

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

Student Hearing Office  
810 First Street, NE, 2nd Floor  
Washington, DC 20002

OSSE  
STUDENT HEARING OFFICE  
2012 MAR -5 11:10:00

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

Date Issued: March 3, 2012

Petitioners,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Respondent.

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by PETITIONERS (the “Petitioners” or “Parents”), under the Individuals with Disabilities Education Act, as amended (the “IDEA”), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In their Due Process Complaint, the Petitioners allege that Student was denied a free appropriate public education (“FAPE”) for the 2010-2011 and 2011-2012 school years because Student’s public school

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

Individualized Education Programs (“IEPs”) did not provide the full-time special education placement, which Student required.

Student, an AGE girl, is a resident of the District of Columbia. The Petitioners’ Due Process Complaint, filed on December 9, 2011, named D.C. Office of the State Superintendent of Education (“OSSE”) and DCPS as respondents. On December 22, 2011, the Hearing Officer granted OSSE’s motion to be dismissed as a respondent. No report of a resolution meeting or resolution period disposition form was filed. On January 5, 2012, the Hearing Officer convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters. The 45-day timeline for issuance of this HOD began on January 9, 2011. On February 12, 2012, the Hearing Officer denied Petitioners’ first, unopposed motion for a continuance. The due process hearing, scheduled for February 14-15, 2012, was commenced before the undersigned Impartial Hearing Officer on February 14, 2012 at the Student Hearing Office in Washington, D.C. The hearing was not completed at the end of the second day. On February 16, 2012, Petitioners filed their second, unopposed, motion for a continuance to provide addition time to complete the hearing and for issuance of the Hearing Officer Determination. Petitioners’ second continuance motion was granted by the Chief Hearing Officer on February 17, 2012.

On February 13, 2012, the Petitioners filed a motion to exclude DCPS’ evidence on the grounds that DCPS’ emailed five-day disclosures were received one day late by Petitioners’ counsel. The Hearing Officer denied this motion on February 14, 2012 and, subsequently, denied Petitioners’ February 15, 2012 motion to reconsider that decision.

The due process hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioners appeared in person, and were represented by

PETITIONERS' COUNSEL. Respondent DCPS was represented by SPED COORDINATOR from CITY ELEMENTARY SCHOOL ("CES") and by DCPS COUNSEL.

The Petitioners called, as witnesses, SPEECH PATHOLOGIST, OCCUPATIONAL THERAPY DIRECTOR and EDUCATION DIRECTOR from NONPUBLIC SCHOOL, EDUCATIONAL CONSULTANT and MOTHER. DCPS called, as witnesses, DCPS SPEECH PATHOLOGIST, FOURTH GRADE TEACHER, SPED TEACHER, SPED COORDINATOR from CITY MIDDLE SCHOOL ("CMS"), and CES SPED Coordinator. Petitioners' Exhibits P-1 through P-63 and P-66, were admitted into evidence without objection, with the exception of Exhibits P-33, P-34, P-35, P-47, P-48, P-49 and P-50. The Hearing Officer sustained DCPS' objections to said excepted exhibits for failure of Petitioners to introduce the exhibits on their case-in-chief or on rebuttal. Exhibits P-64 and P-64 were admitted over DCPS' objection. DCPS' Exhibits R-1 through R-25 were admitted into evidence, over Petitioners' continuing objection that the DCPS exhibits were not timely disclosed. The Hearing Officer denied Petitioners' motion to strike Exhibit R-24.

Following completion of the Petitioners' case-in-chief, DCPS moved for a directed finding on Petitioners' claim that DCPS had denied Student a FAPE by not timely conducting a Speech/Language (S/L) evaluation requested by Parents. The Hearing Officer took the motion under advisement. Counsel for Petitioners stipulated at the beginning of the hearing that Petitioners did not seek separate relief for their S/L evaluation claim. I therefore deny DCPS' motion for a directed finding.

Counsel for both parties made oral closing arguments. During closing argument, Petitioners filed Parents' Memorandum of Points and Authorities. Neither party requested leave to file a further post-hearing brief.

