

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

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

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[Parent], on behalf of  
[Student],<sup>1</sup>

Petitioner,

Date Issued: February 6, 2013

Hearing Officer: Jim Mortenson

v

District of Columbia Public Schools (DCPS),  
On behalf of Cesar Chavez Public Charter School (CC)

Respondent.

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**HEARING OFFICER DETERMINATION**

**I. BACKGROUND**

The complaint in this matter was filed with the Respondent and Student Hearing Office (SHO) by the Petitioner on November 26, 2012. A response to the complaint was filed on December 4, 2012. A resolution meeting was held on December 5, 2012, and did not result in any agreements. The 30 day resolution period was not adjusted and the 45 day hearing timeline began on December 27, 2012. A prehearing conference was held, via telephone, on December 12, 2012, and a prehearing order was issued on that date.

Following the prehearing order, Counsels for the parties and the Undersigned discussed a scheduling change due to the unavailability of one of the Petitioner's witnesses on the scheduled hearing date. The parties and Undersigned all noted they were available the day following the

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

scheduled hearing, January 24, 2013. A scheduling order was issued January 15, 2013, changing the date of the hearing. No extension of the Hearing Officer Determination (HOD) deadline was necessary or made.

Both parties filed motions to permit one each of their respective witnesses to testify via telephone on January 15, 2013. The motions were granted on January 24, 2013, on the record.

The parties disclosed their proposed exhibits on January 16, 2013. Only the Petitioner filed a trial brief as required by the prehearing order.

The hearing was convened at 9:25 a.m. on January 24, 2013, in room 2003 at 810 First Street NE, Washington, D.C. The hearing was closed to the public. The Petitioner was represented by Miguel Hull, Esq., and the Respondent was represented by Tanya Chor, Esq. The hearing concluded approximately 4:45 p.m. The parties were permitted to file written closing arguments no later than 11:59 p.m. on Wednesday, January 30, 2013. Both parties did so. The due date for this HOD is February 9, 2013. This HOD is issued on February 6, 2013.

## **II. JURISDICTION**

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5E, Chap. 30.

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

The issue to be determined by the IHO is:

Whether the Respondent failed to place the Student based on her individualized education program (IEP) when it proposed Anacostia Senior High School on November 20, 2012?

The substantive requested relief at the time of hearing was prospective placement at the High Road Academy, a non-public special education day school, and compensatory education consisting of 160 hours of tutoring in reading and math, from Linda Mood-Bell Learning Center.

The Respondent did not fail to place the Student based on her IEP when it proposed

[REDACTED]

#### IV. EVIDENCE

Seven witnesses testified at the hearing, five for the Petitioner and two for the Respondent.

The Petitioner's witnesses were:

- 1) The Petitioner, Student's Mother (P)
- 2) The Student (S)
- 3) [REDACTED], Educational Advocate, (M.L.)
- 4) [REDACTED] [REDACTED] (T.S.)
- 5) [REDACTED], Educational Advocate (provided expert opinion on compensatory education) (L.D.)

Respondent's witnesses were:

- 1) [REDACTED], Special Education Coordinator for CC (L.H.)
- 2) [REDACTED], Special Education Coordinator for [REDACTED]  
(S.G.)

All witnesses testified credibly but for the Petitioner. The Petitioner made several contradictory statements on direct, cross-examination, questions from the Undersigned, and when compared to testimony from other witnesses and the documentary record. At the close of the hearing Petitioner's Counsel proffered that Petitioner had recently undergone surgery, was on

medication as part of her recovery, and that this may account for her various conflicting statements. Regardless of the cause of her often conflicting statements, her testimony is largely not relied upon, with only a few exceptions concerning uncontroverted facts.

