

**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
2012 FEB -2 AM 9:33

PETITIONER,
on behalf of STUDENT,¹

Date Issued: February 2, 2012

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by PETITIONER² (the “Petitioner” or “Grandmother”), 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.”). In her Amended Due Process Complaint, Petitioner alleges that DCPS denied Student a free

¹ Personal identification information is provided in Appendix A.

² Petitioner is Student’s grandmother. For purposes of this due process request, she is deemed to be a “Parent” in her capacity as an individual acting in the place of a biological parent with whom the child lives. *See* 34 CFR § 300.30(a)(4).

appropriate public education (“FAPE”) by convening an IEP meeting which neither Petitioner nor MOTHER attended, by making an inappropriate placement of Student at CITY HIGH SCHOOL PROGRAM (“CHSP”), and by issuing an inaccurate Prior Written Notice.

Student, an AGE young man, is a resident of the District of Columbia. Petitioner’s Due Process Complaint, filed on November 17, 2011, named DCPS as respondent. The undersigned Hearing Officer was appointed on November 18, 2011. The parties met for a resolution session on December 9, 2011, but did not come to an agreement. The 45-day timeline for issuance of this HOD began on December 18, 2011. On December 20, 2011, upon the unopposed motion of Petitioner, the Hearing Officer granted a 10-day continuance to hold the due process hearing and for issuance of this decision. On December 14, 2011, the Hearing Officer convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before the undersigned Impartial Hearing Officer on January 25, 2012 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 Petitioner, Student and Mother appeared in person, and were represented by PETITIONER’S COUNSEL. Respondent DCPS was represented by DCPS COUNSEL and by NON-PUBLIC PROGRAM MANAGER.

The Petitioner testified and called as witnesses, Mother, Student, EDUCATIONAL ADVOCATE, and the DIRECTOR OF ADMISSIONS and a TEACHER from PRIVATE SCHOOL. DCPS called, as witnesses, CO-LOCATION CLASSROOMS COORDINATOR (“CLC Coordinator”) and Non-Public Program Manager. Petitioner’s Exhibits P-1 through P-25, with the exception of P-10 and P-13, were admitted into evidence without objection.

Exhibits P-10 and P-13 was admitted over DCPS' objection. DCPS' Exhibits R-1 through R-12, with the exception of R-8 and R-9, were admitted into evidence without objection. Exhibits R-8 and R-9 was admitted over Petitioner's objection.

Counsel for both parties made oral closing arguments. At the request of Petitioner, the parties were granted permission to file post-hearing briefs, no later than January 27, 2012. Only the Petitioner filed a post-hearing brief.

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, ON OR ABOUT JULY 28, 2011, DCPS VIOLATED THE IDEA BY CONVENING AN IEP MEETING FOR STUDENT AT A TIME AND DATE THAT WAS NOT CONVENIENT FOR PETITIONER AND WITHOUT PETITIONER'S ATTENDANCE;
- WHETHER FOLLOWING THE JULY 28, 2011 IEP MEETING, DCPS ISSUED AN IMPROPER PRIOR WRITTEN NOTICE THAT WAS INACCURATE AS TO WHAT OCCURRED AT THE IEP MEETING AND FAILED TO EXPLAIN WHY STUDENT'S PLACEMENT WAS CHANGED;
- WHETHER THE CHSP PLACEMENT MADE AT THE JULY 28, 2011 IEP MEETING IS INAPPROPRIATE BECAUSE CHSP IS UNABLE TO IMPLEMENT STUDENT'S IEP, WHICH PROVIDES FOR FULL TIME OUTSIDE OF GENERAL EDUCATION PROGRAMMING AND AN 11 MONTH PROGRAM; and
- WHETHER THE CHSP PLACEMENT, MADE AT THE JULY 28, 2011 IEP MEETING, IS INAPPROPRIATE BECAUSE THE CHSP COMPUTER LEARNING PROGRAM IS NOT APPROPRIATE FOR STUDENT BECAUSE OF HIS DISABILITIES AND UNIQUE NEEDS.

For relief, Petitioner seeks reimbursement for Student's unilateral placement at Private School since October 11, 2011, and an order for DCPS to fund Student ongoing attendance there.

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 is an AGE resident of the District of Columbia, where he has resided with Grandmother since birth. Testimony of Grandmother.

