

**DC Office of the State Superintendent of
Education**

Office of Review & Compliance
Student Hearing Office
1150 5th Street, S.E.
Washington, D.C. 20003

CONFIDENTIAL

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STUDENT HEARING OFFICE
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<p>STUDENT¹, by and through Student's Parent</p> <p>Petitioners,</p> <p>v.</p> <p>DCPS</p> <p>Respondent.</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p><u>Impartial Hearing Officer:</u> Joseph Selbka</p>
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I. Introduction and Procedural Background

Before the undersigned is a complaint filed by Parents on behalf of their son, Student.

1. Student is a _____ year old who is eligible for special education and related services from the District.
2. The parties agree that the complaint was filed on April 27, 2012, while the thirty day timeline ended on May 27, 2012. The parties did not waive or shorten the resolution

¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

period timeline. Accordingly, the parties agree that the 45-day timeline started to run on May 28, 2012. As such, a final decision will be due on July 11, 2012.

3. On May 10 2012, the District filed a response and motion to dismiss the complaint. The Parents responded to the motion to dismiss on May 14, 2012.

4. On June 6, 2012, a resolution session occurred where no issues were settled.

5. On May 22, 2012, the undersigned held a prehearing conference.

6. On May 26, 2012, the undersigned served a prehearing order on the parties. No party objected to the contents of the prehearing order (except for some typographical errors irrelevant to these proceedings), and thus it is binding on the parties pursuant to the ASP's and the language of the order. The undersigned denied the District's motion to dismiss in the prehearing order.

7. A hearing occurred on June 13 and 14, 2012. The parties presented closing written arguments on June 21, 2012.

8. Both parties timely provided their proposed exhibits to one another, and at hearing, neither party had any objections to the other party's marked exhibits for timeliness. At hearing, the undersigned admitted Parent Exhibits ##1-7 over objection and ##8-11 without objection; and District Exhibits ##1-3 and 5-7 without objection and the undersigned now admits District Exhibit #4 over objection.

9. At the hearing, Parent called the following witnesses: _____ The District called the following witnesses: _____ At hearing, the District presented a motion for directed verdict which was denied.

II. Issues to be Decided

10. The issues raised by the Petitioner, including the relief requested, and the response of the Respondent, present the following issues and requested relief for determination by the Hearing Officer. The Due Process Complaint issues as modified and restated through discussions with the parties and the hearing officer are as follows:

Issue #1: Whether _____ is an appropriate location of services to implement Student's IEP;

Issue #2: Whether the District denied Student a FAPE by failing to develop an IEP in November, 2011.

Issue #3: Whether the District changed Student's placement by determining _____ was an appropriate location of services; and if so, whether DCPS denied the parent

meaningful participation when DCPS did not include the Parent in the decision to change the Student's placement;

Issue #4: Whether DCPS failed to comply with the procedural requirements of IDEA (including an appropriate MDT prior to action notice) in changing Student's placement by determining _____ was an appropriate location of services for the 2011-2012 school year.

Parents are seeking prospective compensatory and equitable relief in the form of a prospective placement with a new IEP. Parents also request the special education services be delivered at the _____ as appropriate location of services. Parents also request compensatory relief in the form of reimbursement for the 2011-2012 school year tuition at the _____

III. Findings of Fact

A. The Nature of Student's Disability

11. Student has a learning disability and is classified as LD for purposes of special education (Dist. Ex. #1, pg. 3). Student has been diagnosed with dyslexia/ learning disability in reading; dysgraphia/learning disability in written language; mixed expressive/receptive language disorder; and Student has weaknesses in impulsivity and executive functioning (Dist. Ex. #1, pg. 4). Student also has an extremely high I.Q. (nearly 130) (EAL Testimony).

B. The Previous Due Process Complaint and the Previous H.O.D.

12. Student has been enrolled at the _____ since the 2008-2009 school year (Dist. Ex. #1, pg. 3). On April 25, 2011, Parent filed a due process complaint ("Complaint 2011-0395") wherein Parent alleged a denial of FAPE by the District for various reasons (Dist. Ex. #1, pg. 1). As for relief in the previous complaint, Parent sought reimbursement for costs at the private school for the 2009-2010 and 2010-2011 school years and a placement at the _____ moving forward.

