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

PETITIONERS,
on behalf of STUDENT,[1]

Petitioners,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Date Issued: November 25, 2012

Hearing Officer: Peter B. Vaden

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STUDENT HEARING OFFICE
2012 NOV 26 AM 8:28

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioners (the "Petitioners" or "PARENTS"), under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("D.C. Regs."). In their Due Process Complaint, Petitioners allege that DCPS denied Student a free appropriate public education ("FAPE") by changing her non-public placement to a DCPS public school for the 2012-2013 school year.

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[1] Personal identification information is provided in Appendix A.

Student, an AGE girl, is a resident of the District of Columbia. Petitioners' Due Process Complaint, filed on September 13, 2012, named DCPS as respondent. The undersigned Hearing Officer was appointed on September 14, 2012. Instead of meeting for a resolution session, the parties elected to use the mediation process described in 34 CFR § 300.506. The mediation efforts did not result in an agreement. The 45-day deadline for issuance of this Hearing Officer Determination began on October 14, 2012. On September 24, 2012, the Hearing Officer convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

Petitioners' present complaint follows upon a due process hearing and Hearing Officer Determination issued by Impartial Hearing Officer James McKeever on May 1, 2012 (the "May 1, 2012 HOD"). In their prior complaint, Petitioners alleged, *inter alia*, that DCPS had denied Student a FAPE for the 2011-2012 school year by placing her at NEIGHBORHOOD SCHOOL. Hearing Officer McKeever found that Student's IEP required placement in a full-time self contained classroom, and that, although DCPS was willing to create a self-contained class for Student at Neighborhood School, no such program existed at the time of the due process hearing. Hearing Officer McKeever concluded that DCPS' offer to create such a program for Student was too speculative to amount to an offer of a FAPE, because no information and/or details were provided about the program in order for the Parents or the Hearing Officer to make an assessment as to the appropriateness of the program for Student. *See* Exhibit P-21.

On May 7, 2012, DCPS notified Parents that Student's location of services for the 2012-2013 school year would be Neighborhood School. On October 26, 2012, Petitioners filed a motion for summary decision in the present case, asserting that the issue of whether Neighborhood School can appropriately implement Student's IEP had already been decided by

Hearing Officer McKeever in the May 1, 2012 HOD and that re-litigation of this issue was barred under the doctrine of *res judicata* or claim preclusion. I found that the doctrine did not apply and denied the Petitioners' motion.[2]

The due process hearing was held before the undersigned Impartial Hearing Officer on November 13, 2012 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioners appeared in person, and were represented by PETITIONERS' COUNSEL. Respondent DCPS was represented by DCPS COUNSEL.

Both Parents testified and Petitioners called as additional witnesses, CURRICULUM SPECIALIST and EDUCATIONAL CONSULTANT. DCPS called as its only witness NEIGHBORHOOD SCHOOL PRINCIPAL. Petitioners' Exhibits P-1 through P-37 were admitted into evidence without objection, except for Exhibits P-2, P-3, P-4, P-16, P-17 and P-18, which were admitted over DCPS' objection. DCPS' Exhibits R-1 through R-4 were admitted without objection. Exhibit R-5 was withdrawn. Following presentation of the Parents' case-in-chief, DCPS moved to strike the evidence on the grounds that Parents had not made a showing that Neighborhood School could not implement Student's 2012-2013 IEP. I denied the motion. At the request of Petitioners' Counsel, the parties were granted leave to file post-hearing briefs on or before November 15, 2012. Both parties filed post-hearing memoranda.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

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[2] *See* Order Denying Motion for Summary Decision, November 12, 2012.

