

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

Office of Dispute Resolution  
810 First Street, NE, 2nd Floor  
Washington, DC 20002

OSSE  
Office of Dispute Resolution  
December 12, 2014

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PETITIONERS,  
on behalf of STUDENT,<sup>1</sup>

Date Issued: December 11, 2014

Petitioners,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Office of Dispute Resolution,  
Washington, D.C.

Respondent.

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioners (the Petitioners or Parents), 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 (DCMR). In their Due Process Complaint, Petitioners allege that Respondent District of Columbia Public Schools (DCPS) denied Student a Free Appropriate Public Education (FAPE) by failing to propose an Individualized Education Plan (IEP) or educational placement for her for the 2012-2013 and 2013-2014 school years.

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

Student, an AGE young woman, is a resident of the District of Columbia. Petitioners' Due Process Complaint, filed on August 18, 2014, named DCPS as respondent. The parties met for a resolution session on August 28, 2014 and did not reach an agreement. The 45-day period for issuance of this decision began on September 18, 2014. On September 10, 2014, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. The due process hearing date was originally scheduled for October 20, 2014. On October 15, 2014, PETITIONERS' COUNSEL filed a request for a continuance due to a conflicting court hearing. By order entered October 20, 2014, the Chief Hearing Officer granted a 41-day continuance, extending the due date for this determination to December 12, 2014. On October 6, 2014, counsel for DCPS filed a motion for summary decision, which I denied by order entered October 31, 2014.

The due process hearing was held before this Impartial Hearing Officer on November 25, 2014 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioners appeared in person, and were represented by Petitioners' Counsel. Respondent DCPS was represented by DCPS' COUNSEL.

Petitioner MOTHER testified and Petitioners called NONPUBLIC SCHOOL HEAD OF SCHOOL as their only other witness. DCPS called no witnesses. Petitioners' Exhibits P-1 through P-9 were admitted into evidence, including Exhibits P-4 and P-5, which were admitted over DCPS' objections. Respondent's Exhibits R-1 through R-3 were admitted into evidence without objections. Exhibit R-4 was not offered. Counsel for Petitioners made an opening statement. Counsel for both parties made closing arguments. Neither party requested leave to file a post-hearing memorandum.

## **JURISDICTION**

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

## **PRIOR ADJUDICATIONS**

In this case, the Petitioners seek reimbursement for Student's tuition at Nonpublic School for the 2012-2013 and 2013-2014 school years. On July 27, 2012, the Petitioners, on behalf of Student, filed a prior due process complaint against DCPS in Case No. 2012-0515, which was heard before former Hearing Officer Melanie Byrd Chisholm. The issues for determination in that case were:

1. Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP for the student in December 2010, specifically, by failing to develop an IEP with specific goals unique to the student, thirty-one (31) hours of specialized instruction per week outside of the general education environment and ninety (90) minutes per week of speech-language therapy;
2. Whether DCPS denied the student a FAPE by failing to offer an appropriate placement for the student in December 2010, specifically, placement in a private special education day school; and
3. Whether DCPS failed to review the student's December 2010 IEP at least annually and whether that failure constitutes a denial of a FAPE.

Exhibit R-1. For relief in the prior case, the Parents requested reimbursement from DCPS for the costs, including tuition, related services and mileage for transportation, of Nonpublic School for the 2011-2012 school year; and prospective placement of Student at Nonpublic School for the 2012-2013 school year.

In her September 27, 2012 Hearing Officer Determination (the September 27, 2012 HOD), Hearing Officer Chisholm determined, *inter alia*, that DCPS did not deny Student a FAPE by failing to develop an appropriate IEP on December 10, 2010 or by failing to offer Student a placement in a private special education day school. The

hearing officer found that DCPS had denied Student a FAPE by failing to review her IEP, at least annually, on or before December 15, 2011. However the hearing officer found that, with the exception of the omission of speech-language services for which she was possibly eligible, Student's preceding December 10, 2010 IEP was still appropriate on December 15, 2011. As equitable relief for DCPS' failure to convene an IEP meeting for Student in December 2011, the hearing officer ordered DCPS to reimburse the Parents one-third of Student's tuition costs at Nonpublic School for the periods December 15, 2011 to June 10, 2012 and August 31, 2012 to September 26, 2012. Hearing Officer Chisholm also ordered DCPS to convene an IEP meeting, within 15 school days, to review Student's September 2011 speech-language assessment and to develop a revised IEP. The hearing officer expressly determined that the Parents were not entitled to reimbursement for Student's private school expenses for the 2011-2012 school year because the Petitioners did not meet all factors in the U.S. Supreme Court's *Burlington/Carter* analysis.<sup>2</sup>

