

**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>

Petitioner,

v

District of Columbia Public Schools (DCPS),

Respondent.

Date Issued: October 13, 2011

Hearing Officer: Jim Mortenson

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STUDENT HEARING OFFICE  
2011 OCT 13 PM 1:15

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**HEARING OFFICER DETERMINATION**

**I. BACKGROUND**

Two prior complaints on behalf of the Student were filed and resulted in Hearing Officer Determinations (HODs) in the past year. Case \_\_\_\_\_ resulted in an HOD by Independent Hearing Officer (IHO) Seymour DuBow on February 11, 2011. Case \_\_\_\_\_ resulted in an HOD by IHO Kimm Massey on August 5, 2011.

The complaint in this matter was filed by the Petitioner on August 19, 2011.

IHO Ramona Justice was appointed to hear the matter. A resolution meeting was held August 29, 2011. The parties did not reach a settlement. They did agree no settlement could be reached and that the 45 day hearing timeline should begin. A response to the complaint was filed on August

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

31, 2011. A prehearing conference was held on September 12, 2011, and a prehearing order issued on that date. The prehearing order was amended on September 14, 2011. The undersigned was appointed on October 3, 2011, replacing IHO Justice in hearing the matter.

## **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. ISSUES, RELIEF SOUGHT, and DETERMINATION**

The issues to be determined by the independent hearing officer (IHO) are:

- 1) Whether the District of Columbia Public Schools (DCPS) denied the Student a free appropriate public education (FAPE) by failing to ensure the Parents of the Student received appropriate written notice of the August 16, 2011 team meeting; and that the meeting was scheduled at a mutually agreed upon time and place to ensure parent participation, in violation of the IDEA, at 34 C.F.R. § 300.322?
- 2) Whether the DCPS denied the Student a FAPE, because on August 16, 2011, it failed to properly convene a placement meeting, by ensuring that the team included the parents and other persons knowledgeable about the child, the meaning of the evaluation data, and placement options, in violation of the IDEA, at 34 C.F.R. § 300.116(a)(1)?
- 3) Whether the DCPS denied the Student a FAPE, because on August 16, 2011, it failed to ensure that the Parent was provided the opportunity to provide meaningful input in the placement decision, in violation of the IDEA, at 34 C.F.R. § 300.116(a)(1)?
- 4) Whether the DCPS denied the Student a FAPE by failing to provide the Student an appropriate placement on August 16, 2011, because the *location of services* identified

in the August 16, 2011 Prior Written Notice, is unable to implement the Student's individualized education program (IEP) by providing the Student the full-time special education program in a therapeutic environment, outside of the general education setting; the Student is well above the cognitive level of students at the school; the school is unable to provide the Student a diploma; and the team failed to consider the Student's needs, in determining the Student's placement; in violation of the IDEA, at 34 C.F.R. §§ 300.114(a)(2)(ii) and 300.116(a)(2) & (b)(2)?

The substantive requested relief at the time of hearing is reimbursement of the school in which the Petitioner unilaterally placed the Student, School.

The Petitioner was provided notice of and participated in the August 16, 2011, team meeting. The Respondent failed to ensure the August 16, 2011, team meeting included persons knowledgeable about the Student or placement options. The Respondent failed to ensure the Student was appropriately placed when the placement was not made based on the Student's IEP.

#### IV. EVIDENCE

Four witnesses testified at the hearing, all for the Petitioner.

The witnesses were:

- 1) The Student (S)
- 2) Chithalina Khanchalern, Educational Advocate (C.K.)
- 3) Executive Director,
- 4) Special Education Coordinator,

27 labeled exhibits were disclosed by the Petitioner and 26 were admitted into evidence.<sup>2</sup> The

Petitioner's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>	
P 1	September 28, 2011 (printed)	[Pages from	website]
P 2	September 28, 2011	Student Schedule	

<sup>2</sup> P 3 was not admitted. It consisted of several pleadings and orders from the administrative record.

