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STUDENT HEARING OFFICE
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# DISTRICT OF COLUMBIA
# OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

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| STUDENT,[1] through the Parent, | ) | |
| Petitioner, | ) | Date Issued: January 30, 2012 |
| v. | ) | Hearing Officer: Virginia A. Dietrich |
| District of Columbia Public Schools | ) | |
| Respondent. | ) | |

## HEARING OFFICER DETERMINATION

### Background

Petitioner, the mother of -year old Student, filed a due process complaint notice on November 16, 2011 alleging that Student had been denied a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Act ("IDEA"). At the time of the alleged violations, Student was a child with a disability who had an Individualized Education Program ("IEP") that had been developed at the private school at which Student had been unilaterally placed by Petitioner in July 2010.

Petitioner alleged that at a IEP Team meeting at the private school in October 2011 that was attended by a District of Columbia Public School ("DCPS") representative, (1) Petitioner requested that DCPS place and fund Student at the private school and DCPS did not honor the request or provide any other school placement for Student; and (2) at the IEP Team meeting in October 2011, DCPS failed to issue a Prior Written Notice explaining why Student could not be placed at the private school that Petitioner requested.

DCPS asserted that it was not required to provide Student with an IEP or a placement/location of services because Student had been unilaterally placed at the private school; that Petitioner had failed to provide DCPS with proper notice of the unilateral placement; and that although the DCPS representative attended the IEP Team meeting, DCPS not responsible for

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

providing Student with an IEP or a school placement at the meeting because DCPS had not convened the meeting.

## Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act ("IDEA"), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations ("C.F.R.") Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

## Procedural History

The due process complaint was filed on 11/16/11. This Hearing Officer was assigned to the case on 11/18/11. A resolution meeting took place on 12/14/11 at which time the parties agreed to let the 30-day resolution period expire prior to proceeding to a due process hearing. The 30-day resolution period expired on 12/16/11, the 45-day timeline to issue a final decision began on 12/17/11, and the final decision is due on 01/30/12.

Neither party objected to the testimony of witnesses by telephone. Petitioner participated in the hearing in person.

Petitioner presented three witnesses: Petitioner's educational advocate; special education coordinator ("SEC") at School; and Acting Head of School at School. DCPS presented one witness: DCPS progress monitor at School.

Petitioner's disclosures dated 01/17/2012, containing a witness list and Exhibits P-1 through P-21, were admitted into evidence without objection. DCPS' disclosures dated 01/17/12, containing a witness list and Exhibits DCPS-1 through DCPS-2, were admitted into evidence without objection.

The two issues to be determined in this Hearing Officer Determination are as follows:

Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate placement/location of services at the Multidisciplinary Team ("MDT") meeting on 10/04/11 when Student's IEP was changed to full-time out of general education services; specifically, by failing to issue a Prior Written Notice ("PWN") to School, the private school where Student had been unilaterally placed by Petitioner, or issue a PWN to any school where Student's full-time IEP could be implemented.

Whether DCPS denied Student a FAPE by failing to provide Petitioner with a proper Prior Written Notice on 10/04/11 explaining why DCPS had denied Petitioner's request for Student's placement at Monroe School.

Hearing Officer Determination

For relief, Petitioner requested a finding that Student was denied a FAPE on each of the issues presented; that DCPS issue a Prior Written Notice to fund Student at School, retroactive to 10/04/11 and for the duration of one calendar year or until Student's annual IEP meeting occurs and placement has been determined; and within 30 days of the Hearing Officer Determination, DCPS to reimburse Petitioner for all transportation costs incurred by Petitioner since 10/04/11 while Student has been attending School.

Footnotes hereinafter refer to the testimony of a witness or an exhibit admitted into evidence.

