DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

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STUDENT HEARING OFFICE
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PETITIONERS, on behalf of
[STUDENT],[1]

Petitioners,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Date Issued: December 30, 2011

Hearing Officer: Peter B. Vaden

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by MOTHER and FATHER (the "Parents" or "Petitioners"), 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 ("D.C. Regs."). This case follows two prior due process hearings concerning whether DCPS must pay for Student to attend PRIVATE SCHOOL, which she has attended since 2009. In the present proceeding, Petitioners

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

allege that DCPS has denied Student a free appropriate public education ("FAPE") for the 2011-2012 school year by not providing a revised Individualized Education Program ("IEP") which provides sufficient hours of Specialized Instruction and related services, by not providing an appropriate school placement and by not complying the IDEA's Prior Written Notice ("PWN") requirements.

Student resides with the Petitioners in the District of Columbia. The Petitioners' Due Process Complaint, filed on October 18, 2011, named DCPS as respondent. The undersigned Hearing Officer was appointed on October 19, 2011. On November 2, 2011, the Hearing Officer convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters. The parties met for a resolution session on November 9, 2011 and failed to reach an agreement. The 45-day time line for issuance of this HOD began on November 17, 2011.

On November 10, 2011, Respondent District of Columbia Public Schools ("DCPS") filed a motion to dismiss Petitioners' complaint on the grounds that Petitioners' claims are barred by the doctrine of prior adjudication. The Hearing Officer denied the motion to dismiss.

The due process hearing was held before the undersigned Impartial Hearing Officer on December 15 and 20, 2011, 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. Upon the request of DCPS, the Hearing Officer excluded from the hearing an observer invited by Petitioners. The Petitioners appeared in person and were represented by PETITIONERS' COUNSEL. Respondent DCPS was represented by SPED COORDINATOR and by DCPS COUNSEL.

Prior to the taking of evidence, DCPS renewed, orally, its motion to dismiss Petitioners' claim that Student requires a full-time special education placement, on the grounds that in prior Hearing Officer Determinations ("HODs"), hearing officers had found that Student did not require full-time special education services. The Hearing Officer denied DCPS' motion.

Petitioners called as witnesses Mother, CURRICULUM COORDINATOR, and S/L PATHOLOGIST. DCPS called as witnesses COMPLIANCE CASE MANAGER, SCHOOL PRINCIPAL, SCHOOL SOCIAL WORKER, NONPUBLIC UNIT MANAGER, and SPED Coordinator. Petitioners initially offered Exhibits P-1 through P-37. DCPS objected to all exhibits, except P-1, P-8, P-16, P-23, P-26, P-33 and P-34, which were admitted into evidence without objection. Exhibits P-15, P-20, P-21, P-24, P-29, P-30, and P-36 were admitted over DCPS' objection. Exhibits P-2 through P-7, P-9 through P-14 and P-17, evaluations and educational records, were admitted as records previously furnished to DCPS by Petitioners or Private School, but not for the truth of the matters contained therein. DCPS' objection to Exhibit P-35 was sustained. The Petitioners did not pursue admission of their remaining exhibits. DCPS Exhibits R-1 through R-5 were admitted into evidence without objection, with the exception of Exhibit R-3, which was admitted over Petitioners' objection.

At the request of Petitioners, the parties were granted leave to file post hearing briefs by December 27, 2011. Only Petitioners submitted a post hearing memorandum.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

– Whether DCPS denied Student a FAPE by failing to develop a revised IEP for Student in February 2011 IEP meetings or, in the alternative, by developing an inappropriate IEP which did not provide sufficient hours of Specialized Instruction and related services;

– Whether DCPS failed to provide a timely written notice of change of Student's placement/location to PUBLIC ELEMENTARY SCHOOL; and

– Whether DCPS' placement/locating of Student at Public Elementary School for the 2011-2012 school year is a failure to match Student with a school capable of fulfilling her appropriate IEP needs.

For relief, Petitioners seek an order for DCPS to reimburse the costs of Student's enrollment at Private School for the 2011-2012 school year.

FINDINGS OF FACT

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

1. Student is an AGE girl. Her birthdate is BIRTHDATE. She resides with Parents in the District of Columbia. Exhibit R-3, Testimony of Mother.

2. Student is a "child with a disability" as defined by the IDEA. She is eligible for special education and related services under the Primary Disability, Specific Learning Disability. Exhibit R-3. Student has Attention Deficit Hyperactivity Disorder ("ADHD") and exhibits severe language processing deficits. Testimony of Curriculum Coordinator.

3. For the past two and one-half years, Student has attended Private School. Testimony of Mother. Private School is an ungraded day school in Northwest Washington. Private School provides services to children, generally at grades 1 through 12 age level, who have specific learning disabilities and average to above average cognitive abilities. Private School has a current Certificate of Approval from the D.C. Office of the State Superintendent of

Education ("OSSE") and provides services to some students who are funded by DCPS. Students at Private School have no school contact with non-disabled peers. Testimony of Curriculum Coordinator.

