

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

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

OSSE
Student Hearing Office
February 12, 2014

PETITIONERS,
on behalf of STUDENT,¹

Date Issued: February 12, 2014

Petitioners,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Student Hearing Office,
Washington, D.C.

Respondent.

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 (DCMR). In their Due Process Complaint, Petitioners allege that Respondent District of Columbia Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by not providing her an appropriate Individualized Education Program (“IEP”) and educational placement after she moved to the District from Maryland in February 2013.

¹ Personal identification information is provided in Appendix A.

Student, an AGE youth, is a resident of the District of Columbia. Petitioners' due process complaint, filed on November 5, 2013, named DCPS as respondent. The parties met for a resolution session on November 19, 2013 and were unable to reach an agreement. The original 45-day time limit for issuance of the Hearing Officer Determination in this case started on December 6, 2013. On December 2, 2013, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters and I issued my Prehearing Order on the same day. On January 10, 2013, the Chief Hearing Officer granted Petitioners' request for a 29-day continuance, extending the due date for my Hearing Officer Determination to February 17, 2014.

The due process hearing was convened before me on February 7, 2014 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 and PETITIONERS' CO-COUNSEL. DCPS was represented by DCPS' COUNSEL.

At the beginning of the hearing, DCPS' Counsel made an oral motion to dismiss for want of subject matter jurisdiction in the Hearing Officer. I denied the motion.

MOTHER testified and Petitioners called as witnesses, EDUCATIONAL CONSULTANT, NONPUBLIC SCHOOL DIRECTOR, and Nonpublic School IEP COORDINATOR. DCPS called no witnesses. Petitioners' Exhibits P-3, P-4, P-8, P-10, and P-13 were admitted into evidence without objection. Exhibits P-1, P-2, and P-5 were admitted over DCPS' objections. Exhibits P-6, P-7, P-9, P-11 and P-12 were not offered. DCPS' Exhibit R-1 was admitted without objection. At the close of Petitioners' case in chief, DCPS' Counsel made an oral motion for a directed finding against Petitioners on the grounds that they had not

made a *prima facie* showing, *inter alia*, that Student was entitled to a FAPE from DCPS because Parents had not enrolled her in a DCPS school or requested DCPS to develop an IEP for her. I denied this motion, except with respect to Petitioners' claim that DCPS had failed to provide them access to Student's educational records. I made a directed finding against the Parents on the records issue because Parents had put on no evidence that DCPS had not provided them an opportunity to inspect and review Student's educational records. Petitioners' Counsel made an opening statement. Counsel for both parties made closing statements. Neither party requested leave to file a post-hearing memorandum.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The issues to be determined in this case and relief sought are:

- Whether DCPS denied Student a free, appropriate education for the 2012-2013 school year by failing to offer her an educational placement after she transferred into the District with an IEP from Montgomery County, MD;
- Whether DCPS failed to comply with the IDEA's procedural safeguards and prior written notice requirements;
- Whether DCPS denied Student a FAPE by failing to develop an IEP for Student, for the 2012-2013 and 2013-2014 school years, after her Montgomery County IEP expired April 9, 2013;
- Whether DCPS denied Student a FAPE by failing to propose an educational placement for Student for the 2013-2014 school year; and
- Whether DCPS violated the Parents' rights under the IDEA by failing to provide them access to Student's educational records.

For relief, the Parents request an order that DCPS reimburse all of their costs related to Student's educational (including related services) program for the 2012-2013 and 2013-2014

school years at Nonpublic School, from the time that the family became residents of the District of Columbia. The Parents also request that the Hearing Officer declare that Nonpublic School is Student's current educational placement and order DCPS to pay for Student's enrollment at Nonpublic School for the rest of the current school year.