13. Prior to filing Complaint 2011-0395, Parents sent an email informing the District of Parents' intent to enroll Student in a private placement on August 17, 2010 (Dist. Ex. #1, pg. 9).

14. The hearing officer in Complaint 2011-0395 granted some of the relief Parent requested, but denied a prospective placement at the _____ (Dist. Ex. #1, pg. 18). (Hereinafter referred to as the "2011-0395 Decision"). The hearing officer in Complaint 2011-0395 made a specific finding that Student could be partially mainstreamed and that the _____ completely removes Student from any interaction with nondisabled students (Dist. Ex. #1, pg. 17).

C. District and Parent Actions after the 6/11 H.O.D. and Prior to Hearing on this H.O.D.

15. On or about September 21, 2011, Parent timely appealed the 2011-395 Decision (Dist. Ex. #2, pg. 28). Parent sought reversal of the Hearing Officer's order requiring the District to partially mainstream Student (Dist. Ex. #2, pg. 8).

16. On or about November 17, 2011, the District filed an answer and counterclaim in the District Court requesting a finding that the District has sole authority to determine appropriate locations of services (Dist. Ex. #3, pg. 16).

17. On or about July 13, 2011, the District sent out an MDT "prior to action" notice (Parent Ex. #2). The notice did not contain procedural safeguards notice required by law and located at Dist Ex. #4, pp 2-3 (Testimony). The notice did not list the evaluations, assessments, records, or other information used by the District to determine whether [redacted] was an appropriate location of services (Testimony). The notice stated that Student's placement was being changed to a less restrictive placement on the continuum of services (Parent Ex. #2).

18. The District did not conduct an IEP meeting prior to changing Student's placement to a less restrictive placement with a location of services at [redacted].

19. The District did not conduct an IEP meeting or prepare a proposed IEP for Student after June, 2011 (Testimony).

D. Student's Current Private School

20. Student currently receives extensive specialized services at the [redacted] (Parent Ex. #3). He receives at least 31.5 hours of specialized instruction with a special education teacher (Parent Ex. #3, P-3-1; Parent Ex. #6, P-6-1). He receives 90 minutes of speech therapy and 45 minutes of occupational therapy services per week (*Id.*) The [redacted] analyzes Student's strengths and weaknesses (*Id.* At P-3-13 to 15), and provides objectives and strategies for Student to obtain an educational benefit (*Id.* At P-3-16 to 24). Student is also accommodated in the classroom (*Id.* At P-3-25). Student has been making some progress at the [redacted] (Parent Ex. #4-5).

21. The 2011-0395 Decision found the placement at the [redacted] to be appropriate for purposes of providing FAPE, but found that the [redacted] was not the least restrictive environment for Student (Dist. Ex. #1, pg. 17).

IV. Conclusions of Law

A. Conclusions of Law Related to the Jurisdiction of the Hearing Officer and the Previous H.O.D.

22 The due process hearing was held and a decision in this matter is being rendered, pursuant to 4 U.S.C.A. 1400 et seq., and its implementing regulations, 34 CFR 300 et seq. and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

23. The Federal and State Special Education Laws are set out in the Individual with Disabilities Education Act, 20 U.S.C.A. 1400 et seq. ("IDEA") and in the District of Columbia Municipal Code. In enacting IDEA, Congress intended to establish a "cooperative federalism." *Evans v. Evans*, 818 F.Supp.1215, 1223 (N.D. Ind. 1993). Compliance with minimum standards set out by the federal act is necessary, but IDEA does not impose a nationally uniform approach to the education of children with a given disability. *Id.* Thus IDEA does not preempt state law if the state standards are more stringent than the federal minimums set by IDEA. *Id.*

24. In regard to the burden of proof in a special education proceeding, the Supreme Court has held that the ultimate burden of persuasion lies with the party filing the due process complaint. *Schaffer v. Weast* 546 U.S. 49 (2005). The parents must prove their case by a preponderance of the evidence.

