

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

Student Hearing Office  
810 First Street, NE, Second Floor  
Washington, DC 20002

OSSE  
Student Hearing Office  
March 24, 2014

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Petitioner

Hearing Officer: Kimm Massey, Esq.

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS

Respondent.

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**HEARING OFFICER DETERMINATION**

**BACKGROUND AND  
PROCEDURAL HISTORY**<sup>1</sup>

Student presently attends a nonpublic school located outside the District of Columbia. On December 18, 2013, Petitioner filed a Complaint against Respondent District of Columbia Public School (“DCPS”). On January 2, 2014, DCPS filed its Response to the Complaint.

The parties did not conduct a resolution session meeting. On January 10, 2014, the parties determined to waive a resolution session meeting; however, at the prehearing conference the parties determined to retract that waiver and remain on the standard 75-day timeline to facilitate the scheduling of a 2-day due process hearing. Hence, the 45-day timeline for this case started on January 18, 2014 and will end on March 3, 2014, which is the HOD due date.

On January 15, 2014, the hearing officer conducted a prehearing conference and determined, that the claims to be adjudicated, defenses asserted, and relief requested were as follows:

***Petitioner’s Claims:*** (i) Did DCPS deny Student a FAPE by failing to propose an appropriate special education program on February 24, 2012? (ii) Did DCPS deny Student a FAPE by failing to propose a special education program from February 24, 2013 through the end of the 2012-2013 school year? (iii) Did DCPS deny Student a FAPE by failing to propose an appropriate special education program for the 2013-2014 school year? (iv) Is Student’s current program at the current nonpublic school a proper educational placement for Student?

***Respondent’s Defenses:*** (i) The Complaint does not provide sufficient information to determine what it means by an appropriate program, or if they are referring to an IEP, what date and what parts. (ii) DCPS provided student with an IEP on February 24, 2012 which was

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<sup>1</sup> This section sets forth only the basic procedural history. Other events, including motions practice, may have taken place that are not listed here.

reasonably calculated to provide educational benefit, and which includes a placement in the least restrictive environment. (iii) Parents rejected DCPS's offer of FAPE and expressed their intent to have their child remain in the non-public school. (iv) On June 20, 2013, DCPS provided Parent with an IEP designed to meet Student's individualized educational needs, the team proposed a placement in Student's LRE, and DCPS provided Parent with a location of services prior to the start of the school year. (v) Issue number four is a request for relief, not an issue; however, no relief is warranted in this matter.

**Relief Requested:** DCPS to (i) reimburse the parents for tuition paid to the nonpublic school from February 24, 2012 through the end of the 2011-2012 school year; (ii) reimburse the parents for tuition paid to the nonpublic school for the 2012-2013 school year; (iii) reimburse the parents for tuition paid to the nonpublic school for the 2013-2014 school year; and (iv) fund Student's placement at the nonpublic school for the remainder of the 2013-14 school year.

By their respective letters dated February 7, 2014, Petitioner disclosed sixty-nine documents (Petitioner's Exhibits 1-69), and DCPS disclosed sixteen documents (Respondent's Exhibits 1-16).

The hearing officer convened the two-day due process hearing on March 10, 2014.<sup>2</sup> All disclosed documents were admitted into the administrative record without objection. As a preliminary matter, DCPS made a motion to dismiss for lack of jurisdiction,<sup>3</sup> arguing that DCPS made offers of FAPE by way of the IEPs developed on February 2012 and June 2013, Parent rejected both IEPs by not accepting them and agreeing to receive services under them, so DCPS complied with its obligations because once the LEA makes FAPE available there's nothing more it is obligated to do for a private school student. Respondent opposed the motion, noting that a federal district court judge determined in February 2013 that no FAPE had been provided, that the parents were entitled to tuition reimbursement from October 2011 until development of the IEP, and that parents would be entitled to seek another due process hearing if they were dissatisfied with the IEP DCPS developed. After consideration of the parties' arguments and further discussion, the hearing officer determined that the matter was too complex for determination based on oral arguments at the start of the hearing, and the hearing officer set a schedule for the parties to brief their respective positions on the motion. DCPS was to submit its brief by 6:00 pm on March 13<sup>th</sup>, and Petitioners was to submit its brief by 12:00 noon on March 17<sup>th</sup>.<sup>4</sup>