FINDINGS OF FACT

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

1. Student resides with her Parents in the District of Columbia. Testimony of Mother. She is a "child with a disability" in need of special education and related services as defined by the IDEA. Exhibit R-1.
2. Student was adopted by Parents as a three year old child. She lived in Florida and Georgia before moving with the family to Montgomery County, Maryland in 2010. For the 2010-2011 and 2011-2012 school years, Student attended public schools in Maryland. By the end of the 2011-2012 school year, in the Parents' perception, Student had not made progress in Montgomery County and the public school was not able to keep Student safe from bullying by other children. Testimony of Mother, Exhibit P-3. In June 2012, Parents notified the Maryland school principal that they were pulling Student out. At the beginning of the 2012-2013 school year, while still residing in Maryland, Parents unilaterally placed Student at Nonpublic School, a special education day school in the Maryland suburbs. Testimony of Mother.
3. While enrolled in the Maryland public schools, Student had Montgomery County Public Schools IEPs. Her April 10, 2012 IEP (the MCPS IEP) identified her Primary Disability as "Deaf" and the areas affected by the disability as, Expressive language delayed more than 4 years; Receptive language delayed 2 or more years; Speech and communication delayed more

than 4 years; Academics progress impacted in reading, writing and . . . [sic] Exhibit R-1.

4. Student has bilateral cochlear implants to remediate her hearing impairment. Exhibit P-2. Student is not trained in American Sign Language (ASL) and does not use ASL to communicate. Testimony of Mother. Student has a Learning Disability. Testimony of IEP Coordinator.

5. On February 18, 2013, the family moved from Maryland to the District of Columbia. Exhibit P-3. Prior to the move, Mother contacted the special education coordinator at CITY ELEMENTARY SCHOOL 1, which was the neighborhood school for the family's new residence. This person told Mother that City Elementary School 1 would not be appropriate for Student and advised her to contact PROGRAM MANAGER in DCPS' Non-Public Unit, Private and Religious Office, who would be able to help her with options for Student. Testimony of Mother.

6. Mother spoke with Program Manager by telephone and had a series of email communications with him. In a February 7, 2013 email to Program Manager, Mother described Student's disability and recent school experiences. On February 13, 2013, Program Manager emailed Mother to advise that he had "sent everything over to our team of professionals to determine what we can do for your daughter." On February 14, 2013, Mother asked Program Manager where to bring Student's application for DCPS schools. Program Manager responded, "Let's wait until we see what's available." On February 21, 2013, Mother faxed the MCPS IEP to Program Manager. Also, on February 21, 2014, Program Manager asked Mother what would be "the ideal day of enrollment" for her. Mother responded, "As soon as possible." On February 25, 2013, Program Manager emailed Mother about a possible DCPS school for Student. "It has been communicated to me that [CITY ELEMENTARY SCHOOL 2] will be able to implement

the services on the [MCPS April 10, 2012] IEP, let me get to the school and start the process for you. I will keep you notified of the next steps.” Program Manager set up an appointment for Mother to see City Elementary School 2 and meet the PRINCIPAL on March 19, 2013.

Testimony of Mother, Exhibit P-3.

7. On March 19, 2013, Mother and Educational Consultant went to meet Principal. At the meeting, they briefly discussed Student and how the Parents got to City Elementary School 2. Principal described her school’s program. She stated that City Elementary School 2 had an American Sign Language (ASL) class or, alternatively, could place Student in a classroom with 22-23 other children. Principal stated that City Elementary School 1 should implement Student’s IEP and that she did not think her school was appropriate for Student.

Testimony of Educational Consultant, Testimony of Mother.

8. After the meeting with Principal, Mother told Educational Consultant that “this doesn’t feel right.” Mother felt she “was getting the shaft.” After that, Mother had no more contact with Program Manager or anyone else from DCPS. She never again requested DCPS to provide services to Student. The Parents never enrolled Student in a DCPS school. Through the date of the due process hearing, Student has continued to attend Nonpublic School as a parentally-placed Student. Testimony of Mother.

9. After Mother’s meeting with Principal, no one from DCPS ever communicated with the Parents. The Parents never received any further written notice or other communication from DCPS concerning where Student should attend school. Testimony of Mother.

10. Nonpublic School is a full-time school for children with special needs, including language and learning impairments, sensory-motor integration deficits, Other Health Impairments and Autism Spectrum Disorder. The school provides therapeutic interventions, as

needed, to its students throughout the school day. The school employs “Smart Boards”, laptop computers and sound field FM amplification to facilitate aural communication. The school holds a current Certificate of Approval from the D.C. Office of the State Superintendent of Education (OSSE) and is approved by the Maryland Department of Education. Current student enrollment is approximately 135 students in grades pre-kindergarten through high school. There are approximately 61 students in the lower/middle school program. Testimony of Director.

