



(4) failing to conduct age appropriate transition assessments and/or a vocational evaluation during the 2011-12 school year; and (5) failing to conduct re-evaluations upon parental request.

DCPS filed its Response on January 13, 2012, denying the allegations of the Complaint. DCPS responds (*inter alia*) that the Student was placed at another non-public, special education day school located in D.C., during the 2010-11 school year; that DCPS provided the Student with access to a FAPE for the 2011-12 school year within Center Schools and Programs in co-location classrooms at a DCPS campus Academy at \_\_\_\_\_ but the parent declined the offer; and that DCPS has fully responded to all of the parent's evaluation requests.

On January 13, 2012, DCPS also held a resolution meeting, which did not resolve the Complaint. The parties agreed to end the statutory 30-day resolution period early, as of that date. As a result, the 45-day timeline for issuance of the Hearing Officer Determination ("HOD") began on 01/13/2012 and is scheduled to expire on 02/27/2012.

On January 18, 2012, a Prehearing Conference was held to discuss and clarify the issues; and on January 26, 2012, a Prehearing Order was issued. The parties then filed their five-day disclosures, as agreed, on February 9, 2012.

The Due Process Hearing was held in two sessions on February 16 and 21, 2012, in Hearing Room 2006. Petitioner elected for the hearing to be closed. At the Due Process Hearing, the following Documentary Exhibits were admitted into evidence without objection:

**Petitioner's Exhibits:** 1 through -22.

**Respondent's Exhibits:** DCPS-1 through DCPS-21.

In addition, the following Witnesses testified on behalf of each party:

**Petitioner's Witnesses:** (1) Student; (2) Parent-Petitioner; (3) Educational Advocate ("EA") (Direct and Rebuttal); (4) Private School Teacher; and (5) Associate Head of Private School.

**Respondent's Witnesses:** (1) Temple Crutchfield, Program Director, \_\_\_\_\_ Academy- DCPS Locations (expert on special education programming and placement in public school setting); (2) Nickaya Foster, DCPS Case Manager; (3) Joshua Thomas, DCPS Case Manager; and (4) Nicole Garcia, LEA Representative.

Oral closing arguments were submitted by both parties thereafter.

Petitioner also submitted a written statement of authorities via email, which has been reviewed.

## **II. JURISDICTION**

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* 5-E DCMR §§ 3029, 3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("SOP"). The statutory HOD deadline is February 27, 2012.

## **III. ISSUES AND REQUESTED RELIEF**

The following issues were presented for determination at hearing:

**(1) Failure to Develop Appropriate IEP (05/04/2011)** – Did DCPS deny the Student a FAPE by failing to develop an appropriate IEP (*i.e.*, one that is reasonably calculated to confer educational benefit) as of **May 4, 2011**?

*Specifically*, Petitioner alleges that the annual goals contained in the Student's May 4, 2011 IEP Post-Secondary Transition Plan are not tailored to meet his individual needs, based upon age appropriate transition assessments.

**(2) Procedural – Parent Participation in 7/26/2011 Meeting** – Did DCPS commit a procedural violation and, as a result thereof, deny the Student a FAPE by failing to ensure parental participation in the July 26, 2011 MDT/IEP meeting?

**(3) Failure to Provide Appropriate Placement** – Did DCPS deny the Student a FAPE by failing to determine a proper placement for the 2011-12 school year? – Petitioner alleges that \_\_\_\_\_ Academy at \_\_\_\_\_ cannot meet the Student's educational needs and cannot provide an educational benefit.

**(4) Failure to Evaluate (Transition Assessments and/or Vocation Evaluation)** – Did DCPS deny the Student a FAPE by failing to conduct age appropriate transition assessments and/or a vocational evaluation as required during the 2010-11 school year?

**(5) Re-Evaluation (FBA)** – Did DCPS deny the Student a FAPE by failing to conduct a timely re-evaluation of a 2007 functional behavioral assessment ("FBA") upon parental request and consent on May 4, 2011?