21 of the Petitioner's 22 disclosures were admitted into the record as exhibits.<sup>2</sup> The

Petitioner's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 2	February 27, 2012	IEP
P 3	May 18, 2011	Summary and Score Report
P 4	November 8, 2012	Report Card
P 5	Undated	[Student] IEP Meeting [Notes]
P 6	May 6, 2010	Final Eligibility Determination Report
P 7	November 5, 2008	Confidential Report of Psychological Evaluation
P 8	October 7, 2008	Cognitive Evaluation
P 9	September 17, 2012	IEP/MDT Meeting Teacher Survey
P 10	September 18, 2012	IEP/MDT Meeting Teacher Survey
P 11	April 8, 2011	IEP Progress Report – Annual Goals
P 12	June 17, 2011	IEP Progress Report – Annual Goals
P 13	November 4, 2011	IEP Progress Report – Annual Goals
P 14	February 13, 2012	IEP Progress Report – Annual Goals
P 15	March 25, 2011	Report to Parents on Student Progress
P 16	October 28, 2011	Report to Parents on Student Progress
P 17	January 20, 2012	Report to Parents on Student Progress
P 18	January 11, 2013	[Various completed student assessment tools]
P 19	Undated	Compensatory Education Proposal
P 20	December 7, 2012	Letter from ██████████ to Hull
P 21	Undated	Résumé of ██████████
P 22	Undated	Résumé of ██████████

Nine of the Respondent's 17 disclosures were admitted into the record as exhibits. The

Respondent's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
R 9	June 11, 2012	IEP Progress Report – Annual Goals
R 10	October 5, 2012	View Contact Details for [Student]
R 11	August 27, 2012	Letter from ██████████ to [Petitioner]
R 12	September 16, 2012	Letter of Invitation to a Meeting
R 13	September 19, 2012	Multidisciplinary Team (MDT) Meeting Notes
R 14	November 19, 2012	IEP Progress Report – Annual Goals
R 15	November 20, 2012	Multidisciplinary Team (MDT) Meeting Notes

<sup>2</sup> P 1 was the complaint, which is already part of the administrative record.

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
R 16	November 21, 2012	Amended Individualized Education Program (IEP)[Incomplete]
R 17	January 15, 2013	[Web page: <a href="http://profiles.dcps.dc.gov/Anacostia+High+School">http://profiles.dcps.dc.gov/Anacostia+High+School</a> ]

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

#### **V. FINDINGS OF FACT**

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

1. Student is a [REDACTED] learner currently attending [REDACTED] (CC) in the District of Columbia.<sup>3</sup> Student is eligible for special education and related services under the IDEA meeting the definition of having a Specific Learning Disability (SLD).<sup>4</sup> Her IEP was last revised in February 2012 and requires, in relevant part: 27.5 hours of specialized instruction per week outside of the general education setting; and 240 minutes of speech and language therapy per month outside of the general education setting.<sup>5</sup> The IEP does not further specify the Student's educational placement.<sup>6</sup> She began at CC at the beginning of the 2012-2013 School Year and previously attended Prospect Learning Center,

<sup>3</sup> Testimony (T) of S, T of L.H., R 13, R 15.

<sup>4</sup> P 2.

<sup>5</sup> P 2.

<sup>6</sup> P 2.

a DCPS special education day school.<sup>7</sup> CC is a “District Charter” under D.C. Mun. Regs. 5-E3019.2.<sup>8</sup>

2. Near the end of the 2011-2012 school year, DCPS advised the Petitioner that the Student would be attending her neighborhood school for the following year.<sup>9</sup> The Petitioner had moved in June 2012, and did not want to send the Student to another DCPS and determined, based on its proximity to her sister’s home, to send the Student to CC.<sup>10</sup>
3. CC was informed of the Student’s IEP and obtained it near the beginning of the school year.<sup>11</sup> An IEP team meeting was held on September 19, 2012, and the IEP and placement were reviewed.<sup>12</sup> The Petitioner attended with the Student and two other family members who advocated for her.<sup>13</sup> The Student’s performance at CC was not good, and the Respondent advised the Petitioner that CC could not fully implement the Student’s IEP.<sup>14</sup> The Respondent advised the Petitioner that the Student’s IEP could be implemented at her neighborhood high school (identified incorrectly as Wilson Senior High School).<sup>15</sup> The advocates expressed concern about Wilson (too big to provide the Student the support she requires) and about attending any DCPS.<sup>16</sup> It was requested the Student be sent to Kingsbury, a non-public school, which was rejected by the Respondent (without written notice) because a public school was available that could implement the IEP.<sup>17</sup> Petitioner advised she believed

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<sup>7</sup> T of P, T of L.H., P 2.