## JURISDICTION

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

## ISSUES AND RELIEF SOUGHT

– WHETHER THE 2010-2011 IEP PROPOSED FOR STUDENT BY DCPS WAS INAPPROPRIATE BECAUSE IT OFFERED INSUFFICIENT HOURS OF SPECIALIZED INSTRUCTION AND RELATED SERVICES AND BECAUSE DCPS DID NOT OFFER STUDENT A FULL-TIME, OUTSIDE OF GENERAL EDUCATION, PLACEMENT; and

– WHETHER THE 2011-2012 IEP PROPOSED FOR STUDENT BY DCPS WAS INAPPROPRIATE BECAUSE IT OFFERED INSUFFICIENT HOURS OF SPECIALIZED INSTRUCTION AND RELATED SERVICES AND BECAUSE DCPS DID NOT OFFER STUDENT A FULL-TIME, OUTSIDE OF GENERAL EDUCATION, PLACEMENT.

For relief, Petitioners seek reimbursement for Student's tuition and related services expenses at Nonpublic School for the 2010-2011 and 2011-2012 school years.<sup>2</sup>

## FINDINGS OF FACT

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

1. Student is an AGE resident of the District of Columbia, where she resides with her parents and two siblings. Testimony of Mother.
2. Student is currently enrolled in Nonpublic School. She is considered to be in the GRADE level. Testimony of Education Director.
3. In March 2007, when Student was in the first grade at CES, she was identified as a child with a specific learning disability, according to the criteria discrepancy between verbal,

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<sup>2</sup> At the beginning of the due process hearing on February 14, 2012, Counsel for Petitioners stipulated that Petitioners were not seeking separate relief for their claim, set forth in the Prehearing Order, that DCPS denied Student a FAPE by not timely conducting an S/L evaluation requested by the Parents prior to May 2010.

perceptual and working memory scales – impact on retention, reading and in-class. Exhibit P-5.

4. In her initial IEP, developed April 30, 2007 at CES, Student was provided 60 minutes per week of Specialized Instruction in the general education setting and 90 minutes per week of Specialized Instruction in the special education setting. Exhibit P-5.

5. In the following, 2007-2008, school year at CES, Student made excellent progress throughout the year. On her second grade Report Card, for the last (fourth) advisory period, Student was reported as “Approaches the Standard (Basic)” in Reading/English/Language Arts, “Meets the Standard (Proficient)” in Mathematics, Science and Social Studies, and “Exceeds the Standard (Advanced) in Music and Art and in Health & Physical Education. The Teacher Comment reported that Student had worked hard and had made excellent progress throughout the year. Exhibit P-6.

6. For her March 6, 2008 IEP, Student’s special education services were increased to 135 minutes per week of Specialized Instruction in the general education setting and 90 minutes per week of Specialized Instruction in the special education setting. Mother attended the IEP meeting and signed the IEP to affirm that she agreed with its contents. Exhibit P-7.

7. In January 2009, Parents had Student privately tested to assess her current academic levels and to assist in educational planning. In a March 13, 2009 Neuropsychological Evaluation report, EDUCATIONAL DIAGNOSTICIAN reported that Student achieved a Full Scale IQ score of 95, which fell in the average range. The examiner reported that Student’s General Ability Index (GAI), which was somewhat higher in the average range, provided a more useful estimate of Student’s higher order thinking skills, than did the Full Scale IQ score. The examiner reported that: Student’s current profile indicated above average to superior nonverbal reasoning skills; Her verbal abilities placed lower in the average range; Like many students with

language-based learning disabilities, she performed lower than expected on measures of auditory working memory and phonological awareness; Her basic listening comprehension and memory for stories was solidly average; Student's basic word reading and decoding skills clustered in the below average range, while her ability to independently read lengthier passages was well below average and below grade level; Her comprehension placed in the average range, and she scored in the low average range on math tests; Student's scores on measures of spelling, written expression and writing fluency clustered in the low average range. The examiner concluded that Student had clearly made progress since she was first evaluated some two years earlier, but she continued to perform, academically, below age, grade and IQ expectations. Exhibit P-10.

