case #2011-0683)
P 3	July 21, 2011	Prehearing Order (Case #2011-0683)
P 4	September 26, 2011	Hearing Officer Determination (Case #2011-0683)
P 10	May 6, 2011	IEP
P 11	Undated	[Functional Behavioral Assessment Report]
P 12	March 2, 2011	Comprehensive Psychological Evaluation
P 13	August 2, 2011	Letter from Corley to [Petitioner]

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<sup>2</sup> The testimony of this witness was not given any weight. Her testimony was largely based on testimony she heard at another due process hearing and she had no first hand knowledge of the programs she testified about. The person's statements she was reporting were not fully corroborated - the person was not called as a witness in this hearing and no evidence of the full direct and cross-examinations of the person was provided. Thus, despite the admissibility of hearsay evidence in administrative hearings generally, this testimony in this case is not very credible.

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 14	August 4, 2011	Prior Written Notice
P 15	August 10, 2011	Student Schedule
P 16	August 8, 2011	Email from Holman to Young
P 17	August 1, 2011	Letter to Parents/Students from Whittle
P 18	September 16, 2011	Negotiated Contract for Goods And/Or Services
P 19	Undated	Resume Ida Jean Holman
P 20	Undated	Curricula Vitae for Natasha Nelson

Two exhibits of four of the Respondent's disclosed exhibits were admitted into evidence. The Respondent's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
R 1	August 4, 2011	Prior Written Notice
R 2	May 6, 2011	IEP

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. To the extent the findings of fact do not reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are not credited. Any finding of fact more properly considered a conclusion of law is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

### **V. FINDINGS OF FACT**

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is a year old learner with a disability.<sup>3</sup> The Student has been determined eligible for special education and related services under the definition of emotional disturbance (ED).<sup>4</sup>

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<sup>3</sup> R 2/P 10.

<sup>4</sup> R 2/P 10.

2. The Student attended \_\_\_\_\_ School for much of the 2010-2011 school year and a placement change to a segregated day school for students with disabilities, \_\_\_\_\_ Academy, was proposed near the end of the school year.<sup>5</sup> The Petitioner objected to the proposed placement and challenged it in a due process hearing.<sup>6</sup> The IHO in that case found the proposed placement was appropriate for the Student.<sup>7</sup>
3. During the hearing period in the aforementioned case, the original school proposed, \_\_\_\_\_ Academy, closed and the Student was assigned to a different location, Spectrum at \_\_\_\_\_ School.<sup>8</sup> The IHO determined Spectrum at \_\_\_\_\_ was an appropriate placement also.<sup>9</sup>
4. The assignment to Spectrum at Phelps was made by the Compliance Case Manager for the Respondent and was not the direct result of a team meeting.<sup>10</sup> The Compliance Case Manager assigned the Student to Spectrum at \_\_\_\_\_ after learning the Student was expected to go to his neighborhood school, \_\_\_\_\_ because he was in a “stay-put” placement due to the pending hearing.<sup>11</sup>
5. The Student’s placement, determined appropriate by the IHO in Case \_\_\_\_\_ was all special education and related services provided outside of the general education setting, including a small group environment and behavioral support services.<sup>12</sup>
6. Both \_\_\_\_\_ Academy and Spectrum at \_\_\_\_\_ are schools designed for students with disabilities who receive all of their special education and related services outside of the

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<sup>5</sup> P 4. Testimony (T) of I.H.

<sup>6</sup> P 1, P 4.

<sup>7</sup> P 4.

<sup>8</sup> T of P, T of I.H., T of J.D., P 4, R 1/P 14.

<sup>9</sup> P 4.

<sup>10</sup> T of J.D.

<sup>11</sup> T of J.D., R 1/P 14.

<sup>12</sup> R 2/P 10, P 4.

general education setting (often referred to as “full-time”).<sup>13</sup> In both schools the students are segregated from non-disabled peers, although the students at Phelps enter the same door to the school as non-disabled peers and are then escorted to their portion of the facility whereas the students at Spectrum had a segregated entrance to their facility.<sup>14</sup> Spectrum at Phelps uses online teaching as well as special education staff, whereas Spectrum did not use online teaching.<sup>15</sup> Both schools provide(d) strong behavioral support to Students and are/were highly structured environments.<sup>16</sup>

## VI. CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer’s own legal research, the Conclusions of Law of this Hearing Officer are as follows:

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. “Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.” D.C. Mun. Regs. 5-E3030.14. The recognized standard is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); Holdzclaw v. District of Columbia, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).

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<sup>13</sup> T of J.D., T of N.G., T of I.H., P 4, R 1/P 14.

<sup>14</sup> T of J.D., T of N.G., T of I.H. (I.H. testified that she did not think the students at Phelps were truly segregated. This idea was not backed up or corroborated with any credible evidence.)

<sup>15</sup> T of N.G., T of I.H.

<sup>16</sup> T of N.G., T of J.D., T of I.H.

2. Parents must be members of any group determining a child's educational placement. 34 C.F.R. §§ 300.116 & 300.327. In the District of Columbia IEP teams are to make placement determinations. D.C. Mun. Regs. 5-E3001.1.
3. There are vagaries of what is meant by "placement." When moving a child from one building to another where the programs are "substantially and materially similar" there is no change of placement. 71 Fed. Reg. 46588-89 (August 14, 2006). According to OSEP:

Historically, we have referred to "placement" as points along the continuum of placement options available for a child with a disability, and "location" as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services. Public agencies are strongly encouraged to place a child with a disability in the school and classroom the child would attend if the child did not have a disability. However, a public agency may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement.

Id. at 46588.

4. Both the placements (now no longer available) and Spectrum at have already been determined appropriate for the Student pursuant to his IEP. This hearing deals more fully with the question of whether at is substantially and materially similar to the Student's placement at Academy. This IHO concludes that it is. Both schools are separate day schools located in buildings with other programs. Both schools provide strong behavioral support for students. Both schools limit their students' access to non-disabled peers. The IHO in case found Spectrum at to be an appropriate placement for the Student. Both programs, therefore, occupy the same place on the continuum of alternative placement options for students with disabilities and the change from one to the other is material or substantial and is therefore not a change in placement under the IDEA.

5. Because the assignment of the Student to \_\_\_\_\_ at \_\_\_\_\_ High was not a change in placement, there was no violation or denial of FAPE for assigning the Student to \_\_\_\_\_ at \_\_\_\_\_ without the IEP team or the Petitioner. Therefore, no remedy is warranted.

**VII. DECISION**

The Respondent did not deny the Student a FAPE when it did not include the Petitioner in the determination to send the Student to \_\_\_\_\_ at \_\_\_\_\_ School because that assignment was not a change in placement under IDEA.

**VIII. ORDER**

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered that the Respondent prevails and the complaint is dismissed with prejudice.

**IT IS SO ORDERED.**

Date: December 13, 2011



\_\_\_\_\_  
Independent Hearing Officer

**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).