Thereafter, the hearing officer received Petitioner's opening statement, DCPS reserved its opening statement until the start of its case without objection from Petitioner, and Petitioner presented its testimonial evidence. Upon the conclusion of Petitioner's case, which ended at approximately 1:00 pm on the first day of hearing, DCPS made a motion for directed verdict, arguing that Petitioner failed to present the evidence necessary to prove its claims. After consideration of the parties arguments for and against the motion, the hearing officer determined

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<sup>2</sup> Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

<sup>3</sup> The hearing officer noted that the motion would be considered because it goes to jurisdiction, which is an issue that can be raised at any time; otherwise, the hearing officer would have summarily denied the motion as untimely.

<sup>4</sup> DCPS advised by email on the evening of March 13<sup>th</sup> that it did not intend to file "an additional motion"; Petitioner filed its written brief on March 17<sup>th</sup> by the established deadline.

that Petitioner had provided sufficient evidence to withstand a motion for directed verdict and denied the motion. The hearing officer then adjourned the hearing for the day.

The hearing officer re-convened the hearing on March 11, 2014. As a preliminary matter, at the parties' request, the hearing officer admitted into the administrative record a December 30, 2011 Hearing Officer Decision rendered by another hearing officer as Hearing Officer Exhibit 1 ("IHO-1"). Thereafter, the hearing officer received DCPS's opening statement and testimonial evidence, as well as both parties' closing statements. At the conclusion of the proceedings, Petitioner's counsel requested that the matter be reopened to allow the presentation of testimony from Parent regarding the Student's nonpublic school fees and tuition for SY 2013/14. The hearing officer denied the request and brought the hearing to a close.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

### **ISSUE(S)**

1. Did DCPS deny Student a FAPE by failing to propose an appropriate special education program on February 9, 2012?<sup>5</sup>
2. Did DCPS deny Student a FAPE by failing to propose a special education program from February 9, 2013 through the end of the 2012-2013 school year?<sup>6</sup>
3. Did DCPS deny Student a FAPE by failing to propose an appropriate special education program for the 2013-2014 school year?
4. Is current program at Student's current nonpublic school a proper educational placement for Student?

### **FINDINGS OF FACT**<sup>7,8</sup>

1. Student \_\_\_\_\_ currently attends \_\_\_\_\_ a nonpublic school located outside of the District of Columbia.

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<sup>5</sup> Although Petitioners' Complaint, and therefore the Prehearing Order, reference a February 24, 2012 IEP, the evidence in this case reveals that the IEP was actually developed on February 9, 2012, which is the date that will be used throughout this decision.

<sup>6</sup> See FN 5, *supra*.

<sup>7</sup> To the extent that the hearing officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, then the hearing officer has taken such action based on the hearing officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

<sup>8</sup> When citing an exhibit that has been submitted by both parties, the hearing officer may only cite to one party's exhibit.

2. Student attended a DCPS elementary school in general education classrooms for kindergarten through second grades during school years 2008/09 through 2010/11.<sup>10</sup>
  
4. In May 2011, during the spring of his second grade year, Student was diagnosed with Asperger's syndrome.<sup>12</sup>
5. In June of 2011, Petitioner's counsel requested an IEP meeting for Student. Also, in June of 2011, Parent requested that DCPS engage in the special education referral and eligibility determination process for Student, and DCPS issued a written acknowledgment of the special education referral.<sup>13</sup>
6. In August 2011, Parent advised DCPS that Student had been accepted at his current nonpublic school and that Petitioners intended to enroll Student at the school, but Petitioners wanted DCPS to continue with the IEP process and Petitioners would consider whatever program and placement DCPS ultimately offered for Student.<sup>14</sup>
7. Student began attending the current nonpublic school on August 29, 2011, and he was provided with an IEP that called for 100% special education and related services, which is the same level of services provided to all students at the nonpublic school.<sup>15</sup>
8. Student is enrolled in a program for children with Asperger's syndrome at the current nonpublic school. The program was specifically designed to address the challenges of students with Asperger's syndrome, including problems with flexibility and executive functioning. However, the nonpublic school provides only a full-time special education environment, as all students there have both full-time IEPs and Asperger's syndrome.<sup>16</sup>
9. By October of 2011, Student had stopped engaging in head-banging at school. By December of 2011, Student was doing better in initiating and maintaining transitions, wandering less, requiring fewer prompts to be redirected, asking more appropriate

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<sup>9</sup> See Complaint at 1; testimony of Parent.