<sup>8</sup> R 13, R 15.

<sup>9</sup> R 15.

<sup>10</sup> T of S, T of P.

<sup>11</sup> T of L.H., R 10, R 11, R 13.

<sup>12</sup> R 13, T of L.H.

<sup>13</sup> R 13.

<sup>14</sup> R 13, T of L.H.

<sup>15</sup> R 13, T of L.H.

<sup>16</sup> R 13, T of L.H.

<sup>17</sup> R 13, T of L.H. (In fact, the evidence suggests no prior written notice was provided to the Petitioner at all since at least the end of the 2011-2012 school year – the time frame examined here. The lack of notice was not raised as an issue, and the Petitioner was fully involved in all of the IEP team meetings, so it does not appear this procedural

the Student would best be served in a charter or private school.<sup>18</sup> The team agreed to a compromise that included having DCPS conduct an “LRE placement observation,” reconvening in 30 days to review the Student’s progress, not changing the IEP “with the understanding that it is not being fully implemented at [CC,]” and reconvening near the end of the first grading quarter to discuss the results of the placement observation.<sup>19</sup>

4. The IEP team met again on November 20, 2012, to discuss the Student’s educational placement.<sup>20</sup> The family advocates did not participate with the Petitioner this time, but a professional advocate, M.L., did.<sup>21</sup> The team reviewed the Student’s progress which indicated she was failing all but one class (music).<sup>22</sup> The Respondent repeated that the Student’s neighborhood school (clarified as [REDACTED]) could implement her IEP and would be an appropriate placement.<sup>23</sup> M.L. believed that the IEP could not be implemented at Anacostia because another student she had advocated for had been placed there when it was in another building and the student did not make good progress, some classes were not special education classes, and the Student would be with students with other disabilities, among other things.<sup>24</sup> The Petitioner again rejected sending the Student to

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violation resulted in any denial of FAPE. The Respondent is reminded to provide prior written notice pursuant to 34 C.F.R. § 300.503 and D.C. Mun. Regs. §§ 5-E3024 and 5-E3025.)

<sup>18</sup> R 13.

<sup>19</sup> R 13, T of L.H.

<sup>20</sup> R 13, T of L.H., T of M.L. (The Respondent argues that the discussions and this case are about “location of service.” It is unclear why the Respondent made this argument given the stated issue and the evidence both sides presented which unambiguously shows that the Respondent’s proposed placement at Anacostia was very different from CC because CC could not implement the IEP, as opposed to the schools being essentially the same and the selection of one over the other being merely a question of location assignment.)

<sup>21</sup> R 15, T of M.L. (M.L. testified that she is not the “assigned” advocate for the Student, that she just attended a meeting for the Student and that another advocate, L.D., was assigned to the Student. This distinction is irrelevant for the purposes here as M.L. was the person assisting the Petitioner and advocating at the meeting in question.)

<sup>22</sup> R 15, P 4.

<sup>23</sup> R 15, T of M.L., T of K.H.

<sup>24</sup> T of M.L.

Anacostia and agreed to keep the Student at CC even though she understood the IEP was not being fully implemented there.<sup>25</sup>

5. [REDACTED] is the Student's neighborhood school.<sup>26</sup> The school serves students with disabilities who have "full-time" specialized instruction outside of the general education setting, which totals 26 hours per week during the regular school day at Anacostia.<sup>27</sup> There are about 70 to 80 students at [REDACTED] with "full-time" IEPs who have been determined eligible under various disability categories.<sup>28</sup> Such services are provided in a designated wing of the school and the teachers are dually certified in both academic content areas and special education.<sup>29</sup> The classes include about eight to ten students to a teacher who is assisted by a paraprofessional.<sup>30</sup> A variety of strategies are used to teach the students, including in reading, which are employed based on each student's particular needs, including the Wilson program, tutoring, and small group instruction.<sup>31</sup> Students with disabilities may be integrated with non-disabled peers during non or extra-curricular times including, but not limited to, lunch, school assemblies, and dismissal.<sup>32</sup> If a student's IEP requires it, all classes, including "specials" such as health and physical education are provided only with peers with disabilities.<sup>33</sup> Library time is conducted with the special education class in a self-contained setting.<sup>34</sup> Related services, such as speech and language pathology, is provided on a pull-out basis and is delivered either one on one or in small groups.<sup>35</sup>

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<sup>25</sup> R 15.