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 2(cont.)	September 28, 2011 Undated September 12, 2011 September 14, 2011 September 12, 2011 September 27, 2011 Undated	Attendance Record for [Student] [Suffix worksheet] [Math worksheet] [Math worksheet] [Math worksheet] Language Norms Test Staff Bio Template
P 4	August 5, 2011 February 11, 2011	Case No. 2011-0578 Hearing Officer Determination Case No. 2010-1543 Hearing Officer Determination
P 5	September 15, 2011 September 13, 2011	[Email] Spectrum Student Letter Letter from        to Administrator
P 6	September 12, 2011	[Email chain ending from Hecht to Justice and Cooley]
P 7	August 30, 2011	[Email from CK to Garcia, Bryant, and Thomas with attachments]
P 8	August 23, 2011 August 22, 2011	Letter from Hannah to Hecht (See R 10) Letter from Hecht to Beers (See P 9 & R 10)
P 9	August 22, 2011	Letter from Hecht to Beers (See P 8 & R 10)
P 10	August 16, 2011	Advocate's Notes
P 11	Undated August 16, 2011	Meeting Notes [August 16, 2011 meeting] (See R 8) Prior Written Notice (See R 9)
P 12	August 11, 2011  August 11, 2011  August 9, 2011 August 9, 2011 August 9, 2011 August 1, 2011 July 28, 2011  July 28, 2011 July 28, 2011 July 22, 2011 July 22, 2011 July 22, 2011	[Email chain ending from Hecht to Adon, Bolton, Garcia, and Bryant] Email from Hecht to Bolton, Adon, Garcia and Bryant] [Email chain ending from Webb to Hecht] [Email chain ending from Hecht to Bolton] Email from Hecht to Adon Email from Cole to Garcia, Bryant, and Adon Email from Hecht to Bolton, Garcia, Bryant, and Adon Email from Cohen to Hecht Email from Hecht to Garcia [Email chain ending from [Email chain ending from Email from
P 13	July 25, 2011 July 25, 2011	Email from McCall to Hecht and Massey [Email chain ending from McCall to Massey and Hecht]
P 14	Undated July 20, 2011  June 2, 2011	Meeting Notes [July 20, 2011 meeting] New Addendum Meeting Page (See R 5), [IEP] Meeting Notes (See R 6) [IEP] (See R 5, different from R 2)
P 15	July 20, 2011	Letter of Invitation to a Meeting (See R 7)

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 16	June 2, 2011	Advocate's Notes
P 17	Undated	Meeting Notes [June 2, 2011 meeting] (See R 3)
P 18	June 2, 2011	[IEP] Meeting Notes
P 19	December 7, 2010	[IEP]
P 20	December 7, 2010	IEP Meeting For The [Surname] Siblings
P 21	June 4, 2011	Functional Behavioral Assessment
P 22	Undated	Speech Language Evaluation [March 19, 2011]
P 23	Undated	Vocational Level III Evaluation [April 28, 2011]
P 24	January 11, 2011	Educational Evaluation
P 25	September 23, 2011	[Email chain ending from Cooley to Hecht]
P 26	September 28, 2011	Email from Khanchalern to Austin
P 27	September 29, 2011	[Email chain ending from Khanchalern to Austin]
	September 29, 2011	[Email chain ending from Austin to Khanchalern]
	September 29, 2011	Transcript
	September 29, 2011	Letter of Understanding
	August 16, 2011	Prior Written Notice
	September 28, 2011	Email from Khanchalern to Austin
	September 27, 2011	Email from Hecht to West
	September 27, 2011	[Email chain ending from Hecht to West]
	September 27, 2011	[Email chain ending from West to Hecht]
	September 26, 2011	Email from Hecht to West
	September 23, 2011	Email from Wendorf to West
	September 22, 2011	Email from Wendorf to Hecht
	September 15, 2011	Letter from Hecht to Mitchell, General Authorization for Information