4. Student was first enrolled at Private School in 2009 under the Parents' unilateral private placement. Testimony of Mother. In November 2009, Parents filed a due process request seeking reimbursement for Student's tuition expenses at Private School (Case No. 2009-1501). In a Hearing Officer Determination dated January 29, 2010 ("January 29, 2010 HOD"), Hearing Officer Paul Ivers found that DCPS had failed to offer Student a FAPE for the 2009-2010 school year by not completing an initial eligibility evaluation in a timely manner. Hearing Officer Ivers ordered DCPS to reimburse Parents approximately 50 percent of costs incurred by them for tuition, speech and language ("S/L") services and occupational therapy ("OT") services at Private School. Exhibit R-1.

5. In the January 29, 2010 HOD, Hearing Officer Ivers concluded, *inter alia*, that the Student should be able to receive appropriate instruction in a less restrictive special class environment than Private School. Exhibit R-1.

6. Student remained at Private School for the 2010-2011 school year. On July 23, 2010, Parents filed a second due process complaint, alleging that DCPS had failed to propose an appropriate IEP or placement for Student for the 2010-2011 school year (Case No. 2010-0884). Parents sought reimbursement for Student's 2010-2011 tuition expenses at Private School and an award of private placement for the remainder of the school year. In a Hearing Officer Determination dated November 8, 2010 (the "November 8, 2010 HOD"), Hearing Officer Massey found that Student "no longer requires the intensive, full-time services she is receiving at [Private School]." However, Hearing Officer Massey found that the IEP developed by DCPS for

Student was inappropriate and that DCPS had offered Student an inappropriate placement in a general education classroom at Public Elementary School ("PES"). Hearing Officer Massey also faulted the Parents for not visiting two additional schools proposed by DCPS or requesting additional placements besides Private School. She reduced the private placement tuition award by one-third because the Parents' actions were unreasonable. Hearing Officer Massey ordered DCPS to fund 67 percent of Student's placement at Private School until the end of the 2010-2011 school year. Exhibit R-2.

7. In the November 8, 2010 HOD, Hearing Officer Massey concluded that, "[a]lthough the evidence proves that Student needs less than 35 hours of service in a full-time special education setting but more than approximately14 hours per week of services in a mostly general education setting, the evidence in this case is insufficient to permit the hearing officer to determine exactly what would be an appropriate amount of specialized instruction." She ordered the parties to participate in another IEP meeting for the purpose of allowing Student's IEP team another opportunity to determine exactly how much specialized instruction and related services Student requires to receive educational benefit in light of the guidance provided in the HOD. Exhibit R-2 at 14-15.

8. Pursuant to the November 8, 2010 HOD, Student's IEP team met on February 11 and 16, 2011 at Private School. Father and/or Mother and both parties' attorneys participated in both meetings, either in person or by telephone. Exhibits P-20, P-23, R-3, Testimony of Mother.

9. At the February 11, 2011 IEP meeting, Private School offered a draft IEP which would have continued Student's full-time special education placement at Private School at DCPS expense. The draft IEP would have provided Student 30 hours per week of Specialized Instruction, 45 minutes per week of OT, 90 minutes per week of S/L and 45 minutes per month

of Behavioral Support Services. All services would have been provided outside of the General Education setting. Exhibit P-21, Testimony of SPED Coordinator. DCPS representatives thought the Private School draft IEP was "way too restrictive." The meeting concluded without an agreement. Testimony of SPED Coordinator.

10. The IEP team met again on February 16, 2011 at Private School, with representatives from PES participating by telephone. Mother and Petitioners' Counsel attended the February 16, 2011 IEP meeting. Father did not attend. Testimony of Mother, Exhibit P-23. The February 16, 2011 IEP meeting was chaotic. Testimony of Nonpublic Unit Manager. At the second meeting, DCPS offered a draft IEP prepared by SPED Coordinator and PES staff. In the February 16, 2011 IEP, DCPS offered to provide Student 22 hours per week of Special Education Services, 180 minutes per month of OT, 120 minutes per month of Behavioral Support Services and 240 minutes per month of S/L Pathology. All services would be provided at PES. Except for Behavioral Support Services and S/L, all services would be provided outside the General Education setting. Exhibit R-3, Testimony of SPED Coordinator.

11. The Parents wanted a "full-time" IEP and disagreed with the level of services proposed by DCPS. Testimony of Nonpublic Unit Manager, Testimony of Mother. Parents also expressed their opposition to placing Student at PES. Testimony of SPED Coordinator.

