

**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  
March 25, 2013

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STUDENT, <sup>1</sup>	)	
through the Parent,	)	
	)	Date Issued: March 23, 2013
Petitioner,	)	
	)	Hearing Officer: Virginia Dietrich
v.	)	
	)	Case No: 2013-0013
District of Columbia Public Schools	)	
Respondent.	)	Hearing Date: March 1, 2013
	)	Hearing Room: 2004
	)	

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**HEARING OFFICER DETERMINATION**

**Background**

Petitioner, the father of [REDACTED] Student, filed a due process complaint notice on January 7, 2013 alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Act (“IDEA”).

Petitioner specifically alleged that District of Columbia Public Schools (“DCPS”) had failed to offer Student a FAPE by failing to provide Student with a location of services that could implement Student’s Individualized Education Program (“IEP”) when Student returned to the community following a court ordered residential placement. As a result, Petitioner enrolled Student in a nonpublic school. Petitioner seeks tuition reimbursement to the nonpublic school and transportation reimbursement to Petitioner arising from Student’s attendance at the nonpublic school from May through November 2012.

DCPS asserted that it had not denied Student a FAPE. DCPS asserted that since the inception of the case, it was willing to reimburse tuition and transportation costs that had accrued from Petitioner’s unilateral placement of Student at the nonpublic school from May through November 2012.

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

### **Subject Matter Jurisdiction**

Subject matter jurisdiction is conferred pursuant to the 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 on 01/07/13. This Hearing Officer was assigned to the case on 01/09/13. DCPS filed a response to the complaint on 01/18/13. A prehearing conference took place on 01/31/13 and a Prehearing Order was issued the same day. At the prehearing conference, DCPS agreed to reimburse the nonpublic school for tuition and reimburse Petitioner for out of pocket transportation costs. A resolution meeting took place on 01/17/13, at which time parties agreed to let the 30-day resolution period expire prior to proceeding to a due process hearing. The 30-day resolution period expired on 02/06/13, the 45-day timeline to issue a final decision began on 02/07/13, and the final decision was due on 03/23/13.

The due process hearing was a closed hearing that took place on 03/01/13. Petitioner was represented by Alana Hecht, Esq. and DCPS was represented by Lynette Collins, Esq. Neither party objected to the testimony of witnesses by telephone. Petitioner participated in the hearing in person. Both parties rejected the opportunity to discuss settlement at the beginning of the due process hearing. The issues, relief requested and DCPS’ position, as memorialized in the Prehearing Order, were read into the record at the start of the due process hearing.

Prior to the disclosures being admitted into evidence, DCPS made an oral motion to dismiss the complaint on the grounds that the case was moot. DCPS argued there was no live controversy because DCPS agreed to provide all of the relief requested by Petitioner, i.e., DCPS was willing to reimburse verified tuition costs to the nonpublic school and DCPS was willing to reimburse Petitioner for his out of pocket transportation costs for sending Student to the nonpublic school.

Petitioner objected to DCPS’ motion to dismiss on the basis that (1) the motion was not made at least five business days prior to the hearing, and (2) DCPS had not formally agreed to the relief requested via a settlement agreement. The Hearing Officer denied DCPS’ motion on the record, as it was untimely made.<sup>2</sup> Moreover, at the time the motion was made, no testimonial or documentary evidence had been admitted into the record on which the Hearing Officer could base a decision to dismiss the case. A live controversy still existed at the start of the due process hearing. There was a dispute between the parties over whether or not DCPS had offered all of the relief requested.

On 02/25/13, Petitioner timely filed Petitioner’s Objection To Respondent’s Five Day Disclosure, objecting to the introduction into evidence of any testimony about settlement negotiations. This objection encompassed the testimony of the DCPS compliance case manager

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<sup>2</sup> Per the Prehearing Order issued on 01/31/13, prehearing motions were to be filed by 02/15/13.

and the Settlement Agreement disclosed by Respondent as Exhibit R-2.<sup>3</sup> Petitioner failed to make reference to regulatory authority or case law in support of his objection to DCPS' disclosures. In response to Petitioner's objection, DCPS filed DCPS's Response To The Administrative Due Process Complaint Notice, a mis-titled response to Petitioner's objection. DCPS asserted that settlement agreements could be disclosed pursuant to *Davis v. DCPS*, 2006 U.S. Dist. Lexis 94650.

The due process hearing is not governed by formal rules of procedure or evidence.<sup>4</sup> The conduct of the due process hearing is left to the discretion of the Hearing Officer, subject to review under 34 C.F.R. 300.514, 300.516. *Letter to Anonymous*, 23 IDELR 1073 (OSEP 1995).