8. At the end of her 2008-2009, third grade, school year at CES, Student received "Meets the Standard (Proficient)" marks in Reading/English/Language Arts, Mathematics, Music and Health & Physical Education, and "Exceeds the Standard (Advanced)" marks in Science, Social Studies and Art. Student's classroom teacher reported that she had grown tremendously in all academic areas over the school year. Exhibit P-8.

9. By the 2008-2009 school year, Mother disagreed with the reports of solid educational progress from Student's teachers. Mother felt that Student had enormous problems with reading, that Student did not write at third grade levels and that math was also a struggle. Mother was also concerned that at home, Student exhibited anxiety about school. Testimony of Mother.

10. Student's IEP team at CES convened on May 13, 2009 to update and revise Student's IEP. The IEP team decided to continue to provide Student 90 minutes per week of Specialized Instruction outside the general education setting and 135 minutes per week of Specialized Instruction inside general education. Mother attended the IEP meeting and signed

the May 13, 2009 IEP to affirm that she agreed with its contents and that she consented for the services to be initiated. Exhibit R-2.

11. At the time of the May 13, 2009 IEP meeting, Mother told the CES principal, who was not a member of the IEP team, that the proposed IEP was nowhere near adequate. The principal responded that they could not make changes to the services proposed. Testimony of Mother.

12. After receiving Educational Diagnostician's neuropsychological evaluation report in March 2009, Parents decided to make an application for Student at Nonpublic School. Parents had missed the private school's application deadline for the 2009-2010 school year and had to wait to apply for the following school year. Around October 2009, Parents submitted Student's application to Nonpublic School for the 2010-2011 school year. Student was accepted by Nonpublic School in March 2010. Parents made a deposit then to reserve Student's place. Testimony of Mother.

13. Student's IEP team met at CES on April 12, 2010 to review and revise her IEP. The meeting was attended by both Parents and Petitioners' counsel. In the present levels of performance section of the IEP, the IEP team reported that in Mathematics, Student's performance on the DC-BAS assessments indicated that she was increasing her mathematical proficiency and that throughout the current school year, Student had shown adequate progress in mastering the basic concepts of grade level material. For Reading, the IEP team reported that Student had demonstrated good growth in her overall reading achievement during the school year. For Written Express, the IEP team reported that Student's growth areas included spelling, sentence structure and the length and detail of her writing, but that Student demonstrated difficulty in spelling, written syntax and the detail of her writing. Exhibit R-4.

14. The April 12, 2010 IEP team decided that Student would continue to receive 135 minutes per week of Specialized Instruction in the general education setting and 90 minutes per week of Specialized Instruction outside of general education. On April 19, 2010, Mother signed the April 12, 2010 IEP to affirm that she agreed with its contents and consented for the IEP service to be initiated for Student. Exhibit R-4.

15. At the April 12, 2010 IEP meeting, Parents requested that an updated S/L evaluation of Student be conducted. DCPS agreed to provide the S/L evaluation. Parents advised that they preferred to have the evaluation done by a private provider. Testimony of CES SPED Coordinator.

16. A Comprehensive Speech and Language Assessment was conducted by a S/L pathologist at Nonpublic School in May 2010. Mother told the S/L pathologist that Student made friends easily and liked school (*i.e.*, CES). Mother stated that although Student had fluctuating moods, she had a happy disposition. Mother stated that Student had trouble remembering and difficulty completing homework. Mother described Student as being disorganized, but not frustrated in learning. Exhibit P-15.

17. In her Comprehensive Speech and Language Assessment report, the Nonpublic School S/L pathologist reported that Student exhibited a complex array of deficits, which included a latency of response and auditory processing weaknesses, exacerbated by the complex interaction of work retrieval (and resulting formulation deficits) combined with articulation dyspraxia. The S/L pathologist reported that: The test results were consistent with diagnoses of Mixed Receptive-Expressive Language Disorder and Reading Disorder; The diagnosis of Disorder of Written Expression was also warranted due to a breakdown of written language skills at and above the sentence level and persistent spelling deficits; and Diagnosis of

Phonological Disorder was also warranted due to the presence of articulation dyspraxia. The S/L pathologist recommended that Student receive one individual 40-45 minute S/L therapy session and one 40-45 minute small group S/L therapy session per week. Exhibit P-15.