11. The tuition cost at Nonpublic School is \$25,500 per year, plus additional charges for related services. Testimony of Director. The Parents have paid all of Student’s enrollment expenses, except for a \$2,000 scholarship grant which Student received in the current school year. Testimony of Mother.

12. Student was admitted to Nonpublic School in the summer of 2012 and has attended since the beginning of the 2012-2013 school year. She is currently in a GRADE classroom of 11 students, taught by a special education teacher and a teaching assistant. For related services, Student receives 60 minutes per week of Speech-Language, 30 minutes per week of Occupational Therapy and 60 minutes per week of counseling. Testimony of Director.

13. Nonpublic School has developed annual “Diagnostic-Prescriptive Goals” (DPG) plans for Student. Student has never had an IEP at Nonpublic School. Exhibits P-1, P-2, Testimony of Director.

14. At present, Student presents with a severe Speech/Language Disorder. She has made good gains in her ability to communicate. She is now speaking in sentences of five to seven words. Her comprehension remains compromised, but she is able to respond better to “Wh” questions (Who, What, Where, Why, Which, When or How) and questions about her day.

Testimony of Director. Student has made progress on all of her speech-language goals. Exhibit P-3; Testimony of IEP Coordinator.

15. Educational Consultant has over 20 years experience in special education and has testified at numerous due process hearings. Testimony of Educational Consultant.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument 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 the responsibility of the party seeking relief – the Petitioners in this case. *See* DCMR 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).

Analysis

1. Did DCPS deny Student a FAPE for the 2012-13 school year by failing to offer her an educational placement after she transferred to the District with an IEP from Montgomery County, MD?

i.

Parents contend that DCPS denied Student a FAPE by not implementing her April 10, 2012 Montgomery County, Maryland IEP (the MCPS IEP) after Student moved from Maryland to the District in February 2013. The Parents base this claim on the IDEA's regulations concerning the provision of FAPE to children who transfer from another state. The IDEA provides for such children:

In the case of a child with a disability who transfers school districts within the same academic year, *who enrolls in a new school, and who had an IEP that was in effect in another State*, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those

described in the previously held IEP, in consultation with the parents until such time as the local educational agency conducts an evaluation . . . if determined to be necessary by such agency, and develops a new IEP, if appropriate, that is consistent with Federal and State law.

20 U.S.C. § 1414(d)(2)(C)(i)(ii) (emphasis supplied). *See, also*, 34 CFR § 300.323(f).

Petitioners' Counsel argues that the MCPS IEP was in effect when Student moved to the District because the IEP had a stated "End Date" of April 9, 2013. However, in June 2012, the Parents withdrew Student from Montgomery County Public Schools and, later, unilaterally placed her at Nonpublic School. I find that the MCPS IEP has not been "in effect" since the Parents unilaterally enrolled Student in Nonpublic School in August 2012. That is because, under the IDEA, parentally-placed private school children are entitled to a "services plan," not an IEP, from the school system. *See* 34 CFR § 300.138(b). *Cf. Moorestown Tp. Bd. of Educ. v. S.D.* 811 F.Supp.2d 1057, 1068 (D.N.J.2011) (IDEA statutory framework logically suggests that a Local Education Agency (LEA) need not have in place an IEP for a child who has unilaterally enrolled in private school and thereby rejected the district's offer of a FAPE.) At Nonpublic School, the private school developed a "Diagnostic-Prescriptive Goals" (DPG) plan for Student. Student has never had an IEP at Nonpublic School. I conclude, therefore, that when Student transferred from Maryland to the District in February 2013, she did not have an IEP in effect. The IDEA's interstate transfer provision also is inapplicable on these facts because Student never enrolled in a District school, a condition precedent in the statute. *Cf., e.g., Herbin ex rel. Herbin v. District of Columbia*, 362 F.Supp.2d 254, 265 (D.D.C.2005) (Where language of statute is clear, defendants' arguments must give way to the plain meaning.)

ii.