Hearing Officer Chisholm also determined, based on the D.C. Circuit's *Branham* factors,<sup>3</sup> that Student was not entitled to prospective placement at Nonpublic School for the 2012-2013 school year because "the nature and severity of the student's disability is not such that requires placement in a private special education school. The student is able to participate in the general education curriculum with supports and is able to attain average to above-average grades. The student does not have behavior issues and she is able to navigate independently within the community. The student has special

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<sup>2</sup> See *Sch. Comm. of the Town of Burlington v. Dep't of Educ.*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993).

<sup>3</sup> See *Branham v. Gov't of the District of Columbia*, 427 F.3d 7, 11-12 (D.C.Cir.2005) .

education needs which include the need for specialized instruction within and outside of the general education environment and the need for [English Language Learners (ELL)] services. [Nonpublic School] is not able to offer specialized instruction, delivered by a special education teacher, for the student's English, math, science and foreign language classes. Likewise, [Nonpublic School] is unable to offer the ELL services needed by the student in order to support the student's academic progress in an English-speaking school. . . . Finally, . . . [Nonpublic School is not the [Least Restrictive Environment] for the student." Exhibit R-1.

The Parents appealed the September 27, 2012 HOD to the U.S. District Court for the District of Columbia (Civil Action No. 12-2058). The matter was referred to U. S. Magistrate Judge Deborah A. Robinson for full case management. In her March 14, 2014 Report and Recommendation, Exhibit R-2, Magistrate Judge Robinson found, *inter alia*, that the Parents had failed to demonstrate that the hearing officer had erred in determining that DCPS did not deny Student a FAPE by failing to develop an appropriate IEP on December 10, 2010; that the Parents had not proven that the hearing officer erred in concluding that DCPS did not deny Student a FAPE by failing to offer her a placement in a private special education day school at the December 10, 2010 IEP meeting; and that the Parents were not entitled to reimbursement for Student's attendance at Nonpublic School for the 2011-2012 school year. In a Memorandum and Order entered April 15, 2014, Exhibit R-3, United States District Judge James E. Boasberg adopted Magistrate Judge Robinson's Report and Recommendation and entered final judgment in favor of DCPS.

## **ISSUE AND RELIEF SOUGHT**

The following issue for determination was certified in the September 10, 2014

Prehearing Order:

- Whether DCPS denied Student a FAPE by failing to propose a free, appropriate public education or develop IEPs for Student for the 2012-2013 and 2013-2014 school years.

For relief, Petitioners seek reimbursement for the costs of Student's enrollment at Nonpublic School for the 2012-2013 and 2013-2014 school years.

## **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. During the 2012-2013 and 2013-2014 school years, Student, now a young adult, resided with Petitioners in the District of Columbia. For both school years, Student was parentally placed at Nonpublic School, a private special education day school in suburban Maryland. Student graduated from the Nonpublic School high school program on June 6, 2014. Testimony of Mother, Exhibit P-1.

2. During the 2012-2013 and 2013-2014 school years, Student was a "child with a disability" as defined by the IDEA and eligible for special education and related services under the primary disability classification Specific Learning Disability (SLD). Exhibits P-4, P-5.

3. Petitioners paid for Student's Nonpublic School tuition, supplemental speech-language services and school transportation for the 2012-2013 and 2013-2014 school years. The total amount paid by the Parents was \$95,843.53. Testimony of Mother, Exhibit P-9.

