

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

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

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STUDENT HEARING OFFICE  
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STUDENT, <sup>1</sup>	)	
through the Parent,	)	
	)	Date Issued: November 27, 2012
Petitioner,	)	
	)	Hearing Officer: Virginia Dietrich
v.	)	
	)	Case No: 2012-0645
District of Columbia Public Schools	)	
	)	Hearing Date: November 8, 2012
	)	Hearing Room: 2004
Respondent.	)	
	)	

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**HEARING OFFICER DETERMINATION**

**Background**

Petitioner, the grandmother and guardian of [REDACTED], filed a due process complaint notice on September 14, 2012, alleging that the District of Columbia Public Schools ("DCPS") had denied Student a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Act ("IDEA").

In September 2010, a Hearing Officer Determination ("HOD") ordered a specific nonpublic placement (nonpublic school #1) for Student and imposed very specific restrictions on DCPS' role as the Local Education Agency ("LEA") in the education of this child. Student has attended nonpublic school #1 ever since. The complaint that is the subject of this litigation seeks reinforcement of the terms of the HOD that Student should remain at nonpublic school #1 until such time that Petitioner and nonpublic school #1 jointly agree otherwise.

Petitioner seeks a determination that DCPS violated the September 2010 HOD when it issued a Prior Written Notice in August 2012 changing Student's school placement from nonpublic school #1 to nonpublic school #2. Petitioner argues that the HOD stripped DCPS of its authority to make such a decision. Petitioner also argues that the change in nonpublic schools constituted a change in educational placement that violated the IDEA's requirement that Petitioner be a party to the placement decision.

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<sup>1</sup> Personal identification information is provided in Appendix A.

DCPS asserts that the role that DCPS has been relegated to by the terms of the HOD; i.e., having no input into the determination of appropriate educational services or placement for Student and no role in the determination of a FAPE for Student other than paying the bill at nonpublic school #1, is inconsistent with the IDEA and there is recent case law that supports its position. DCPS asserts that the HOD does not prohibit it from choosing a location of services, which it has a unilateral right to do. DCPS also argues that it did not change Student's educational placement when it issued a Prior Written Notice to nonpublic school #2 because DCPS did not change the educational services prescribed by Student's Individualized Education Program ("IEP") and nonpublic school #2 can implement Student's current IEP.

### **Subject Matter Jurisdiction**

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

### **Procedural History**

The due process complaint was filed by Petitioner, the grandmother and guardian of Student, on 09/14/12. This Hearing Officer was assigned to the case on 09/17/12.

Petitioner waived the resolution meeting, but DCPS did not. The resolution meeting took place on 10/04/12, at which time parties agreed to let the 30-day resolution period expire prior to proceeding to a due process hearing. The resolution period ended on 10/14/12, the 45-day timeline to issue a final decision began on 10/15/12, and the final decision was due on 11/28/12.

The due process hearing was a closed hearing that took place on 11/08/12. Petitioner were represented by Domiento C.R. Hill, Esq. and DCPS was represented by Justin Douds, Esq. Petitioner participated in the hearing in person, but was excused one hour prior to the end of the hearing.

Petitioner presented three witnesses: Petitioner; educational consultant ("consultant"); and Head of School and Acting IEP Coordinator at nonpublic school #1 ("head of nonpublic school #1").

DCPS presented one witness: DCPS student progress monitor and LEA representative at nonpublic school #1 ("DCPS progress monitor").

Petitioner's disclosures dated 11/01/12, containing a witness list and Exhibits P-1 through P-15, were admitted into evidence without objection.

DCPS' disclosures dated 11/01/12, containing a witness list and Exhibits R-01 through R-05, were admitted into evidence without objection.

The two issues to be determined in this Hearing Officer Determination ("HOD") are as follows:

Issue #1 – Whether DCPS denied Student a FAPE by failing to include Petitioner in the placement decision on 08/22/12 when DCPS changed Student's educational placement by issuing a Prior Written Notice to nonpublic school #2; specifically, the change in schools from nonpublic school #1 with an 11 months program to nonpublic school #2 with a 10 months program, resulted in a reduction in IEP service hours.

Issue #2 – Whether DCPS denied Student a FAPE by violating a Hearing Officer Determination ("HOD") dated 09/09/10; specifically, did DCPS change Student's educational placement on 08/22/12 to nonpublic school #2 in violation of a HOD that (a) placed Student at nonpublic school #1 until she graduates, ages out or the IEP Team determines a different school placement, (b) forbade DCPS from changing Student's educational services, and (c) forbade DCPS from participating in the determination of appropriate services and placement for Student.