<sup>26</sup> R 15, T of L.H.

<sup>27</sup> T of S.G.

<sup>28</sup> T of S.G.

<sup>29</sup> T of S.G.

<sup>30</sup> T of S.G.

<sup>31</sup> T of S.G.

<sup>32</sup> T of S.G.

<sup>33</sup> T of S.G.

<sup>34</sup> T of S.G.

<sup>35</sup> T of S.G.

## VI. CONCLUSIONS OF LAW

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

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. "Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof." D.C. Mun. Regs. 5-E3030.14. The recognized standard is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).
2. "Public charter schools that elect to be treated as a part of the DCPS for purposes of IDEA and the Rehabilitation Act of 1973 shall ensure the provision of services for all special education levels in collaboration with DCPS." D.C. Mun. Regs. 5-E924.3. "Notwithstanding the status of the public charter school for purposes of IDEA and the Rehabilitation Act, whether as an LEA or as a part of the DCPS, the public charter school is the accountable entity for the viability of the special education program." D.C. Mun. Regs. 5-E924.7. "DCPS shall be the LEA responsible for meeting the requirements applicable to an LEA under the IDEA, Part B and its implementing regulations (34 C.F.R. Part 300), as well as all local laws, regulations, and policies, with respect to the children enrolled in the District Charter. Each District Charter shall follow the policies, procedures, and guidelines established by DCPS for the referral of individual child needs and IEP matters to DCPS to be addressed consistent with the requirements of IDEA." D.C. Mun. Regs. 5-E3019.4.

3. Federal law requires that a child's placement: "(1) Is determined at least annually; (2) Is based on the child's IEP; and (3) Is as close as possible to the child's home; (c) Unless the IEP of a child with a disability requires some other arrangement, the child be educated in the school that he or she would attend if nondisabled; (d) In selecting the [least restrictive environment], consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs[.]" 34 C.F.R. § 300.116, *See also* D.C. Mun. Regs. 5-E3013. D.C. law defines "placement" as:

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

- D.C. Mun. Regs. 5-E3019.12. "**Location assignment** - the actual school site or facility at which the child will receive his/her instruction." *Id.* Under the title: "Maintaining Placement in the Least Restrictive Environment" D.C. law provides:

Pursuant to 34 C.F.R. § 300.114, no child enrolled in a public charter school shall be removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

- (a) District Charters. If a District Charter anticipates that it may be unable to meet its obligation to provide a free appropriate public education (FAPE) to a child with a disability currently enrolled in its program, it shall make an appeal to DCPS consistent with the policies, procedures, and guidelines established by DCPS for District Charters.

D.C. Mun. Regs. 5-E3019.8.

4. The Student was attending a public special education day school during the 2011-2012 school year. Her IEP was revised in February 2012 and required, in relevant part, 27.5 hours of specialized instruction per week and 240 minutes of speech and language pathology per month, both outside of the general education setting. The IEP does not further specify that the services must be provided in a segregated school and it is not known why the Student was still in that setting following the February 2012 revision of the IEP. The Petitioner was advised, near the end of the school year by the Respondent, that the Student should attend her

neighborhood school the following school year. The Petitioner did not want to send the Student to her neighborhood school and determined, based on the schools location, to send the Student to CC. CC obtained the Student's IEP from DCPS near the beginning of the school year and an IEP team meeting was held to discuss the IEP and placement. The Petitioner was informed that the Student's IEP could not be fully implemented at CC and that she should attend her neighborhood school which could implement the IEP.<sup>36</sup> The Petitioner, with the aid of advocates (family members), advised the team that they did "not want to consider DC public schools as an option" for the Student. They expressed their desire that the Student be placed in a charter (presumably a different one) or a private school. DCPS advised that non-public placements would not be considered because there were public options that could implement the IEP. The team agreed to a temporary compromise where the Student would be observed to gather additional information about the educational setting and educational resources that would serve the Student and that a team meeting would be held near the end of the quarter. The team, including the Petitioner, agreed to not change the Student's IEP, with the understanding that it was not being fully implemented at CC. Petitioner did not challenge this agreement. It was two months later when the IEP team met again, this time without the family relative advocates and with a professional advocate. The Respondent again advised that the Student's IEP could be implemented at the Student's neighborhood school, specifically identified as [REDACTED]. The Petitioner continued to object, but also agreed to keep the Student at CC, despite knowing the Student's IEP was not being implemented. There is a special education program at Anacostia that provides "full-time" specialized instruction outside of the general education setting. The