18. In April and May 2010, Fourth Grade Teacher administered to Student the Fountas and Pinnell Benchmark Assessment System (F&P), the Woodcock Johnson-III Tests of Achievement/Normative Update (WJ-III) and the Gray Oral Reading Test (4<sup>th</sup> Edition) (GORT-IV). Student's performance on the F&P indicated that she was reading at a 4.2 Grade equivalency with 94% accuracy and satisfactory comprehension. The WJ-III indicated overall reading achievement within the low average range. On the GORT-IV, Student's scores fell within the borderline range in oral reading. Student's scores on the WJ-III Broad Written Language cluster indicated that her overall writing achievement was within the low average range. Her scores on the WJ-III Broad Math cluster indicated average achievement, but her performance on math fluency was significantly lower than the other mathematics measures. Student's achievement in Oral Language, using the WJ-III tests, was within the average range. Exhibit P-16.

19. The WJ-III had previously been administered to Student, by Educational Diagnostician, in January 2009, when Student was in third grade. On the second WJ-III evaluation, in her fourth grade year, Student attained essentially the same or higher standard scores as on the prior administration. Exhibit R-7. A student's attaining the same standard scores on the WJ-III in consecutive school years means that the Student has progressed one academic year. Testimony of CES SPED Coordinator. (Nonpublic School also administered the WJ-III on September 9, 2010. However the Nonpublic School results are deemed invalid by

DCPS, because the 4 month time interval between the test dates was too short to conform with WJ-III protocol. *Id.*)

20. Student's CES IEP team met again on June 7, 2010, after receipt of the S/L evaluation from Nonpublic School. The IEP team determined that Student needed S/L services and added S/L services to Student's IEP, as recommended by the Nonpublic School S/L evaluator – 45 minutes per week of S/L pathology outside of the general education setting, 45 minutes per week of S/L pathology in general education and 30 minutes per week of S/L pathology consultation services. Testimony of CES SPED Coordinator, Exhibit R-16. DCPS was not able to provide S/L services to Student because the Parents did not sign a consent to initiate the new services. Testimony of CES SPED Coordinator.

21. At the June 7, 2010 IEP meeting, Parents refused DCPS' proposed IEP. Parents and/or Petitioners' Counsel stated that the Parents intended to withdraw Student from CES at the end of the 2009-2010 school year, place her at Nonpublic School and seek tuition funding from DCPS. Parents and Petitioners' Counsel left the IEP meeting before it ended, because Petitioners' Counsel had another meeting to attend. The other members of the IEP team finished the meeting and finalized the IEP. Testimony of CES SPED Coordinator, Exhibits R-9, R-11.

22. On June 7, 2010, DCPS issued a Prior Written Notice ("PWN"), stating that DCPS proposed to continue Student's educational placement at CES and that DCPS refused to accept the request from Parents to place Student in the full-time special education program [at Nonpublic School]. The PWN stated that DCPS rejected the Parents' private placement request because Student had made significant and continual progress in her inclusion-based general education classroom, with 92% of her week spent with nondisabled peers. The PWN stated that

placing Student at Nonpublic School would be in conflict with the Least Restrictive Environment (“LRE”) requirement of the IDEA. Exhibit R-9.

23. On June 29, 2010, Petitioners’ Counsel provided written notice to DCPS that Parents rejected DCPS’ June 7, 2010 IEP, and that Parents intended to enroll Student at Nonpublic School and to seek public funding for that placement. Exhibit R-12.

24. Student was enrolled at Nonpublic School at the beginning of the 2010-2011 school year. Testimony of Education Director. On October 26, 2010, Nonpublic School developed an IEP for Student, which provided for full-time special education and related services at the private school. The Parents signed the Nonpublic School IEP to affirm their agreement with its contents and their consent to its implementation. Exhibit P-26.

25. In its October 26, 2010 IEP, Nonpublic School reported Current Levels of Functioning for Student as, Written Language - Instructional Level 3, Reading - Instructional Level 2-3, and Math - Instructional Level 2-3. Exhibit P-26.