ISSUES AND RELIEF SOUGHT

- WHETHER DCPS HAS DENIED STUDENT A FAPE FOR THE 2012-2013 SCHOOL YEAR BY FAILING TO MATCH STUDENT WITH A FACILITY CAPABLE OF FULFILLING HER IEP REQUIREMENTS FOR A FULL-TIME, SELF-CONTAINED, SPECIAL EDUCATION PROGRAM;

- WHETHER DCPS DENIED STUDENT A FAPE BY PREDETERMINING HER PLACEMENT AT NEIGHBORHOOD SCHOOL FOR THE 2012-2013 SCHOOL YEAR WITHOUT OBTAINING INPUT FROM THE PARENTS OR NON-PUBLIC SCHOOL STAFF AND BY DENYING PARENTS THEIR RIGHT TO PARTICIPATE IN THE PLACEMENT DECISION;

- WHETHER DCPS' DECISION TO PLACE STUDENT AT NEIGHBORHOOD SCHOOL FOR THE 2012-2013 SCHOOL YEAR WAS BARRED BY THE DOCTRINE OF PRIOR ADJUDICATION/ISSUE PRECLUSION; and

- WHETHER DCPS DENIED STUDENT A FAPE BY FAILING TO RESPOND TO PARENTS' WRITTEN INQUIRIES, BEGINNING IN MAY 2012, REGARDING DCPS' INTENTIONS TO PLACE STUDENT AT NEIGHBORHOOD SCHOOL FOR THE 2012-2013 SCHOOL YEAR.

For relief, Parents seek an order for DCPS to pay tuition and expenses for Student to continue to attend NON-PUBLIC SCHOOL the remainder of the 2012-2013 school year.

FINDINGS OF FACT

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

1. Student is an AGE resident of the District of Columbia, where she resides with Parents. Testimony of FATHER.

2. On October 14, 2011, Student was last found eligible for special education and related services. Her primary disability classification is Specific Learning Disability ("SLD"). Exhibit P-20.

3. Student is an intellectually gifted child with pervasive learning disabilities. Non-Public School is able to fulfill the needs of children with Student's disability profile. Testimony

of Curriculum Specialist.

4. For the 2012-2013 school year, Student is enrolled in the GRADE at Non-Public School in Washington, DC. Testimony of Curriculum Specialist.

5. In the May 1, 2012 HOD, Impartial Hearing Officer James McKeever ordered DCPS to fund Student's placement at Non-Public School for the 2011-2012 school year. Exhibit P-21. At the present time, Student continues to attend Non-Public School under the IDEA's "stay-put" provision.[3] *See* Prehearing Order, Sept. 25, 2012.

6. At an IEP annual review meeting, convened at Non-Public School on April 30, 2012, Student's IEP team determined that Student required full-time specialized instruction, outside of the general education setting. The IEP team agreed that for the 2012-2013 school year, Student requires 31.5 hours per week of specialized instruction, 90 minutes per week of Speech-Language pathology, 45 minutes per week of Occupational Therapy and 45 minutes per week of Behavioral Support Services – all outside of the general education setting. Exhibit P-20. Neither party disputes the appropriateness of the April 30, 2012 IEP. Opening Statements of Petitioners' Counsel and DCPS Counsel.

7. In the May 1, 2012 HOD, Hearing Officer McKeever found that Neighborhood School had self-contained classes for students with autism, but did not have self-contained classes for students with SLD. Hearing Officer McKeever concluded that although the Neighborhood School principal was willing to create a self-contained class for Student, DCPS had nonetheless failed to offer Student a FAPE, because at the time Student's 2011-2012 IEP was developed, and as of the date of the due process hearing (April 24, 2012), no such program existed at the school. Hearing Officer McKeever found that "DCPS' assertion that a program could have been created for the Student had she attended the proposed school [was] too

[3] *See* 20 U.S.C. § 1415(j).

speculative to amount to an offer of a FAPE because no information and/or details were provided about the program in order for the parent and/or [Hearing Officer McKeever] to make an assessment as to appropriateness of the program for this Student." Exhibit P-21 at 8. Hearing Officer McKeever further determined that Non-Public School was an appropriate placement for Student and was Student's Least Restrictive Environment. He ordered DCPS to fund Student's placement there for the 2011-2012 school year. Exhibit P-21.