2. Grandmother is identified as the contact person for Student in DCPS records. Testimony of CLC Coordinator.

3. Student was enrolled in CLOSED PRIVATE SCHOOL ("CPS") during the 2005-2006 school year. Exhibit P-20. He remained at CPS until the school closed in August 2011. Testimony of Grandmother.

4. In his February 9, 2009 CPS Individualized Educational Program ("IEP"), Student's disabilities were identified as Multiple Disability ("MD"), Specific Learning Disability ("SLD"), Other Health Impairment ("OHI") and Emotional Disturbance ("ED"). Exhibit P-23. Under the IEP, he was provided full-time (26 hours per week) Specialized Instruction, 1 hour per week of psychological counseling and 30 minutes per week of Occupational Therapy ("OT"). Exhibit P-23. Student's IEP was updated by CPS on February 7, 2011. *See Exhibit R-6 (Last IEP Date 02/07/2011).* The February 7, 2011 IEP was not offered as evidence.

5. In more recent CPS IEPs, Student's primary disability classification was identified as SLD. Testimony of CLC Coordinator.

6. At CPS, there were no problems with Student's behavior. He made A's and B's in his classes, and his attendance was always good. Testimony of Petitioner.

7. Following a March 2009 evaluation, the CPS Occupational Therapist recommended that in light of Student's progress and strengths, he did not warrant continued

support from OT services. Exhibit P-21.

8. In a June 2007 Cognitive Evaluation report, the examiner reported that at CPS, Student was receiving special education services as a student with an Emotional Disturbance. The examiner reported that Student met the criteria for Attention Deficit Hyperactivity Disorder (“ADHD”), Combined Type. The examiner recommended that Student required a highly individualized program in a special school for children with learning and emotional needs. The examiner also recommend that Student should have available to him the latest technology in order to sustain him in his special education program, including a computer, calculator, tape recorder and books-on-tape. Exhibit P-16.

9. In a November 2007 Clinical Psychological Evaluation, CLINICAL PSYCHOLOGIST diagnosed Student with ADHD - Combined type and Disruptive Behavior Disorder NOS (by history). Clinical Psychologist recommended that consideration be given to Student’s special education designation as ED and Other Health Impaired (“OHI”). He recommended that Student would benefit from a small class with a high teacher-to-student ratio and considerable individual attention. Clinical Psychologist also recommended, *inter alia*, that tasks which Student could engage to improve attention and concentration included a variety of computer and video games. Exhibit P-17.

10. Following a November 14, 2007 Psychiatric Evaluation, the examining psychiatrist confirmed Student’s ADHD - Combined Type diagnosis and recommended, *inter alia*, that Student would continue to need a structured school program. Exhibit P-18.

11. On February 25, 2008, a S/L evaluation of Student was completed. The S/L Diagnostician found that Student performed very poorly on Understanding Spoken Paragraphs, Concepts & Following Directions and Word Definitions. She recommend that direct S/L

intervention was warranted for 60 minutes per week. Exhibit P-19.

12. An Educational Diagnostician completed an educational evaluation of Student in May 2008. In her May 19, 2008 report, the examiner reported that Student's language skills, academic skills and ability to apply those skills were in the average range when compared to the range of scores obtained by others at his age level. His fluency with academic tasks and his ability to apply academic skills were within the low average range. His performance was average in basic reading skills and written language, low average in reading mathematics and written expression, and low in math calculation skills. The examiner recommended that Student would require an academic setting with a high teacher-to-student ratio, where he could receive an individualized curriculum at his present achievement level that would address his strengths as well as his learning disabilities. The examiner recommended, *inter alia*, that Student's classroom be equipped with technology to support his academic program and that Student's ability in the basic skills will likely improve best with the introduction of and training with computerized specialized remedial software and word processing equipment, that provide opportunities to learn and practice his phonemic and sound awareness skill in fun and visually-stimulating ways. Exhibit P-20.

13. On July 7, 2011, CLC Coordinator, in her former position as DCPS Progress Monitor, sent, by regular mail and certified mail, a Letter of Invitation ("LOI") to Petitioner for a meeting set for July 28, 2011 to review and update Student's IEP. Exhibits R-2, R-3, Testimony of CLC Coordinator. On the same day, CLC Coordinator tried to telephone Petitioner at her home to inform her of the IEP meeting date and time. She was unable to reach Petitioner or to leave a message. Exhibit R-2.

14. On July 27, 2011, DCPS CASE MANAGER attempted to contact Petitioner by a

home visit to provide notice of the IEP meeting, but Petitioner was not home. Case Manager left a copy of the LOI in Petitioner's door. Exhibit R-2.