<sup>10</sup> Testimony of Parent; IHO-1 at 7-8.

<sup>11</sup> IHO-1 at 7-8 and 31; testimony of Parent.

<sup>12</sup> IHO-1 at 9.

<sup>13</sup> IHO-1 at 11-12.

<sup>14</sup> IHO-1 at 12.

<sup>15</sup> IHO-1 at 13 and 27.

<sup>16</sup> Testimony of Assistant Director of nonpublic school; IHO-1 at 34 and 36.

questions and advocating for himself rather than responding in a negative tone. Student was also much more engaged in the educational process, he was happy, his anxiety was reduced, he was no longer clenching his fists, he was no longer isolated, he was doing well academically, and he had made one friend with whom he played chess.<sup>17</sup>

10. Although Student made progress in the nonpublic school from the very beginning, as late as January 2012, he still “climbing” into his shirt at the nonpublic school by pulling his legs and/or arms and legs into his shirt, he still required prompts to be “appropriate” in his conversations and comments, and he was still sucking on and biting the collar of his shirt. Student also displayed other behaviors such as crawling under his desk, making sounds, and sitting strangely in his seat. In other words, Student was still becoming acclimated to the nonpublic school. Moreover, the gains Student made at the nonpublic school were made in a small, structured special education setting where the student/teacher ratio was 8-9 students to 6 adults, and where prompts such as an elapsed time clock were used throughout the school day and Student had access to accommodations such as a special cushioned seat for his chair.<sup>18</sup>
11. Petitioners filed a due process Complaint against DCPS on October 27, 2011, challenging, *inter alia*, whether DCPS failed to timely evaluate Student, determine his eligibility for special education services, and propose an appropriate special education program for Student.<sup>19</sup>
12. In a December 30, 2011 Hearing Officer Decision (“HOD”), a hearing officer ruled, *inter alia*, that DCPS failed to timely evaluate Student and determine his eligibility, but that Petitioners had prematurely charged DCPS with a failure to propose an appropriate special education program for Student because the deadline for an initial IEP was subsequent to the date of filing of Petitioner’s October 2011 complaint. The former hearing officer further determined that a prospective placement at the current nonpublic school was not appropriate because it was not the least restrictive environment (“LRE”) for Student. Accordingly, the former hearing officer ordered DCPS to convene a meeting and determine Student eligible for special education and related services as a child with autism, but the hearing officer denied Petitioners’ request for tuition reimbursement and a prospective placement at the current nonpublic school.<sup>20</sup>
13. Petitioners appealed the December 30, 2011 HOD to a federal court. In February 2013, the federal court ruled that because DCPS failed to timely evaluate and make an eligibility determination for Student, and thus effectively deprived him of a timely IEP, Student was denied a FAPE and Petitioners were entitled to partial reimbursement for Student’s placement at the current nonpublic school. The court ordered DCPS to reimburse Petitioners for the cost of Student’s placement at the current nonpublic school from October 11, 2011, the date that the eligibility determination should have been made,

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<sup>17</sup> IHO-1 at 34-35.

<sup>18</sup> See Respondent’s Exhibit 2; Petitioner’s Exhibit 15; testimony of special education teacher; testimony of school psychologist.

<sup>19</sup> See IHO-1 at 1 and 4-5.