25. In administrative proceedings, hearsay is admissible as long as it is relevant and material. *Otto v. Securities and Exchange Commission*, 253 F.3d 960, 966 (7th Cir. 2001). To the extent hearsay is admitted without objection, the evidence can be given its natural weight. *Sykes v. District of Columbia*, 518 F.Supp.2d 261, 49 IDELR 8 (D.D.C. 2007).

26. Admissions by counsel during opening and closing argument may be treated as judicial admissions and may be treated as binding on the party making the admissions. *Lowe v. Kang*, 178 Ill.App.3d 772, 776 (1988).

27. Inferences are conclusions of fact derived from the evidentiary facts introduced at hearing. *Smith v. Tri-R Vending*, 249 Ill.App.3d 654, 661 (1993). Hearing officers can make reasonable inferences from the evidence adduced at hearing. However, like in all administrative adjudications, the inferences must be supported by facts proved or admitted. *National Labor Relations Board v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 814-815 (1990)(Scalia, j. dissenting). The inferences must be drawn from facts through a process of logical reasoning. *Id.* Thus, the hearing officer must draw an accurate and logical bridge between the evidence and result. *Frobes v. Barnhart*, 467 F.Supp.2d 808, 817 (N.D. Ill. 2006). Moreover, any inference a hearing officer makes must be supported by substantial evidence. Substantial evidence means relevant evidence that a reasonable mind might accept as adequate to support his/her conclusions. *Frobes v. Barnhart*, 467 F.Supp.2d 808, 817 (N.D. Ill. 2006).

28. Expert opinions are admissible if the experts are considered qualified under a relaxed standard similar to the *Daubert* standard used in the federal courts. *Pasha v. Gonzalez*, 433 F.3d 530, 535 (7th Cir. 2005). To the extent the hearing officer relies upon expert opinions, the expert opinions must be inferred ultimately from facts in the record, and the inferential process by which an expert reaches his/her conclusions must

be fully explained. *Zamecnik v. Indian Prairie School District No. 204*, ___ F.3d ___, 2011 WL 692059 (2011) (expert testimony must be grounded by material facts in the record and the inferential process by which an expert reaches his/her conclusions must be fully explained in the record); *Mid- State Fertilizer Co. v. Exchange National Bank of Chicago*, 833 F.2d 1333, 1339-1340 (7th Cir. 1989)(in litigation, expert opinions must be grounded in facts and inferred from a process of logical reasoning).

29. In determining whether an expert is qualified on a specific subject matter, education, experience, or other training can provide the appropriate qualifications for an expert. See *Fox v. Dannenberg*, 906 F.2d 1253, 1255 (8th Cir. 1990) and *United States v. Briscoe*, 896 F.2d 1476, 1498-1497 (7th Cir. 1990). The test to determine whether expert testimony should be admissible is whether the expert has specialized knowledge and expertise in the area where the expert expresses his/her opinion. *Id.*

30. Hearing officers are entitled to and often need to make credibility findings. However, in such cases, hearing officers should provide reasons for why they found testimony credible or not credible. *Marshall Joint School District No. 2. v. C.D. ex rel Brian D.*, 616 F.3d 632, 638 (7th Cir. 2010). This is especially true where testimony is uncontradicted.

31. A hearing officer's final determination ("H.O.D.") is generally a final decision as to the issues presented to the hearing officer and decided in the hearing. 34 CFR 300.514(a).

32. A hearing officer does not have jurisdiction to enforce another hearing officer's H.O.D. *Blackman v. District of Columbia*, 456 F.3d 167, finte 6, 46 IDELR 31 (D.C.Cir. 2006) (dicta); *Robinson v. Pinderhughes*, 810 F.2d 1270, 558 IDELR 239 (4th Cir. 1987); *Dominique L. v. Board of Education of the City of Chicago*, 56 IDELR 65 (N.D. Ill. 2011). Rather, courts have allowed parents to enforce H.O.D.'s either through Section 1983 actions in the federal courts or through actions in the federal courts brought directly under IDEA. See *Dominique L., supra*.