15. On July 28, 2011, CLC Coordinator telephoned Petitioner to inquire about her participation in the IEP meeting set for that day. Petitioner was unavailable and could not be reached. Exhibit R-2.

16. Petition had previously been represented by FORMER ATTORNEY. Testimony of Petitioner. On July 14, 2011, Former Attorney wrote CLC Coordinator and other DCPS officials regarding scheduling placement meetings for "our students" at CPS. Former Attorney wrote that, "it appears to me (and everyone else paying attention) that DCPS plans to move every child from [CPS], regardless of their individual needs." Former Attorney objected to DCPS' convening IEP meetings at its First Street location. "1st Street is not a location to which the parents can agree. The children's teachers and service providers cannot make meetings there." It cannot be determined from this letter – which expressly references, by name, two other children, but not Student – whether Former Attorney represented Petitioner or Student at the time the letter was written. Exhibit P-13.

17. Despite having received no response from Petitioner to its LOI, DCPS convened an IEP meeting for Student on July 28, 2011 at DCPS' First Street office. In attendance were CLC Coordinator, another DCPS representative, a CHSP representative, a DCPS case manager, a special education teacher, a DCPS school psychologist and an S/L pathologist. Neither Petitioner nor any other parent representative was present. CPS, which was contacted by DCPS, refused to participate in the meeting without the student or the parent present. Exhibit R-5, Testimony of CLC Coordinator.

18. At the July 28, 2011 IEP meeting, the DCPS/CHSP representatives determined that Student continued to require full-time Specialized Instruction outside of general education. The team decided that for the 2011-2012 school year, Student would receive 25.5 hours per week of specialized instruction, 60 minutes per week of Behavioral Support Services and 60 minutes per week of S/L Pathology. Exhibits R-5, R-6. The DCPS/CHSP representatives accepted DCPS' proposal to place Student at CHSP for the 2011-2012 school year. The CHSP representative told the IEP team that the CHSP program is an out of general education setting and has a small classroom size. Exhibit R-5.

19. At the July 28, 2011 IEP meeting, DCPS informed the team that Student's IEP would be reviewed at a 30 day review meeting. DCPS explained that, if at that time the parent felt that CHSP was not an appropriate location of service, other locations could be considered. Exhibit R-5.

20. The D.C. Office of the State Superintendent of Education ("OSSE") has approved the CHSP program. Testimony of CLC Coordinator.

21. On July 28, 2011, CLC Coordinator sent Petitioner a Prior Written Notice ("PWN") that Student's "location of service" was being changed from CPS to CHSP for the 2011/2012 school year. Exhibit R-7, Testimony of CLC Coordinator. Petitioner recalls seeing something about CHSP. Testimony of Petitioner.

22. Several days before the August 22, 2011 first day of school, Mother received a letter stating that CPS would not reopen. She telephoned DCPS and was informed that Student had been placed at CHSP. Mother attended an open house the same evening at CHSP. Testimony of Mother.

23. Mother took Student to CHSP on the first day of school. She had to take Student down to the school office to register him. Before she left CHSP that day, she had decided that Student would not be going back. Testimony of Mother.

24. The week before the August 22, 2011 first day of school, Mother ran into one of Student's former teachers from CPS. She told the teacher she was looking for a school for Student. The teacher told Mother about Private School and another non-public school. Mother visited both schools and obtained pre-acceptance letters for Student. Neither school had interviewed Student or seen any of his educational records. Testimony of Mother.

25. Mother enrolled Student at Private School on August 23, 2011. Testimony of Mother. Neither Mother nor Petitioner informed DCPS that they were removing Student from CHSP or enrolling him in Private School. Testimony of CLC Coordinator.

26. Student is doing very well at Private School. Testimony of Grandmother, Exhibit P-7. At Private School, when Student gets fidgety in class, he is allowed to move about within the classroom. Testimony of Private School Teacher.

27. Mother did not have consent of DCPS to enroll Student at Private School. In an October 11, 2011 letter (backdated to August 22, 2011), Petitioner's counsel gave written notice to DCPS of Petitioner's intent to remove Student from DCPS and unilaterally place him at Private School. The letter stated that Petitioner would seek DCPS funding for Student's placement at Private School. Exhibit P-11.