12. The February 16, 2011 meeting ended with Mother and Petitioners' counsel leaving. Testimony of SPED Coordinator. Mother left the February 16, 2011 IEP meeting understanding that while she and Private School agreed Student needed a full-time IEP, the DCPS representatives believed Student needed a less services. Mother knew that DCPS was not in agreement that Student should remain at Private School. Mother knew that DCPS was prepared to offer Student Specialized Instruction services at a level less than the full-time

program at Private School and more than the 14 hours per week which Hearing Officer Massey found insufficient in the November 8, 2010 HOD. Mother understood that the Parents would receive a copy of the IEP proposed by DCPS. Testimony of Mother.

13. DCPS did not provide a "hard copy" of its proposed IEP at the February 16, 2011 IEP meeting. DCPS' draft IEP "document" was on a computer screen at PES, from where SPED Coordinator, Social Worker and a Psychologist were participating in the IEP meeting by telephone. The PES staff input changes to the IEP during the meeting. Testimony of SPED Coordinator, Exhibit R-3. At the end of the meeting, SPED Coordinator asked the Private School officials to print out copies of the IEP for the Parents, but there is no evidence this was done. Testimony of SPED Coordinator.

14. Petitioners' counsel made an audio recording of the February 16, 2011 IEP meeting and Mother took notes. Testimony of Mother.[2]

15. After the February 11, 2011 IEP team meeting, DCPS had requested a lot of information from Private School, including updated information for the Present Levels of Performance/Annual Goals section of the IEP. As of the February 16, 2011 IEP meeting, DCPS had still received very little information from Private School. DCPS made a request to Private School to provide updated baseline data for the Present Levels of Performance, but DCPS never received it. When the IEP team concluded the February 16, 2011 meeting, DCPS still did not have all of the information requested from Private School. Testimony of Social Worker, Testimony of SPED Coordinator, Testimony of Nonpublic Unit Manager.

16. At the end of the February 16, 2011 IEP meeting, DCPS moved ahead with the information it had, but DCPS "really needed" updated information on Student from Private

[2] Neither the recording transcript nor Mother's notes were offered as evidence at the due process hearing.

School for the IEP. Testimony of Social Worker. Social Worker understood that at the end of the meeting, the DCPS IEP was a "final" product, but it would have to be revised if the IEP goals did not "match" updated information requested from Private School. Testimony of Social Worker.

17. The February 16, 2011 IEP (Exhibit R-3) is marked "DRAFT" because under DCPS' former policy, the IEP could not become final until the child attended a DCPS school. Testimony of SPED Coordinator.

18. There is no evidence that Parents or Petitioners' Counsel received the written February 16, 2011 IEP before filing their due process complaint in the present proceeding. Testimony of Mother, Exhibit P-29.

19. On May 24, 2011, Private School convened another IEP meeting for Student. Exhibit P-24. The May 24, 2011 meeting was attended by both Parents and by several Private School staff members, who participated in the February 16, 2011 IEP meeting, including the Head of School None of the DCPS representatives, who was involved in the February IEP meetings, was invited. Testimony of SPED Coordinator. According to Mother, DCPS was represented at the May 24, 2011 meeting by ATTENDEE. Testimony of Mother. The evidence at the due process hearing did not establish Attendee's position with DCPS, her qualifications, or her authority as a DCPS representative or IEP team member.

20. Under Private School's May 24, 2011 IEP, Student would receive 32.75 hours per week of Specialized Instruction, 90 minutes per week of S/L and 45 minutes per week of OT, all at Private School outside the General Education setting. This IEP stated, inaccurately, that Student's last IEP meeting was on May 26, 2010 and omits any mention of the February 2011 IEP meetings. Exhibit P-24. The Private School IEP team's decision to continue to provide

Student full-time special education conflicts with Hearing Officer Massey's November 8, 2010 HOD finding that Student no longer requires the intensive, full-time services she was receiving at Private School. There was no evidence that Private School provided a copy of its May 26, 2011 IEP to DCPS.

21. Private School informed Parents that Student's tuition for the 2011-2012 school year would be due at the end of June 2011 and that the Parents would owe one-third of the tuition costs. Parents paid one-third of the 2011-2012 tuition costs. Testimony of Mother.

22. Student attended Extended School Year ("ESY") classes at Private School during the summer of 2011, for which the Parents paid in full. Testimony of Mother.

23. In the 2010-2011 school year, Student was in the elementary program at Private School. For the 2011-2012 school year, she was moved to Private School's intermediate program at a different campus. At Private School, Student continues to make progress academically and has shown nice growth. She also is slowly progressing with social interactions. Testimony of Curriculum Coordinator. This year, Student is progressing very well and is reported motivated to learn. She still needs a lot of 1:1 support and has to be redirected at times. Testimony of Mother.