33. No court has ruled that an administrative due process hearing officer has authority to enforce another hearing officer's H.O.D. *Dominique L., supra*. IDEA contains no mechanism for which an administrative due process hearing officer can enforce a H.O.D. *Robinson v. Pinderhughes, supra*. Rather, state boards of education (in the District's case, the Office of the State Superintendent of Education) are tasked with enforcing H.O.D.'s. *Dominique L., supra*.

34. Moreover, when there is an administrative review action, the district court would have jurisdiction to enforce the H.O.D. (either through a Section 1983 action (majority rule) or directly through an administrative review action (minority rule)). *Dominique L., supra*.

35. However, a parent has a specific right to file a subsequent due process complaint on any issue not decided in a previous H.O.D. 34 CFR 300.513(c). In such

circumstances, the first H.O.D. does not preclude a new due process complaint and/or a second H.O.D. addressing issues not raised in the previous due process complaint and decided in the first H.O.D. *Id.*

36. Moreover, not only can a parent bring a new due process complaint for issues not decided in a previous H.O.D., a parent must bring a new due process complaint and exhaust his/her/their administrative remedies prior to bringing a complaint in the district court for disputes which arose after the initial H.O.D. was issued. *Jeremy H. v. Mount Lebanon School District*, 95 F.3d 272, 24 IDELR 831 (3rd Cir. 1996).

B. Conclusions of Law Related to Location of Services Causing a Change of Placement or a Failure to Implement an IEP

37. In general, a school district has administrative discretion as to the location where children with disabilities will attend school. *Concerned Citizens and Parents for Continuing Education at Malcolm X School (PS 79) v. New York Board of Education*, 629 F.2d 751 (2nd Cir. 1980) *cert denied*, 449 U.S. 1078. Moreover, a school district has discretion to close down any of its schools for any reason and the closing of the school will ordinarily not amount to a change in placement for the students previously attending the school. *Id.*

38. However, a change in location may constitute a change in placement if the location would result in a fundamental change in the IEP or the change in location would result in the elimination of a significant aspect of the IEP (because the IEP cannot be implemented at the school district's new proposed location). *Lunceford v. District of Columbia Board of Education*, 745 F.2d 1577, 1582 (D.C. Cir. 1984); *Savoy v. District of Columbia*, 112 LRP 8777 (D.D.C. 2012).

39. Even if there is no change in placement, a student can be denied FAPE because a change in location resulted (or in this case, will result) in a material failure to implement the Student's IEP. *Savoy v. District of Columbia*, *supra*, See also, *Van Duyn ex rel. Van Duyn v. Baker School District 5J*, 502 F.3d 811 (9th Cir. 2007) and *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

40. There are exceptions to the general rule that the district has administrative discretion to choose a location for provision of special education. Specifically, if: (1) a district changes a location for a student mid-year; (2) a district changes a location in the last year of high school; or (3) a student would be harmed by a change in location—then a parent/student can require the district to keep a student in a specific location. *Block v. District of Columbia*, 748 F.Supp. 891 (D.D.C. 1990); *Holmes v. District of Columbia*, 680 F.Supp. 40 (D.D.C. 1988); *Z.W. v. Smith*, 210 Fed.Appx. 282 (4th Cir. 2006). In such cases, a hearing officer has discretion to find the proposed location of services inappropriate based upon the harm of the transfer. *Id.*

41. Moreover, if a district is attempting to rid itself of disabled students through expulsions, *Board of Education of Community High School District No. 218, Cook*

County v. Illinois State Board of Education, 103 F.3d 545, 548-549 (7th Cir. 1996), or placing a student outside of his/her neighborhood school for no reason, 34 CFR 300.116(b)(3), this can be a change of placement and/or violation of IDEA.

C. Conclusions of Law Related to Developing an IEP for Students in Private Schools

42. In general, a student eligible for special education in a private school is entitled to equitable services under IDEA. 34 CFR 300.132; 34 CFR 300.137. The student or his/her parents have no private right of action for failure to provide equitable services or even an equitable right to the services at issue. 34 CFR 300.137(a). In such circumstances, the student is not entitled to an IEP, but rather the child should receive a services plan. 34 CFR 300.132(b).