28. DCPS responded to the October 11, 2011 letter from Petitioner's Counsel on October 12, 2011, advising that DCPS did not agree to bear the cost of the private placement and stating DCPS' position that CHSP could meet Student's educational needs and provide him a FAPE. Exhibit P-11.

29. The Hearing Officer takes notice that CPS closed permanently on or about August 8, 2011, in the midst of an investigation by the D.C. Office of the State Superintendent of Education which was then underway.

30. DCPS contracts with CONTRACTOR to operate "Co-Location Classrooms" at three DCPS public schools. Under the contract, Contractor is required to educate students with, and at-risk for, ED. Exhibit P-8.

31. According to a brochure on the Co-Location Classrooms distributed by the CLC Coordinator, Every CHSP student has access to a workstation with a computer. The brochure claims that this technology allows students to follow a prescribed academic path, remain motivated to learn and become familiar with tools they are likely to use at home, in the workplace or in post-secondary education. Exhibit R-8.

32. Each Co-Location Classroom is staffed by a special education teacher, an instructional aide and a behavioral staff member. In addition, a social worker is available at each site. Related services at CHSP are provided by DCPS staff. Testimony of CLC Coordinator.

33. CHSP uses a computer based learning program, known as "A+" for all courses. Students on the D.C. high school diploma track may earn Carnegie credits toward graduation through the A+ program. The A+ program is approved by OSSE. Testimony of CLC Coordinator.

34. Student is good with computers. Testimony of Petitioner.

35. There are two Co-Location Classrooms at CHS. They operate on a 10 month school year. Each has a maximum capacity of 12 students, through the classes are currently below full enrollment. Testimony of CLC Coordinator.

36. Students at CHSP can participate in extra-curricular activities with non-disabled peers. Testimony of CLC Coordinator.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, 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, Petitioner seeks reimbursement for Mother's unilateral placement of Student at Private School, and an order for DCPS to pay for Student's ongoing enrollment there. Mother placed 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). Further, “‘equitable 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, supra*, 471 U.S. at 374. 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 by not ensuring that Petitioner was present for the July 28, 2011 IEP meeting, the parent is not entitled to reimbursement for her unilateral placement of Student at Private School.

Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner 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).

Analysis

1. DID DCPS VIOLATE THE IDEA BY CONVENING THE JULY 28, 2011 IEP MEETING AT A TIME AND DATE THAT WAS NOT CONVENIENT FOR PETITIONER AND WITHOUT PETITIONER’S ATTENDANCE?

DCPS convened the July 28, 2011 IEP meeting for Student at its downtown Washington, D.C. offices without the Petitioner or Mother in attendance. Petitioner contends that DCPS’

holding the IEP meeting without her violated the IDEA. DCPS maintains that it made sufficient efforts to try to ensure Petitioner was present. The IDEA's procedural safeguards help ensure that parents are able to participate fully in decisions affecting their child's education. *J.N. v. District of Columbia*, 677 F. Supp.2d 314, 320 (D.D.C. 2010), citing *Rowley, supra*, 458 U.S. 176, 183 n. 6 206-07, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). The applicable U. S. Department of Education regulations further emphasize the importance of parental participation in IEP meetings:

Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP meeting or are afforded the opportunity to participate, including (1) notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and (2) scheduling the meeting at a mutually agreed upon time and place.

34 CFR § 300.322(a). However, a meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case, the public agency must keep a record of its attempts to arrange a mutually agreed on time and place, such as—

- (1) Detailed records of telephone calls made or attempted and the results of those calls;
- (2) Copies of correspondence sent to the parents and any responses received; and
- (3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

34 CFR § 300.322(d).

In the present case, DCPS made little effort to schedule the July 28, 2011 IEP meeting at a mutually agreed upon time and place, and was not diligent in ensuring that Petitioner would attend. On July 7, 2011, CLC Coordinator sent Petitioner, by regular mail and certified mail, a Letter of Invitation ("LOI") to attend the July 28, 2011 IEP meeting. The LOI did not offer a

choice of alternative dates. On the same day, CLC Coordinator attempted to telephone Petitioner to inform her of the July 28, 2011 meeting, but she was unable to reach Petitioner or to leave a message for her. Even though CLC Coordinator did not have confirmation that Petitioner had received its LOI for the July 28, 2011 meeting, DCPS did not try to contact Petitioner again until July 27, 2011 – the day before the IEP Meeting. On July 27, 2011, DCPS Case Manager made a visit to Petitioner’s home to attempt to provide notice of the meeting. The Petitioner was not at home, so the case manager left the LOI in her door. There is no evidence that Petitioner received the LOI left for her. When the IEP team convened on July 28, 2011, no one attended on behalf of Petitioner or Student. On these facts, I find that DCPS’ efforts were insufficient to ensure that Petitioner was present at, or was afforded the opportunity to participate in, the July 28, 2011 IEP meeting. *See* 34 CFR § 300.322(a), *supra*.