24. After the February 16, 2011 IEP meeting, Parents did not receive any communications from DCPS and Parents did not contact DCPS regarding Student's IEP or her placement. Testimony of Mother. Mother knew she had to re-register Student with DCPS for the 2011-2012 school year. In her testimony, Mother appeared uncertain as to when or whether she actually did so. *Id.*

25. On September 12, 2011, Petitioners' Counsel wrote DCPS Compliance Case Manager "to confirm" Student's placement at Private School for the 2011-2012 school year.

Mother had spoken to Petitioners' Counsel in September 2011, before the attorney sent the September 12, 2011 letter. Mother did not contact Petitioners' Counsel sooner, because she understood that DCPS has already paid for two-thirds of Student's Private School tuition for the 2011-2012 school year. Testimony of Mother.

26. In the September 12, 2011 letter, Petitioners' Counsel wrote: "The draft IEP that was discussed on [February 16, 2011] called for cull-time [*sic*] special education, but was never followed by a revised IEP or a Prior Notice. To the best of our knowledge, DCPS has taken no action regarding placement for the 2011-2012 year since our [February 2011] IEP meetings." Exhibit P-29. I find that Petitioners knew, or should have known, that their attorney's representation that the draft IEP, discussed on February 16, 2011, called for full-time special education was inaccurate.

27. On September 20, 2011, DCPS Counsel responded to Petitioners' Counsel. He forwarded a June 30, 2011 DCPS Prior Written Notice addressed to the Parents, which stated that "DCPS proposes that the student attend [PES]." Exhibits P-30, R-3. Compliance Case Manager created the PWN prior to the end of the 2010-2011 school year to highlight the February 2011 IEP team decision and identify the location of services for Student. Testimony of Compliance Case Manager. Mother denies receipt of the PWN and the evidence does not establish that the PWN was given to Parents or their attorney until provided by DCPS Counsel in his September 20, 2011 letter.

28. If Student had enrolled at PES, SPED Coordinator would have met with the Parents and Student's classroom teacher to find ways to modify and adapt the classroom and curriculum to serve Student. SPED Coordinator would have provided 1:1 and small group instruction to Student. SPED Coordinator currently works with 1 or 2 PES students who are

placed outside general education for the same number of hours specified in DCPS' February 16, 2011 IEP. There was no part of the IEP that PCS would have had trouble implementing. Testimony of SPED Coordinator.

29. PES has on staff part-time OT and S/L workers, a full time social worker and three full time inclusion teachers. Testimony of Principal.

30. At the November 9, 2011 resolution session, convened after the Parents filed their present due process complaint, Petitioners' Counsel stated that Parents were absolutely not intending to enroll Student at PES. Testimony of Compliance Case Manager.

CONCLUSIONS OF LAW

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

DISCUSSION

In this case, Petitioners seeks reimbursement for Student's 2011-2012 tuition and expenses at Private School, incurred prior to the due process hearing, and an order for DCPS to pay for Student's ongoing enrollment at Private School. Parents elected to re-enroll Student at Private School for the 2011-2012 School year without the consent of DCPS. "Under 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 County Sch. Dist. 4 v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (citing *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)); *Schoenbach v. Dist. of Columbia*, 309 F.Supp.2d 71, 76-77 (D.D.C.2004). Such parents may be reimbursed only if (1) the school

officials' public placement violated IDEA and (2) the private-school placement was proper under IDEA. *Carter*, 510 U.S. at 15, 114 S.Ct. 361; *Holland v. Dist. of Columbia*, 71 F.3d 417, 420 n. 3 (D.C.Cir.1995) (noting that this circuit has ordered reimbursement "where the public agency violated [IDEA] and the parents made an appropriate placement.") In analyzing the first factor of whether the public placement violates IDEA, the court undertakes a two-step sub-inquiry, asking (a) whether the school officials complied with the procedures set forth in IDEA, and (b) whether the IEP developed through IDEA procedures was reasonably calculated to enable the child to receive educational benefits. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982); *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 763 (6th Cir.2001). "'[E]quitable considerations are relevant in fashioning relief,' and the court enjoys 'broad discretion' in so doing. Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required." *Carter, supra*, 510 U.S. at 15-16, citing *Burlington,* 471 U.S. at374. A hearing officer may also reduce or deny tuition reimbursement if, *inter alia*, the Parents fail to inform the public agency of their intent to enroll their child in a private school at public expense or "upon a judicial finding of unreasonableness with respect to actions taken by the parents." *See Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 84-85 (D.D.C. 2004) (citing 20 U.S.C.§ 1412(a)(10)(C)). For the reasons set forth below, I find that, although DCPS violated the IDEA and Student's placement at Private School was proper under Act, Parents are not entitled to reimbursement.

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* D.C. Regs. 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).