4. In the September 27, 2012 HOD, Hearing Officer Chisholm ordered DCPS

to convene an IEP meeting by October 23, 2012 (15 school days from September 27, 2012) to review Student's September 7, 2011 Comprehensive Speech-Language Assessment and to develop an IEP for the Student. Exhibit P-8. On October 15, 2012, DCPS COMPLIANCE CASE MANAGER wrote Petitioners' Counsel by email to propose October 16, 2011 as the date for the IEP meeting. Previously, DCPS had cancelled an IEP meeting scheduled for earlier in the month. DCPS next scheduled the IEP meeting for October 23, 2012. By email of October 19, 2012, Petitioners' Counsel informed Compliance Case Manager that Mother was not available on October 23, 2012 and requested alternative meeting dates. In a response the same day, Compliance Case Manager wrote that she would consult with the DCPS school to obtain more dates and that she would get back to counsel. By email of October 26, 2012, Petitioners' Counsel confirmed that Petitioners agreed to an extension of the September 27, 2012 HOD deadline for holding the IEP meeting to November 9, 2012. Exhibit P-3. DCPS did not convene an IEP meeting by November 9, 2012 and, as of the date of the due process hearing in this case, has not convened an IEP meeting. Testimony of Mother.

5. After October 26, 2012, neither the Parents nor their representative ever again requested that DCPS develop an IEP for Student. After October 26, 2012, neither the Parents nor their representative ever requested DCPS to provide a FAPE to Student. Testimony of Mother.

### **CONCLUSIONS OF LAW**

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

### Burden of Proof

The burden of proof in a due process hearing is normally the responsibility of the party seeking relief – the Petitioners in this case. *See* DCMR tit. 5-E, § 3030.14. *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

Did DCPS deny Student a FAPE by failing to propose a free, appropriate public education or develop IEPs for Student for the 2012-2013 and 2013-2014 school years?

For the 2011-2012, 2012-2013 and 2013-2014 school years, the Parents placed Student at Nonpublic School and paid for her private school tuition and other expenses. In Case No. 2012-0515, Hearing Officer Chisholm determined that the Parents were not entitled to tuition reimbursement for school year 2011-2012 and denied the parent's request to order DCPS to fund Student's placement at Nonpublic School for the 2012-2013 school year. In the September 27, 2012 HOD, the hearing officer did order DCPS to convene an IEP team meeting by October 23, 2012 and to develop a revised IEP for Student. The Parents unsuccessfully appealed the September 27, 2012 HOD to the U.S. District Court for the District of Columbia, which entered final judgment in favor of DCPS on April 15, 2014.

After initially making some effort to schedule the IEP team meeting required by the September 27, 2012 HOD, DCPS failed to follow through and, thereafter, never convened an IEP meeting or developed another IEP for Student. The issues for determination in the instant case are whether DCPS denied Student a FAPE by failing to develop revised IEPs or to offer Student a FAPE after the September 27, 2012 HOD

was issued, and, if so, whether the Parents are entitled to tuition reimbursement for Student's enrollment at Nonpublic School for school years 2012-2013 and 2013-2014.

The IDEA regulations require that a student's IEP team reviews the student's IEP periodically, but not less than annually, to determine whether the annual goals for the student are being achieved, and revises the IEP, as appropriate. See 34 CFR § 300.324(b). It is well-established that a school district is required to continue developing IEPs for a disabled child, no longer attending its schools, when, as in this case, a prior year's IEP (the December 10, 2010 IEP) for the child is under administrative or judicial review. See *Andersen by Andersen v. District of Columbia*, 877 F.2d 1018, 1022-1023 (D.C.Cir. 1989); *Town of Burlington v. Dep't of Educ.*, 736 F.2d 773, 794 (1st Cir.1984), *aff'd sub nom. Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985); *Amann v. Stow Sch. Sys.*, 982 F.2d 644, 651 n. 4 (1st Cir.1992); *MM ex rel. DM v. School Dist. of Greenville County* 303 F.3d 523, 536, (4<sup>th</sup> Cir.2002); *County School Bd. of Henrico County, Va. v. R.T.* 433 F.Supp.2d 657, 691 -692 (E.D.Va.2006). In *Town of Burlington* the First Circuit Court of Appeals noted that a school district should continue to review a child's IEP and revise his placement during the administrative and judicial review of a contested placement. Without these annual reviews, "the court is faced with a mere hypothesis of what the [school district] would have proposed and effectuated during the subsequent years, an hypothesis which at the time of trial would have the unfair benefit of hindsight." *Id.* at 794. Applying the *Town of Burlington* rule to this case, DCPS was required to continue developing annual IEPs for Student while the September 27, 2012 HOD against the Parents, as to the

appropriateness of the December 10, 2010 IEP, remained on appeal.<sup>4</sup> By not ensuring that an IEP team conducted periodic reviews of Student's IEP, DCPS violated both the IDEA and the September 27, 2012 HOD.