Although all discussions occurring during mediation are confidential and may not be used as evidence in any subsequent due process hearing, nothing in the IDEA precludes an offer of settlement or any information pertaining to the settlement process from being included as part of a party's five-day disclosures. 34 C.F.R. 300.506, 300.512(a). Under the IDEA, settlement discussions, if they occur at the resolution meeting, are not confidential. See Comments to Federal Register, Vol. 71, No. 156, page 46704. Although the SOP Section 1002.1 states that all settlement negotiations are confidential, the SOP conflicts with the IDEA. When there is conflict between the SOP and the IDEA, the IDEA governs. See SOP Section 200.

The Federal Rules of Evidence 408, which prohibits parties from introducing evidence of settlement negotiations, does not apply to resolution sessions conducted under the IDEA. *Friendship Edison Public Charter School, Chamberlain Campus v. Smith, et. al.*, 561 F. Supp. 2d 74 (D.D.C. 2008), 50 IDELR 192. Although *Friendship Edison* specifically addressed resolution sessions, the holding is extrapolated by the Hearing Officer to all settlement discussions and negotiations.

At the due process hearing, the Hearing Officer ruled on Petitioner's Objection to Respondent's Five Day Disclosure as follows: (1) Under the provisions of the IDEA, resolution meetings and settlement discussions are not confidential, and (2) There is nothing in the IDEA that precludes parties from including settlement information as part of their five day disclosures. See 34 C.F.R. 300.506, 300.512(a).

Petitioner's disclosures dated 02/22/13, containing a witness list and Exhibits P-1 through P-6, were admitted into evidence without objection.

DCPS' disclosures dated 02/22/13, contained a witness list and Exhibits R-1 through R-2. R-1 was admitted into evidence without objection. R-2 was admitted into evidence over Petitioner's objection. Testimony from DCPS' witness about settlement discussions was not precluded from being introduced into evidence. The case number on DCPS' disclosures was corrected from 2012-0851 to 2013-0013.

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<sup>3</sup> Per the Prehearing Order issued on 01/31/13, formal objections to the disclosures of the opposing party were to be filed by 02/27/13.

<sup>4</sup> District of Columbia Public Schools Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures ("SOP") Section 700.4.

Petitioner presented the following three witnesses in his case in chief: Educational advocate; Petitioner; and Director of Admissions at the nonpublic school that Student has been attending since May 2012. Petitioner presented no rebuttal evidence.

DCPS presented one witness: DCPS compliance case manager.

By agreement of the parties, DCPS presented its only witness out of turn. After two witnesses for Petitioner testified, DCPS' witness testified. After that, Petitioner's last witness testified.

At the due process hearing, DCPS stipulated to the following: DCPS is willing to fund Student's transportation and tuition at the nonpublic school from May 2012 through November 2012.

The two issues to be determined in this Hearing Officer Determination are as follows:

Issue #1 – Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate location of services from May 4, 2012 when Petitioner gave DCPS notice of unilateral placement of Student following Student's termination from residential placement, until November 16, 2012 when DCPS issued a Prior Written Notice to the school at which Student had been unilaterally placed by Petitioner in May 2012.

Issue #2 – Whether Petitioner is entitled to tuition reimbursement and transportation reimbursement for Petitioner's unilateral placement of Student at the nonpublic school from May 4, 2012 through November 15, 2012.

For relief, Petitioner requested a finding that Student was denied a FAPE; that DCPS reimburse Petitioner and/or the nonpublic school from 05/04/12 through 11/15/12 for tuition and transportation costs arising from Student's attendance at the nonpublic school; and a finding that Petitioner is the prevailing party.

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, age seventeen, is a resident of the District of Columbia. Petitioner is the father of Student.<sup>5</sup> Student is a special education student with a disability classification of Emotional Disturbance.<sup>6</sup>

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<sup>5</sup> Petitioner.

<sup>6</sup> P-6-1.

#2. Student currently attends a nonpublic vocational school (“nonpublic school”) that services students with disabilities. Student attended the nonpublic school from May 14, 2012 through November 15, 2012 as an unfunded unilaterally placed student. Since November 16, 2012, DCPS has been funding Student at the nonpublic school.<sup>7</sup>

#3. When Petitioner enrolled Student at the nonpublic school, Petitioner willingly signed an agreement with the nonpublic school that made transportation costs for Student to attend school the full responsibility of Petitioner until such time that Student became a funded Student.<sup>8</sup> From May – November 2012, Petitioner paid out of pocket transportation costs for Student to attend the nonpublic school at a rate of \$60.00/month for a public transportation pass.<sup>9</sup>