<sup>20</sup> See IHO-1 at 39-57.

until such time as Student was provided with an appropriate placement by way of the completion of an IEP. The court declined to address the issue of prospective placement, leaving that to Student's IEP team, and noted that Petitioners would have to file a new action to the extent that they were dissatisfied with the placement proposed for Student by DCPS.<sup>21</sup>

14. In the meantime, on February 9, 2012, DCPS convened a multidisciplinary team ("MDT") meeting for Student to, *inter alia*, develop an initial IEP. The team essentially adopted the goals contained in Student's full-time IEP from the current nonpublic school, but DCPS determined that Student required only the following amounts of service: 1 hour per week of specialized instruction outside general education, 5 hours per week of specialized instruction in general education, 4 hours per month of behavior support services outside general education, 2 hours per month of behavior support services in general education, and 5 hours per month, combined, of speech-language pathology and occupational therapy services. Altogether, the team determined that Student would receive approximately 9 hours per week of special education and related services. The team also selected the neighborhood DCPS elementary school as Student's location of services. Parent disagreed with the IEP, indicating her belief that the IEP was not appropriate for Student when compared to the services he was receiving at the current nonpublic school. Accordingly, Parent rejected both the proposed IEP and the proposed location of services. Parent also rejected DCPS's suggestion that Student could be provided with an individual service plan ("ISP") for implementation at the current nonpublic school.<sup>22</sup>
15. The February 2012 IEP proposed by DCPS was inappropriate for Student because it did not provide enough services overall, and it did not provide enough coordinated services for Student. Given the severity of Student's behaviors at that time, Student needed a program that provided a coordinated Asperger's model to make improvement in the areas of behavior, social/emotional development, academic skill development, social pragmatics and linguistic development. More specifically, Student needed a very highly coordinated program with all staff trained to provide a coordinated intervention approach, as opposed to a piecemeal approach.<sup>23</sup>
16. By letter dated August 6, 2012, Petitioners informed DCPS that they intended to maintain Student's placement at the current nonpublic school for SY 2012/13 and seek public funding for the placement.<sup>24</sup>
17. On November 12, 2012, the current nonpublic school prepared an IEP Attendance and Approved Services Form that, once again, required Student to receive 100% of his special education and related services outside of general education.<sup>25</sup>

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<sup>21</sup> Petitioner's Exhibit 46 at 2 and 14-15.

<sup>22</sup> Respondent's Exhibits 4-6; testimony of Parent.

<sup>23</sup> Testimony of special education consultant.

<sup>24</sup> Petitioner's Exhibit 69; testimony of Parent.

<sup>25</sup> Petitioner's Exhibit 39.

18. DCPS did not develop another IEP for Student in February 2013, which was one year after DCPS's development of Student's February 2012 IEP.
19. By May of 2013, Student had made tremendous progress at the current nonpublic school. He was able to move throughout the school independently, complete work without prompting, work independently, make transitions with limited prompting, and engage in appropriate conversations and interactions with peers. Moreover, Student was no longer sitting strangely in his seat or chewing his shirts, and he was able to ignore negative behaviors displayed by his peers.<sup>26</sup>
20. On June 20, 2013, DCPS developed an IEP that required the following hours of service for Student: 1 hour per week of specialized instruction outside general education, 5 hours per week of specialized instruction in general education, 4 hours per month of behavior support services outside general education, 2 hours per month of behavior support services in general education, and 5 hours per month, combined, of speech-language pathology and occupational therapy services outside general education. Once again, DCPS essentially adopted the goals contained in Student's full-time IEP from the current nonpublic school, and DCPS proposed Student's neighborhood DCPS elementary school as the location of services for implementation of the IEP.<sup>27</sup>
21. June 20, 2013 was the last day of SY 2012/13.<sup>28</sup>
22. By June of 2013, Student had received services at the current nonpublic school for two years, and as a result, his needs were nowhere near as severe as they had been two years earlier. As a result, Student no longer required a highly coordinated Asperger's program on a full-time basis.
23. Student can benefit from interaction with his nondisabled peers, because nondisabled peers serve as peer role models for students with Asperger's syndrome and allow those students an opportunity to learn to generalize.<sup>29</sup>
24. On October 24, 2013, the current nonpublic school prepared an IEP Attendance and Approved Services Form that, once again, required Student to receive 100% of his special education and related services outside of general education.<sup>30</sup>
25. Student has made excellent progress at the current nonpublic school. He can independently use strategies he's been taught, he can accept and respond to feedback from other students when they no longer wish to hear him speak on a preferred subject, he can use social stories and social scripts to solve interpersonal problems and engage in leisure activities with peers, he can better find information in the classroom to interpret nonverbal cues, and he has made academic progress consistent with his intelligence.