8. Shortly after the May 1, 2012 HOD was issued, in a Prior Written Notice dated May 4, 2012, DCPS provided notice to the Parents that Student's "placement will be moved from a non-public school to a DC Public School as of the 2012-2013 school year." Exhibit P-23.

9. By letter of May 7, 2012, DCPS PROGRESS MONITOR informed the Parents that in a prior written notice dated May 4, 2012, DCPS indicated that Student's educational placement for the 2012-2013 school year would be changed from Non-Public School to "a DC Public School" and that Student's location of services would be Neighborhood School. Exhibits P-23, P-24. Parents were not members of the group that made the decision to move Student's placement from Non-Public School to a DC Public School. Testimony of Father.

10. On May 22, 2012, Petitioners' Counsel wrote Progress Monitor in response to her May 7, 2012 letter to Parents. In the May 22, 2012 letter, Petitioners' Counsel wrote, "[o]f course, a Hearing Officer has recently found that [Neighborhood School] could not implement a full-time IEP for [Student] for the 2011-12 school year. In view of that Decision, is DCPS actually proposing [Neighborhood School] yet again for the next year? . . . Please let us know so we can attempt to observe before school is over." Exhibit P-25. DCPS did not respond to counsel's May 22, 2012 letter. Testimony of Father.

11. On June 1, 2012, Petitioners' Counsel sent a follow-up letter to Progress Monitor.

In the June 1, 2012 letter, Petitioners' Counsel wrote, "[i]f DCPS is indeed proposing [Neighborhood School], yet again, for next year, please respond as soon as possible so that we can attempt to observe before the school year concludes." Exhibit P-26. DCPS did not respond to counsel's June 1, 2012 letter. Testimony of Father.

12. On July 26, 2012, Petitioners' Counsel sent another follow-up letter to Progress Monitor. In the July 26, 2012 letter, Petitioners' Counsel wrote, "[B]ecause you failed to respond, we were unable to advise our clients to observe the program in anticipation of next school year." In that letter, Petitioners' counsel gave notice that the Parents intended to maintain Student at Non-Public School for the 2012-2013 school year and were seeking public funding for that placement. Exhibit P-27. DCPS did not respond to counsel's July 26, 2012 letter. Testimony of Father.

13. On September 13, 2012, Petitioners filed the present due process complaint seeking continued DCPS funding for Student's enrollment at Non-Public School. Petitioners had filed a prior complaint on August 9, 2012 asserting the same claims, which they withdrew, without prejudice, on September 13, 2012. Exhibits P-28, P-29.

14. Neighborhood School Principal is in her second year as principal of Neighborhood School. At the present time, the only self-contained classroom at Neighborhood School serves students with autism disabilities. If Student were to enroll at Neighborhood School, the school would set up a separate self-contained classroom for her, in order to provide the full-time specialized instruction services specified in her IEP. The school would probably bring in a new teacher to teach Student, who would be the only child in the self-contained classroom. Neighborhood School Principal was not informed by DCPS that Parents had sought, through their attorney, to arrange an observation at Neighborhood School after receiving the

May 4, 2012 prior written notice. Testimony of Neighborhood School Principal. I found Neighborhood School Principal to be a credible witness.

15. Non-Public School is approved by the District of Columbia Office of the State Superintendent of Education as a nonpublic special education school serving students with disabilities funded by the District of Columbia. Student is doing very well at Non-Public school for the current school year. Testimony of Curriculum Coordinator. Student continues to need the level of services provided by Non-Public School. Testimony of Educational Consultant.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument and legal memoranda of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Burden of Proof