For relief,<sup>2</sup> Petitioner requested a finding that DCPS had violated the 09/09/10 HOD; a determination that Student had been denied a FAPE on the issues presented; an Order for DCPS to issue a Prior Written Notice to nonpublic school #1 for the 2012-2013 school year and the 2013-2014 school year, with transportation; an Order for DCPS to reimburse Petitioner in the amount of \$60.00 for transportation costs she incurred in sending Student to nonpublic school #1 during the 2012-2013 school year; and an Order for DCPS to reimburse nonpublic school #1 for transportation costs it incurred for Student to attend during the 2012-2013 school year.

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

### **Findings of Fact**

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

#1. Student is a [REDACTED] resident of the District of Columbia with a Specific Learning Disability, who was placed at nonpublic school #1 by a Hearing Officer Determination ("HOD") dated 09/09/10. Student has been attending nonpublic school #1 ever since.<sup>3</sup> Nonpublic school #1 is located in the District of Columbia and provides services only to children with various disabilities that include Specific Learning Disabilities. All students at nonpublic school #1 are able to earn credits towards a high school diploma.<sup>4</sup>

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<sup>2</sup> Petitioner withdrew her request for relief of an award of compensatory education for any missed instruction during the 2012-2013 school year due to the lack of transportation to nonpublic school #1 or due to DCPS' failure to pay Student's tuition at nonpublic school #1 while litigation was pending.

<sup>3</sup> P-5, P-8, head of nonpublic school #1.

<sup>4</sup> Head of nonpublic school #1.

#2. The 09/09/10 HOD placed certain restrictions on DCPS' role in determining and providing for the educational needs of Student. Specifically, the HOD specified that: (1) Student would be placed at nonpublic school #1 at DCPS' expense and DCPS would remain responsible for the cost of Student to attend nonpublic school #1, with transportation, (2) DCPS would not have the right to dictate what services would or would not be provided to Student; DCPS would only have the right to challenge any services billed by nonpublic school #1 via a due process hearing, (3) DCPS was effectively removed from the role of serving Student, (4) Petitioner and nonpublic school #1 together would be the sole entities to determine appropriate services for Student, (5) "If Student is, for any reason but for graduation or aging out, no longer able to attend nonpublic school #1, Student will again become the direct responsibility of DCPS and all of the procedures and obligations under the IDEA will become applicable," and (6) "Nothing in this order requires placement at another non-public placement, unless the IEP team determines that such a placement is necessary for Student."<sup>5</sup>

#3. DCPS is the Local Education Agency ("LEA") for Student. The LEA's overall role when a student within its jurisdiction is placed and/or funded by DCPS at a nonpublic school is to monitor the student at the school to ensure that the student is being provided with a FAPE. More specifically, the LEA representative/progress monitor at the nonpublic school participates in Multidisciplinary Team meetings, makes sure that the IEP goals are appropriate and are being implemented, ensures that the student is making progress with the curriculum, and ensures that accommodations and transportation services are being provided in accordance with the IEP. DCPS, as the LEA, performs this function at the behest of the Office of the State Superintendent of Education for the District of Columbia ("OSSE"), which is the State Education Agency. Although OSSE sets the minimum requirements for nonpublic schools to be certified as nonpublic schools in the District of Columbia, DCPS as the LEA, monitors the nonpublic school to ensure that the nonpublic school is complying with the law in terms of providing appropriate educational services to children in a safe environment.<sup>6</sup>

#4. Student's most recent IEP, dated 12/19/11, classifies Student as a child with a Specific Learning Disability and prescribes 27.5 hours/week of specialized instruction outside of general education. The IEP also provides for transportation services for Student. At the time the IEP was developed, the IEP Team had not yet determined whether or not Student required Extended School Year ("ESY") services. The IEP indicates that Student is slated to graduate from high school with a high school diploma.<sup>7</sup>

#5. On 03/24/12, Student's IEP was amended to reflect that ESY services were not necessary for Student because Student was attending an 11 months program at nonpublic school #1.<sup>8</sup> The amendment did not affect the amount or setting of special education services; i.e., the IEP still required Student to receive 27.5 hours/week of specialized instruction outside of general education.<sup>9</sup>

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<sup>5</sup> P-5.

<sup>6</sup> DCPS progress monitor.

<sup>7</sup> P-9.

<sup>8</sup> R-3-1.

<sup>9</sup> R-3-1.