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<sup>26</sup> Respondent's Exhibit 7; testimony of special education teacher; testimony of school psychologist.

<sup>27</sup> Respondent's Exhibits 8 and 10 at 3.

<sup>28</sup> See Complaint at 8.

<sup>29</sup> Testimony of school psychologist.

<sup>30</sup> Petitioner's Exhibit 58.

Overall, Student has made significant strides in social learning, social adjustment, the ability to stay on task and use language in appropriate ways, the reduction of school anxiety, and his comfort level with being in a classroom.<sup>31</sup>

26. Student has made so much progress at the current nonpublic school that the school staff has determined that Student has the requisite skills to be transitioned back into a mainstream setting, with appropriate accommodations, for SY 2014/15. This decision was made in the fall of SY 2013/14 and shared with parents early, as the nonpublic school has a policy of starting the conversation regarding a less restrictive placement early enough to allow parents time to prepare to send their child to another school.<sup>32</sup>

27. For SY 2012/13, Student's tuition and fees at the current nonpublic school amounted to a total of \$53,212.00.<sup>33</sup>

### **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 burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). In this regard, IDEA does not require a departure from the ordinary default rule that plaintiffs bear the risk of failing to prove their claims. *See id.*; *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3<sup>rd</sup> Cir. 2012); *L.E. v. Ramsey Board of Educ.*, 435 F.3d 384, 391 (3<sup>rd</sup> Cir. 2006). Now, for a consideration of Petitioner's claims, which will be considered together to the extent appropriate.

#### **Alleged Inappropriate Programs on February 9, 2012 and June 20, 2013 and the Appropriateness of the Current Nonpublic School**

The "free appropriate public education" required by the Act is tailored to the unique needs of the handicapped child by means of an "individualized educational program." Board of Education of the *Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982). The requirement to provide a FAPE is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.*

In determining whether a Student's IEP is appropriate, the hearing officer must determine (1) whether the LEA has complied with the procedures set forth in IDEA, and (2) whether the IEP developed through IDEA's procedures was reasonably calculated to provide Student with educational benefits. *Board of Education of the Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982) ("Rowley"). In turn, in determining whether an IEP is reasonably calculated to provide educational benefit, the measure and

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<sup>31</sup> Testimony of special education consultant; testimony of Assistant Director of nonpublic school.

<sup>32</sup> Testimony of Assistant Director of nonpublic school.

<sup>33</sup> Respondent's Exhibit 12.

adequacy of the IEP is to be determined “as of the time it is offered to the student.” *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10<sup>th</sup> Cir. 2008), *cert. denied*, 555 U.S. 1173 (2009).

IDEA also requires that a public agency provide an appropriate educational placement/location of services for each child with a disability, so that the child’s needs for special education and related services can be met. *See* 34 C.F.R. § 300.17; 34 C.F.R. §§ 300.114-300.120. In this regard, a FAPE consists of special education and related services that, *inter alia*, include an appropriate secondary school and are provided in conformity with the Student’s IEP. *See* 34 C.F.R. § 300.17.

In the instant case, Petitioner argues that Student’s February 24, 2012 and June 20, 2013 IEPs were inappropriate because they failed to provide Student with a sufficient number of service hours. Petitioner does not challenge the goals and objectives in the IEPs, because those were essentially copied from Student’s full-time IEPs at the current nonpublic school. Moreover, although Petitioner complains about and presented evidence challenging the location of the IEP meetings and DCPS’s failure to include Student’s teachers from the nonpublic school in the IEP meetings, Petitioner did not assert those factors as ones to be adjudicated in the instant action, with the result that DCPS was not on notice of the need to present a defense with respect to those factors. Hence, the hearing officer will not address those factors herein.

