

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

Student Hearing Office  
810 First Street NE, STE 2  
Washington, DC 20002

OSSE  
Student Hearing Office  
February 21, 2013

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[Student],<sup>1</sup>

Petitioner,

v

District of Columbia Public Schools (DCPS),

Respondent.

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Date Issued: February 21, 2013

Hearing Officer: Jim Mortenson

Case No: 2012-0831

**HEARING OFFICER DETERMINATION**

**I. BACKGROUND**

The complaint in this matter was filed with the Respondent and Student Hearing Office (SHO) by the Petitioner on December 19, 2012. No response to the complaint was filed. A prehearing conference was held, via telephone, on January 4, 2013, and a prehearing order was issued on that date. A resolution meeting was held on January 14, 2013, and did not result in any agreements. The 30 day resolution period was not adjusted and the 45 day hearing timeline began on January 19, 2013.

The parties disclosed their proposed exhibits on February 5, 2013. Only the Respondent filed a trial brief.

The hearing was convened at 9:30 a.m. on February 12, 2013, in room 2003 at 810 First Street NE, Washington, D.C. The hearing was closed to the public. The Petitioner was

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

represented by Donovan Anderson, Esq., and the Respondent was represented by Tanya Chor, Esq. The hearing concluded at 3:30 p.m. The due date for this HOD is March 4, 2013. This HOD is issued on February 21, 2013.

## **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. 5E, Chap. 30.

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

The issues to be determined by the IHO are:

- (1) Whether the Respondent changed the Student's placement when it dropped her from school rolls when there was a dispute or misunderstanding over the school the Student would attend for the 2012-2013 school year?
- (2) Whether the Respondent changed the Student's placement when it informed the Student that her school for the 2012-2013 school year would be [REDACTED]
- (3) If the proposal to send the Student to [REDACTED] was a change in educational placement, whether the Student was excluded from the determination process?

The substantive requested relief at the time of hearing was reimbursement directly to [REDACTED] for the 2012-2013 school year, including reimbursement for transportation.

The Respondent did not change the Student's placement, it only changed her location assignment, and she was not required to be involved in the assignment determination process.

#### IV. EVIDENCE

Six witnesses testified at the hearing, four for the Petitioner and two for the Respondent. The

Petitioner's witnesses were:

1) [REDACTED] CFO, [REDACTED]

2) The Student (S)

3) [REDACTED], Special Education Coordinator, [REDACTED]  
(H.C.)

4) [REDACTED] Director [REDACTED]

Respondent's witnesses were:

1) [REDACTED] Special Projects Coordinator, DCPS ([REDACTED])  
[REDACTED] [REDACTED] [REDACTED]

15 of the Petitioner's 16 disclosures were admitted into the record as exhibits.<sup>2</sup> The

Petitioner's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 1	May 8, 2012	Individualized Education Program (IEP)
P 2	July 5, 2012	Meeting Notes
P 3	July 31, 2012	Prior Written Notice
P 4	August 23, 2012	Meeting Notes
P 6	August 24, 2012	Memos (three) from [REDACTED] to [REDACTED]
P 7	Undated	2012-2013 Site Agreement
P 8	August 31, 2012	Memos (four) from [REDACTED] to [REDACTED]
P 9	September 7, 2012	Memos (eight) from [REDACTED] to [REDACTED]
P 10	January 29, 2013	Email chain ending from [REDACTED] to [REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
P 12	January 29, 2013	Email chain ending from [REDACTED] to Anderson
P 13	January 29, 2013	Email chain ending from [REDACTED] to Anderson
P 14	January 29, 2013	Email chain ending from [REDACTED] to Anderson
P 15	January 29, 2013	Email chain ending from [REDACTED] to Anderson
P 16	January 14, 2013	RSM Notes

<sup>2</sup> P 5 was a partial duplicate of R 10, and R 10 was admitted.

Eight of the Respondent's 12 disclosures were admitted into the record as exhibits. The Respondent's exhibits are:

Ex. No.	Date	Document
R 1	December 21, 2012	OSSE Division of Specialized Education Approved Nonpublic Day Schools
R 3	August 1, 2012	Adult Student Letter of Invitation-IEP Meeting
R 4	August 3, 2012	Letter from Walters to Student
R 6	Undated	Letter of Invitation to a Meeting
R 7	November 14, 2012	Prior Written Notice
R 9	March 2, 2011	Memo from OSSE to LEAs
R 10	August 17, 2012	Letter from [REDACTED] to [REDACTED]
R 11	Undated	Attendance Report

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. The findings of fact are the Undersigned's determinations of what is true, based on the evidence in the record. Findings of fact are generally cited to the best evidence, not necessarily the only evidence. Any finding of fact more properly considered a conclusion of law is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

## **V. FINDINGS OF FACT**

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

1. Student is a learner with a disability, [REDACTED] <sup>3</sup> The Student has been determined eligible for special education and related services, by the Respondent, under the IDEA definition of Specific Learning Disability.<sup>4</sup>
2. The Student's individualized education program (IEP) was last revised on May 8, 2012.<sup>5</sup> The IEP requires, among other things, specialized instruction, outside the general education

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<sup>3</sup> P 1.