The failure to comply with the IDEA’s procedural requirements, such as the parental notification provisions, can be a sufficient basis for holding that a government entity has failed to provide a FAPE. However, to the extent that the procedural violations did not actually interfere with the provision of a free appropriate public education, these violations are not sufficient to support a finding that an agency failed to provide a FAPE. *See Dibuo v. Board of Educ. of Worcester*, 309 F.3d 184, 190 (4th Cir. 2002). *See, also, A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 163-164 (D.D.C. 2005). (“Not every technical violation of the procedural prerequisites of an IEP will invalidate its legitimacy.”); *Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006).

When the DCPS IEP team met on July 28, 2011, the team decided to continue the same level of services under which Student had made educational progress at CPS, including full-time special education in an outside of general education setting, and one hour per week each of

behavioral support services and S/L pathology. Petitioner does not claim that if she had attended the July 28, 2011 IEP meeting, she would have advocated for other or additional services.

Furthermore, CPS closed permanently on August 8, 2011. Obviously, Petitioner's attendance at the July 28, 2011 IEP meeting could not have affected Student's continued enrollment there. I find therefore that DCPS' failure to assure that Petitioner was present for the July 28, 2011 IEP meeting did not interfere with the provision of FAPE to Student. *Cf. Hawkins v. District of Columbia*, 692 F. Supp.2d 81, 84 (D.D.C. 2010) (No proof child suffered educational harm.) DCPS prevails on this issue.

2. DID DCPS DENY STUDENT A FAPE BY ISSUING AN IMPROPER PRIOR WRITTEN NOTICE AFTER THE JULY 28, 2011 IEP MEETING?

Petitioner contends that DCPS' July 28, 2011 Prior Written Notice, which gave notice of Student's assignment to CHSP, was improper because it was not sufficient to meet the requirements of the IDEA. Under the IDEA, the PWN must include—

- (1) A description of the action proposed or refused by the agency;
- (2) An explanation of why the agency proposes or refuses to take the action;
- (3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
- (4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
- (5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;
- (6) A description of other options that the IEP Team considered and the reasons why those options were rejected; and
- (7) A description of other factors that are relevant to the agency's proposal or refusal.

34 CFR § 300.503(b).

Here, the action proposed by DCPS was to move Student to CHSP. The July 28, 2011 PWN explains the proposed action, the reasons for the change and a summary of the records and reports used by DCPS as the basis for its proposed action. Petitioner's complaint appears to be that the PWN is lacking in details. I believe that Petitioner misapprehends the purpose of a PWN. Its purpose "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). This PWN was certainly adequate for that purpose. Student did attend CHSP the first day of the 2011-2012 school year, but Mother decided after one day to make a unilateral placement of Student at PHS. Ultimately, Petitioner filed her request for a due process hearing, where she was represented by able counsel. Accordingly, any omission of details in the July 28, 2011 PWN did not affect Petitioner's primary procedural protection and, hence, did not violate her rights under the IDEA.³

³ Petitioner also argues that the PWN was untimely because it indicated that Student was being placed at CHSP on August 5, 2011, which was 8 days after the PWN was issued. This statement is inaccurate. As Mother testified, Student enrolled at CHSP on the first day of the 2011-2012 school year, August 22, 2011. In any case, DCPS could not properly have issued the PWN before the July 28, 2011 IEP meeting. See U.S. Dept. of Education, 34 CFR Parts 300 and 301, *Analysis of Comments and Changes*, Fed. Reg., Vol. 71, No. 156, Aug. 14, 2006, p. 46691. ("A public agency meets the requirements in Sec. 300.503 so long as the prior written notice is provided a reasonable time before the public agency implements the proposal (or refusal) described in the notice. A public agency is not required to convene an IEP Team meeting before it proposes a change in the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child. The proposal, however, triggers the obligation to convene an IEP Team meeting. Providing prior written notice in advance of meetings could suggest, in some circumstances, that the public agency's proposal was improperly arrived at before the meeting and without parent input. Therefore, we are not changing Sec. 300.503 to require the prior written notice to be provided prior to an IEP Team meeting.")