A review of the evidence in this case reveals that the February 2012 IEP DCPS developed for Student was inappropriate because the IEP did not provide enough services overall and it did not provide enough coordinated services for Student. Indeed, the evidence reveals that in light of the severity of Student’s behaviors at that time, Student needed a program that provided a coordinated Asperger’s model with all staff trained to provide a coordinated intervention approach. Based on this evidence, the hearing officer concludes that Petitioner has met its burden of proving a denial of FAPE in connection with the February 2012 IEP by proving that the February 2012 IEP was not reasonably calculated to provide Student with educational benefit at the time it was developed.

With respect to the June 2013 IEP DCPS developed for Student, the situation is not so clear cut because the evidence proves that Student had made tremendous progress at the current nonpublic school by June 2013. Upon careful consideration of all the evidence, however, the hearing officer concludes that although Student no longer required a coordinated Asperger’s model on a full-time basis in light of the significant progress he had made after two full years at the nonpublic school, Student had not yet progressed to the point where his services could be reduced to a mere 8-9 hours per week of specialized instruction and related services combined, which is what DCPS offered in its June 2013 IEP. As a result, the hearing officer further concludes that Petitioner has met its burden of proving a denial of FAPE in connection with the June 2013 IEP by proving that the June 2013 IEP was not reasonably calculated to provide Student with educational benefit at the time it was developed.

“Where a public school system has defaulted on its obligations under the IDEA, a private school placement is proper under the Act if the education by said school is ‘reasonably calculated to enable the child to receive educational benefits.’” *N.G. v. District of Columbia*, 556 F.Supp.2d

11, 37 (D.D.C. 2008) (quoting *Wirta v. District of Columbia*, 859 F. Supp. 1, 5 (D.D.C. 1994) (quoting *Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley*, 456 U.S. 176, 207)). “Courts have identified a set of considerations relevant to determining whether a particular placement is appropriate for a particular student, including 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 school, the placement's cost, and the extent to which the placement represents the least restrictive environment.” *Id.*, 556 F.Supp.2d at 37 (quoting *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005) (citing *Board of Education v. Rowley*, *supra*, 456 U.S. 176, 202)).

Moreover, 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 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). However, the amount of such reimbursement may be reduced or denied upon a judicial finding of unreasonableness with respect to the actions taken by the parents. 34 C.F.R. § 300.148(d)(3).

In the instant case, the hearing officer has determined that DCPS denied Student a FAPE by failing to provide Student with appropriate IEPs on February 9, 2012 and June 20, 2013, because the IEPs did not provide for Student to receive a sufficient number of service hours. With respect to the February 9, 2012 IEP, the evidence proves both (1) that at the time the February 2012 IEP was developed, Student required a program that provided a coordinated Asperger's model with all staff trained to provide a coordinated intervention approach, and (2) that the nonpublic school was providing Student with a program that was specifically designed to address the challenges of students with Asperger's syndrome. Based on this evidence, the hearing officer concludes that as of February 9, 2012, the nonpublic school was appropriate for Student and was reasonably calculated to provide Student with educational benefit. Hence, the hearing officer will award Petitioners full reimbursement for Student's tuition at the nonpublic school from February 9, 2012 through the end of SY 2011/12, and from the start of SY 2012/13 through June 20, 2013, when DCPS made a new offer of FAPE to Student. *See e.g., G.G. et al. v. District of Columbia*, 924 F.Supp.2d 273, 281 (D.D.C. February 20, 2013) (citing 20 U.S.C. § 1412(a)(10)(C)(iii)) (internal quotation and punctuation marks omitted) (if the parents of a child with a disability enroll the student in a private school, the court may require the agency to reimburse the parents for the cost of the enrollment if the court finds that the agency had not made a FAPE available to the child in a timely manner).