Failure to conduct periodic reviews of a student's IEP is a procedural violation of the IDEA. *See, e.g., K.E. v. District of Columbia*, 19 F.Supp.3d 140, 147 (D.D.C.2014). Although a procedural violation may rise to the level of a denial of a FAPE, "an IDEA claim is viable only if those procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C.Cir.2006). Courts in this circuit have found a denial FAPE when DCPS has abrogated its responsibility and, as a result, the student's IEP was not completed prior to the beginning of the school year. *K.E., supra* at 149. Here DCPS not only failed to ensure that Student's IEP was reviewed prior to beginning of the 2013-2014 school year, it did not comply with the September 27, 2012 HOD order to convene an IEP team meeting to develop an IEP for Student. I conclude, therefore, that DCPS' ongoing failure, after September 27, 2012, to ensure that Student's IEP was reviewed and revised as appropriate caused Student to be denied a FAPE.

#### Whether there were Changed Circumstances

DCPS, relying on the D.C. Circuit's decision in *Andersen, supra*, argues that despite its failure to develop annual IEPs for Student, the Petitioners are not entitled to relief because they have not shown "changed circumstances" that would render the September 27, 2012 HOD, which upheld the appropriateness of the December 10, 2010 IEP, inappropriate for guiding relief for the 2012-2013 and 2013-2014 school years. In

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<sup>4</sup> This finding applies only to the school years before me in this proceeding, the 2012-2013 and 2013-2014 school years.

the *Andersen* case, the plaintiff parents argued that they were entitled to reimbursement for private school tuition because the school district had failed to participate in annual reviews of the students' IEPs or to propose placements each year. Upholding the district court's decision which rejected the parents' claims, the D.C. Circuit wrote,

In [*Town of Burlington v. Department of Educ. of Massachusetts*, 736 F.2d 773 (1st Cir.1984), *aff'd*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)], the First Circuit noted that a school district should continue to review a child's IEP and revise his placement during administrative and judicial review of a contested placement. Without these annual reviews, "the court is faced with a mere hypothesis of what the [school district] would have proposed and effectuated during the subsequent years, an hypothesis which at the time of trial would have the unfair benefit of hindsight." *Id.* at 794. It suggested that this ongoing process might promote settlement of the pending litigation and that the IEPs and proposed placements would provide useful evidence when the court considered the relief appropriate for later years. *Id.*

The court nevertheless held that where the school district failed to meet these obligations "the losing party in the dispute over the [contested] IEP [or placement] will have the *burden of producing evidence and persuading the court of changed circumstances* that render the district court's determination as to the initial year inappropriate for guiding its order of relief for subsequent years." *Id.* at 795 (emphasis added, footnote omitted). We are persuaded, as was the district court, that the *Town of Burlington* test is the proper one to apply when attempting to fashion appropriate relief for subsequent years. If the handicapped child's circumstances continue unchanged, any placement that was appropriate for him in the initial year would continue to meet his educational needs in succeeding years. Although circumstances obviously may change, and often do, the nature or direction of change is unpredictable (except for the children's inevitable aging), so that a presumption of continuity seems most practical.

When we apply the test to the cases before us, we find no error in the district court's decisions. It clearly understood and applied *Town of Burlington* to the facts of these cases. It found that plaintiffs had produced insufficient evidence to prove that the circumstances of any of the students had changed during the pendency of the litigation. Nothing we have seen persuades us otherwise; thus we affirm the district court's decisions to deny relief for the later years.

*Andersen*, 877 F.2d 1022-1023 (emphasis in underline supplied).

In the instant case, unlike in *Andersen*, Parents have demonstrated changed circumstances since the December 10, 2010 IEP was developed. Notably, in the September 27, 2012 HOD, Hearing Officer Chisholm determined that DCPS had denied Student a FAPE by not conducting an annual review of the December 10, 2010 IEP and that, as of December 2011, there was a potential significant change to Student's academic and functional needs, namely her possible eligibility for speech-language services. The hearing officer ordered DCPS to convene an IEP team meeting to review Student's September 2011 speech-language assessment and to develop a revised IEP. The Parents have established that DCPS failed to convene the IEP team meeting required by the HOD and failed to ensure that the DCPS IEP team considered Student's eligibility for speech-language services and how that affected Student's academic and functional needs. I conclude, therefore, that the Parents have met their burden of producing evidence of changed circumstances that render Hearing Officer Chisholm's denial of private school reimbursement for the 2010-2011 school year "inappropriate for guiding [my] order of relief" for the 2012-2013 and 2013-2014 school years. *See, Andersen, supra*, 877 F.2d at 1023. The question then becomes what relief is appropriate.