#4. In April 2012, Student was discharged from a residential facility where he had been placed by the court. As a prerequisite to Student’s discharge, Petitioner identified the nonpublic school as a location of services that Student would attend upon release from the residential facility.<sup>10</sup> Upon the advice of the nonpublic school, Petitioner secured the services of an advocate to help him negotiate the enrollment and funding process.<sup>11</sup>

#5. On 05/04/12, Petitioner, through counsel, notified DCPS in writing (1) that Student had been released from residential placement for the past month, (2) that Student was in need of a school placement that could implement his IEP and provide Student with an appropriate therapeutic setting, (3) that Petitioner had identified an appropriate nonpublic school that could meet Student’s educational needs, and (4) that Petitioner would enroll Student in the nonpublic school unless DCPS placed Student in an appropriate school within 10 days.<sup>12</sup>

#6. DCPS failed to respond to Petitioner’s 05/04/12 letter within 10 days. DCPS also failed to provide Student with a school placement within 10 days of 05/04/12.<sup>13</sup> Petitioner enrolled Student in the nonpublic school on 05/14/12.<sup>14</sup>

#7. On 05/21/12, DCPS replied to Petitioner’s 05/04/12 letter as follows: (a) DCPS did not agree to bear the cost of the nonpublic school chosen by Petitioner, (b) DCPS, as the local education agency, is responsible for providing Student with a FAPE, and (c) Student could be provided with a FAPE and Student’s educational needs could be met at a certain named school. The named school was the residential facility that Student recently had been discharged from.<sup>15</sup>

#8. At a Multidisciplinary Team meeting on 11/16/12, DCPS determined that the nonpublic school that Student had been attending since 05/14/12 could provide Student with a FAPE.<sup>16</sup> DCPS began funding the nonpublic school placement on 11/16/12.<sup>17</sup> On 11/16/12,

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<sup>7</sup> Director of Admissions at nonpublic school.

<sup>8</sup> Petitioner, Director of Admissions at nonpublic school.

<sup>9</sup> Petitioner.

<sup>10</sup> Petitioner.

<sup>11</sup> Director of Admissions at nonpublic school.

<sup>12</sup> P-1.

<sup>13</sup> Petitioner, DCPS compliance case manager.

<sup>14</sup> Director of Admissions at nonpublic school.

<sup>15</sup> R-1.

<sup>16</sup> P-6-17.

DCPS also developed Student's current Individualized Education Program ("IEP") that prescribes 26.5 hours/week of specialized instruction, 1 hour/week of behavioral support services and 1 hour/week of speech-language pathology services, with all services to be provided outside of general education.<sup>18</sup>

#9. Petitioner attended a resolution meeting with DCPS on 01/17/13. At that time, DCPS agreed to reimburse Petitioner for his out of pocket transportation costs and reimburse the nonpublic school for tuition costs incurred from 05/14/12 through 11/15/12, subject to (a) verification of Student's attendance at the nonpublic school, (b) verification that no payments already had been made by DCPS to the nonpublic school for Student's attendance from 05/14/12 through 11/15/12, and (c) the transportation reimbursement scale used by DCPS.

### **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 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.

"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. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005).

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 provide Student with an appropriate location of services from May 4, 2012 when Petitioner gave DCPS notice of unilateral placement of Student following Student's termination from residential placement, until November 16, 2012 when DCPS issued a Prior Written Notice to the school at which Student had been unilaterally placed by Petitioner in May 2012.

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<sup>17</sup> Director of Admissions at nonpublic school,

<sup>18</sup> P-6-10.

Free appropriate public education or FAPE means special education and related services that are provided at public expense, meet the standards of the State Education Agency, include an appropriate school and are provided in conformity with the IEP. 34 C.F.R. 300.17.

DCPS was the local education agency responsible for providing Student with a FAPE. The evidence in the record showed that DCPS did not timely respond to Petitioner's letter requesting placement within the 10 days prior to Petitioner enrolling Student in the nonpublic school. The record also showed that when DCPS finally did respond to Petitioner's letter on 05/21/12, DCPS erroneously indicated that a FAPE could be provided to Student at the residential facility that Student had just been discharged from. On 05/14/12, Petitioner enrolled Student in the nonpublic school. On 11/15/12, DCPS picked up the funding for Student at the nonpublic school. Petitioner proved that DCPS denied Student a FAPE when it failed to provide Student with a location of services that could implement Student's IEP following Student's discharge from residential placement. The Hearing Officer determines that DCPS failed to provide Student with an appropriate location of services from 05/14/12 through 11/15/12.