While DCPS was not required to implement the MCPS IEP after Student moved to the District, under the facts in this case, DCPS was required to offer Student a FAPE. This

obligation derives from the IDEA's "Child Find" mandate, as recently described by U.S. District Judge Lamberth in *DL v. District of Columbia*, 2013 WL 6913117 (D.D.C. Nov. 8, 2013):

Congress enacted the IDEA "to ensure 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). In exchange for federal funding, the IDEA requires that states and the District of Columbia "establish policies and procedures to ensure . . . that free appropriate public education [FAPE] . . . is available to disabled children." *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir.2005) (internal quotations omitted); see also 20 U.S.C. § 1412(a)(1)(A). Under the IDEA, "[s]chool districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction." *Reid*, 401 F.3d at 518. Instead, the IDEA imposes an affirmative obligation on school systems to "ensure that all children with disabilities residing in the State . . . regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated." *Id.* at 519 (internal quotations omitted); § 1412(a)(3)(A). . . . The duties to identify, evaluate, and determine eligibility for disabled children are collectively known as the "Child Find" obligation.

Id. at 1.

Here, it is undisputed that Student is a child with a disability in need of special education and related services and that, since February 2013, she has resided in the District. It is immaterial that six months prior to moving to the District, Parents unilaterally placed Student at Nonpublic School because the District's Child Find obligation extends to D.C. resident students in private school and to those attending school out of state. *See District of Columbia v. Abramson*, 493 F.Supp.2d 80, 85 (D.D.C.2007); *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 27 -28 (D.D.C. 2008). Under the IDEA's Child Find requirement, DCPS had an affirmative obligation to identify, locate and evaluate Student for services.

An LEA's Child Find duty does not necessarily include developing an IEP for a child in private school. *See, e.g., D.P. ex rel. Maria P. v. Council Rock School Dist.*, 482 Fed.Appx. 669, 672-673, 2012 WL 1450528, 3 (3rd Cir. 2012) (If a student is enrolled at a private school because of a parent's unilateral decision, the school district does not maintain an obligation to provide an

IEP.) However, if the parents of a child who resides in the District request DCPS to provide their child a FAPE, DCPS is obligated to offer an appropriate educational placement – even though the child may still be enrolled in a private school. *Cf. Vinyard, supra*, at 7 (“[N]othing in [20 U.S.C. § 1412(a)(10)] authorizes the school district to ignore a parent’s request that an IEP be developed for a child simply because the child is presently enrolled in a private school.”); *Vinyard* at 10 (District’s obligation to offer private school student a FAPE when it is requested by the parents.)

I find that Mother’s email communications with Program Manager, at the time of the family’s move to the District in February 2013, constituted a request to DCPS to provide Student a FAPE. Prior to the family’s move to the District, Mother contacted Program Manager in DCPS’ Non-Public Unit, Private and Religious Office “to learn about her options within the public school system.” In a February 7, 2013 email, Mother described Student’s disability and recent school experience. On February 13, 2013, Program Manager emailed Mother to advise that he had “sent everything over to our team of professionals to determine what we can do for your daughter.” On February 14, 2013, Mother asked Program Manager where to bring Student’s application for DCPS schools. Program Manager responded, “Let’s wait until we see what’s available.” On February 21, 2014, Program Manager emailed Mother to ask what would be “the ideal day of enrollment” for her. Mother responded, “As soon as possible.” On February 25, 2013, Program Manager emailed Mother about a possible DCPS school for Student. “It has been communicated to me that [City Elementary School 2] will be able to implement the services on the [MCPS] IEP, let me get to the school and start the process for you. I will keep you notified of the next steps.”

At all times concerned, DCPS had knowledge that Student was a child with a disability in

need of special education and related services. In her email communications, Mother was clear that the Parents were anxious to learn about Student's options with DCPS, that she wanted to submit an enrollment application for a DCPS school and that she wanted to enroll Student in a DCPS school as soon as possible. Therefore, I conclude that when the family moved to the District, DCPS was required to offer Student a FAPE because it had been requested by the Parents.