26. By letter of March 18, 2011, DCPS volunteered to conduct an annual review of DCPS’ June 7, 2010 IEP, which services the Parents had refused, and to develop a new IEP for Student for the 2011-2012 school year. Exhibit P-31. Petitioners’ Counsel accepted on behalf of the Parents. The DCPS IEP meeting was convened on June 1, 2011 at Nonpublic School. Exhibit R-16.

27. Prior to the June 1, 2011 IEP meeting, on May 19, 2011, Nonpublic School developed its own 2011-2012 school year IEP for Student, which continued to specify full-time Specialized Instruction, as well as S/L and Occupational Therapy (“OT”) services at Nonpublic School. Mother signed Nonpublic School’s May 19, 2011 IEP to affirm that she agreed with its contents and consented to its implementation. Exhibit P-39.

28. At the June 1, 2011 DCPS IEP meeting, which Mother and Petitioners' counsel attended, DCPS offered a proposed IEP, which incorporated the Goals and Objectives from the Nonpublic School May 19, 2011 IEP. The DCPS IEP would have provided Student with 6 hours per week of Specialized Instruction in the general education setting, 3 hours per week of Specialized Instruction outside general education, 45 minutes per week of S/L Pathology in the general education setting, 45 minutes per week of S/L Pathology outside general education and 30 minutes per week of S/L Pathology Consultative Services. Exhibit P-44.

29. The Nonpublic School members of the June 1, 2011 IEP team maintained that Student needed full-time special education to master the IEP goals. The DCPS members felt that Student would be able to continue to make good progress with a program similar to the IEP provided to Student in her 2009-2010 fourth grade school year at CES. The educators "agreed to disagree." Testimony of CES SPED Coordinator.

30. DCPS' proposed June 1, 2011 IEP for Student would have been implemented at CMS. CMS has students enrolled, who have learning disability ("LD") disabilities similar to Student's disability. CMS uses co-taught and non co-taught classes for special education and has a special education resource room. CMS could have implemented all services proposed for Student in DCPS' June 1, 2011 IEP. Testimony of CMS SPED Coordinator.

31. On June 7, 2011, DCPS issue a PWN notifying the Parents that DCPS offered to place Student at CMS and that DCPS refused Parents' request for full-time special education placement at Nonpublic School. In its PWN explanation, DCPS stated that placement at Nonpublic School would deny Student the right to an education in the least restrictive environment. In the PWN, DCPS offered to perform an additional occupational therapy evaluation, which had been requested by the Parents and Nonpublic School, if Parents re-

registered Student with DCPS as a non-attending Student, and requested the OT evaluation.

Exhibit R-17.

32. The Parents refused DCPS' proposed June 1, 2011 public school IEP and filed a due process complaint against DCPS, which they subsequently withdrew. See Due Process Complaint Notice, Exhibit P-1, at p. 7.<sup>3</sup>

33. Nonpublic School is a private, approved, educational facility in the District of Columbia. It is an OSSE-approved school. There are about 75 children in the intermediate division attended by Student. All teachers in the intermediate division are certified to teach special education, except the special education teacher who is content-certified. Testimony of Education Director.

34. Nonpublic School serves students with LD disabilities, Other Health Impairments, primary S/L diagnoses, sensory motor needs, executive functioning deficits and attention issues. Most Students at Nonpublic School are identified as of average, or above average, intelligence. Testimony of Education Director.

35. At Nonpublic School, Student is placed in a class with 12 students staffed by a teacher and two assistant instructors. Testimony of Education Director.

36. The base tuition at Nonpublic School is around \$34-35,000 per year. Local school systems are billed \$43,250 per student, which includes annual base tuition and related services. Testimony of Education Director.

37. Student has done "really well" at Nonpublic School. She has made nice gains. Her instructional levels went up. In her current functional work, Student remains about one year

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<sup>3</sup> Through the course of this matter, Parents have filed three due process complaints. They filed their original due process complaint on March 29, 2011, which they withdrew on May 8, 2011. Their second due process complaint was filed on July 29, 2011 and voluntarily withdrawn on October 14, 2011. Parents filed the due process complaint in the present case on December 9, 2011. See Due Process Complaint Notice, Exhibit P-1, at p. 6-7.

behind her regular grade level in reading, 2 ½ to 3 years behind grade level in spelling and around 2 years behind grade level in written language and mathematics. Testimony of Education Director.