#6. The DCPS regular school term runs 10 months per school year. This is the amount of time that DCPS, as the LEA, is required to provide educational services to all students within its jurisdiction. ESY services constitute an additional month of educational programming that commonly occurs at the conclusion of the 10-month regular school program. The need for ESY services are determined on an annual basis by the IEP Team and are provided for the purpose of preventing regression of students over the summer break from school.<sup>10</sup> ESY is built into the 11 months program at nonpublic school #1.<sup>11</sup> ESY services are available at nonpublic school #2.<sup>12</sup>

#7. On 08/22/12, DCPS issued a Prior Written Notice that changed Student's site designation or location of services from nonpublic school #1 to nonpublic school #2.<sup>13</sup> No changes to the IEP were made.<sup>14</sup> Prior to DCPS issuing the Prior Written Notice, a Multidisciplinary Team or IEP Team meeting did not take place where the transfer from one school to another school was discussed<sup>15</sup> nor was Petitioner or nonpublic school #1 made aware of DCPS' decision to transfer Student from one school to another. Petitioner never requested that Student be transferred from nonpublic school #1, Student did not graduate from nonpublic school #1 and Student did not age out of nonpublic school #1.<sup>16</sup>

#8. Once the Prior Written Notice to nonpublic school #2 was issued, transportation was arranged for Student to attend nonpublic school #2. However, Student remained at nonpublic school #1 and sought reinstatement of transportation services to nonpublic school #1. Due to DCPS administrative procedures, reinstatement of bus service to nonpublic school #1 required the signature of Petitioner and nonpublic school #1, but both refused to sign.<sup>17</sup> As a result, Petitioner provided transportation for Student to attend nonpublic school #1 during the months of October and November 2012 and incurred \$60.00 in expenses in doing so. During the months of August and September 2012, nonpublic school #1 provided Student with transportation tokens.<sup>18</sup>

#9. At least since July 2012, nonpublic school #1 has had continuing problems with DCPS about the quality of the instruction provided and the certification of its teachers within the District of Columbia; i.e., most, if not all, of nonpublic school #1's teachers were not certified by OSSE to provide specialized instruction or content area instruction in the District of Columbia. Certification means that the instructors have met the educational requirements to provide instruction in the District of Columbia. Some of these teachers were providing specialized instruction to Student. As a result of nonpublic school #1's continuing inability to demonstrate that their teachers are licensed and/or approved by OSSE, DCPS unilaterally decided to relocate Student from nonpublic school #1 to nonpublic school #2 and issued a Prior Written Notice changing the location of services on 08/22/12.<sup>19</sup>

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<sup>10</sup> DCPS progress monitor, head of nonpublic school #1.

<sup>11</sup> Head of nonpublic school #1.

<sup>12</sup> DCPS progress monitor.

<sup>13</sup> P-12-3.

<sup>14</sup> DCPS progress monitor.

<sup>15</sup> DCPS progress monitor, head of nonpublic school #1, consultant.

<sup>16</sup> Petitioner.

<sup>17</sup> DCPS progress monitor.

<sup>18</sup> Petitioner.

<sup>19</sup> DCPS progress monitor, R-4.

#10. Nonpublic school #2 has an educational program specifically geared for students with Specific Learning Disabilities and the school can implement Student's 12/19/11 IEP, as amended on 03/24/12. The school can provide Student with 27.5 hours/week of specialized instruction outside of general education in a school that services only children with disabilities. All of the teachers at nonpublic school #2 are certified as special educators in the District of Columbia. Nonpublic school #2 is only one block from Student's home; Student easily can walk to school. Nonpublic school #2 has a 10 months program that enables students to earn credits towards receiving a high school diploma. Nonpublic school #2 also provides ESY services for eligible students and can provide ESY services to Student if the IEP Team determines that Student requires it to prevent regression over the summer.<sup>20</sup>

### **Discussion/Conclusions of Law**

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

The overall purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1.

To comply with the overall purpose of the IDEA, all local education agencies (LEA) in the District of Columbia must ensure that all children with disabilities, ages three to twenty-two, who are residents or wards of the District of Columbia, have available to them a FAPE and that the rights of these children and their parents are protected. 34 C.F.R. 300.101, 5 D.C.M.R. E-3000.1.

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

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

The first issue to be determined is whether DCPS denied Student a FAPE by failing to include Petitioner in the placement decision on 08/22/12 when DCPS changed Student's educational placement by issuing a Prior Written Notice to nonpublic school #2; specifically, the

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<sup>20</sup> DCPS progress monitor.

change in schools from nonpublic school #1 with an 11 months program to nonpublic school #2 with a 10 months program, resulted in a reduction in IEP service hours.