DCPS' obligation to offer Student a FAPE included ensuring that an IEP team developed an IEP for her as well as providing Student a suitable educational placement. *See District of Columbia v. Wolfire*, 2014 WL 169873, 4 (D.D.C. Jan. 16, 2014) (Developing an IEP is a necessary predicate to offering a FAPE, and it follows that the obligation to offer a FAPE also includes an obligation to develop an IEP;) *Alston v. District of Columbia*, 439 F.Supp.2d 86, 90 (D.D.C.2006) ("Once the IEP team develops the IEP, the school system must provide an appropriate educational placement that comports with the IEP.") DCPS never developed an IEP for Student after she moved to the District. Instead, Program Manager, in effect, adopted the MCPS IEP, which Mother had sent to him.²

Having adopted the MCPS IEP as Student's ongoing IEP for the 2012-2013 school year, DCPS was required to offer the child a placement capable of implementing the IEP. *See O.O. ex rel. Pabo v. District of Columbia*, 573 F.Supp.2d 41, 53 (D.D.C.2008) (DCPS is required to offer the student "placement in a school that can fulfill the requirements set forth in the IEP.") By email sent February 25, 2013, Program Manager informed Mother that it had been

² DCPS' failure to develop a new IEP for Student, in accordance with 34 CFR § 300.320 *et seq.*, may have been a procedural violation of the IDEA. *See Eley v. District of Columbia*, 2012 WL 3656471, 7 (D.D.C. Aug. 24, 2012). I do not reach that question because it has not been asserted as an issue by the Petitioners in this case. *See* Prehearing Order, December 2, 2013.

communicated to him that City Elementary School 2 would be able to implement the services in the MCPS IEP. He arranged for Mother to visit the school on March 19, 2013. On the school visit, Mother and Educational Consultant met with Principal, who informed them that Elementary School 2, could only offer Student an ASL classroom or a large classroom with 23 to 24 children. Principal stated that she did not think Elementary School 2 was an appropriate location for Student but that Student's neighborhood elementary school, Elementary School 1, could implement what was on the MCPS IEP. After meeting with Principal, Mother felt like she was "getting the shaft" from DCPS. Thereafter, the Parents had no further communications with anyone at DCPS about enrolling Student in a District school. Neither did DCPS attempt any further communications with the Parents. Student has continued to attend Nonpublic School through the date of the due process hearing.

Based upon Principal's statements to Mother and Educational Consultant, I find that Elementary School 2 was not an appropriate placement for Student capable of implementing the MCPS IEP. Even though the Parents did not follow up with Program Manager after the unsatisfactory meeting with Principal, DCPS still had an affirmative obligation to offer Student an appropriate location of services which could implement her IEP. *See James v. Dist. of Columbia*, 2013 WL 2650091, 4 (D.D.C. June 9, 2013) (An appropriate location of services is one which can implement a student's IEP and meet his specialized educational and behavioral needs"); *See, also, Reid, supra*, 401 F.3d at 518 (School districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction.) However, after Mother's visit to Elementary School 2, DCPS made no further effort to offer Student an educational placement. I conclude that DCPS' failure to offer Student an appropriate placement for the remainder of the 2012-2013 school year was a denial of FAPE.

2. Did DCPS deny Student a FAPE by failing to develop an IEP for Student, for the 2012-2013 and 2013-2014 school years, after her MCPS IEP expired?

The Petitioners contend that DCPS had a duty to develop a new IEP for Student after her MCPS IEP “expired” on April 9, 2013. As stated above in this decision, the IDEA required DCPS to develop a new IEP for Student after Mother requested a FAPE in February 2013. (*But see* n.2 above.) I have also found that the MCPS IEP was no longer in effect when Student moved to the District. It follows that the MCPS IEP, which was no longer in effect, could not have “expired” after Student moved to the District. Hence, I further find that the so-called expiration of the MCPS IEP did not trigger any separate obligation for DCPS to develop a revised IEP for Student.

3. Did DCPS deny Student a FAPE by failing to propose an educational placement for Student for the 2013-2014 school year?

After Mother’s unsatisfactory meeting with Principal at Elementary School 2 on March 19, 2013, the Parents dropped their efforts to have DCPS provide Student a FAPE and they had no further communications with the District. Student remained at Nonpublic School and Parents did not request DCPS to provide her a FAPE for the 2013-2014 school year. Although Parents did not request services for the 2013-2014 school year, they allege that DCPS denied Student a FAPE by failing to propose an education placement on its own initiative. I disagree. Generally, LEAs are not required to develop IEPs for children placed by their parents in private schools. *See, e.g., D.P. ex rel. Maria P. v. Council Rock School Dist.* 482 Fed.Appx. 669, 672-673, 2012 WL 1450528, 3 (3rd. Cir. 2012) (“A school district is obligated to have an IEP in place at the beginning of the school year. But if a student is enrolled at a private school because of a parent’s unilateral decision, the school district does not maintain an obligation to provide an IEP. *Id.* (citations omitted.)) However, as I have stated above in this decision, if the parents of a private