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<sup>36</sup> There was some confusion about which High School was the Student's neighborhood school, due to the Petitioner moving at the end of the 2011-2012 school year and the Respondent's record keeping. However, this confusion is not relevant to this determination, despite the arguments made about it by both sides.

regular school week results in 26 hours of instructional time. The teachers in the special education program outside of the general education setting are dually certified in both academic content areas and special education. There is a small student to teacher ratio in the program, about eight to 10 students to each teacher and a paraprofessional. A variety of reading instruction methodologies are employed and used with students based on their particular needs. Related services, such as speech and language pathology, are provided in pull-out sessions, individually or in small groups. The Student can be in all classes outside of the general education setting and all "special education" classrooms are housed in a separate wing of the school. Extracurricular activities and lunch time are spent with students without disabilities. Thus, the program at Anacostia is a placement based on the Student's IEP because it can provide all of the specialized instruction and related services outside of the general education setting, as required by the IEP, and only a minor adjustment to the school day need be made to ensure the Student's IEP is implemented as written.

5. The Petitioner chose to send the Student to CC because she did not want to send her to a DCPS. She apparently did no further investigation into the appropriateness of CC for the Student other than to make the determination based on its location. Once CC was aware of the Student's IEP, it advised the Petitioner it could not implement the IEP and the Petitioner agreed to keep the Student at CC, on two separate occasions, because she objected to the DCPS. Given the Petitioner was fully informed of the problems with CC, and flatly refused any DCPS, the equities of the matter dictate the determination that it was the Petitioner, not the Respondent, who kept the Student in a placement that was not based on her IEP over the recommendations of the Respondent. However, for the Student's sake, the Student's placement will be at Anacostia Senior High School for the remainder of the School year,

inconformity with her IEP.<sup>37</sup> This does not prevent the Petitioner from placing her child in another non-public school of her choice at her own expense, or another public charter school that can implement the Student's IEP.

#### **VII. DECISION**

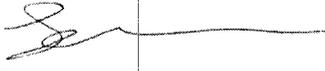
The Respondent did not fail to place the Student based on her IEP when it proposed Anacostia Senior High School.

#### **VIII. ORDER**

The Student's educational placement for the 2012-2013 school year is [REDACTED] School. The Student's IEP must be implemented there, including the provision of 27.5 hours per week of specialized instruction and 240 minutes per month of speech and language pathology, which will entail the provision of more than 90 minutes of instruction outside of the normal school day since the regular school week at [REDACTED] is only 26 hours per week and the related services cannot take away from the time the IEP team determined was necessary for specialized instruction to provide FAPE. (The Student's IEP is not to be changed to meet the needs of the Respondent. It can only be changed to meet the needs of the Student.)

**IT IS SO ORDERED.**

Date: February 6, 2013

  
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Jim Mortenson, Independent Hearing Officer

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<sup>37</sup> There may be issues concerning the provision of FAPE to this child, given that she is a learner with an SLD, in secondary school, and is reading at approximately kindergarten level and performing in math at approximately first grade level. (See R 13). However, the Student's academic performance is not the result of the issue raised in this complaint (educational placement) and the IEP was not examined to determine whether it is reasonably calculated to enable the Student to be involved in and progress in the general education curriculum because the Petitioner did not challenge the IEP, and no implication about the appropriateness of the IEP should be taken from this HOD. Further, there should be no implication from this HOD about whether the Student's academic performance is the result of her disability or something else. If the Petitioner determines she has claims based on other issues, she can raise them in a subsequent complaint, pursuant to 34 C.F.R. § 300.513(c).

**NOTICE OF RIGHT TO APPEAL**

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