The second issue to be determined is whether Petitioner is entitled to tuition reimbursement and transportation reimbursement for Petitioner's unilateral placement of Student at the nonpublic school from May 4, 2012 through November 15, 2012.

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private school without the consent of or referral by the public agency, a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the hearing officer finds that the agency has not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. Reimbursement may be reduced or denied if the parents did not give notice to the public agency of the public agency's failure to provide a child with a FAPE and their intent to enroll their child in a private school at public expense. Notice may be given at the last IEP Team attended by parents or in writing at least 10 days prior to the removal of the child from the public school. 34 C.F.R. 300.148(c), 300.148(d).

Petitioner failed to prove that the private placement was appropriate. The parents need to demonstrate, with "objective evidence," that the private placement provides specially designed instruction to meet the student's unique needs to permit the student to receive educational benefit. *Frank G. v. Board of Education of Hyde Park*, 459 F.3d 356, 46 IDELR 33 (United States Court of Appeals, 2<sup>nd</sup> Circuit (2006)). And, the court held in *Gagliardo v. Arlington Central School District*, 489 F.3d 105, 48 IDELR 1 (United States Court of Appeals, 2<sup>nd</sup> Circuit (2007)), that the reported success of the student at the private school does not itself demonstrate that the school is an appropriate placement. The *Gagliardo* court held that the placement is appropriate only if it provides "education instruction specifically designed to meet the unique needs of a handicapped student."

Petitioner failed to offer *any* objective evidence that the nonpublic school was an appropriate school placement for Student. The hearing record was devoid of any information about any IEP that existed prior to November 16, 2012. Petitioner failed to offer any evidence on what Student's specific educational needs were prior to November 16, 2012. Therefore, it

## Hearing Officer Determination

was not possible on this record to determine what Student's specific educational needs were from 05/14/12 through 11/15/12. Petitioner also failed to offer into evidence any information about (1) the services that the nonpublic school provided to Student from 05/14/12 through 11/15/12, and (2) whether Student received any educational benefit at the nonpublic school from 05/14/12 through 11/15/12. The fact that DCPS found the nonpublic school to be an appropriate location of services on 11/16/12 is insufficient for the Hearing Officer to determine that the nonpublic school was an appropriate location of services from 05/14/12 through 11/15/12. The Hearing Officer's determination must be based on objective facts, none of which were introduced into the record.

Due to Petitioner's failure to prove that the nonpublic school provided specially designed instruction to meet the student's unique needs to permit the student to receive educational benefit, Petitioner's request for reimbursement to the nonpublic school for tuition and to Petitioner for out of pocket transportation costs cannot be granted on this record.

Even if Petitioner had proven that the nonpublic school was an appropriate placement for Student from 05/14/12 through 11/15/12, which he didn't, DCPS had already agreed to reimburse tuition and transportation costs at the resolution meeting on 01/17/13, at the prehearing conference on 01/31/13 and at the due process hearing on 03/01/13.

It is understandable when litigation continues in order to build the foundation for compensatory education. *District of Columbia v. Nahass*, 699 F. Supp. 2d 175 (D.D.C. 2010), 54 IDELR 115. A finding of a denial of a FAPE is essential to an entitlement of compensatory education. "When a school district deprives a disabled child of free appropriate public education in violation of the Individuals with Disabilities Education Act, a court fashioning "appropriate" relief, as the statute allows, may order compensatory education, i.e., replacement of educational services the child should have received in the first place." *Reid v. District of Columbia*, 43 IDELR 32 (2005).

In this case, there was no discernible basis for a claim of compensatory education. DCPS agreed to fund Student at the nonpublic school of Petitioner's choice from 05/14/12 through 11/15/12. Student's services were not interrupted during that time; therefore, Student was not denied an educational benefit. Student did not suffer any educational harm by DCPS' failure to provide Student with an appropriate location of services from 05/14/12 through 11/15/12.

Therefore, there was no reason for Petitioner to continue litigation of this case once DCPS agreed to fund Student's tuition and transportation at the nonpublic school from 05/14/12 through 11/15/12. The case was moot. See *District of Columbia v. Nahass*, 699 F. Supp. 2d 175 (D.D.C. 2010), 54 IDELR 115, where despite the District's willingness to subsidize the evaluations that were the subject of the due process complaint, litigation was continued to request an order finding that the student was denied a FAPE.

**ORDER**

All requested relief is denied. 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: March 23, 2013

*/s/ Virginia A. Dietrich*  
Hearing Officer

Copies to:  
Petitioner: (U.S. mail)  
Petitioner's Attorney: Alana Hecht, Esq. (electronically)  
DCPS' Attorney: Lynette Collins, Esq. (electronically)  
DCPS (electronically)  
SHO (electronically)