school child request an IEP for their child, the LEA is required to honor that request. *See, District of Columbia v. Wolfire*, 2014 WL 169873, 3 (D.D.C.2014); *District of Columbia v. Vinyard*, 2013 WL 5302674, 8 (D.D.C. Sep. 22 , 2013). Here, the Parents neither requested DCPS to develop an IEP for Student nor requested the District to provide her a FAPE for the 2013-2014 school year. Under these facts, DCPS had no obligation to offer Student an IEP, or to propose an IEP placement, for the 2013-2014 school year. *See D.P. ex rel. Maria P. v. Council Rock School Dist.*, 482 Fed.Appx. 669, 673, 2012 WL 1450528, 3 (3rd Cir. 2012) (Where parents never requested that school district to perform a reevaluation of student's IEP and never informed the school district of an intent to re-enroll student in public school, school district was no longer required to update student's IEP.)

4. Did DCPS fail to comply with the IDEA's procedural safeguards and prior written notice requirements?

The Parents contend that Student was denied a FAPE because, after the family moved to the District, DCPS never provided them written notice of their IDEA procedural safeguards. The IDEA regulations, 34 CFR § 300.504(a)(1) and (4) state that a copy of the IDEA procedural safeguards must be given to parents one time a school year, except that a copy must also be given to parents upon initial referral or parents' request for evaluation; upon receipt of the first State complaint or due process complaint in that school year; and upon request by a parent. *See Department of Education, Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46692 (August 14, 2006). When a child with a disability transfers to a new school district, that school district has an obligation to ensure that the child's parents are provided the procedural safeguards notice at least once in that school year. *Id.* The notice must include a full explanation of the procedural safeguards available to parents under the IDEA.³

³ The procedural safeguards notice must include a full explanation of all of the procedural safeguards available under §300.148, §§300.151 through 300.153, §300.300, §§300.502 through

In this case, DCPS should have provided the Parents a procedural safeguards notice after Student transferred to the District in February 2013 and it is undisputed that DCPS did not provide a the notice to Parents at any time during the 2012-2013 school year. Failure to provide a required procedural safeguards notice is a procedural violation of the IDEA. *See, e.g., Salley v. St. Tammany Parish School Bd.*, 57 F.3d 458, 465-466 (5th Cir.1995). A procedural violation does not, standing alone, establish a failure to provide a FAPE. *See Lesesne v. Dist. of Columbia*, 447 F.3d 828, 834 (D.C.Cir.2006). In the absence of a showing that the child's education was substantively affected, no relief may be awarded. *O.O. ex rel. Pabo v. District of Columbia*, 573 F.Supp.2d 41, 47 (D.D.C.2008).

The parents of a child who changes school districts need to receive the procedural

300.503, §§300.505 through 300.518, §§300.530 through 300.536 and §§300.610 through 300.625 relating to—

- (1) Independent educational evaluations;
- (2) Prior written notice;
- (3) Parental consent;
- (4) Access to education records;
- (5) Opportunity to present and resolve complaints through the due process complaint and State complaint procedures, including—
 - (i) The time period in which to file a complaint;
 - (ii) The opportunity for the agency to resolve the complaint; and
 - (iii) The difference between the due process complaint and the State complaint procedures, including the jurisdiction of each procedure, what issues may be raised, filing and decisional timelines, and relevant procedures;
- (6) The availability of mediation;
- (7) The child's placement during the pendency of any due process complaint;
- (8) Procedures for students who are subject to placement in an interim alternative educational setting;
- (9) Requirements for unilateral placement by parents of children in private schools at public expense;
- (10) Hearings on due process complaints, including requirements for disclosure of evaluation results and recommendations;
- (11) State-level appeals (if applicable in the State);
- (12) Civil actions, including the time period in which to file those actions; and
- (13) Attorneys' fees.

34 CFR § 300.504(c).

safeguards notice in a timely manner to ensure that they have information about due process procedures when they are most likely to need them. *See Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46692. Prior to moving to the District, Parents had received notice, as recently as April 2012, from Montgomery County Public Schools of the IDEA's procedural safeguards. *See Exhibit P-4*. Moreover, when Mother met with Principal at City Elementary School 2, she was accompanied by Educational Consultant, who had over 20 years experience in special education and had testified in numerous due process hearings. I find that the Parents had other sources of information about due process procedures when they moved to the District and they have not shown that Student's education was affected by DCPS' omission to provide them the IDEA procedural safeguards notice.