DCPS prevails on this issue.

3. IS STUDENT'S PLACEMENT AT CHSP INAPPROPRIATE BECAUSE THE CHSP COMPUTER LEARNING PROGRAM DOES NOT MEET STUDENT'S UNIQUE NEEDS?

Petitioner seeks reimbursement for Student's enrollment at Private School, because she contends that DCPS' placement of Student at CHSP was inappropriate. Under the IDEA, DCPS is obligated to devise IEPs for each eligible child, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir. 1991).

DCPS maintains that CHSP is a school capable of fulfilling Student's IEP needs.

Student's 2007 to 2009 educational and psychological evaluations recommend that Student needs to be educated in a small classroom environment with a high teacher-to-student ratio. The July 28, 2011 IEP provides that Student will receive full time Specialized Instruction services outside of the General Education setting. CHSP consists of two dedicated self-contained classrooms in a separate wing of City High School ("CHS"). Current enrollment is less than the maximum classroom size of 12 students. Each classroom is staffed by a special education teacher, an instructional aide and a behavioral staff member, and may have a mix of students enrolled in grades 9 through 12. A CHSP social worker is available on site. If Related Services are specified in a student's IEP, the services are provided by DCPS.

To establish that Student's placement at CHSP was inappropriate, Petitioner had to show that CHSP was unable to implement the IEP as written. *Hinson ex rel. N.H. v. Merritt Educational Center*, 579 F.Supp.2d 89, 104 (D.D.C. 2008). Petitioner offered no evidence that CHSP was not capable of implementing the July 28, 2011 IEP. She bases her objection to Student's placement at CHSP on the school's intensive use of a computer learning

methodology.⁴ According to the DCPS description brochure, every CHSP student has a personal workstation with a computer and essential learning materials. The brochure claims that this technology allows students to follow a prescribed academic path, remain motivated to learn and become familiar with tools they are likely to use at home, in the workplace or in post-secondary education. The CHSP computer learning programs (the "A+ Program") enables CHSP students, on a D.C. high school diploma track, to earn Carnegie credits required for graduation.

Petitioner argues that the CHSP program is not suitable for Student, who has ADHD, because he would have to sit in front of a computer to learn and because he would be assigned to one classroom for the entire day. Student's educational and psychological evaluations, dating from 2007 to 2009, confirm his ADHD diagnosis, but do not indicate that Student cannot learn using computer technology. In a June 29, 2007 Cognitive Evaluation report, the examiner found that Student's ability to sustain attention, concentrate and exert mental control is in the average range. She recommended that Student should have available to him the latest technology, including a computer, in order to sustain him in his special education program. In the November 1, 2007 Clinical Psychological Evaluation, Psychologist reported that Student was quite distractible, but with frequent redirection and encouragement, he was able to complete all evaluation tasks requested of him. Psychologist recommended, *inter alia*, that Student engage in tasks, including a variety of computer games and video games to improve attention and concentration. In a May 19, 2008 Educational Evaluation report, the examiner recommended that Student's classrooms be equipped with technology to support his academic programs. She added that his abilities in the basic skills would likely improve best with the introduction of and

⁴ Petitioner also objects to CHSP on the basis that the program is focused on children who have, or are at risk for, Emotional Disturbance. See Exhibit P-8. However CLC Coordinator testified that the program serves students with a range of disabilities, including Multiple Disabilities, SLD, ED, Intellectual Disability and Other Health Impairment. In any case, Student does have a history of an ED Disability. *See, e.g., Exhibit P-17*.

training with computerized specialized remedial software and work processing equipment. In sum, these evaluations, as well as Petitioner's testimony that Student is good with computers, tend to refute Petitioner's contention that that Student could not benefit from computer learning technology.

Petitioner also offered no competent evidence that Student's ADHD disorder requires that he move from classroom to classroom during the school day. In fact, she offered no expert testimony to address Student's current needs or limitations which may result from ADHD. At Private School, when Student gets fidgety in class, he is allowed to move about within the classroom. Petitioner offered no basis for concluding that this same accommodation, if needed, would not be made in the CHSP classroom.