Issues

1. DID DCPS VIOLATE THE IDEA BY FAILING TO PROVIDE A REVISED IEP FOR STUDENT FOLLOWING THE FEBRUARY 2011 IEP MEETINGS?

The Petitioners base their claim for tuition reimbursement on two alleged violations of the IDEA by DCPS – failure to provide Student's completed IEP after the February 16, 2011 IEP meeting and failure to provide them a timely PWN changing Student's placement from Private School to PES. DCPS admits that it cannot prove that it timely provided either the completed IEP or the PWN to Parents, but DCPS contends that the IEP was completed at the February 16, 2011 meeting.

I find that at the February 16, 2011 meeting, DCPS did propose a draft IEP for Student, but it was not a completed document. DCPS witnesses testified that when drafting the February 16, 2011 IEP, DCPS lacked important data about Student, who had never attended DCPS schools. Before and during the February 16, 2011 meeting, the PES staff was still requesting Private School to provide updated baseline data for the IEP Present Levels of Performance ("PLOP") and Annual Goals section, which Private School never provided. Obviously, DCPS was not able to incorporate the updated baselines data into the February 16, 2011 IEP. Without the current data on Student, the IEP team could not complete the IEP. *See* 34 C.F.R § 300.324(a). (In developing each child's IEP, the IEP Team must consider, *inter alia*, the strengths of the child, the results of the most recent evaluations, and the academic, developmental, and functional needs of the child.)

Nor was the February 16, 2011 IEP ever provided, as a written document, to the Parents

or their attorney until after Parents filed their due process complaint. A "written, complete IEP" is important to serve the parents' interest in receiving full appraisal of the educational plan for their child, allowing the parents both to monitor their child's progress and determine if any change to the program is necessary. *Mewborn v. Gov't of Dist. of Columbia*, 360 F.Supp.2d 138, 144 (D.D.C. 2005). I find that DCPS defaulted on its obligation under the IDEA to provide a written, complete IEP for Student prior to the beginning of the 2011-2012 school year. Petitioners prevail on this issue.

2. WERE THE PARENTS' IDEA RIGHTS VIOLATED BY DCPS' FAILURE TO PROVIDE A TIMELY WRITTEN NOTICE OF STUDENT'S CHANGE OF PLACEMENT TO PES?

DCPS' Compliance Case Manager drafted a Prior Written Notice of DCPS' intent to change Student's placement from Private School to PES on June 30, 2011. However, Parents deny receiving the PWN, until forwarded by DCPS counsel on September 20, 2011. There was no evidence that DCPS provided the PWN before then. Pursuant to 34 C.F.R. § 300.503(a), written notice must be given to the parents of a child with a disability a reasonable time before the public agency—

> (1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or
>
> (2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

Id. By not providing the PWN until several weeks after the 2011-2012 school year started,[3] DCPS violated the IDEA's PWN requirement.

Unless the delay in delivering the PWN affects parents' "primary procedural protection," the untimeliness of the notice is not considered a violation of parents' rights under the IDEA.

[3] The Hearing Officer takes notice from the public record that the first day of school for DCPS was August 22, 2011.

See Shaw v. District of Columbia, 238 F.Supp.2d 127, 188 (D.D.C. 2002). The purpose of the PWN "is to provide sufficient information to protect the parents' rights under the [IDEA] and to enable parents to make an informed decision whether to challenge the DCPS' determination and to prepare for meaningful participation in a due process hearing on their challenge." *Kroot v. District of Columbia*, 800 F.Supp. 976, 982 (D.D.C. 1992). Here, the Petitioners had filed two prior due process complaints in the last two years. They are undoubtedly well-versed in the IDEA's procedural safeguards. Moreover, as Mother testified, the Parents were fully aware at the February IEP meetings of DCPS' determination to change Student's placement to PES after the 2010-2011 school year. With that knowledge, Parents have continued to send Student to Private School, and Petitioners' Counsel declared at the November 9, 2011 resolution session, that Parents were absolutely not intending to enroll Student at PES. When Petitioners' Counsel did receive the PWN in September 2011, the Parents promptly filed their request for a due process hearing, where they were represented by able counsel. It is difficult to conceive that Parents would have acted any differently if they had timely received the DCPS June 30, 2011 PWN. I find that DCPS' "foul up" in not timely providing the June 30, 2011 PWN to Parents did not affect their primary procedural protection and, hence, did not violate Parents' rights under the IDEA. *See, Kroot, supra*, at 982; *Shaw, supra*, at 138. Respondent prevails on this issue.

3. ARE PETITIONERS ENTITLED TO REIMBURSEMENT FOR THEIR COSTS OF STUDENT'S PLACEMENT AT PRIVATE SCHOOL FOR THE 2011-2012 SCHOOL YEAR?