Parents also contend that DCPS violated the IDEA's procedural requirements by never providing them a prior written notice to inform them where DCPS proposed that Student would attend school. The IDEA requires that the LEA must give prior written notice before the LEA proposes to, or refuses to, initiate or change the identification, evaluation, or educational placement of child with a disability or the provision of FAPE to the child. *See 34 CFR § 300.503(a)*. In this case, DCPS proposed to assign Student to a public school, where it was intended that all of the elements of Student prior MCPS IEP placement would be implemented. "[T]here is no a change in 'educational placement' under the IDEA where a student is placed in a new program where all the basic elements are fundamentally the same as the prior placement." *D.K. v. District of Columbia*, 2013 WL 5460281, 5 (D.D.C. Oct. 2, 2013). Because DCPS never proposed to, or refused to, change Student's educational placement, there was no requirement for DCPS to issue a prior written notice to Parents concerning Student's school assignment.

5. Reimbursement for Unilateral Private School Placement

In this case, Petitioners seek reimbursement from DCPS for their expenses for Student to

attend Nonpublic School. In his recent decision in *K.E. v. District of Columbia*, 2014 WL 242986 (D.D.C. Jan. 23, 2014), U.S. District Judge Walton explained the circumstances under which parents must be reimbursed for private school expenses:

Under the IDEA, parents who unilaterally place their child at a private school without the consent of school officials do so at their own financial risk. *Florence Cnty. Sch. Dist. 4 v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284, (1993) (citation omitted). Parents in such situations may be reimbursed only 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,” 34 C.F.R. § 300.148(c) (2012); *see also Florence Cnty.*, 510 U.S. at 15, 114 S.Ct. 361 (parent may only receive tuition reimbursement “if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act”); *Holland v. District of Columbia*, 71 F.3d 417, 420 n. 3 (D.C.Cir.1995) (noting that the circuit has ordered reimbursement “where the public agency violated [the IDEA] and the parents made an appropriate placement”).

K.E., 2014 WL 242986 at 5. “[I]f there is an appropriate public school program available, *i.e.*, one reasonably calculated to enable the child to receive educational benefits, the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child.” *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir.1991).

In this decision, I have found that DCPS denied Student a FAPE by failing to offer her a suitable educational placement, for the remainder of the 2012-2013 school year, after Student transferred to the District in February 2013. The Petitioners have therefore established the first condition, denial of a FAPE, required for reimbursement. With regard to the second requirement for reimbursement, a private school placement is “proper under the Act” if the education provided by the private school is “reasonably calculated to enable the child to receive educational benefits.” *See Florence County, supra*, 510 U.S. at 11, 114 S.Ct. 361. A finding that a private placement is proper “is not solely dependent on a determination that the private placement is an appropriate placement, but rather is informed based on a factual analysis of all of the events that lead to the selection.” *K.E., supra* at 9 (citing *Maynard v. District of Columbia*,

701 F.Supp.2d 116, 124–25 (D.D.C.2010)). The cost of reimbursement may be reduced or denied –

(I) if—

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate *1240 public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa); . . . or

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

20 U.S.C. § 1412(a)(10)(C)(iii). *See, also, e.g., Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 85-86 (D.D.C.2004) (denying equitable relief of tuition reimbursement because of parents’ lack of notice before removing their child to private school and their unreasonable acts of not objecting to the IEP’s public school placement during, or in adequate time after, the team meeting). Reimbursement may not be reduced for parents’ lack of pre-removal notice, if the parents were not provided the IDEA procedural safeguard notice concerning the 10 business days written notice requirement. 34 CFR § 300.148(e)(1)(2).

In this case, I find that the education provided by Nonpublic School was reasonably calculated to enable Student to receive educational benefits. Student has a hearing impairment and a severe speech-language disorder. She requires intensive specialized instruction in a small, structured setting, given her hearing loss and other learning challenges. Nonpublic School, which holds a current OSSE Certificate of Approval offers a full-time special needs program for children with a variety of disabilities, including language-learning impairments. Nonpublic School provides therapeutic interventions, as needed, for all students throughout the school day.