38. Student did extremely well at Nonpublic School “from the get-go.” Student loves the school. Testimony of Mother.

39. Independent Educational Consultant, an expert in the education of LD students, was engaged by Petitioners in fall 2010 to compare the services at Nonpublic School to those at CES and CMS. She observed Student at Nonpublic School and observed classrooms where Student could have been placed at CES and CMS. She did not observe Student in a DCPS setting or speak with any of Student’s former educators at CES. Testimony of Independent Educational Consultant.

### CONCLUSIONS OF LAW

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

### DISCUSSION

In this case, Petitioners seek reimbursement for their unilateral placement of Student at Nonpublic School for the 2010-2011 and 2011-2012 school years. The Petitioners placed Student at Private School for both school years without the consent of DCPS. “Under IDEA, parents who unilaterally place their child at a private school, without the consent of school officials, do so at their own financial risk. *Florence County Sch. Dist. 4 v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (citing *Sch. Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 369, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)); *Schoenbach v. Dist. of Columbia*, 309

F.Supp.2d 71, 76-77 (D.D.C. 2004). Such parents may be reimbursed only if (1) the school officials' public placement violated the IDEA and (2) the private-school placement was proper under the IDEA. *Carter*, 510 U.S. at 15, 114 S.Ct. 361; *Holland v. Dist. of Columbia*, 71 F.3d 417, 420 n. 3 (D.C.Cir.1995) (noting that this circuit has ordered reimbursement "where the public agency violated [IDEA] and the parents made an appropriate placement.")

In analyzing the first factor of whether the public placement violates IDEA, the court undertakes a two-step sub-inquiry, asking (a) whether the school officials complied with the procedures set forth in IDEA, and (b) whether the IEP developed through IDEA procedures was reasonably calculated to enable the child to receive educational benefits. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982); *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 763 (6th Cir.2001). Although the District must pay for private school placement "[i]f no suitable public school is available[,] . . . if there is an appropriate public school program available . . . the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child." *N.T. v. District of Columbia*, Civil Action No. 11-676 (RMC), (D.D.C. January 11, 2012), quoting *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C. Cir. 1991) (citations and quotations omitted). Further, "equitable considerations are relevant in fashioning relief," and the court enjoys 'broad discretion' in so doing. Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required." *Carter, supra*, 510 U.S. at 15-16, citing *Burlington, supra*, 471 U.S. at 374. A hearing officer may also reduce or deny tuition reimbursement "upon a judicial finding of unreasonableness with respect to actions taken by the parents." See *Schoenbach, supra*, 309 F.Supp.2d at 84-85 (citing 20 U.S.C. § 1412(a)(10)(C)).

### Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioners in this case. *See* D.C. Regs. tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

### ANALYSIS

1. WAS STUDENT DENIED A FAPE BY DCPS' 2010-2011 IEP BECAUSE THE IEP PROVIDED INSUFFICIENT HOURS OF SPECIALIZED INSTRUCTION AND RELATED SERVICES, AND BECAUSE STUDENT REQUIRED A FULL-TIME, OUTSIDE OF GENERAL EDUCATION, PLACEMENT?

The threshold question in this case is whether DCPS' June 7, 2010 IEP, keeping Student at CES, was appropriate. The appropriateness inquiry turns on two further sub-issues: (1) whether DCPS has complied with IDEA's administrative procedures and (2) whether or not the June 7, 2010 IEP generated by the CES IEP team was reasonably calculated to provide some educational benefit to Student. *See Schoenbach, supra*, 309 F.Supp.2d at 78, citing *Rowley, supra*, 458 U.S. at 207, 102 S.Ct. 3034; *Zearley v. Ackerman*, 116 F.Supp.2d 109, 113 (D.D.C. 2000). Whether DCPS has complied with the IDEA's administrative procedures is not an issue in this case. Therefore, only the second sub-issue, whether the June 7, 2010 IEP was reasonably calculated to provide some educational benefit, must be decided. If Student's IEP placement at CES was appropriate for the 2010-2011 school year, then Parents are not entitled to reimbursement for placing Student at Nonpublic School, and there is no need to analyze whether the private school placement was proper. *See Anderson v. District of Columbia*, 606 F.Supp.2d 86, 90 (D.D.C. 2009).