Having found that DCPS violated the IDEA by failing to provide a complete, written IEP for Student prior to the beginning of the 2011-2012 school year, I now address whether Parents are entitled to reimbursement for Student's 2011-2012 Private School tuition costs. Under

Florence County Sch. Dist. 4 v. Carter, supra, parents may be entitled to reimbursement if the public agency violated the IDEA and the private school placement is proper under the Act. *See Holland v. District of Columbia*, 71 F.3d 417, 425 (D.C. Cir. 1995) (citing *Carter, supra*, 510 U.S. at 15 (1993)). "[A] private school placement is 'proper under the Act' if the education provided by said school is 'reasonably calculated to enable the child to receive educational benefits.'" *Wirta v. District of Columbia*, 859 F.Supp. 1 (D.D.C. 1994) citing *Board of Education of Hendrick Hudson Central School District v. Rowley, supra.* The evidence is undisputed that Student is receiving educational benefits at Private School. According to Curriculum Coordinator and Mother, Student continues to make progress academically and has shown nice growth at Private School. She also is slowly progressing with social interactions. Private School has a Certificate of Approval from OSSE and DCPS has placed other children with disabilities at the school. In the prior HODs, the hearing officers found that Private School is not the Least Restrictive Environment for Student. However, numerous judicial decisions hold that a unilateral private placement need not satisfy the IDEA's least restrictive environment requirement. *See, e.g., C.B. v. Special Sch. Dist. No. 1, 636 F.3d 981, 991* (8th Cir., 2011) (joining Third and Sixth Circuits in concluding that a private placement need not satisfy a least-restrictive environment requirement to be "proper" under the IDEA). I find therefore that Student's placement at Private School is proper under the IDEA.

Even though I find that DCPS violated the IDEA and that Student's placement at Private School is proper under the IDEA, I nonetheless will deny Parents' request for reimbursement for 2011-2012 tuition costs, both because of equitable considerations and because Parents did not comply with the IDEA written notice requirement before enrolling Student at Private School for the 2011-2012 school year. In its decision in *Florence County School Dist. Four v. Carter,* the

U.S. Supreme Court emphasized "that once a court holds that the public placement violated IDEA, it is authorized to 'grant such relief as the court determines is appropriate.' 20 U. S. C. § 1415(e)(2). Under this provision, 'equitable considerations are relevant in fashioning relief,' *Burlington*, 471 U. S., at 374, and the court enjoys 'broad discretion' in so doing, *id.*, at 369." *Carter, supra*, 510 U.S. at 15-16. A hearing officer may also reduce or deny tuition reimbursement if, *inter alia*, the Parents fail to inform the public agency of their intent to enroll their child in a private school at public expense or "upon a judicial finding of unreasonableness with respect to actions taken by the parents." *See Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 84-85 (D.D.C. 2004) (citing 20 U.S.C.§ 1412(a)(10)(C)).

In considering the equities in this case, the history of the parties' interaction merits review. In the November 8, 2010 HOD, Hearing Officer Massey ordered the Parents and DCPS to participate in another IEP meeting to allow Student's IEP team another opportunity to determine how much services the Student required in light of the guidance in her HOD, to wit: less than 35 hours per week in a full-time special education setting but more than 14 hours per week in a mostly general education setting. Both Hearing Officer Ives and Hearing Officer Massey had already determined that Student did not require the intensive, full-time services she was receiving at Private School in order to receive FAPE. In her HOD, Hearing Officer Massey had faulted the Parents for not visiting two additional schools proposed by DCPS or requesting additional placements besides Private School. She reduced Student's 2010-2011 private placement tuition award by one-third because the Parents' actions were "unreasonable." Nonetheless, when Student's IEP team met on February 11 and February 16, 2011, Parents continued to insist that Student had to receive full-time special education services at Private School. I find that this conduct was unreasonable and it was non-compliant with Hearing Officer

Massey's order that Parents participate in another IEP meeting to determine Student's need for specialized instruction and related services in a less than full-time special education setting.

I further find that Parents acted unreasonably by not communicating with DCPS to ascertain the status of Student's DCPS IEP and placement before re-enrolling Student at Private School for the 2011-2012 school year. Mother testified that she had expected to receive the written IEP after the February 16, 2011 IEP meeting and did not receive it. But Parents made no effort, until after the beginning of the 2011-2012 school year, to follow up with DCPS or to ascertain the status of Student's IEP placement. *Cf. Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 89 (D.D.C., 2004). (Parents must talk, or complain, when given the chance. Timely input can allow a school district to respond meaningfully to parental requests.)