As relief, Petitioner requests that the Hearing Officer make appropriate findings and order DCPS to (a) reimburse the funding at Private School since 08/19/2011; (b) place and fund Student at Private School prospectively; (c) fund independent FBA and vocational evaluations; (d) convene an MDT/IEP team meeting to review evaluations and update the IEP; and (e) award compensatory education for denials of FAPE during the 2010-11 school year, primarily in the form of transition services, which were to be described in writing in the five-day disclosures.

As the party seeking relief, Petitioner was required to proceed first at the hearing and carried the burden of proof on the issues specified above. 5-E DCMR §3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). Petitioner also had the burden of proposing a well-articulated plan for compensatory education, in accordance with the standards of *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005).

#### **IV. FINDINGS OF FACT**

Based upon the evidence presented at the due process hearing, this Hearing Officer makes the following Findings of Fact:

1. The Student is a -year old student who is a resident of the District of Columbia. Petitioner is the Student's mother. -1; *Parent Test*.
2. The Student has been determined to be eligible for special education and related services as a child with a disability under the IDEA. -1; -8; *Parent Test*. His primary disability is Other Health Impairment ("OHI"). *Id*.
3. From approximately April 2008 to August 2011, the Student attended pursuant to a full-time special education placement funded by DCPS. The Student currently attends Private School, a non-public, special education day school located in D.C., pursuant to unilateral parental placement. He is doing well in school, and he is on track to graduate in June 2012 with a regular high school diploma. *See Student Test.; Parent Test*.
4. On or about May 4, 2011, DCPS convened an MDT/IEP Team meeting at RCA to discuss the Student's overall progress and to update his IEP. *See -8; -10; DCPS-2*. The 05/04/2011 IEP developed at this meeting provided approximately 26.5 hours per week of Specialized Instruction in an Outside General Education setting, along with one (1) hour per week of Behavioral Support Services in an Outside General Education setting. -8, p. 1; *DCPS-2, p. 000025*. The 05/04/2011 IEP also contained a statement of the Student's post-secondary transition service needs, labeled either a "DCPS Transition Services Plan" -8, p. 15) or a "Post-Secondary Transition Services Plan" (*DCPS-2, p. 000030*), depending on the document.<sup>3</sup> Petitioner attended the meeting,

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<sup>3</sup> The evidence adduced at hearing indicates that Exhibit -8 is the form of IEP manually prepared at the 05/04/2011 IEP meeting held at while DCPS-2 is the version input into the DCPS computerized special education data system ("SEDS") based on -8. *See Garcia Test*. The content of the two versions appears to be substantially the same, although certain variances are noted herein to the extent relevant.

signed the IEP, and checked the box next to her signature indicating that she agreed with the contents of the IEP. -8, p. 1. See also -10; Parent Test.

5. At the May 4, 2011 meeting, the IEP Team reviewed and revised the goals in the IEP and agreed that the Student continued to require a full-time special education program and out-of-general-education setting. -10. The IEP Team also reviewed the Student's transition plan and discussed his interest in becoming an electrical engineer or electrician. *Id.*; *Garcia Test.*; *Student Test.* It was noted that the Student hoped to attend a post-secondary school in Ohio and then move to California to live independently; that he had completed a Level I Vocational Assessment reflecting his post-secondary career interests; and that he was currently participating in the Individual Graduation Portfolio ("IGP") with his guidance counselor at -10, p. 2. See also -8, p. 15; *Garcia Test.*
6. At the May 4, 2011 meeting, the IEP Team also discussed the Student's behavior, and Petitioner provided written consent for DCPS to conduct an FBA. -10; -19. The FBA was completed on or about June 10, 2011. -20.
7. During approximately this same time period, OSSE was proposing to revoke certificate of authority. As a result, the May 4, 2011 IEP Team understood that, while intended to oppose the proposed revocation, the Team might have to come back to the table to discuss LRE, placement and/or location of services for the 2011-12 SY depending on the outcome of such regulatory action. See -10, p. 3; see also *Garcia Test.* (discussing OSSE directive to DCPS to hold LRE/placement meetings for students).
8. On or about July 7, 2011, DCPS sent a Letter of Invitation ("LOI") inviting Petitioner to an IEP Team meeting to be held on July 26, 2011, to discuss possible changes in the setting, placement, and/or location assignment of the Student for the 2011-12 school year. See *DCPS-3*; *Garcia Test.*; *Crutchfield Test.* The LOI was mailed twice to Petitioner's address and a copy left at Petitioner's home by a DCPS case manager making a home visit prior to the meeting, on or about July 19, 2011.<sup>4</sup> They were also faxed to Petitioner's educational advocate at the James Brown law firm. DCPS also attempted to reach Petitioner several times by telephone. See *Garcia Test.*; *Foster Test.*; *Thomas Test.*