## 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, age is a resident of the District of Columbia. Student is a child with a disability[2] who prior to July 2010, attended a DCPS school and had an IEP.[3]

#2. In July 2010, Student was unilaterally placed at School, a private school located in the northeast quadrant of the District of Columbia. Until the beginning of the 2011-2012 school year, Student was funded at School through grants and scholarships. Since the beginning of the 2011-2012 school year, Student has attended School without funding.[4]

#3. On 05/04/11, an Order of Dismissal was issued that dismissed, with prejudice, Petitioner's claim that DCPS failed to provide Student with an appropriate placement since 07/09/10.[5] Since 05/04/11, Petitioner has not provided DCPS with any formal notice of her unilateral placement of Student at School and Petitioner never sought DCPS' services in providing Student with a FAPE until the IEP Team meeting on 10/04/11 that took place at School.

#4. The meeting on 10/04/11 was attended by Petitioner, Petitioner's advocate, personnel from School and the DCPS progress monitor. DCPS did not convene the meeting and the DCPS progress monitor attended as a guest and as a silent participant.[6] DCPS did not participate in the development of the IEP and DCPS did not participate in placement discussions.[7] After the IEP was developed, Petitioner asked DCPS to issue a Prior Written Notice ("PWN") that would place and fund Student at School. The DCPS progress monitor indicated that she did not have the authority to issue the PWN and would get back to Petitioner with an answer. The DCPS progress monitor never replied to Petitioner's request for

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[2] P-9.
[3] Acting Head of School at School.
[4] Acting Head of School at School.
[5] DCPS-1.
[6] DCPS progress monitor, educational advocate.
[7] DCPS progress monitor.

placement and funding at School, despite a follow-up letter from the advocate sent to the DCPS progress monitor on 10/05/11.[8]

#5. DCPS did not issue a PWN following the 10/04/11 meeting explaining why DCPS was unwilling to place and fund Student at School.[9]

## 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:

The overall purpose of the IDEA is 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. 34 C.F.R. 300.1.

Free appropriate public education or FAPE means 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 State Education Agency; (c) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) are provided in conformity with an IEP. 34 C.F.R. 300.17.

"Based solely upon 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 that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast,* 44 IDELR 150 (2005).

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. 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. 34 C.F.R. 300.513(a).

The first issue to be determined is whether DCPS denied Student a FAPE by failing to provide Student with an appropriate placement/location of services at the MDT meeting on 10/04/11 when Student's IEP was changed to full-time out of general education services; specifically, by failing to issue a Prior Written Notice ("PWN") to School, the private school where Student had been unilaterally placed by Petitioner, or issue a PWN to any school where Student's full-time IEP could be implemented.

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[8] P-11, educational advocate.
[9] DCPS progress monitor, educational advocate.

Hearing Officer Determination

Student was unilaterally enrolled by Petitioner in a private school in July 2010 and privately funded there through the end of the 2010-2011 school year. By Order of Dismissal issued on 05/04/11, Petitioner's claim that DCPS had failed to provide Student with an appropriate placement since 07/09/10 was dismissed with prejudice.

There was no evidence in this record that following the Order of Dismissal, Petitioner gave DCPS notice of her unilateral placement of Student at School at public expense for the 2011-2012 school year. There also was no evidence in the record that between May 2011 and the time of the due process hearing that DCPS had not made a FAPE available to Student. The first notice that DCPS got of Petitioner's request for a FAPE or private placement with public funding was at the MDT meeting on 10/04/11. That meeting was convened by the private school and DCPS attended only as a guest and a silent participant. DCPS offered no input into the development of the IEP and DCPS did not offer an opinion on the appropriateness of the IEP or engage in discussions about the appropriateness of the private school as a placement for Student.

The IDEA does not require a local education agency ("LEA") to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility. 34 C.F.R. 300.148(a). 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 a child in a private 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 has 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). The cost of reimbursement may be reduced or denied if (a) at the most recent IEP Team 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 DCPS to provide FAPE to the child, including stating their concerns and their intent to enroll their child in a private school at public expense; or (b) at least ten (10) business days prior to the removal of the child from the public school, the parents did not give written notice to the public agency that they were rejecting the placement proposed by the DCPS to provide FAPE to the child, including stating their concerns and their intent to enroll their child in a private school at public expense. 34 C.F.R. 300.148(d).