43. However, when "FAPE is at issue," 34 CFR 300.148 governs the requirements of the parties. Specifically, when a parent: (1) seeks FAPE from a public school district; (2) disagrees that the public school district is offering FAPE; then (3) the district must make FAPE available to the child.. 34 CFR 300.148(a,b).

44. FAPE, by definition, must be provided in conformity with the terms of the student's IEP. 34 CFR 300.17(d).

45. As such, a District must formulate a proposed IEP in order to make FAPE available and where "FAPE is at issue." *See also Moorestown Township Board of Education v. S.D.*, 811 F.Supp.2d 1057 (D.N.J. 2011).

46. Moreover, a school district is obligated to continue formulating IEPs for a student in a private school when a student's previous year's IEP is under administrative or judicial review. *M.M. v. School District of Greenville County*, 303 F.3d 523 (4th Cir. 2002); *Amman v. Stow School System*, 982 F.2d 644, ftnte 4 (1st Cir. 1992).

D. Conclusions of Law Related to the Necessity of Holding IEP Meetings and Changing Placements through Determining an Appropriate Location of Services

47. A district has no right to unilaterally change a placement for a student without obtaining the participation of a parent in an appropriate format (generally an IEP meeting). 34 CFR 300.116(a)(1); 34 CFR 300.320(a); 34 CFR 300.321(a)(1); 34 CFR 300.322.

E. Conclusions of Law Related to Notices and Parental Participation

48. In general, prior to taking action to change a placement, the district must send the parents a notice with the requirements set forth in 34 CFR 300.503(b). The notice must contain evaluations, procedures, tests, records and reports used. 34 CFR 300.503(b)(3).

The notice must also contain a statement that parents of a child with a disability have a right to procedural safeguards for parents. 34 CFR 300.503(b)(4).

49. Although the School District must comply with the procedural requirements of IDEA, hearing officers can only enter an order against the District if the procedural inadequacies: (1) impeded the Student's right to a free appropriate public education; or (2) denied the student some educational benefit; or (3) significantly impeded the parents' ability to participate in the decisionmaking process regarding the provision of a free appropriate public education. 20 U.S.C.A. 1415(f)(E)(ii)(I-III).

F Conclusions of Law Related to Remedies

50. If a hearing officer finds a denial of FAPE, the hearing officer is entitled to reimburse the parent for tuition at a private placement. 34 CFR 300.148(c). To order such a reimbursement, the hearing officer must find that the district did not make FAPE available to the student in a timely manner prior to enrollment; and that the private placement is appropriate. *Id.* The private placement need only be reasonably calculated to provide the child with an educational benefit to be appropriate. *Florence County School District Four v. Carter*, 510 U.S. 7 (1993). The private placement does not need to meet state standards to be appropriate. 34 CFR 300.148(c).

51. The hearing officer may reduce or deny the reimbursement if the Parent fails to provide a notice at an IEP meeting or within 10 days of the placement of the intent to use a private placement. 34 CFR 300.148(d). However, reimbursement cannot be denied if the district prevented the parents from providing the notice or the parents had not received their procedural safeguards notice. 34 CFR 300.148(e)(1).

52. The undersigned is also entitled to place a student in a private placement as compensatory education or if a district consistently fails to provide a student with FAPE for long periods of time and the hearing officer makes a finding that the district cannot or will not offer the student FAPE. *Branham v. District of Columbia*, 44 IDELR 149, 427 F.3d 7 (D.C. Cir. 2005). See also *Draper v. Atlanta Independent School System*, 49 IDELR 211, 518 F.3d 1275 (11th Cir. 2008).