“The IDEA’s guarantee of a FAPE is that of a ‘basic floor of opportunity . . . [that] consists of access to specialized instruction and related services which are individually designed to provide education benefit to the handicapped child.’ *Rowley*, 458 U.S. at 201, 102 S.Ct. 3034. There is no requirement for a state to provide services to maximize each child’s potential, *id.* at 198, 102 S.Ct. 3034, nor must the FAPE ‘be designed according to the parent’s desires,’ *Shaw v. District of Columbia*, 238 F.Supp.2d 127, 139 (D.D.C. 2002). *See also Kerkam v. McKenzie*, 862 F.2d 884, 886 (D.C.Cir.1988). (‘[P]roof that loving parents can craft a better program than a state offers does not, alone, entitle them to prevail under the Act.’)” *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 45 (D.D.C. 2006). The Supreme Court recognized in *Rowley* that “the determination of when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the [IDEA] presents a more difficult problem . . .” *Id.*, 458 U.S. at 201-202. Addressing this problem, U.S. District Judge Penn wrote in *Angevine v. Jenkins*, 752 F.Supp. 24, 27 (D.D.C. 1990), that “it seems clear that there is no general rule upon which to test the adequacy of any placement. The key appears to be that the child receive ‘some educational benefit,’ but that does not mean that the child is not to advance. . . . Therefore, while recognizing the unique needs of each child, the school system is to have in mind, not only the placement of the child, but the advancement of the child where possible.” *Id.* *See, also, e.g., J.N. v. District of Columbia*, 677 F. Supp.2d 314, 322 (D.D.C. 2010) (Academic progress is strong, though not dispositive, evidence that an IEP provides educational benefit.)

In the present case, Petitioners contend that keeping Student at CES for fifth grade was not appropriate because Student had, allegedly, not progressed academically in her fourth grade year in the public school. DCPS strongly disagrees and points to what it calls “overwhelming” evidence of Student’s progress at CES. First, DCPS cites Student’s standard scores on the norm-

referenced WJ-III achievement tests, administered in January 2009 and in April-May 2010.

Student's standard scores on the WJ-III were fairly constant from 2009 to 2010, which DCPS' expert, CES SPED Coordinator, explained means that Student had progressed one academic year between the test dates. Parents' expert, Educational Consultant, agreed that if the standard score on the WJ-III stays fairly constant over time, that is a means of showing growth for any student. DCPS also cites Student's spring 2010 scores on the F&P reading test, administered in Student's fourth grade year, which indicated that Student was reading at a 4.2 grade equivalency with 94 % accuracy and satisfactory comprehension.

Next, DCPS points to Student's grades and the Teacher Comments on Student's 2009-2010 report card. The Teacher Comments, by Fourth Grade Teacher, endorse continuous progress throughout Student's fourth grade year at CES. By the end of the last (Fourth) advisory, Student's report card stated that she had "met the standard" (Proficient) for Mathematics, Science, Social Studies, Art, and Music, and "approached the standard" (Basic) in Reading/Language Arts. For the last advisory, Fourth Grade Teacher reported in Teacher Comments, that Student had made "great academic progress in all subjects" during the school year, citing specific, detailed markers of growth in reading, writing, math and social studies. Fourth Grade Teacher testified at the due process hearing that Student did very well in her fourth grade class and that, by the end of the school year, she was working at a fourth grade level and had made adequate progress. She stated that Student was ready to be promoted to fifth grade.

Finally DCPS cites Student's IEP progress reports, prepared by Special Education Teacher, which DCPS contends show reasonable progress. Student was reported, as of January 29, 2010, as "Progressing" or "Mastered" on all of her May 13, 2009 IEP goals, except for goals which had not been, or had just been, introduced. (Student's subsequent April 15, 2010 IEP

progress report is based on an updated set of goals from the April 12, 2010 IEP and sheds no further light on Student's progress under the May 13, 2009 IEP.) Special Education Teacher testified at the due process hearing that Student was able to make good progress in the general education classroom at CES and that she saw Student make progress in reading, spelling, writing and mathematics.