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<sup>4</sup> Petitioner testified that she has resided at the address listed on the 07/07/2011 LOI for the past two years. See *Parent Test.* (cross examination).

9. On or about July 26, 2011, DCPS convened an MDT/IEP Team meeting pursuant to the 07/07/2011 LOI. Participants included various DCPS' representatives and a representative of [redacted] Academy. Petitioner did not attend or participate in the meeting. [redacted] also was invited, but declined to attend. *See DCPS-4; Parent Test.*
10. At the July 26, 2011 meeting, DCPS discussed least restrictive environment ("LRE") considerations for the Student and determined that the Student should remain in an out-of-general education setting as his LRE. *DCPS-4, p. 000036.* DCPS then proposed to change the Student's location of services and/or placement for the 2011-12 school year from [redacted] to [redacted] Academy at [redacted] which it stated could implement the IEP and offer a small environment for the Student. *Id., pp. 000036-37.* The meeting included a discussion of [redacted] Academy at [redacted] the Student's needs, and why DCPS believed the proposed school placement was appropriate for the Student. *Garcia Test.* The [redacted] Academy campus was selected because it was the closest to the Student's home. *Id.*
11. Also on July 26, 2011, DCPS issued a formal Prior Written Notice proposing to change the Student's "location of services" from [redacted] to [redacted] Academy at [redacted] effective with the 2011-12 school year. *DCPS-6.* The PWN provided that the Student's "last day enrolled at [redacted] is 8/5/11." *Id., p. 000054.* The 07/26/2011 PWN was mailed to Petitioner and also left at Petitioner's door on another home visit in August, 2011. *See Foster Test.* Transportation services were also authorized beginning 08/22/2011. *DCPS-8.*
12. On or about August 8, 2011, [redacted] closed down. *Garcia Test.*
13. On or about August 19, 2011, the Admissions Committee of Private School offered the Student a place in its Upper School program for the 2011-12 school year. [redacted] -16.
14. On or about August 29, 2011, the Student enrolled at and began attending Private School for the first day of classes. *Assoc. Head Test.* Petitioner failed to notify DCPS prior to this enrollment.
15. Approximately two weeks later, on or about September 13, 2011, Petitioner through her attorney sent a letter to DCPS' Director of Special Education notifying DCPS that she "intends to obtain an alternate placement for her child as the Student's current placement is no longer appropriate." [redacted] -15. Petitioner informed DCPS that the Student had been

accepted into Private School and that she was “requesting a unilateral placement order be granted” for Student to attend Private School. *Id.*