The conduct of Private School officials in convening a "rump" IEP team meeting on May 24, 2011 raises further concerns. The meeting, which both Parents attended, was convened without notice to any of the DCPS participants from the February 2011 IEP team meetings. The Private School IEP stated, incorrectly, that Student's last IEP meeting was in 2010, as though the two February 2011 IEP meetings at Private School had never happened. Most importantly, Parents and the rest of the Private School IEP team completely disregarded Hearing Officer Massey's binding determination, made in the November 8, 2010 HOD, that Student no longer required the intensive, full-time services she was receiving at Private School.[4]

[4] I find that the May 24, 2011 IEP meeting was not a valid IEP team meeting. For IEP meetings initiated by a private school, the public agency must ensure that the parents and an agency representative (i) are involved in any decision about the child's IEP; and (ii) agree to any proposed changes in the IEP before those changes are implemented. *See* 34 C.F.R. § 300.325(b). By convening the May 24, 2011 meeting without notice to DCPS' February 16, 2011 IEP team representatives, Private School effectively prevented DCPS from performing its oversight role. Further, the May 24, 2011 IEP team lacked a DCPS representative, described by 34 C.F.R. § 300.321(a)(4), who was qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; knowledgeable about the general education curriculum; and knowledgeable about the availability of resources of the public agency.

Lastly, when Petitioners' Counsel finally wrote DCPS' Compliance Case Manager on September 12, 2011 to advise that Parents had not received a revised IEP or PWN from DCPS, he stated that the draft IEP discussed at the February 16, 2011 IEP meeting called for full-time special education. The February 16, 2011 draft IEP actually called for 22 hours per week of Special Education Services and some 2.25 hours per week of Related Services. The Parents knew, or should have known, that their attorney's representation was not accurate. In sum, I find that Parents' aforesaid conduct was inequitable, unreasonable and weighs against a reimbursement award.

The cost of private school reimbursement may also be reduced or denied if,

(i) 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 public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(ii) At least ten (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 paragraph (d)(1)(i) of this section.

34 C.F.R. § 300-148(d)(1). Several court decisions hold that this notice requirement is equally applicable to parents of a child, already enrolled in a private school, who reject a public school placement and intend to continue their child's enrollment in a private school at public expense. *See, e.g., S.W. v. N.Y. City Dep't of Educ.*, 646 F.Supp.2d 346, 362-63 (S.D.N.Y. 2009); see also *Roark v. District of Columbia*, 460 F.Supp.2d 32, 41 & n.9 (D.D.C.2006) (assuming without deciding that notice requirements applied to parents whose child was already enrolled in a private school at public expense and who removed the child to another private school).

In the present case, Petitioners did not give DCPS written notice of their intent to re-enroll Student in Private School for the 2011-2012 school year at DCPS expense. Had Parents done so, before paying a portion of Student's 2011-2012 Private School tuition bill in June 2011,

DCPS would have been alerted that Parents had not received its February 16, 2011 IEP or PWN and could have timely corrected its omission.

Accordingly, I deny Parents' request for reimbursement of Student's 2011-2012 tuition expenses on equitable grounds, because actions taken by the Parents were unreasonable and for Parents' failure to give written notice of their intent to re-enroll Student at Private School at public expense. *See* 34 C.F.R. § 300.148(d). Respondent prevails on this issue.

4. WAS DCPS' PROPOSED PLACEMENT OF STUDENT AT PUBLIC ELEMENTARY SCHOOL FOR THE 2011-2012 SCHOOL YEAR A FAILURE TO MATCH STUDENT WITH A SCHOOL CAPABLE OF FULFILLING HER APPROPRIATE IEP NEEDS?

As discussed above in this decision, under the U.S. Supreme Court's decision in *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, the Hearing Officer must address two questions that are aimed at DCPS' paralleling responsibilities to comply with the procedural and substantive requirements of the IDEA: First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? *Rowley, supra*, 458 U.S. at 206-07, 102 S.Ct. 3034. In this decision, I have found that by failing to provide a complete, written IEP for Student prior to the beginning of the 2011-2012 school year, DCPS did not comply with the procedures set forth in the IDEA. Parents also contend that DCPS' February 16, 2011 IEP is inappropriate for Student because Student continues to require full-time special education programming.

In this proceeding, DCPS has repeatedly urged that Petitioners' claim that Student requires full-time special education services is barred by the *res judicata* doctrine of issue preclusion. Issue preclusion bars the re-litigation of specific issues actually adjudicated in prior proceedings. *Lans v. Adduci Mastriani & Schaumberg L.L.P.*, Civil Action No. 02-2165 (RBW)

(D.D.C. May 23, 2011). Issue preclusion requires: (1) that the party against whom preclusion is asserted have been a party to the prior case; (2) the issue presently raised must have been actually litigated in the prior case; (3) the issue must have been "actually decided" by a final judgment of a court of competent jurisdiction; (4) determination of the issue must have been "essential to the judgment;" and (5) preclusion in the second case must not work a basic unfairness to the party bound by the first determination, such as when the losing party clearly lacked any incentive to litigate the point in the first trial. *Id.* (Citations omitted.). The *res judicata* doctrine has consistently been applied to administrative hearings that reach a final judgment on the merits. *Theodore v. District of Columbia*, Civil Action No. 09-0667 (JDB) (D.D.C. March 28, 2011).