The IDEA guarantees each child a free and appropriate education—not an education that is “designed according to a parent's desires.” *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 45 (D.D.C. 2006), quoting *Shaw v. District of Columbia*, 238 F.Supp.2d 127, 139 (D.D.C. 2002). Although Petitioner may prefer that Student be placed in a school that does not rely upon computer learning programs, Student's IEP does not preclude the use of this methodology. Petitioner has not shown that CHSP cannot provide the special education and related services that are provided for in Student's current IEP. *See Hinson, supra*, at 105. I conclude therefore that she has not met her burden of proof to establish that Student's placement at CHSP was inappropriate. DCPS prevails on this issue.

4. WAS STUDENT'S PLACEMENT AT CHSP INAPPROPRIATE BECAUSE CHSP IS UNABLE TO IMPLEMENT STUDENT'S IEP, WHICH PROVIDES FOR FULL TIME OUTSIDE OF GENERAL EDUCATION PROGRAMMING AND AN 11 MONTH PROGRAM?

The remaining issues raised by the Petitioner are whether CHSP is able to implement full-time outside of general education programming and provide an 11 month program.

Student's July 28, 2011 IEP provides for full time, outside of general education, special education programming. It does not provide for an 11 month program or for Extended School Year ("ESY") services. With regard to full-time programming, the evidence is undisputed that CHSP does provide full-time special education programming outside of general education, as required by Student's IEP. All of the students at CHSP are children with disabilities. They are educated exclusively in a self-contained classroom in a separate wing of CHS. As to the second issue, CHSP operates on a 10 month program. However, Student's IEP does not require an 11 month program. (Whether Student's IEP is deficient for want of ESY services is not an issue before the Hearing Officer in this hearing. *See Prehearing Order, December 14, 2011.*)

5. IS PETITIONER ENTITLED TO REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENT?

Parents may be reimbursed for unilateral private placements only if (1) the school officials' public placement violated IDEA and (2) the private-school placement was proper under IDEA. *Carter, supra*, 510 U.S. at 15, 114 S.Ct. 361. Importantly, the first factor is a threshold question: if the public school placement would have been appropriate, the hearing officer's analysis ends, and a disabled child's parents are not entitled to reimbursement. *See, e.g., N.S. v. District of Columbia*, 709 F.Supp.2d 57, 67 (D.D.C. 2010). Because I have found that Student's public school placement at CHSP would have been appropriate and did not violate the IDEA, Petitioner is not entitled to reimbursement for Mother's unilateral placement of Student at Private School. I do not reach the second factor of whether Student's placement at Private School was proper under the IDEA.

Had Petitioner shown that DCPS placement of Student at CHSP violated the IDEA, her claim for reimbursement would still be subject to reduction or denial. Under 34 CFR § 300.148(d), parental reimbursement may be reduced or denied if 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 they were rejecting the placement proposed by the agency, including stating their concerns and their intent to enroll their child in a private school at public expense. *Id.* This requirement is meant to give the school district an opportunity to cure whatever defects the parent may find in the public placement and provide a FAPE prior to unilateral placement. *See L.K. ex rel. A.K. v. Dep't of Educ. of the City of New York*, 09-CV-2266 (RMM)(LB), (E.D.N.Y. Jan. 13, 2011). Reimbursement may also be reduced or denied upon a judicial finding of unreasonableness with respect to actions taken by the parents. *See* 34 CFR § 300.148(d)(3). In the present case, after Student attended only one day of school at CHSP, Mother enrolled Student at Private School without giving notice of any sort to DCPS. Petitioner's counsel only gave written notice of Petitioner's intent to seek reimbursement on October 11, 2011 (backdated over seven weeks to August 22, 2011). Even if Petitioner had proven that DCPS' placement of Student at CHSP violated the IDEA, I find that the conduct of Petitioner and Mother in removing Student from CHSP without notice, and without giving DCPS the opportunity to address their concerns about the CHSP program, was unreasonable and would warrant denial of reimbursement for their unilateral placement of Student at Private School.

Summary

In summary, I have found that DCPS violated the IDEA by not acting diligently to ensure that Petitioner was present at the July 28, 2011 IEP meeting. However this procedural violation did not interfere with the provision of FAPE to Student. I find that DCPS' July 28, 2011 Prior Written Notice did not violate the requirements of the IDEA. I find that Petitioner has not met her burden of proof to establish that CHSP was not a school capable of fulfilling Student's IEP needs, and, finally, that Petitioner is not entitled to reimbursement for Mother's unilateral

placement of Student at Private School.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED:
that all relief requested by Petitioner herein is denied.

Date: February 2, 2012

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).