The burden of proof in a due process hearing is normally the responsibility of the party seeking relief – the Petitioners in this case. *See* D.C. Regs. tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006). At the due process hearing on November 13, 2012, Petitioners made an oral motion to place the burden of proof on DCPS in this case, on the grounds that DCPS issued its prior written notice assigning Student to Neighborhood School on May 4, 2012 – only a few days after Hearing Officer McKeever had issued the May 1, 2012 HOD ordering DCPS to fund Student's prior year enrollment at Non-Public School. Petitioners cite *Andersen v. District of Columbia,* 877 F.2d 1018, 1022 (D.C. Cir.1989) for the rule that after issuance of a Hearing Officer Determination on a contested IEP or placement, the losing party will have the burden of producing evidence and persuading the

Hearing Officer of changed circumstances, that render the first determination inappropriate for guiding the order of relief for subsequent school years. *See id.*

DCPS was the losing party in the May 1, 2012 HOD with respect to Student's placement at Neighborhood School for the last school year. Petitioners argue that under the rule in *Andersen*, DCPS must now bear the burden of producing evidence and showing changed circumstances, that would render the May 1, 2012 HOD inappropriate for guiding this Hearing Officer's determination as to whether Neighborhood School is an appropriate placement for the current school year. I disagree. *Andersen* was decided before the U.S. Supreme Court's 2005 burden of proof decision in *Schaffer v. Weast, supra.* The *Andersen* decision's continued weight as a precedential authority on the burden of proof issue is therefore problematical. Further, I find that the procedural history in this case is distinguishable from *Andersen.* In *Andersen,* the trial court had found, in a prior adjudication, that the disputed school placement was appropriate. In the May 1, 2012 HOD, Hearing Officer McKeever did not decide whether Neighborhood School was able to implement Student's IEP, but found that because DCPS had failed to provide sufficient information or details on the placement, DCPS' willingness to create a new program there for Student was too speculative to amount to an offer of FAPE. I conclude that the Petitioners, who are the parties seeking relief, have not shown that they should not bear the burden of proof in this due process hearing, pursuant to the *Schaffer v. Weast* decision.

Legal Standard for Prospective Non-Public Placement

Petitioners assert that Student is entitled to funding from DCPS for a private placement in this case, because DCPS allegedly violated the IDEA and denied Student a FAPE by changing Student's educational placement from Non-Public School to Neighborhood School for the 2012-2013 school year. The IDEA ensures that "all children with disabilities have available to them a

free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). Under the Act, DCPS is obligated to devise IEPs for each eligible child, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir.1991). If no suitable public school is available, DCPS must pay the costs of sending the child to an appropriate private school; however, if there is an "appropriate" public school program available, *i.e.*, one "reasonably calculated to enable the child to receive educational benefits," DCPS need not consider private placement, even though a private school might be more appropriate or better able to serve the child. *Id. (*citing *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)). "The question of whether a public school placement is appropriate rests on '(1) whether DCPS has complied with IDEA's administrative procedures and (2) whether or not the IEP . . . was reasonably calculated to provide some educational benefit to [the student.]'" *J.N. v. District of Columbia*, 677 F.Supp.2d 314, 322 (D.D.C. 2010) (quoting *Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 80 (D.D.C.2004)) A hearing officer may award appropriate equitable relief, including a prospective private placement, when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia,* 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d 7, 11–12 (D.C.Cir.2005)).

ANALYSIS

1. DID DCPS DENY STUDENT A FAPE BY UNILATERALLY CHANGING HER SCHOOL ASSIGNMENT FROM NON-PUBLIC SCHOOL TO NEIGHBORHOOD SCHOOL FOR THE 2012-2013 SCHOOL YEAR?