#### Reimbursement Remedy

In this case, Petitioners seek reimbursement from DCPS for their expenses for Student to attend Nonpublic School during the 2012-2013 and 2013-2014 school years. In his decision in *K.E. v. District of Columbia, supra*, U.S. District Judge Walton reviewed the circumstances under which parents must be reimbursed for private school expenses:

Under the 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 Cnty. Sch. Dist. 4 v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284, (1993) (citation omitted). Parents in such situations may be reimbursed only if “the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate,” 34 C.F.R. § 300.148(c) (2012); *see also Florence Cnty.*, 510 U.S. at 15, 114 S.Ct. 361 (parent may only receive tuition reimbursement “if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act”); *Holland v. District of Columbia*, 71 F.3d 417, 420 n. 3 (D.C.Cir.1995) (noting that the circuit has ordered reimbursement “where the public agency violated [the IDEA] and the parents made an appropriate placement”).

*K.E., supra*, 19 F.Supp.3d at 146 -147.

I find that for purposes of entitlement to reimbursement under the *Burlington/Carter* test, the Parents’ continued placement of Student at Nonpublic School was not proper. In the September 27, 2012 HOD, Hearing Officer Chisholm concluded that Nonpublic School was not an appropriate placement because the private school did not offer ELL classes or services needed by Student; because, during the 2011-2012 school year, Nonpublic School did not offer a curriculum aligned with the DC Standards of Learning as required by the DCMR; because, during the 2011-2012 and 2012-2013 school years, some of Student’s Nonpublic School teachers did not hold the certifications required by DCPS and because the nature and severity of Student’s disability did not require a setting as restrictive as a private special education day school. *See Exhibit R-1*. Hearing Officer Chisholm also cited those reasons as factors for denying the Student prospective placement at Nonpublic School for the 2012-2013 school year. The September 27, 2012 HOD was upheld on appeal to the U.S. District Court. I find, therefore, that the Petitioners have not provided a basis for concluding that Nonpublic School should now be determined to have been a appropriate placement under the IDEA.

Furthermore, a finding that a private placement is proper “is not solely dependent on a determination that the private placement is an appropriate placement, but rather is informed based on a factual analysis of all of the events that lead to the selection.” *K.E., supra* at 9 (citing *Maynard v. District of Columbia*, 701 F.Supp.2d 116, 124–25 (D.D.C.2010)). The cost of reimbursement may be reduced or denied –

(1) If—

(i) At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section;

(2) If, prior to the parents’ removal of the child from the public school, the public agency informed the parents, through the notice requirements described in §300.503(a)(1), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or

(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

34 CFR § 300.148(d).

Here, the September 27, 2012 HOD required that DCPS convene an IEP team meeting within 15 school days. DCPS initially attempted to schedule the meeting, but failed to follow through after committing, in an October 25, 2012 email, to obtain new dates when DCPS school staff would be available to meet. DCPS was clearly at fault for this omission. However, neither Petitioners’ Counsel nor the Parents ever followed up with DCPS when it did not offer alternative meeting dates. “[E]quity aids the vigilant, not those who slumber on their rights.” 2 J. Pomeroy, *Equity Jurisprudence* 169 (5th ed.

1941). The Parents' failure to pursue the request for an IEP meeting from October 2012 until June 2014, when Student graduated from Nonpublic School, was not reasonable conduct.