16. On or about September 14, 2011, DCPS replied to Petitioner’s 09/13/2011 letter.  
*14.* The DCPS reply stated (*inter alia*): “DCPS will not agree to fund [Student]’s placement at [Private] School. It is DCPS’ position that can meet [Student]’s educational needs and provide a FAPE.” *Id.* DCPS also visited Petitioner’s home in mid-September and handed her a copy of the letter. *See Foster Test.*
17. On or about September 22, 2011, DCPS wrote again to Petitioner regarding the Student’s enrollment status. The 09/22/2011 DCPS letter informed Petitioner that the Student “will be withdrawn from \_\_\_\_\_ on September 30, 2011,” and that after that date Petitioner “will then be required to start the re-enrollment process by coming down to DCPS Central Office (1200 First Street, NE, 9<sup>th</sup> Floor) and speaking to a Non-Public Unit Program Manager or by going to your neighborhood school.” *DCPS-15, p. 000068.*
18. On or about September 30, 2011, DCPS issued a Prior Written Notice proposing to withdraw the Student from \_\_\_\_\_ at \_\_\_\_\_. The 09/30/2011 PWN further stated: “Should the Student make himself available, service would be rendered at his local public school, \_\_\_\_\_ where a 30-day review meeting would be held.” *DCPS-14, p. 000067.*
19. Petitioner did not respond to DCPS’ 09/22/2011 letter or 09/30/2011 PWN. She never visited \_\_\_\_\_ at \_\_\_\_\_ and did not have any other contact with DCPS regarding that proposed school placement. *See Parent Test.*
20. On or about January 13, 2012, DCPS held a resolution meeting with Petitioner to discuss the issues raised by the Complaint. *See 4; DCPS-17.* DCPS maintained its position that \_\_\_\_\_ at \_\_\_\_\_ was an appropriate placement and would have been able to implement the Student’s IEP, had the Student not been unilaterally placed at Private School. *Id., pp. 2-3.* DCPS offered to conduct a Vocational II Assessment and convene an MDT/IEP Team meeting to review the Vocational II and FBA, and review/revise the Student’s transition plan as appropriate. Petitioner declined this offer. *Id., p. 4.* DCPS also provided Petitioner a copy of the June 2011 FBA at that time. *Id.; Parent Test.*

21. Petitioner has not paid anything to Private School, and she has not received any bill or invoice from Private School, for the Student's tuition or other services from August 29, 2011 to the present. *Parent Test.* (cross examination). Normal tuition expenses are approximately over a 180-day school year. *Assoc. Head Test.*

22. at can implement the goals and services in the Student's IEP. *See Crutchfield Test.; Garcia Test.; DCPS-21.*

## V. DISCUSSION AND CONCLUSIONS OF LAW

This is a case for retroactive reimbursement of the costs of a unilateral parental placement, along with prospective placement and other relief. The governing legal principles are well established. Under the IDEA, “[i]f the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private ... secondary school without the consent of or referral by the public agency, a court or a hearing officer *may* require the agency to reimburse the parents for the cost of [private school] enrollment if the court or hearing officer finds [1] that the *agency had not made FAPE available to the child in a timely manner prior to that enrollment and* [2] that *the private placement is appropriate.*” 34 C.F.R. § 300.148 (c) (emphasis added). Essentially the same two-prong test was recognized by the Supreme Court under general equitable authority prior to the 2004 IDEA amendments. *See Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 12-13 (1993); *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 369-70 (1985); *see also Roark v. District of Columbia*, 460 F. Supp. 2d 32 (D.D.C. 2006). Moreover, “equitable considerations are relevant in fashioning relief,” *Burlington*, 471 U.S. at 374, and courts and hearing officers have “broad discretion” in the matter. *Id.* at 369. The Hearing Officer “must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required.” *Carter*, 510 U.S. at 16.<sup>5</sup>

IDEA further provides that the cost of reimbursement may be reduced or denied if: (1) “at the most recent IEP Team meeting that the parents attended prior to removal of the child

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<sup>5</sup> *See also Forest Grove Sch. Dist. v. T.A.*, 557 U.S. \_\_\_, 129 S. Ct. 2484 (2009), slip op. at 16-17 (“When a court or hearing officer concludes that a school district failed to provide a FAPE and the private placement was suitable, it must consider all relevant factors, including the notice provided by the parents and the school district’s opportunities for evaluating the child, in determining whether reimbursement for some or all of the cost of the child’s private education is warranted”).

from the public school, the parents did not inform the IEP team ...[of] their intent to enroll their child in a private school at public expense”; or (2) at least 10 business days prior to removal, the parents did not give written notice of their intent to the public agency; or (3) “upon a judicial finding of unreasonableness with respect to the actions taken by the parents.” 34 C.F.R. §300.148 (d).

In this case, the Student previously received special education and related services under the authority of DCPS at \_\_\_\_\_ and he was then enrolled by Petitioner in Private School without the consent of or referral by DCPS. In order for Petitioner to obtain tuition reimbursement, she must first prove that DCPS failed to make FAPE<sup>6</sup> available to the Student in a timely manner prior to the Private School enrollment for which she seeks to be reimbursed. In that event, Petitioner would then need to prove that the Private School enrollment was proper under the Act. *See Burlington*, 471 U.S. at 370. Petitioner carries the burden of proof on both points. *See DCMR 5-E3030.3; Schaffer v. Weast*, 546 U.S. 49 (2005).