53. In making decisions to reward a prospective placement at a private school, the undersigned must weigh the equitable factors in each case including: whether a particular placement is appropriate for the student; the nature and severity of the student's disability; the student's specialized educational needs; the link between those needs and the services offered by the private school; the placement's cost; and the extent to which the placement represents the least restrictive environment. *Branham, supra*. The conduct of the parties is also an equitable factor in determining whether a prospective placement is proper. *Id.*

V. Discussion (Including Factual Inferences, Credibility Findings, and Application of law to Fact).

54. The undersigned finds that I have no jurisdiction to enforce the 2011-0395 Complaint. For that reason, I have no jurisdiction to determine whether whether is an appropriate location of services². The hearing officer in the 2011-0395 Decision ordered the District to provide an appropriate location of services for Student. That order can only be enforced by a District Court in a Section 1983 action or through a direct administrative review under IDEA (See *Dominique L*, supra).

55. Relatedly, to determine whether the District assigned a location of services where the IEP could be properly implemented is to determine whether is an appropriate location of services. Moreover, to determine whether the facilities and personnel at are so inappropriate and/or inadequate so as to constitute a change in Student's placement is to determine whether is an appropriate location of services.

56. Similarly, whether the Parent needed to be included in the determination of an appropriate location of services is inextricably linked to an interpretation of the implementation of the order in the 2011-0395 Decision. Specifically, the 2011-0395 decision required the District to "assign" Student to an appropriate location of services (Dist. Ex. #1, pg. 18). Whether the action of "assigning" an appropriate location of services requires parental involvement requires interpreting and then issuing an order on how to enforce the 2011-0395 Decision.

² Contrary to the District's arguments, res judicata is not the proper way to view whether the undersigned can address the issue of whether is an appropriate location of services. The doctrines of res judicata and collateral estoppel do not foreclose adjudication of continuing wrongs, See *Saxon Mortgage, Inc. v. United Financial Mortgage Corporation*, 312 Ill.App.3d 1098, 1109-1110 (2000); *Airtite, a Division of Airtex Corp. v. DPR Limited Partnership*, 265 Ill.App.3d 214, 219 (1994). Moreover, when an issue could not be raised in the previous complaint, res judicata will not bar a subsequent complaint. *Benton v. Smith*, 157 Ill.App.3d 847, 856 (1987). Claims which did not exist at the time the initial litigation was filed cannot arise out of the same operative facts as the subsequent complaint regarding the later claims. *Saxon Mortgage, Inc. v. United Financial Mortgage Corporation*, supra, 312 Ill.App.3d at 1106. The assignment to the appropriate location of services can change depending on the needs of the student in implementing an IEP. An IEP is a continuing program as well as a document, *O'Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692 (10 Cir. 1998), and therefore, whether a location of services is appropriate can change over time. Moreover, the District's choice of an appropriate location of services happened after the 2011-0395 Decision was entered. Rather, the issue here is one of jurisdiction- the federal courts and not a hearing officer must determine whether the District properly carried out 2011-0395 Decision as discussed in the conclusions of law.

57. As such, the undersigned has no jurisdiction to determine Issues #1 and #3 of the pending complaint.

58. However, the notice provided by the District regarding Student's assignment to is an action required by IDEA and not by the 2011-0395 Decision. The propriety of the MDT notice is not a matter of enforcement of a previous order, but rather an issue which arose after the 2011-0395 Decision.

59. As such, the undersigned has jurisdiction over the issue of whether the July, 2011 MDT notice was proper and complied with IDEA.

60. The undersigned makes a credibility finding that the Parent never received Dist. Ex. #4, pp. 48-49, and those two documents were never sent out by the District. The district makes this credibility finding on basis of EJ's testimony that those two pages were never sent out (EJ Testimony).

61. The undersigned makes an inference that Parents' decision making process regarding the provision of FAPE to student (or, more accurately, the District's ability to make FAPE available to Student) was impeded by the lack of a proper MDT notice in July, 2011. Specifically, the MDT notice was supposed to set out the evaluations, records, and other information the District used to determine whether would be an appropriate location of services. By failing to fill out the MDT notice providing the Parents with the District's decision making process, the District materially inhibited the Parents ability to determine whether to send Student to or to file a complaint regarding enforcement the 2011-0395 Decision.

62. Similarly, whether the District was required to develop a proposed IEP in November, 2011, is not a matter which was addressed in the 2011-0395 Decision in any way. As such, the undersigned clearly has jurisdiction over this issue.