11 labeled exhibits were disclosed by the Respondent and 10 were admitted into evidence.<sup>3</sup>

The Respondent's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
R 2	June 2, 2011	[IEP] (Different from R 5/P 14)
R 3	Undated	Meeting Notes [June 2, 2011 meeting] (See P 17)
R 4	June 2, 2011	Consent for Initial Evaluation/Reevaluation
R 5	June 2, 2011	[IEP] (See P 14, different from R 2)
	July 20, 2011	New Addendum Meeting Page (See P 14)
R 6	July 20, 2011	[IEP] Meeting Notes (See P 14)
R 7	July 20, 2011	Letter of Invitation to a Meeting (See P 15)
R 8	Undated	Meeting Notes [August 16, 2011 meeting] (See P 11)
R 9	August 16, 2011	Prior Written Notice (See P 11)
R 10	August 23, 2011	Letter from Hannah to Hecht (See P 8)
	August 22, 2011	Letter from Hecht to Beers (See P 8 & P 9)

<sup>3</sup> R 1 was not admitted as evidence as it was a copy of the response to the complaint which is already part of the administrative record.

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
R 11	Undated	[Curricula Vitae of Regina M. Kimbrough]

### 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 in the     grade.<sup>4</sup> The Student receives special education and related services and was determined eligible for such services under the definition of mental retardation.<sup>5</sup>
2. The Student's IEP revised in December 2010 indicates that the Student's academic achievement would be assessed using the regular statewide assessment (DC-CAS) with accommodations.<sup>6</sup> The IEP also states that the Student is projected to graduate with a High School Diploma.<sup>7</sup>
3. Following the December 2010 IEP revision, the parties went to hearing in case and an HOD was issued February 11, 2011, resulting in a change of placement from  
  
School to
4. The IEP was next revised on June 2, 2011.<sup>9</sup> In that revision the Student's academic achievement is to be assessed using an alternate assessment and the Student is still expected

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<sup>4</sup> Testimony (T) of S, P 14.

<sup>5</sup> P 14, P 19.

<sup>6</sup> P 19.

<sup>7</sup> P 19.

<sup>8</sup> P 4.

<sup>9</sup> P 14/R 5.

to earn a high school diploma.<sup>10</sup> Neither the Student's participation with the DC-CAS nor his opportunity to obtain a diploma was discussed at the June 2, 2011, IEP team meeting.<sup>11</sup>

5. The IEP team met again on July 20, 2011 to make a change to the IEP to include 60 minutes per week of speech and language services.<sup>12</sup> The Student's diploma and academic achievement assessment were not discussed at the IEP team meeting.<sup>13</sup>
6. On July 20, 2011, the Petitioner was invited to a subsequent meeting to discuss the Student's IEP, transition plan, behavioral concerns, placement, and compensatory education.<sup>14</sup> Petitioner was aware of this meeting, through her counsel who objected to the time and place because of concerns about the availability of the Student's teachers from [redacted] who would not be available on the scheduled date.<sup>15</sup>
7. Despite the Petitioner's Counsel's objections, the meeting was held on August 16, 2011, as scheduled and the Petitioner and her advocate participated.<sup>16</sup>
8. None of the Student's teachers were present at the August 16, 2011, team meeting and no one who was familiar with the Respondent's proposed placement at [redacted] was present.<sup>17</sup> There was no disagreement that the Student continued to require a special education day school, but since the Respondent could not provide any information about the proposed school but for the fact it served children with mental retardation, the Petitioner objected.<sup>18</sup>

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<sup>10</sup> P 14/R 5.