The parent must be included as part of the group of persons who makes the educational placement decision. 34 C.F.R. 300.116(a)(1). "Educational placement" means educational program, not the particular institution where that program is implemented." *White v. Ascension Parish School Board*, 343 F.3d 373 (5<sup>th</sup> Cir. 2003), 39 IDELR 182. A placement is not a physical location, but a program of educational services offered to the student. *Sherri A.D. v. Kirby*, 19 IDELR 339 (5<sup>th</sup> Cir. 1992).

A recent ruling in this jurisdiction firmly establishes that the educational placement is the child's IEP, and the school designated by the public agency to implement the child's IEP is the location of services. *Johnson v. District of Columbia*, 2012 L 883125 (D.C.C., March 16, 2012). While the IDEA requires parental participation in educational placement decisions, it does not mandate that parents be involved with site selection. *White v. Ascension Parish School Board*, 343 F.3d 373 (5<sup>th</sup> Cir. 2003), 39 IDELR 182. Therefore, a change in site location is an administrative decision solely within the discretion of DCPS provided that the assignment is made consistent with the child's IEP and the decision of the group determining placement. Federal Register, Vol. 71, No. 156, p. 46,588 (2006).

The term "change in educational placement" is not defined in the IDEA. Whether new placements proposed for students as a result of the anticipated discontinuation of a school would constitute a "change in educational placement" for the students involved would have to be determined on a case-by-case basis. *Letter to Fisher*, 21 IDELR 992 (1994). A change in placement occurs when there is a substantial change in the student's educational program. Federal Register, Vol. 71, No. 156, p. 46,588 (2006).

In determining whether a "change in educational placement" has occurred, the public agency responsible for educating the child must determine whether the proposed change would substantially or materially alter the child's educational program. In making such a determination, the effect of the change in location on the following factors must be examined: (1) whether the educational program set out in the child's IEP has been revised; (2) whether the child will be able to be educated with nondisabled children to the same extent; (3) whether the child will have the same opportunities to participate in nonacademic and extracurricular services; and (4) whether the new placement option is the same option on the continuum of alternative placements. *Letter to Fisher*, 21 IDELR 992 (1994).

If the District determines, based on the student's individual needs, that the student should have the same educational program and opportunities for interaction with his or her nondisabled peers as he or she had during the placement at the previous school, the change in location alone would not constitute a change in educational placement. This is because under these circumstances, the change in location alone would not substantially or materially alter the child's educational program. *Id.*

Petitioner failed to meet her burden of proof on this issue. The Hearing Officer determines that DCPS did not change Student's educational placement when it issued the Prior

## Hearing Officer Determination

Written Notice to nonpublic school #2 on 08/22/12, for the following reasons: (1) there was no change to the services required by Student's IEP, (2) nonpublic school #2 could implement Student's IEP by providing 27.5 hours/week of specialized instruction outside of general education, (3) both nonpublic schools provided services only to disabled students; therefore, the placement at nonpublic school #2 was the same on the continuum of alternative placements; and (4) at nonpublic school #2, Student would be serviced in a program specifically geared for students with a Specific Learning Disability. The IEP did not mandate that Student have access to nonacademic and extracurricular activities. Student participated in the track team at nonpublic school #1,<sup>21</sup> but there was no evidence in the record that the same or similar extracurricular activities were not available at nonpublic school #2.

At nonpublic school #2, Student would have the same educational program and opportunities for interaction with her nondisabled peers as she would have at nonpublic school #1; therefore, the transfer from one school to another constituted a change in the site location and not a change in educational placement. A change in site location is solely within the discretion of DCPS; therefore, DCPS was not required to include Petitioner in its decision to change the location of services from nonpublic school #1 to nonpublic school #2.

There must be a "fundamental change in, or elimination of a basic element of the education program in order to qualify as a change in educational placement." *Lunceford v. D.C. Bd. of Educ.*, 745 F.2d 1577, 1582 (D.C. Cir. 1984). Petitioner's argument that Student's educational placement changed when Student went from an 11 months program at nonpublic school #1 to a 10 months program at nonpublic school #2 was without merit. The DCPS progress monitor was knowledgeable and credible; she was the DCPS progress monitor at both nonpublic school #1 and nonpublic school #2. Her testimony and the testimony of the head of nonpublic school #1 were both credited that since the educational program at nonpublic school #1 was 11 months, ESY services were not necessary. And, the DCPS progress monitor testified credibly that although the regular school program at nonpublic school #2 was only 10 months in duration, Student could receive an 11<sup>th</sup> month of instruction at nonpublic school #2 if the IEP Team deemed it appropriate. There was functionally no difference in the amount of services that Student could receive at each school. Student's IEP only required that Student be provided with 27.5 hours/week of specialized instruction outside of general education during the regular school term, and nonpublic school #2 could comply with that requirement. The 11<sup>th</sup> month of programming was optional and at the discretion of the IEP Team and had to be determined for Student on an annual basis.