63. The undersigned makes an inference that the District should have known that FAPE was at issue in November, 2011. Parent sent a notice prior to enrolling at the Lab School of Washington (prior to filing the 2011-0395 Complaint). Thereafter, the District was engaged with ongoing litigation for nearly a year in November, 2011, and the Parents have never indicated that they were abandoning their claims that FAPE was at issue. Indeed, the Parents had already appealed the 2011-0395 Decision by November, 2011. As such, the District was on notice that FAPE was at issue in this case.

64. The undersigned rejects the District's argument that an additional notice of intent to enroll in a unilateral private placement after the 2011-0395 Decision was issued was required of Parent. Because a previous year's IEP was under judicial review, the District had an obligation to prepare additional IEPs for Student. Moreover, the regulations do not require additional notices other than a notice of intent to provide a unilateral placement prior to enrolling a student in a private school. Parents in this case did that, and there is no reason to find that the 2011-0395 Decision somehow nullified Parents' original notice of intent to enroll Student at the

65. It is undisputed that the District failed to create an IEP for Student in November, 2011. Because carrying out the terms of an IEP is, by definition, necessary to provide FAPE, the District did not make FAPE available from November, 2011 to the present.

66. The undersigned makes an inference that the Parents' decision making process as to the provision of FAPE was impeded by the District's failure to design and send a proposed IEP in November, 2011. By failing to create and design a proposed IEP, the District failed to give the Parents the necessary information to know whether the District made FAPE available for Student. As such, the Parents lost the ability to determine whether to send their child to the District's proposed public placement or to continue with their public placement for most of the 2011-2012 school year.

67. The undersigned makes an inference that by failing to provide a proposed IEP in November, 2011, the District impeded Student's right to FAPE. By failing to propose an IEP, the District, by definition, could not have provided Student FAPE.

68. The undersigned makes an inference that the placement at the _____ of Washington is appropriate³ based upon the _____ IEPs submitted by the Parents and the services provided to Student as evidenced by the _____ IEPs and the testimony of EAL regarding Student's disability. Specifically, the _____ IEPS are reasonably designed to provide Student with an educational benefit give Student's disabilities as testified to by EAL.

69. The undersigned finds a prospective placement at the _____ to be inappropriate based on the fact that it is not the least restrictive environment as determined by 2011-0395 Decision. As such, it would not be an appropriate placement moving forward.

70. The undersigned finds that it would be proper to award reimbursement for the 2011-2012 school year as the District is solely responsible for its failure to make FAPE available to the Student.

VI. Order

71. As to Issues ## 1 and 3, they are dismissed for lack of jurisdiction. The dismissal will be without prejudice and the Parents have leave to file and have Issues ## 1 and 3 heard in an appropriate forum.

72. As to Issue #2, the undersigned finds that the District denied Parents and Student FAPE by failing to develop an IEP in November, 2011.

³ Contrary to the District's argument, it is irrelevant whether the Lab School complies with SEA standards in delivering FAPE. Therefore, it does not matter whether a special ed teacher is with Student at the Lab School every moment of every day. This is a requirement for the District, not a unilateral, private placement.

73. As to Issue #4, the undersigned finds that the District denied Parents FAPE by failing to send out a proper MDT notice which complied with the relevant federal regulations.

74. The District shall reimburse Parents for private school expenses which Parents incurred the 2011-2012 school year for failing to make FAPE available for the 2011-2012 school year.

75. Parent's request for a prospective placement at the Lab School of Washington is denied.

76. The undersigned orders the District to prepare a proposed IEP for Student within 30 calendar days of this order and convene an IEP meeting within 45 calendar days of this order for the purpose of discussing the propriety of the proposed IEP.

77. The District must completely and properly fill out a MDT notice regarding the decision to assign Student to . The MDT notice must contain all evaluations, reports, assessments, and records and shall otherwise comply with 34 CFR 300.503(b) in listing all documents relied upon in choosing as an appropriate location of services for Student. The complete MDT notice must be sent to Parent within 30 days of this order.

Dated this 10th day of July, 2012.

/S Joseph P. Selbka
Joseph Selbka, Esq.
Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).