On May 4, 2012, a few days after Hearing Officer McKeever issued a decision ordering DCPS to fund Student's enrollment at Non-Public School for the 2011-2012 school year, DCPS issued a prior written notice changing Student's school for the 2012-2013 school year to Neighborhood School. While Petitioners identify four separate issues in their due process complaint, the core issues before this Hearing Officer are: (1) whether DCPS complied with the IDEA's procedures when it assigned Student to Neighborhood School; and (2) whether Student's placement at the school was reasonably calculated to enable her to receive educational benefits. *See N.T. v. District of Columbia,* 839 F.Supp.2d 29, 33 (D.D.C.2012) (citing *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir.2003). Petitioners allege that DCPS committed a procedural violation when it did not involve them in the decision to change Student's school, and that Neighborhood School is not a placement reasonably calculated to enable Student to receive educational benefits.

a. WAS DCPS' FAILURE TO INVOLVE PARENTS IN THE DECISION TO TRANSFER STUDENT TO NEIGHBORHOOD SCHOOL A VIOLATION OF THE IDEA'S PROCEDURAL REQUIREMENTS?

The IDEA requires that an LEA ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child. *See* 20 U.S.C. § 1414(e); 34 CFR §§ 300.116, 300.327. In a letter dated May 7, 2012, Progress Monitor informed Parents that Student's "educational placement would be changed from a non-public school to a DC Public School" and that the new location of services would be Neighborhood School. Parents contend that DCPS violated the IDEA by not including them in the group that made this decision. DCPS responds that transferring Student to Neighborhood School was a "site selection" entirely within its discretion, and that Parents were not entitled to be part of the decision making group.

For support of its position that moving Student to Neighborhood School was not a change in educational placement, DCPS cites judicial decisions from several jurisdictions which distinguish between locations of services and educational placements. *See, e.g., AW ex rel. Wilson v. Fairfax County School Bd.*, 372 F.3d 674, 682 (4th Cir. 2004) (Touchstone of the term "educational placement" is not the location to which the student is assigned but rather the environment in which educational services are provided.) Assuming, without deciding, that DCPS is free to change a child's location of services without parental input, DCPS' argument that its decision to move Student to Neighborhood School was not a change in educational placement is unpersuasive. The IDEA does not define the term "change in educational placement." However, there is considerable case law that is instructive. In *Lunceford v. District of Columbia Bd. of Educ.,*745 F.2d 1577, 1582 (D.C.Cir.1984), the D.C. Circuit Court of Appeals cited *Concerned Parents v. New York City Board of Education*, 629 F.2d 751 (2nd Cir.1980), *cert. denied*, 449 U.S. 1078, 101 S.Ct. 858, 66 L.Ed.2d 801 (1981), as the "leading precedent" on what type of change constitutes a change in educational placement. In *Concerned Parents*, the Second Circuit stated that a change in educational placement occurs only when there is a change in the "general educational program in which a child . . . is enrolled, rather than mere variations in the program itself." *Lunceford, supra* (quoting *Concerned Parents* at 754.)[4] School systems are required by the IDEA to ensure that a continuum of alternative placements is available to meet the needs of children with disabilities.[5] As an example of a

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[4] Judicial decisions analyzing the term "then-current educational placement" for purposes of the IDEA's stay-put provision are more frequently encountered. *See, e.g., Johnson v. District of Columbia*, 839 F.Supp.2d 173 (D.D.C. 2012) (A child's educational placement falls somewhere between the physical school attended by a child and the abstract goals of a child's IEP.) However, the "stay-put" decisions are generally not a useful guide for analysis of the IDEA's "decisions on the educational placement" provision in 20 U.S.C. § 1414(e).

[5] Continuum of alternative placements.

(a) Each public agency must ensure that a continuum of alternative placements is available to