For the reasons discussed below, the Hearing Officer concludes that Petitioner has failed to prove by a preponderance of the evidence that DCPS has denied the Student a FAPE as alleged under any of the specified issues. Because Petitioner has not shown that DCPS failed to make FAPE available in a timely manner prior to the Private School enrollment, the first prong of the *Carter/Burlington* test is not satisfied, and there is no basis for awarding any reimbursement. “Parents who choose unilaterally to place their disabled child in a private school without the agreement of the school district do so at their own risk.” *Roark v. District of Columbia*, 460 F. Supp. 2d 32, 45 (D.D.C. 2006). As the U.S. District Court for the District of Columbia has explained:

“It is irrelevant that [Private School] may be better suited to serve [Student] than [DCPS school]. The IDEA ‘does not necessarily guarantee the child [with a disability] the best available education.’ Nor does it guarantee that the child will receive the education that the parent thinks is best. If the parent prefers a private institution to an appropriate placement determined by MDT, then she is free to pay for it at her own expense. DCPS is not required to reimburse a plaintiff for

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<sup>6</sup> Under the IDEA, FAPE means “special education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)...” 20 U.S.C. § 1401(9); *see* 34 C.F.R. § 300.17; DCMR 5-E3001.1.

private school tuition if, as is the case here, a FAPE was made available but the plaintiff rejected it.”

*O.O. v. District of Columbia*, 573 F. Supp. 2d 41, 51 IDELR 9 (D.D.C. 2008) (citations omitted), slip op. at 17. Thus, the Hearing Officer need not reach the second prong of the *Carter/Burlington* test.<sup>7</sup>

### 1. May 4, 2011 IEP – Post-Secondary Transition Plan

To be sufficient to provide FAPE under the IDEA, an “IEP must be ‘reasonably calculated’ to confer educational benefits on the child, but it need not ‘maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.” *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009), slip op. at 6, quoting *Board of Education v. Rowley*, 458 U.S. 176,200,207 (1982); see also *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988).<sup>8</sup> “Beginning not later than the first IEP to be in effect when the child turns 16... the IEP “must include ... ***appropriate measureable postsecondary goals based upon age appropriate transition assessments*** related to training, education, employment, and, where appropriate, independent living skills....” 34 CFR § 300.320(b) (emphasis added). See 20 U.S.C. § 1414 (d)(1)(A)(i)(VII).

In this case, Petitioner did not present any evidence to prove that any of the goals in the Student’s transition plan either (a) were not tailored to meet his individual needs, or (b) were not based upon age appropriate transition assessments. To the contrary, the evidence presented by Petitioner shows that the transition plan developed and discussed at the May 4, 2011 IEP meeting at (and carried forward by DCPS in May-July 2011) was appropriately focused on his interest in becoming an electrician and the tasks needed to accomplish that goal. See -8, p. 15; CG-10, p. 2; *Garcia Test. (cross examination)*. The same evidence also shows that the goals

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<sup>7</sup> Moreover, assuming *arguendo* that the first prong were satisfied, the Hearing Officer would need to consider the appropriate and reasonable level of reimbursement that should be required. *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484; *Carter*, 510 U.S. at 16. In this case, no reimbursement would be appropriate since the evidence shows that Petitioner has not incurred any financial obligation to Private School for the costs of the Student’s enrollment. See *Parent Test.*; *Assoc. Head Test*; *Findings* ¶ 20.

<sup>8</sup> Judicial and hearing officer review of IEPs is “meant to be largely prospective and to focus on a child’s needs looking forward; courts thus ask whether, at the time an IEP was created, it was ‘reasonably calculated to enable the child to receive educational benefits.’” *Schaffer v. Weast*, 554 F.3d 470,477 (4th Cir. 2009) (citing *Rowley*, 458 U.S. at 207).

were based on age appropriate transition assessments, including a Vocational I Assessment as well as academic achievement testing. *Id.*

Accordingly, the Hearing Officer concludes that Petitioner has not proved by a preponderance of the evidence that DCPS denied the Student a FAPE under Issue 1.