<sup>4</sup> P 1.

setting, for 27 hours per week because she requires a small setting with a highly structured environment and individualized instruction.<sup>6</sup> It also requires one hour of behavioral support services outside of the general education setting per week because she requires the privacy and confidentiality of therapy sessions outside of a general education environment.<sup>7</sup> The Student is also working toward a high school diploma, which [REDACTED] cannot provide as of the summer of 2012.<sup>8</sup> The IEP fails to document the Student's participation in State-wide assessments.<sup>9</sup>

3. The Student had been attending [REDACTED] a nonpublic school for students with disabilities operated by [REDACTED], for a couple of years by the summer of 2012.<sup>10</sup> The Student had originally been placed there by the Respondent.<sup>11</sup>
4. BFA does not have a Certificate of Approval (COA) from OSSE, and only had a six month provisional COA from August 3, 2012, until February 3, 2013.<sup>12</sup> The reasons for the lack of a COA are numerous and include, in part, adherence to state graduation requirements and the appropriate inclusion of students with disabilities in statewide assessments.<sup>13</sup>

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<sup>5</sup> P 1.

<sup>6</sup> P 1.

<sup>7</sup> P 1.

<sup>8</sup> P 1, P 9, Testimony ([REDACTED] was discussed at a meeting between the Student, [REDACTED] on August 23, 2012, that if the Student remained at [REDACTED] would have to be on a "certificate track" and the Student wanted to remain at [REDACTED] regardless. However, this was never discussed by the IEP team and the IEP was never changed. S testified at hearing that she wanted to stay at [REDACTED] because she will graduate with a diploma, clearly not understanding that is not the case. [REDACTED] C., P 4.)

<sup>9</sup> P 1.

<sup>10</sup> T of [REDACTED]

<sup>11</sup> T of [REDACTED]

<sup>12</sup> R 10.

<sup>13</sup> R 10. (These are some of the underlying concerns for the Student. She could not get a diploma, she had earned no high school credits, and the IEP reflects no indication of her statewide assessment status. T of [REDACTED])

5. Because BFA did not have a COA, the Respondent advised BFA in May, 2012, that it would not keep its students at the school.<sup>14</sup> On July 5, 2012, in a meeting between the Student, [REDACTED] [REDACTED] DCPS Program Manager, and a DCPS Case Manager, the Student was advised that she would not remain at BFA in the fall due to its lack of a COA.<sup>15</sup> The Student was advised of two possible alternatives: the [REDACTED], and [REDACTED] because those programs could implement her IEP and provide her a diploma upon successful completion.<sup>16</sup> The Student became upset, crying, and did not want to change schools, so the meeting was adjourned.<sup>17</sup>
6. The Student was sent a notice in August 2012 that the Respondent proposed changing her location assignment to [REDACTED].<sup>18</sup> She was also given information to fill out to enroll at [REDACTED] and did not do so.<sup>19</sup> The Student decided to remain at [REDACTED] permitted, and continued attending school there in the fall of 2012 without the support of Respondent.<sup>20</sup> [REDACTED] came to the school near the start of the school year and again personally advised the Student she was assigned to [REDACTED]
7. The Student never attended [REDACTED] and remained at [REDACTED] and the Respondent dropped her from its rolls, due to non-attendance at her assigned location, in November 2012.<sup>22</sup>

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<sup>14</sup> T of [REDACTED]

<sup>15</sup> P 2, [REDACTED]

<sup>16</sup> P 2, 1 [REDACTED]

<sup>18</sup> P 3.

<sup>19</sup> T of S.

<sup>20</sup> T of [REDACTED]

<sup>21</sup> T of [REDACTED]

[REDACTED] written notice that only proves what both parties appear to agree on: that the Student was dropped from the rolls for non-attendance. R 7 shows that the notice was likely backdated, as the document was created on November 29, 2012, and was hand dated November 14, 2012. The person who signed the notice did not testify at hearing.)

## VI. CONCLUSIONS OF LAW

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

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. "Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof." D.C. Mun. Regs. 5-E3030.14. The recognized standard is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 111 (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. Federal law requires that a child's placement: "(1) Is determined at least annually; (2) Is based on the child's IEP; and (3) Is as close as possible to the child's home; (c) Unless the IEP of a child with a disability requires some other arrangement, the child be educated in the school that he or she would attend if nondisabled; (d) In selecting the [least restrictive environment], consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs[.]" 34 C.F.R. § 300.116, *See also* D.C. Mun. Regs. 5-E3013. D.C. law defines "placement" as:

**Placement** - a student placement consistent with 34 C.F.R. Part 300. The term 'placement' refers to, without limitation, the learning environment classified by level of restrictiveness (*e.g.*, general education classroom, special education/resource classroom, or private facility).