At the meeting on 10/04/11, DCPS specifically asked the DCPS representative to provide Student with a FAPE; i.e., to provide Student with placement and funding at the private school that Student was attending. At that point in time, DCPS was not obligated to provide Student with funding and placement at a private school because until that time Petitioner had elected to enroll Student in a private school and Petitioner had not notified DCPS with proper statutory notice that she was seeking a private placement at public expense. As of 10/04/11, when Petitioner asked DCPS to provide Student with private services at public expense, DCPS was only obligated to determine whether or not Student was entitled to a FAPE pursuant to DCPS' Child Find obligation to identify, locate and evaluate all children with disabilities residing in the District of Columbia, including children who are parentally placed in private schools. 34 C.F.R. 300.111, 34 C.F.R. 300.130, 34 C.F.R. 300.131, 5 D.C.M.R. E-3002.1(d). However, the issue of

whether or not DCPS failed to comply with its Child Find obligations is not before this Hearing Officer.

Petitioner failed to meet her burden of proof that DCPS denied Student a FAPE by failing to issue a Prior Written Notice to School or to any other school where Student's 10/04/11 IEP could be implemented. The IEP developed on 10/04/11 was not developed as a result of a meeting convened by DCPS and DCPS had no input into the substantive development of the IEP; therefore, the IEP was inappropriate and insufficient to be used as a basis for the offering of a FAPE by DCPS. See 34 C.F.R. 300.321(a),

The second issue to be determined is whether DCPS denied Student a FAPE by failing to provide Petitioner with a proper Prior Written Notice on 10/04/11 explaining why DCPS had denied Petitioner's request for Student's placement at School.

DCPS must provide the parents of a child with a disability with written notice a reasonable time before DCPS proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. Among other things, the notice must include a description of the action proposed or refused by DCPS; an explanation of why the agency proposes or refuses to take the action; a statement that parents of a child with a disability have protection under the procedural safeguards of the IDEA and the means by which a copy of a description of the procedural safeguards can be obtained; a description of each evaluation procedure, assessment, record or report the agency used as a basis for the proposed or refused action; a description of other options that the IEP Team considered and the reasons why those options were rejected; and a description of other facts that are relevant to the agency's proposal or refusal. 34 C.F.R. 300.503.

On 10/04/11 and 10/05/11, Petitioner asked DCPS to provide Student with placement and funding at a private school. Under the IDEA, Petitioner was entitled to a written notice with respect to DCPS' position on the matter. DCPS violated the IDEA by not responding to Petitioner's request for placement and funding at a private school. However, Petitioner failed to show substantive harm by this procedural violation. Approximately six weeks after the request for funding of a private placement, Petitioner filed a due process complaint on the very matter, thereby demonstrating that Petitioner's procedural protections were exercised in a timely manner. And, as discussed in Issue #1, Petitioner was not entitled to placement at a private school on 10/04/11 because until that time, Petitioner had not approached DCPS about providing a FAPE to Student, Petitioner had not been in procedural compliance with the IDEA by providing proper notice of unilateral placement, and the IEP developed on 10/04/11 was not developed with DCPS as a participant and could not be used by DCPS as a basis for determining Student's needs and making an offer of FAPE. Petitioner failed to meet her burden of proof that Student had been denied a FAPE.

## ORDER

The complaint is **DISMISSED** with prejudice. Petitioner failed to meet her burden of proof on all of the issues presented.

Hearing Officer Determination

All relief requested by Petitioner is **DENIED.**

**IT IS SO ORDERED.**

## 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).

Date: January 30, 2012

/s/ Virginia A. Dietrich
Hearing Officer