The second issue to be determined is whether DCPS denied Student a FAPE by violating a Hearing Officer Determination ("HOD") dated 09/09/10; specifically, did DCPS change Student's educational placement on 08/22/12 to nonpublic school #2 in violation of a HOD that (a) placed Student at nonpublic school #1 until she graduates, ages out or the IEP Team determines a different school placement, (b) forbade DCPS from changing Student's educational services, and (c) forbade DCPS from participating in the determination of appropriate services and placement for Student.

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<sup>21</sup> Petitioner.

DCPS, as the local education agency, is responsible for providing Student with a free appropriate public education. 34 C.F.R. 300.1, 300.17, 300.101, 5 D.C.M.R. E-3000.1. To that end, DCPS is required to provide Student with specially designed instruction to meet Student's unique needs as defined by an IEP that enables Student to access the general education curriculum and make progress towards achieving annual goals. 34 C.F.R. 300.39, 300.320.

The IEP is developed by an IEP Team that includes Petitioner and a representative of the responsible public agency who is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of a child with a disability and who is knowledgeable about the general education curriculum and the availability of resources of the public agency. 34 C.F.R. 300.320, 300.321, 300.323, 300.324. The IEP Team is also responsible for reviewing and revising the IEP at least annually, to ensure that annual goals are being achieved. 34 C.F.R. 300.324(b).

Petitioner did not meet her burden of proof that DCPS violated the HOD by changing Student's educational placement. As previously determined herein, Student's educational placement did not change when DCPS issued a Prior Written Notice to nonpublic school #2 on 08/22/12. There was no change to Student's educational program; DCPS only changed the location where the services would be provided.

The HOD excluded DCPS from participating as a member of the IEP Team in the determination of appropriate services and placement for Student. This exclusion is inconsistent with the IDEA and is contrary to current case law. *See District of Columbia v. Nelson*, 811 F. Supp. 2d 508 (D.C.C. September 21, 2011), 57 IDELR 192.

Under one of the provisions of the HOD, DCPS' Prior Written Notice to nonpublic school #2 was justified. The HOD specified that if for any reason but for graduation or aging out, Student is no longer able to attend nonpublic school #1, DCPS would again become the direct responsibility of DCPS and all of the procedures and obligations under the IDEA would become applicable. DCPS, whose responsibility it is to provide Student with a FAPE by ensuring the provision of the specialized instruction that is required by Student's IEP, had serious concerns about the ability of nonpublic school #1 to provide Student with specialized instruction because the teachers were not certified in the District of Columbia.

In keeping with its responsibility to monitor Student's placement at nonpublic school #1 and ensuring that Student is receiving a FAPE and that the services provided are consistent with Student's IEP, DCPS relocated Student to nonpublic school #2. The testimony of the progress monitor was credible and undisputed that nonpublic school #1 was not complying with requirements that its teachers be certified to provide specialized instruction and content area instruction in the District of Columbia. The result was that Student was not being provided with specialized instruction that was required by her IEP and that met the requirements of the law.

The facts of this case lead this Hearing Officer to conclude that there was a valid and legal reason that Student could no longer attend nonpublic school #1, and that reason gave DCPS the right to step in and assume responsibility for providing Student with a FAPE. DCPS responded by relocating Student to nonpublic school #2. The Hearing Officer determines that

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Hearing Officer Determination

DCPS did not violate the 09/09/10 HOD and Student was not denied a FAPE by her transfer to nonpublic school #2 via the Prior Written Notice issued on 08/22/12.

The Prior Written Notice issued by DCPS to nonpublic school #2 is in effect and valid. Petitioner may choose to enroll Student at nonpublic school #2 or not, but DCPS is not responsible for the costs of tuition and transportation to nonpublic school #1 from 08/22/12 forward, when the Prior Written Notice changing the location of services to nonpublic school #2 took effect.

**ORDER**

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

**IT IS SO ORDERED.**

**NOTICE OF RIGHT TO APPEAL**

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

Date: November 27, 2012

*/s/ Virginia A. Dietrich*  
Hearing Officer

Copies to:

Petitioner: (U.S. mail)  
Petitioner's Attorney: Domiento C.R. Hill, Esq. (electronically)  
DCPS' Attorney: Justin Douds, Esq. (electronically)  
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