This issue of whether Student needs to be placed in a full-time special education setting was actually litigated between the same parties and decided in Case No. 2010-0884 in a final judgment on the merits. In the November 8, 2010 HOD, Hearing Officer Massey decided that because of the progress Student had made since the 2009-2010 school year, Student no longer required the intensive, full-time services she was receiving at Private School.[5] This determination was essential to the Hearing Officer's determination. Preclusion in the present case would not work any unfairness to the Parents, who vigorously litigated the point in Case No. 2010-0884. I find, therefore, that Petitioners' claim, that Student continues to require full-time special education programming in a setting such as Private School, where Student is separated from non-disabled peers, is barred by the doctrine of issue preclusion.

I further find that Petitioners have not met their burden of proof to show that the DCPS' February 16, 2011 IEP is not reasonably calculated to enable Student to receive educational

[5] In Case No. 2009-1501, the Hearing Officer likewise found that Student should be able to receive appropriate instruction in a less restrictive special class environment than Private School. *See* January 29, 2010 HOD, Exhibit R-1, p. 13.

benefits. In the November 8, 2010 HOD, Hearing Officer Massey found that Student requires a highly structured environment that can provide her with highly structured supportive feedback; that as a result of her poor executive functioning, Student continues to frequently require 1:1 or 2:1 guidance and that Student needs less that than 35 hours per week of services in a full-time special education setting, but more than 14 hours per week of services in a mostly general education setting. DCPS' proposed February 16, 2011 IEP appears to fully meet these requirements. Student would receive 22 hours per week of Specialized Instruction Services, outside of General Education, divided between Reading, Mathematics and Written Expression. She would also receive 180 minutes per month of OT services, 120 minutes per month of Behavioral Support Services and 240 minutes per month of S/L pathology. According to Principal and SPED Coordinator, both of whose testimony I found fully credible, PES would have no problem implementing the IEP and providing the specified services.

Parents' expert, Private School Curriculum Coordinator, opined that Student needs to be placed in a full-time special education setting. This witness also testified in Case No. 2010-0884 and Hearing Officer Massey, nonetheless, concluded that Student no longer required the extremely small and restrictive setting offered by Private School. *See* November 8, 2010 HOD, Exhibit 2 at 5, 13. Parents presented no evidence at this hearing that since the November 8, 2010 HOD was issued, Student's disability has worsened or her needs have changed. To the contrary, Student has continued to make process both academically and with social interactions. To the extent, therefore, that Curriculum Coordinator opines that Student needs more restrictive and intensive services than Hearing Officer Massey decided was required, I discount her testimony. DCPS' expert, SPED Coordinator, has over 10 years of experience as a special education teacher in Virginia and District of Columbia public schools. She has served at PES as Special Education

Coordinator and inclusion teacher for over two years. She has observed Student at Private School and spoken with her teachers and service providers there. She participated in the drafting of the February 16, 2011 IEP. SPED Coordinator currently works with 1 or 2 students at PES, who receive instruction outside general education for the same number of hours proposed for Student. SPED Coordinator opined that the February 16, 2010 IEP is appropriate for Student and that Student would receive benefit from it. I found her testimony to be credible and persuasive.

The standard set out by the Supreme Court in determining whether a child is receiving a FAPE, or the "basic floor of opportunity," is whether the child has "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Rowley*, 458 U.S. at 201, 102 S.Ct. 3034, 73 L.Ed.2d 690. The IDEA, according to *Rowley*, imposes "no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children." *Id.* at 198, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690; *see also*, *Kerkam v. McKenzie*, 862 F.2d 884, 886 (D.C. Cir. 1988) (emphasizing that *Rowley* rejected "[i]n at least four places" the notion that a public school placement must "maximize the potential of handicapped children"). I find that the February 16, 2011 IEP proposed for Student by DCPS would provide the "basic floor of opportunity" required by the IDEA and that the IEP was reasonably calculated to provide educational benefits to Student.[6] Respondent prevails on this issue.

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[6] As noted above in this decision, DCPS witnesses testified that additional information was needed from Private School to update and complete the PLOP and Annual Goals section of Student's IEP. If the Parents elect to enroll Student in a DCPS public school, the February 16, 2011 IEP must be revised, as appropriate, upon the IEP team's consideration of the Private School data.

ORDER

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

1. All relief requested by the Petitioners herein is denied.

2. If Parents provide written notice to DCPS of their intent to enroll Student in a DCPS public school, DCPS shall promptly revise and update the February 16, 2011 IEP in conformity with this decision and 34 C.F.R. § 300.324(b).

3. If Parents elect for Student to continue to attend Private School (not at public expense), DCPS shall ensure that Student's private school IEP is revised and updated as required, in conformity with 34 C.F.R. § 300.325(b).

Date: December 30, 2011

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).