## **2. Procedural – Parent Participation in July 26, 2011 Meeting**

The IDEA requires each public agency to “take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate.” 34 C.F.R. §300.322 (a). This includes “(1) notifying parents of the meeting early enough to ensure that they will attend; and (2) scheduling the meeting at a mutually agreed on time and place.” *Id.* The notice must include the purpose, time, and location of the meeting, who will attend, and other required information. *Id.*, §300.322 (b). However, a public agency may conduct a meeting without a parent in attendance “if the public agency is unable to convince the parents that they should attend.” *Id.*, §300.322 (d). In that situation, the public agency “must keep a record of its attempts to arrange a mutually agreed on time and place, such as – (1) detailed records of telephone calls made or attempted and the results of those calls; (2) copies of correspondence sent to the parents and any responses received; and (3) detailed records of visits made to the parent’s home or place of employment and the results of those visits.” *Id.*

In this case, the evidence shows that DCPS did take reasonable steps to ensure Petitioner’s attendance at the July 26, 2011 meeting, but that Petitioner chose not to participate in the IEP placement process for the Student. DCPS notified Petitioner in writing a few weeks prior to the scheduled meeting, and the written notice appears to comply with the requirements of §300.322 (b). DCPS also retained and presented copies of correspondence sent to Petitioner, as well as first-hand testimony concerning telephone calls and home visits. While DCPS did not present actual logs or records of these calls and visits, as would be preferred, the Hearing Officer concludes that DCPS substantially complied with the procedural requirements of §300.322 (d).

Moreover, assuming *arguendo* that DCPS committed a procedural violation in conducting the July 26, 2011 IEP meeting without Petitioner in attendance, the Hearing Officer concludes that the violation has not affected the Student’s substantive rights. *See Lesesne v. District of Columbia*, 447 F. 3d 828 (D.C. Cir. 2006). Petitioner has failed to show that any such

procedural inadequacy impeded the Student's right to a FAPE, significantly impeded Petitioner's opportunity to participate in the decision-making process regarding the provision of a FAPE to her child, and/or caused a deprivation of educational benefit. 34 C.F.R. 300.513 (a) (2) (i), (ii). The evidence indicates that Petitioner was represented by counsel at the James Brown law firm throughout the relevant time period, and that her counsel was well informed of the situation involving certification problem and impending closure and the pressing need for DCPS to conduct placement meetings for students for the 2011-12 school year. *See Parent Test.; Garcia Test.; DCPS-12; DCPS-17, p. 2.*

Accordingly, Petitioner has failed to meet her burden of proof on Issue 2.

### **3. Failure to Provide Appropriate Placement**

Under the IDEA, “[d]esigning an appropriate IEP is necessary but not sufficient. DCPS must also implement the IEP, which includes offering placement in a school that can fulfill the requirements set forth in the IEP.” *O.O. v. District of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008). Moreover, D.C. law mandates that DCPS place a student with a disability in “an appropriate special education school or program” in accordance with the IDEA. D.C. Code 38-2561.02. *See also Branham v. District of Columbia*, 427 F. 3d 7, 12 (D.C. Cir. 2005), *citing McKenzie v. Smith*, 771 F.2d 1527, 1534-35 (affirming “placement based on match between a student’s needs and the services offered at a particular school”) (emphasis added); *Jenkins v. Squillacote*, 935 F. 2d 303, 305 (D.C. Cir. 1991) (“If no suitable public school is available, the District must pay the costs of sending the child to an appropriate private school.”). In addition, DCPS must ensure that its placement decision is in conformity with the Least Restrictive Environment (“LRE”) provisions of the IDEA. *See* 34 C.F.R. §§ 300.114-300.116.

In this case, Petitioner has failed to prove by a preponderance of the evidence that at is (or would have been, as of 07/26/2011) an inappropriate school or program for the Student. Petitioner failed to prove its allegations that (a) cannot meet the Student’s educational needs and (b) cannot provide an educational benefit, as specified under Issue 3. The undisputed evidence shows that could implement all of the goals and services included in the Student’s May 4 or July 26, 2011 IEPs.