change in educational placement, the Second Circuit wrote in *Concerned Parents* that a decision to transfer a disabled child from one type of program to another, within the continuum of alternative placements required by the IDEA, would involve the sort of fundamental alteration in the child's education that would constitute a change in educational placement. *Id. See, also, Anchorage School Dist. v. M.P.*, 689 F.3d 1047, 1056 -1057 (9th Cir.2012) (Change in educational placement relates to whether the student is moved from one type of program – *i.e.*, regular class – to another type – *i.e.*, home instruction.) In the present case, DCPS decided to transfer Student from one type of program to another, within the continuum of alternative placements it offers – namely from a special school for children with learning disabilities to a special class in a regular elementary school. Under the analysis in *Concerned Parents*, this transfer "up" the continuum would be a change in educational placement. I am further persuaded that transferring Student to Neighborhood School would constitute a change in educational placement because, at Non-Public School, Student attends class with other children with disabilities. At Neighborhood School, student would be instructed in a self-contained classroom with no other students. Moving Student to this 1:1 setting would not be a "mere variation in the program." *See Concerned Parents, supra,* at 754. Finally, DCPS, itself, issued the May 4, 2012 prior written notice to Parents "under the [IDEA]," stating that Student's

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meet the needs of children with disabilities for special education and related services.

(b) The continuum required in paragraph (a) of this section must--

(1) Include the alternative placements listed in the definition of special education under Sec. 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

34 CFR § 300.115

"placement will be moved from a non-public school to a D.C. Public School." If, as DCPS now claims, this were only a change of location of services, there would have been no requirement under the IDEA to issue a prior written notice. *See* 34 CFR § 300.503. I conclude, therefore, that DCPS' proposed action to move Student's placement from Non-Public School to Neighborhood School was a decision on the educational placement of the child. DCPS' failure to ensure that Parents were members of the group that made that decision was a violation of the IDEA procedural requirement that parents are members of any group that makes decisions on the educational placement of their child with a disability.[6]

Not every procedural violation of the IDEA constitutes a denial of FAPE. Only those procedural violations which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable. *Lesesne ex rel. B.F. v. District of Columbia* 447 F.3d 828, 834, (D.C.Cir. 2006) (citing *C.M. v. Bd. of Educ.,* 128 Fed.Appx. 876, 881 (3d Cir.2005) (*per curiam*)). DCPS argues, on brief, that it timely notified Parents that Student's IEP and placement would be implemented at Neighborhood School for the 2012-2013 school year and that Neighborhood School could appropriately implement Student's IEP goals and placement. However, the IDEA requires that a school district do more than simply provide services adequate to meet the needs of disabled students; it requires school districts to involve parents in the creation of individualized education programs tailored to address the specific needs of each disabled student. *See N.S. ex rel. Stein v. District of Columbia*, 709 F.Supp.2d 57, 70 (D.D.C. 2010). *See, also, Rowley, supra,* 458 U.S. at 205-06, 102 S.Ct. at 3050 (Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the

[6] Having found that DCPS violated the IDEA by not including Parents in the decision to change Student's placement, it is unnecessary to reach the issue of whether Non-Public School staff were also required to be part of the placement decision group.

measurement of the resulting IEP against a substantive standard.) Here, DCPS' failure to involve Petitioners in the decision to transfer Student was aggravated by its failure to respond at all to the Parents' repeated requests for the opportunity to observe the program at Neighborhood School, after DCPS issued its May 4, 2012 prior written notice. I find, therefore, that DCPS' failure to ensure that Parents were members of the group that decided to transfer Student from Non-Public School to Neighborhood School seriously deprived Parents of their participation rights and resulted in denial of FAPE. Petitioners prevail on this issue.

b. WAS DCPS' PROPOSED TRANSFER OF STUDENT TO NEIGHBORHOOD SCHOOL NOT REASONABLY CALCULATED TO ENABLE STUDENT TO RECEIVE EDUCATIONAL BENEFITS?

In his May 1, 2012 HOD, Hearing Officer McKeever concluded that although the evidence showed that the principal of Neighborhood School was willing to create a self-contained class for Student, no such program yet existed at the school. He found that DCPS' assertion that a program could have been created for the Student, had she attended Neighborhood School for the 2011-2012 school year, was too speculative to amount to an offer of a FAPE, because no information and/or details were provided about the program in order for the Parents and the Hearing Officer to make an assessment as to the appropriateness of the program for the Student.