Neither did the Parents give written notice to DCPS of their intent to re-enroll Student at Nonpublic School before the beginning of the 2013-2014 school year, as provided in 20 U.S.C. § 1412(a)(10)(C)(iii). Petitioners' Counsel argued at the due process hearing that this notice requirement only applies when a child is first removed from public school. That argument has been rejected by several courts. *See S.W. v. New York City Dep't of Educ.*, 646 F.Supp.2d 346, 366 (S.D.N.Y.2009) (rejecting the plaintiffs' argument and holding that the IDEA's notice requirements applied to the plaintiffs, whose child was already enrolled in private school, reasoning that the reading advanced by the plaintiffs "would mean that parents of children who are . . . not currently enrolled in public school, [would] have no obligation whatsoever to notify their local school district before enrolling or re-enrolling their children in private school."); *Wood v. Kingston City School Dist.*, 2010 WL 3907829, 7 (N.D.N.Y. 2010) (regardless of whether child had already been "removed" from public school to the extent that he had not attended school in the district for two years, plaintiffs were nonetheless obligated to notify the district of their dissatisfaction with the IEP before re-enrolling child in private school.); *Carmel Central School Dist. v. V.P. ex rel. G.P.* 373 F.Supp.2d 402 (S.D.N.Y.2005) (parents were ineligible for tuition reimbursement, given their failure to give new school district meaningful opportunity to consider whether student could receive FAPE before re-enrolling her in private school.) I find that the failure of Petitioners to provide DCPS prior written notice of their intent to re-enroll Student at Nonpublic School at DCPS expense further supports denying

reimbursement for the 2013-2014 school year.

In sum, I conclude that the Parents are not entitled to reimbursement under the *Burlington/Carter* test for Student's enrollment expenses at Nonpublic School for the 2012-2013 or 2013-2014 school years because that placement had been determined not to be appropriate in the September 27, 2012 HOD, because the Parents did not act reasonably in not pursuing their request to DCPS to convene an IEP meeting after October 26, 2012 and, for the 2013-2014 school year, because the Parents did not give DCPS prior written notice of their intent to re-enroll Student at Nonpublic School.

#### Other Relief

A hearing officer retains broad discretion to craft an equitable remedy for denial of a FAPE. *See N.S. ex rel. Stein v. District of Columbia*, 709 F.Supp.2d 57, 73 (D.D.C.2010) (Once a Court finds that a public school district has failed to offer a FAPE, the Court is authorized to "grant such relief as the court determines is appropriate." ) "Under this provision [20 U.S.C. § 1415(i)(2)(C)(iii)], equitable considerations are relevant in fashioning relief, and the Court enjoys broad discretion in so doing." *Florence County, supra*, 510 U.S. at 16, 114 S.Ct. 361 (internal quotation marks and citations omitted). Where, as here, DCPS has failed to convene an IEP meeting required by the IDEA, in direct violation of the September 27, 2012 HOD, I find it appropriate to order an equitable remedy for the denial of FAPE, even though the Parents are not entitled to tuition reimbursement under the *Burlington/Carter* test. In the September 27, 2012 HOD, Hearing Officer Chisholm crafted an equitable remedy for the "limited" harm resulting to Student from DCPS' failure to convene an IEP meeting by December 2011. That was to reimburse the Parents one-third of the cost of Student's base tuition at Nonpublic School for the period up to September 26, 2012. The hearing officer

explained that the harm was limited because, while she found evidence from a Nonpublic School evaluation that suggested that the Student may have been eligible for speech-language services which were not included in the DCPS December 10, 2010 IEP, the DCPS IEP was otherwise reasonably calculated to confer educational benefit and Student's DCPS placement was appropriate.

In this case, I, likewise, find that the harm to Student resulting from DCPS' failure to convene the IEP meeting ordered in the September 27, 2012 HOD was limited. During the time period before and after the HOD was issued, Student was enrolled at Nonpublic School, where, by all accounts, she received educational benefit. I find that an appropriate equitable remedy for the limited harm resulting from DCPS' failure to convene an IEP meeting, as ordered in the September 27, 2012 HOD, is to extend the period for which DCPS must reimburse the Parents for one-third of Student's tuition at Nonpublic School, from September 26, 2012 to the end of the regular 2012-2013 school year.

#### ORDER

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

1. DCPS shall promptly reimburse the Petitioners for one-third of the base tuition cost for Student's attendance at Nonpublic School from September 27, 2012 through the end of the 2012-2013 regular school year (approximately June 7, 2013). DCPS may require the Petitioners to provide reasonably satisfactory documentation of the amount they paid for Student's Nonpublic School tuition for this period;
2. Petitioners' request for reimbursement for Student's enrollment expenses at Nonpublic School for the 2013-2014 school year is denied; and

All other relief requested by Petitioners herein is denied.

Date: December 11, 2014

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).