With respect to the June 20, 2013 IEP, however, the evidence proves that by June 2013, Student had made tremendous progress after receiving two full years of services at the current nonpublic school, with the result that he no longer required a highly coordinated Asperger's program on a full-time basis. Nevertheless, the current nonpublic school continued to provide Student with a full-time special education program designed specifically for students with Asperger's syndrome. The evidence further reveals that Petitioners maintained Student's placement at the current nonpublic school for SY 2013/14, even though the nonpublic school staff informed Petitioners in the fall of 2013 that Student has the requisite skills to be transitioned back into a

mainstream setting for SY 2014/15. Based on this evidence, the hearing officer concludes both (1) that the current nonpublic school no longer represented Student's least restrictive environment at the start of SY 2013/14, and (2) Petitioners' decision to maintain Student's placement at the nonpublic school for SY 2013/14 and seek public funding for the placement was unreasonable when they were aware that Student no longer required a full-time special education program designed specifically for students with Asperger's syndrome. Under these circumstances, the hearing officer will award Petitioners reimbursement for only 50% of the cost of Student's tuition at the nonpublic school from the start of SY 2013/14 through either the end of SY 2013/14 or until DCPS develops an IEP for the remainder of SY 2013/14 that provides Student with specialized instruction and related services for at least half of each school day, whichever occurs first. *See* 34 C.F.R. § 300.148(d)(3), *supra*.

### **Failure to Propose a Program from February 9, 2013 through the end of SY 12/13**

IDEA requires that at the beginning of each school year, each public agency must have an IEP in effect for each child with a disability within its jurisdiction. 34 C.F.R. § 300.323(a). Moreover, when a disabled student is parentally placed in a private school, the responsible LEA "must continue to periodically evaluate the student's special education needs, either on its own initiative or at the request of the student's parent or teacher. *District of Columbia v. Wolfire*, 2014 WL 169873, \*2 (D.D.C. January 16, 2014) (citations omitted). Upon receipt of an offer of FAPE, the parents may either (1) accept the offer of FAPE and enroll their child in the designated school, or (2) keep their child in private school. *Id.*

In the instant case, Petitioners argue that DCPS denied Student a FAPE by failing to develop an IEP for Student from February 24, 2013, one year after Student's February 2012 IEP was developed, through the end of SY 2012/13. However, the evidence in this case reveals that Parents notified DCPS in August 2012 of their intent to keep Student in the current nonpublic school for the entirety of SY 2012/13. Moreover, the hearing officer has already determined above to award Petitioners full tuition reimbursement for a period of time that includes February 9, 2013 through June 20, 2013, which was the last day of SY 2012/13. Under these circumstances, the hearing officer questions whether DCPS's failure to propose a program for Student from February 9, 2013 through the end of SY 2012/13 rises to the level of a denial of FAPE, but the hearing officer finds it unnecessary to decide the issue, as such a determination will not affect the results of this case.

### **Oral Motion to Dismiss for Lack of Jurisdiction**

At the start of the due process hearing for this case, DCPS made an oral motion to dismiss for lack of jurisdiction, asserting that DCPS extended offers of FAPE to Student in February 2012 and June 2013, which Parents rejected, with the result that DCPS totally fulfilled its obligation to this parentally-placed private school student. However, upon consideration of DCPS's oral arguments in favor of the motion, as well as Petitioners' oral and written arguments against the motion, the hearing officer has determined that this case is governed, not by the provisions of IDEA applicable to parentally placed private school children, but by 34 C.F.R. § 300.148 concerning private school placements of children by parents when FAPE is at issue. Hence,

DCPS's obligations to Student are not limited to Child Find only, and DCPS's oral motion to dismiss must be denied.

**ORDER**

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

1. DCPS's oral Motion to Dismiss for Lack of Jurisdiction is Denied.
2. DCPS shall provide Petitioners with full reimbursement for Student's tuition at the current nonpublic school from February 9, 2012 through the end of SY 2011/12, and from the start of SY 2012/13 through June 20, 2013.
3. DCPS shall provide Petitioners with reimbursement of 50% of Student's tuition at the current nonpublic school for the period beginning at the start of SY 2013/14 and ending either (i) at the end of SY 2013/14, or (2) when DCPS develops an IEP for the remainder of SY 2013/14 that provides Student with specialized instruction and related services for at least half of each school day, whichever occurs first.

**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: 3/21/14

/s/ Kimm Massey  
Kimm Massey, Esq.  
Hearing Officer