Whether DCPS can appropriately implement Student's IEP at Neighborhood School unavoidably remains a matter of some speculation. In their complaint, Petitioners allege that Student has attended private schools since Kindergarten and has attended Non-Public School since the 2010-2011 school year. Neighborhood School Principal testified, as she did at the April 24, 2012 hearing, that if Student were to enroll at Neighborhood School, the school would set up a separate self-contained classroom for her, in order to provide the full-time specialized

instruction services specified in Student's IEP. Unless and until Parents take DCPS up on its offer to provide services to Student at Neighborhood School, there will be no reason for DCPS to establish a new self-contained classroom, and the school's ability to implement Student's IEP will not be fully known. However, the principal was a credible witness and her testimony on this point was not rebutted by Petitioners. I find, therefore, that Parents have not met their burden of proof to establish that Student's placement at Neighborhood School was not reasonably calculated to enable her to receive educational benefits. DCPS prevails on this issue.

2. WAS DCPS' DECISION TO PLACE STUDENT AT NEIGHBORHOOD SCHOOL FOR THE 2012-2013 SCHOOL YEAR BARRED BY THE DOCTRINE OF PRIOR ADJUDICATION/ISSUE PRECLUSION?

In my order denying Petitioners' Motion for Summary Decision, I found that the doctrine of *res judicata* or claim preclusion is not operative in this case. Petitioners continue to maintain that the related doctrine of issue preclusion, or collateral estoppel, bars DCPS' decision to transfer Student to Neighborhood School for the 2012-2013 school year. In the D.C. Circuit, the standard for issue preclusion requires that "(1) the issue is actually litigated and (2) determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the parties or their privies; (4) under circumstances where the determination was essential to the judgment, and not merely dictum." *Reed v. Department of the Navy*, 2012 WL 5077498, 8 (D.D.C.2012) (quoting *Wash. Med. Ctr. v. Holle*, 573 A.2d 1269, 1283 (D.C.Cir.1990). Petitioners argue that the issue of whether Neighborhood School is capable of implementing Student's April 30, 2012 IEP was litigated in the April 24, 2012 due process hearing and determined against DCPS in the May 1, 2012 HOD. I disagree. The related issue before Hearing Officer McKeever for the April 24, 2012 hearing was "[w]hether DCPS denied the Student a FAPE by failing to propose a placement and/or location of services that could

implement the proposed IEP, dated October 5, 2011." *See* Exhibit P-21 at 3. Hearing Officer McKeever determined that DCPS' failure to provide information about the program proposed for Student at Neighborhood School, at the October 5, 2011 IEP meeting or at the April 24, 2012 due process hearing, made DCPS' assertion that a program could have been created for the Student, had she attended Neighborhood School, too speculative to amount to an offer of a FAPE.

The circumstances of Student's educational placement are little changed factually since the May 1, 2012 HOD was issued. Student continues to attend Non-Public School and DCPS continues to offer to create a self-contained class for Student if she would enroll in Neighborhood School. However, since the October 5, 2011 IEP meeting, DCPS has held several meetings with Parents and a new IEP has been developed. The substantive issue before me now is whether Neighborhood School is capable of fulfilling Student's requirements for a full-time, self-contained, special education program, as set out in her new, April 30, 2012, IEP. That issue was not, and could not have been, litigated in the April 20, 2012 due process hearing. DCPS is not barred from defending on this issue by the doctrine of issue preclusion.

3. DID DCPS DENY STUDENT A FAPE BY FAILING TO RESPOND TO PARENTS' WRITTEN INQUIRIES, BEGINNING IN MAY 2012, REGARDING DCPS' INTENTIONS TO PLACE STUDENT AT NEIGHBORHOOD SCHOOL FOR THE 2012-2013 SCHOOL YEAR?