Petitioner’s main argument seems to be that she believes Academy at Phelps is a program designed for students with emotional disturbances (“ED”) and the Student is OHI

rather than ED. However, the DCPS witnesses testified that the program includes students with a variety of disabilities (including OHI/ADHD and learning disabled), who have or are at risk for behavioral, emotional, and learning difficulties. *See Crutchfield Test.; Garcia Test.; see also DCPS-21.* Petitioner did not successfully rebut this testimony at hearing.<sup>9</sup> Moreover, Petitioner did not present any evidence to prove that the \_\_\_\_\_ program was unable to meet the Student's needs as described in his IEP, much less that it could not provide any meaningful educational benefit consistent with *Rowley*.

#### **4. Failure to Evaluate – Transition/Vocational Assessment**

For the reasons stated under Issue 1 above, the Hearing Officer concludes that Petitioner has failed to prove by a preponderance of the evidence that DCPS denied the Student a FAPE under Issue 4. The evidence shows that a Level I Vocational Assessment was conducted and that such assessment, along with academic achievement testing, was used to formulate the Student's post-secondary transition plan.

#### **5. Re-Evaluation (FBA)**

Prior to the beginning of DCPS' case during the second day of hearing, the Hearing Officer granted DCPS' motion for a directed finding on Issue 5 and dismissed this claim for the reasons stated on the record. Petitioner's own exhibits contain a copy of an FBA prepared and executed by a DCPS licensed clinical social worker on June 10, 2011 \_\_\_\_\_ 20), slightly over 30 days after Petitioner consented to the FBA, \_\_\_\_\_ 19. In addition, Petitioner's counsel expressly withdrew the FBA claim at the conclusion of Petitioner's case on February 16, 2012.

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<sup>9</sup> Petitioner presented the testimony of her educational advocate, who happened to interview in mid-August 2011 for a position with \_\_\_\_\_ Academy (although at a different DCPS campus) and who obtained the firm impression that she would be working in an ED program. *See EA Test.* But this witness never visited the Phelps campus and had no other first-hand knowledge of the Spectrum Academy program. *Id. (cross examination).* Petitioner also makes much of the fact that the program description contained in a so-called "Backgrounder" document was only revised to remove references to "Emotional Disturbance" after the 2011 summer, *compare 22 with DCPS-21*, but Petitioner never states that she relied on the earlier descriptions in declining DCPS' offer and unilaterally placing the Student at Private School.

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The Hearing Officer is not unmindful of the fact that the Student is less than four months away from high school graduation and appears to be progressing toward that important goal. If Petitioner and the Student desire for him to complete his studies at Private School, it is hoped that he will be permitted to do so (regardless of DCPS approval), considering that Private School has already provided services for the first six months of the 2011-12 school year without cost to Petitioner. However, there is no basis for ordering DCPS to fund this parental placement. Petitioner cannot create such exigency by (a) declining to participate in the IEP/placement process during the 2011 summer, despite multiple notices and follow-up efforts, (b) while arranging a private placement of her choice for the Student without prior notice to DCPS, and then (c) waiting several more months to file a due process complaint seeking reimbursement and prospective placement that she now claims is needed to avoid undue educational disruption. That is not how the IDEA was intended to operate. "DCPS is not required to reimburse a plaintiff for private school tuition if, as is the case here, a FAPE was made available but the plaintiff rejected it." *O.O. v. District of Columbia* (D.D.C. 2008), *supra*. See also 34 C.F.R. §300.148 (c).

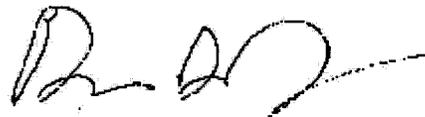
**VI. ORDER**

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

1. Petitioner's requests for relief in her Due Process Complaint filed December 20, 2011 are hereby **DENIED**; and
2. The Complaint is **DISMISSED, With Prejudice**.

***IT IS SO ORDERED.***

Dated: February 27, 2012



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Impartial Hearing Officer

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia court of competent jurisdiction or in a District Court of the United States, without regard to the amount in controversy, within ninety (90) days from the date of the Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).