<sup>11</sup> R 2, R 3, P 16. (The Respondent possesses two IEPs dated June 2, 2011. R 2 includes an IEP that indicates the Student would take the DC-CAS with accommodations and would receive a high school certificate at age 21. This IEP is not only different from the other two IEPs in the record substantively, it has a different format. No one at hearing could explain this and Petitioner's Counsel claimed she had not seen the IEP in R 2 prior to the disclosures. Thus, it is this IHO's finding that the IEP at R 5/P 14 is the June 2, 2011, revision of the IEP, which was subsequently revised on July 20, 2011, not R 2.)

<sup>12</sup> R 6/P 14.

<sup>13</sup> R 6/P14.

<sup>14</sup> R 7/P 15.

<sup>15</sup> P 12.

<sup>16</sup> T of P 10, P 11.

<sup>17</sup> T of P 10, P 11.

<sup>18</sup> T of P 10, P 11.

9. is a separate special education day school for children with moderate to severe intellectual disabilities.<sup>19</sup> There are just under 100 students at the school, from ages four to 22, and about half of whom are high school age.<sup>20</sup> There is a full cadre of related service providers on-site.<sup>21</sup> The school provides instruction in adaptive, functional, and vocational skills.<sup>22</sup> Students attending cannot obtain a high school diploma.<sup>23</sup>
10. The Petitioner, through counsel, notified the Respondent on August 22, 2011, that she was going to place the Student at School within 10 business days.<sup>24</sup> The Respondent responded the following day indicating it was not going to pay for the Parent's unilateral private placement.<sup>25</sup>
11. School is a non-public day school program for students with disabilities.<sup>26</sup> The school serves students in grades nine through 12.<sup>27</sup> The curriculum is aligned with the District of Columbia State Education Standards and students can earn a diploma.<sup>28</sup> The students attending the school participate in academic instruction as well as hands-on vocational training.<sup>29</sup> There are related service providers on-site.<sup>30</sup>
12. The Student has been enrolled at has transitioned well, and enjoys the school.<sup>31</sup> The school is utilizing the Student's IEP from the public school to guide it in addressing his needs.<sup>32</sup>

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<sup>19</sup> T of

<sup>20</sup> T of

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<sup>22</sup> T of

<sup>23</sup> T of

<sup>24</sup> P 8/P 9/R 10.

<sup>25</sup> P 8/R 10.

<sup>26</sup> T of

<sup>27</sup> T of

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## 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 due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to meet their burden. 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).

2. A free appropriate public education (FAPE) for a child with a disability under the IDEA is defined as:

special education and related services that –

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA, including the requirements of this part;
- (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§300.320 through 300.324.

34 C.F.R. § 300.17.

3. 34 C.F.R. § 300.513(a) provides that:

[a] determination of whether a child received FAPE must be based on substantive grounds.

(2) In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies —

- (i) Impeded the child's right to a FAPE;
- (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or
- (iii) Caused a deprivation of educational benefit.

4. Parents must be given an opportunity to participate in IEP team meetings and are to be given notice of such meetings early enough to ensure they have an opportunity to attend. *See* 34 C.F.R. § 300.322.
5. The August 16, 2011, IEP team meeting was scheduled on July 20, 2011. A letter of invitation was sent and received by at least the Petitioner's Counsel. The Petitioner and her advocate participated in the August 16, 2011, IEP team meeting and shared their concerns about the placement proposal with the team. There had been a dispute between Petitioner's Counsel and the Respondent over the time and place of the meeting, based on the unavailability of Rock Creek staff, not the Petitioner. This fact alone does not warrant a conclusion that there was a violation of IDEA. Given the participation of the Petitioner and her advocate at the meeting, there was no denial of FAPE on these grounds because the Petitioner's right to participate in decision making regarding FAPE was not significantly impeded.
6. Placement determinations must be "made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options[.]" 34 C.F.R. § 300.116(a)(1). Placement determinations must be based, in part, on a child's IEP and, unless the IEP requires some other arrangement, a child with a disability is to be educated in the school she would attend if not disabled. *See* 34 C.F.R. § 300.116 (b) & (c).
7. D.C. Mun. Regs. 5-E2203.6 provides:

The decision to pursue a program leading to an IEP Certificate of Completion shall be made by the IEP team including the parent(s) and where possible, the student. The decision shall be made no earlier than the 9<sup>th</sup> grade and shall be attached in writing to the student's Individualized Education Program (IEP).
8. The Respondent failed to convene a group of persons knowledgeable about the Student or the placement options on August 16, 2011, the only meeting where the Student's placement was

discussed. This procedural violation impeded the Student's right to FAPE because the placement determination was not in conformity with his IEP and the proposal would have removed his ability to work toward a diploma. No decision to pursue a program leading to an IEP Certificate of Completion has been made by the Student's IEP team. Thus, the Respondent's proposed placement of the Student at a school that does not enable the Student to work toward a diploma is not consistent with the Student's IEP and is inappropriate. Because the Respondent proposed a placement in which the IEP could not be implemented and the Student would be foreclosed from working toward a diploma, the Respondent denied the Student a FAPE.

10. 34 C.F.R. § 300.148(c) provides:

If 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 preschool, elementary school, or 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 that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.

Use of the term "reimburse" at 34 C.F.R. § 300.148 does not establish that reimbursement is the only available remedy under that provision, nor does it establish that a direct tuition payment remedy is not authorized under § 1415(i)(2)(C)(iii) of the Act itself. *See, Mr. and Mrs. A. v. New York City Dept. of Ed.*, 769 F. Supp. 2d 403, \_\_\_ (S.D.N.Y. 2011). Thus, if determined appropriate by the IHO, the Respondent may be required to pay the private school directly.

11. When there has been a denial of FAPE on substantive grounds (34 C.F.R. § 300.513(a)(1)) the independent hearing officer must grant relief appropriate to ensure the Student is provided a FAPE. *See* 34 C.F.R. § 300.516(c)(3), Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985). The Petitioner has shown by a preponderance of the

evidence that the Student's placement was not based on his IEP and therefore a FAPE was not made available in a timely manner to the Student. She has placed the Student at the School and seeks to have the school reimbursed directly.

School has accepted the Student, can meet the Student's needs and is appropriate or otherwise proper under 34 C.F.R. § 300.148(c) and Florence County School District Four v. Carter, 510 U.S. 7, 15, 114 S.Ct. 361, 366 (1993). Thus, because the Respondent denied the Student a FAPE and the Petitioner's placement is appropriate, the Respondent must reimburse School for educational and related services provided to the Student as long as the Student remains enrolled at the school.

12. Because the Petitioner has chosen to unilaterally place the Student in a private school, the Student's education is no longer under public supervision. (See Florence County School District Four v. Carter, 510 U.S. 7, 13, 114 S.Ct. 361, 365 (1993) "These requirements [e.g. public supervision] do not make sense in the context of a parental placement.")

## VII. DECISION

The Respondent prevails on Issue #1 because the Respondent provided the Petitioner with notice of the August 16, 2011 team meeting early enough to provide the Petitioner an opportunity to attend, which she did..

The Petitioner prevails on Issue #2 because the Respondent did not convene a team on August 16, 2011 with persons knowledgeable about the Student or the placement options which resulted in impeding the Student's right to FAPE.

The Respondent prevails on Issue #3 because, as noted for Issue #1, the Petition participated in the August 16, 2011 meeting and shared her views.

The Petitioner prevails on Issue #4 because the Student's placement at \_\_\_\_\_ was not based on his IEP and resulted in a denial of a FAPE to the Student.

**VIII. ORDER**

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

1. The Respondent will directly reimburse \_\_\_\_\_ School for the Student's educational and related services based on appropriate invoices provided by \_\_\_\_\_ School to the Respondent for as long as the Student is enrolled at \_\_\_\_\_ and eligible for special education and related services if he were a public school student.

**IT IS SO ORDERED.**

Date: October 13, 2011



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