Student is instructed in a classroom of 11 children, taught by a special education teacher and a teaching assistant. The classroom has a sound field FM amplification system to accommodate Student's hearing impairment. Student has made good gains at Nonpublic School in her ability to communicate and has made progress on all of her speech-language goals.

The appropriateness of Nonpublic School notwithstanding, I must also consider the reasonableness of the Parents' conduct. Through no fault of DCPS, when the Parents moved from Maryland to the District in February 2013, they brought with them their frustration over Montgomery County Public Schools' services to Student. In June 2012, Parents withdrew Student from Montgomery County schools because, in the Parents' perception, Student had not made progress in Montgomery County and the LEA had not been able to keep Student safe from bullying by other children. After Mother contacted DCPS Program Manager regarding a DCPS placement for Student, Program Manager promptly arranged for Mother to visit City Elementary School 2, which, as had been communicated to him, was a location which could implement Student's MCPS IEP. When Mother visited City Elementary School 2 on March 19, 2013 and Principal told her that her school was not appropriate for Student and that City Elementary School 1 should implement Student's IEP, Mother felt she "was getting the shaft." From that point forward, the Parents engaged in no further communications at all with Program Manager or anyone else from DCPS.

"[T]he IDEA was not intended to fund private school tuition for the children of parents who have not first given the public school a good faith opportunity to meet its obligations." *C.H. v. Cape Henlopen School Dist.*, 606 F.3d 59, 72 (3rd Cir. 2010). In his previous communications with Mother, Program Manager had been very responsive and Parents had no grounds for deciding that continuing to work with DCPS would be fruitless. While I am sympathetic to Mother's frustration that City Elementary School 2 was not appropriate for

Student after she had been sent there by Program Manager, it was unreasonable for the Parents not to communicate their concerns to Program Manager or anyone else at DCPS, following the meeting with Principal. I find that by breaking off contact with DCPS, the Parents deprived the District of the opportunity to complete the educational placement process and to offer Student a suitable placement that was capable of fulfilling her IEP needs. *Cf. C.S. ex rel. Sundberg v. Governing Bd. Of Riverside Unified School Dist.* 321 Fed.Appx. 630, 631, 2009 WL 905455, 1 (9th Cir. 2009) (Upholding ALJ finding that student was not entitled to reimbursement for the private program because his parents did not give school district the opportunity to make a formal offer of placement.) Accordingly, I deny Parents' request for reimbursement for Student's private school enrollment for the 2012-2013 school year (after Student moved to the District) on equitable grounds for parental unreasonableness.⁴ Parents are not entitled to reimbursement for the current, 2013-2014, school year because they have not established that DCPS denied Student a FAPE for this school year.

Summary

In this decision, I have found that the IDEA's provision for children who transfer school districts in the same school year is not applicable under the facts in this case. Nonetheless, because the Parents requested a FAPE when the family moved to the District in February 2013, DCPS was required to develop a new IEP for Student and to offer her a FAPE. Student was denied a FAPE by DCPS' failure to offer her a suitable educational placement for the remainder of the 2012-2013 school year. I deny Parents' request for private school reimbursement due to parental unreasonableness, in not allowing DCPS the opportunity to complete the educational placement process and to offer Student a suitable placement, following Mother's March 19, 2013

⁴ I do not deny Parents' reimbursement claim on the separate grounds that they failed to give 10 business days written notice prior to removing Student, because the evidence established that DCPS failed to provide Parents a procedural safeguards notice under 34 CFR § 300.504.

meeting with City Elementary School 2 Principal. Under the facts in this case, DCPS did not have a duty to offer Student an educational placement, and the Parents are not entitled to private school reimbursement, for the 2013-2014 school year. I have found that DCPS' failure to ensure that a new IEP was developed for Student after she moved to the District, as well as its failure to provide the Parents written notice of the IDEA procedural safeguards, were procedural violations of the IDEA for which no educational harm was shown. Finally, I have found that the IDEA did not require DCPS to issue a prior written notice to Parents concerning Student's proposed DCPS school assignment after Student moved to the District in 2013.

ORDER

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

All relief requested by the Petitioners herein is denied.

Date: February 12, 2014

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).