Petitioners contend that DCPS denied Student a FAPE by not responding to the letters from Petitioners' Counsel, sent after DCPS issued its May 4, 2012 prior written notice moving Student's placement to Neighborhood School. The IDEA requires a school system to provide a written notice to parents when it proposes to change the placement of a child. *See* 20 U.S.C. § 1415(b)(3)(A). However, the Act does not impose a separate requirement for a school system to respond to parents' letters regarding their child's education. I have found in this determination

that DCPS denied Student a FAPE by not ensuring that Parents were members of the group that decided to transfer Student from Non-Public School to Neighborhood School. DCPS' failure to respond to the letters sent on behalf of Parents, after the prior written notice was issued, does not constitute a separate, independent basis for finding a denial of FAPE.

REMEDY

Petitioners' requested remedy in this case is that DCPS be ordered to fund Student's enrollment at Non-Public School for the 2012-2013 school year. "Where a public school system has defaulted on its obligations under the IDEA, a private school placement is 'proper under the Act' if the education provided by said school is 'reasonably calculated to enable the child to receive educational benefits.'" *Wirta v. District of Columbia*, 859 F.Supp. 1, 5 (D.D.C. 1994), quoting *Rowley, supra*, 458 U.S. at 176, 102 S.Ct. at 3034. *See, also, e.g., N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008). An award of private-school placement is "prospective relief aimed at ensuring that the child receives tomorrow the education required by IDEA." *Branham v. Gov't of the District of Columbia*, 427 F.3d 7, 11 (D.C. Cir.2005).

In this case, I have found that DCPS denied Student a FAPE, by failing ensure that Parents were members of the group that decided to transfer Student from Non-Public School to Neighborhood School. A private school placement award is, therefore, proper under the IDEA, provided the education offered by the private school is reasonably calculated to enable Student to receive educational benefits. Placement awards must be tailored to meet the child's specific needs. *Branham, supra*, at 9. To inform this individualized assessment, courts have identified a set of considerations "relevant" to determining whether a particular placement is appropriate for a particular student, including 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. *Id.* at 12. Pursuant to the *Branham* guidance, I will address each of these considerations in turn.

a. Nature and Severity of Student's Disability

The undisputed evidence in this case establishes that Student's primary disability is SLD and that she requires full-time special education programing in an outside-of-general education setting.

b. Student's Specialized Educational Needs

According to Educational Consultant, Student is an intellectually gifted child with pervasive learning disabilities. Non-Public School is able to fulfill the needs of children with Student's disability profile.

c. Link between Student's Needs and the Services Offered by Private School

In his May 1, 2012 HOD, Hearing Officer McKeever determined that Non-Public School was an appropriate placement for Student. Curriculum Specialist from Non-Public School testified at the November 13, 2012 hearing that Student continues to require instruction in a full-time self contained program and benefits from the program at Non-Public School.

d. Cost of Placement at Private School

Non-Public School has received a Certificate of Approval from the D.C. Office of the State Superintendent of Education. DCPS offered no evidence that tuition expenses at this private school are higher than costs at other OSSE-approved nonpublic day schools serving learning disabled students.

e. Least Restrictive Environment

The IDEA requires school districts to place disabled children in the least restrictive environment possible. *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) (citing 20 U.S.C. § 1412(a)(5); 34 C.F.R. 300.550; D.C. Mun. Regs. tit. 5, § 3011

(2006)). The unrefuted testimony in the present case established that Student's programming needs have not changed since the May 1, 2012 HOD was issued, in which Hearing Officer McKeever determined that Non-Public School was Student's least restrictive environment.

The hearing evidence established that in the current school year, Student is doing very well at Non-Public School and is benefitting from the program. I conclude, therefore, that Student is receiving and would continue to receive educational benefits at Non-Public School and that her placement there is proper under the IDEA.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED:

1. DCPS shall fund Student's enrollment tuition and expenses at Non-Public School for the 2012-2013 school year; and

2. All other relief requested by the parties herein is denied.

Date: November 25, 2012

s/ Peter B. Vaden
Peter B. Vaden, 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 U.S.C. §1415(I).