D.C. Mun. Regs. 5-E3019.12. "**Location assignment** - the actual school site or facility at which the child will receive his/her instruction." *Id.*
3. District of Columbia law provides specific instructions regarding placement of students with disabilities in nonpublic special education schools:

1. DCPS shall be responsible for the placement and funding of a student with a disability in a nonpublic special education school or program when:
  - (1) DCPS cannot implement the student's IEP or provide an appropriate placement in conformity with DCPS rules, the IDEA, and any other applicable laws or regulations; and
  - (2) The nonpublic special education school or program to which the student has been referred:
    - (A) Has been approved by the SEA in accordance with § 38-2561.07;
    - (B) Can implement the student's IEP; and
    - (C) Represents the least restrictive environment for the student.
- (b)(1) Unless the placement of a student has been ordered by a District of Columbia court, federal court, or a hearing officer pursuant to IDEA, no student whose education, including special education or related services, is funded by the District of Columbia government shall be placed in a nonpublic special education school or program that:
  - (A) Allows the use of aversive intervention in its policy or practice; or
  - (B) Has not received and maintained a valid Certificate of Approval from the SEA in accordance with § 38-2561.07.
- (2) A hearing officer may make a placement in a nonpublic special education school or program that lacks a valid Certificate of Approval from the SEA only if the hearing officer has determined that:
  - (A) There is no public school or program able to provide the student with a free appropriate public education; and
  - (B) There is no nonpublic special education school or program with a valid Certificate of Approval that meets the requirements of subsection (a)(2) of this section.
- (c) In conformity with the IDEA, DCPS is not responsible for paying the cost of education, including special education and related services, of a student with a disability who attends a nonpublic special education school or program if:
  - (1) DCPS made a free appropriate public education available to the student; and
  - (2) The student's parent or guardian elected to place the student in a nonpublic special education school or program.

DC ST § 38-2561.03.

4. At some point it was determined DCPS could not implement the Student's IEP or provide an appropriate placement in a public school. This has not been challenged. What is effectively challenged is the Respondent's determination that BFA has not been approved by the SEA and cannot implement the Student's IEP. While BFA had a COA for six months, that alone did not permit the Respondent to keep the Student there because it could not implement the



IEP where no diploma was offered. Thus, the Respondent was required to change the Student's location of service in order to provide FAPE. While there may have been some confusion about the change of location of service, the Student was informed of the change and determined to stay at the nonpublic school she had previously been enrolled in, of her own accord. The Respondent dropped the Student from its rolls, without prior written notice, because she was not attending any of its schools or the nonpublic school it had assigned her to. This procedural error resulted in no harm to the Student as she was already attending a school of her own choosing and was not prevented from returning to DCPS and attending

██████<sup>23</sup> The change from ██████ was a change in location assignment, not educational placement, because there was no change in the learning environment classified by level of restrictiveness or other change in the IEP. No IEP team meeting had held since May 2012.<sup>24</sup> Given that the change from ██████ was a change in location assignment, the Student was not required to be involved in making that determination and she was aware of the change and refused to comply with it.

## **VII. DECISION**

1. The Respondent did not change the Student's placement when it dropped her from the rolls because the Student had unilaterally determined to remain at ██████ a nonpublic school that could not provide the Student with a FAPE. Dropping the Student from its rolls without prior written notice was a procedural error that resulted in no impediment to the Student's right to FAPE, cause a deprivation of educational benefit, or significantly impede her opportunity to

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<sup>23</sup> A denial of FAPE can only be found resulting from a procedural violation if the procedural violation: (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. 34 C.F.R. § 300.513(a)(2).

<sup>24</sup> Meetings held following the May meeting did not include the required IEP team members to be considered IEP team meetings pursuant to 34 C.F.R. § 300.321.

participate in the decision-making process regarding the provision of FAPE. If the Student wishes to return to the Respondent, her assigned school is currently [REDACTED] as determined by the Respondent.


2. The Respondent did not change the Student's placement when it changed her location assignment from [REDACTED] because there was no change in the learning environment classified by the level of restrictiveness.
3. Because the change from [REDACTED] was a change of assigned location and not of educational placement, the Student was not required to be part of the determination process.

#### **VIII. ORDER**

The Complaint is dismissed with prejudice.

**IT IS SO ORDERED.**

Date: February 21, 2013



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Jim Mortenson, Independent Hearing Officer

### **NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).