The Petitioners argue that the "real, hard" data refute DCPS' claims that Student was progressing over the 2009-2010 school year. They cite the CES teachers' December 18, 2009 evaluations, provided when Student applied to Nonpublic School. On these evaluations, Fourth Grade Teacher and Special Education Teacher indicated that Student's "specific grade levels" were 3<sup>rd</sup> for math, late 2<sup>nd</sup> to 3<sup>rd</sup> for reading and 1<sup>st</sup> to 2<sup>nd</sup> for spelling. I find that these evaluations, a "snapshot" of Student's mid-year achievement levels, do not negate the testimony of both teachers that Student had progressed academically over the school year. Petitioners also cite the Current Levels of Function reported in Nonpublic School's October 26, 2010 IEP which report that Student's instructional levels were 2-3 to 3 in Math, Reading and Written Language. These reported instructional levels were based upon assessment standards used by Nonpublic School. Because Student had not been previously evaluated, using the same assessment standards, the data does not inform as to whether Student made academic progress at CES over the prior school year.

The Petitioners discount Student's fourth grade IEP progress reports because the reports show Student "mastered" two goals in the first Reporting Period, with no additional goals mastered by the end of the second Reporting Period. However, the reports indicate that Student continued "progressing" on most goals. Petitioners proffer no reason to infer, from the lack of

additional goals mastered between the first and second Reporting Periods, that Student was not still making satisfactory academic progress.

Petitioners also argue that Student regressed from third to fourth grade because her report card “grades” were higher in third grade. At the end of third grade, Student earned “Proficient” ratings in four subjects and “Advanced” in three subjects. At the end of fourth grade, she was graded “Basic” in Reading/Language Arts, Proficient in five subject areas and Advanced in Health/Physical Education. Assuming that comparing “grades” between two school years, when Student was instructed by different teachers and was learning different material, is a valid exercise, I find the fact that Student attained fewer Advanced marks in fourth grade does not establish that she did not still make academic progress during the school year – especially when the teacher’s comments on the same report card affirm that Student made “great academic progress in all subjects.”

Parents’ expert, Educational Consultant, opined that Student was not making appropriate progress during her fourth grade year at CES. I discount her opinion for several reasons. First, Parents only retained Educational Consultant after Student had been enrolled at Nonpublic School for several months. Educational Consultant did not have an opportunity to observe Student at CMS. Neither did she speak with Student’s regular education or special education teachers at CES, who, presumably, had the best information on Student’s fourth grade progress. In addition, Educational Consultant agreed that the WJ-III achievement tests can be used as a means to assess growth, and, that for the most part, Student’s WJ-III standard scores stayed well within the standard deviation of the WJ-III mean, showing growth in the specific skills measured.

I find, as DCPS argues, that the evidence in this case establishes, convincingly, that Student did make academic progress in her fourth grade year at CES. As noted above, academic progress is strong, but not dispositive, evidence that an IEP provides educational benefit. *See Schoenbach, supra*, 309 F.Supp.2d at 80-81 (considering the student's academic progress, as well as her social-emotional, organizational, interpersonal social, coping, and attending skills). Mother testified at the due process hearing that during Student's fourth grade year at CES, Student struggled at school and that at home, Student was an "emotional wreck." every night. However, in her May 2010 interview with the Nonpublic School S/L pathologist (when Student was still attending CES), Mother reported that Student made friends easily and liked school. Mother stated then that although Student had fluctuating moods, she had a happy disposition. Mother's testimony characterization of Student's fourth grade emotional state is also at odds with Regular Education Teacher's testimony that at CES, student was very social, got along well with nondisabled peers, and was part of a nice group of students who were "good, solid partners."

On this evidence, I find that Student did make academic progress under her May 13, 2009 IEP at CES and that there are not other factors proved, which would show that the IEP did not provide educational benefit. Under DCPS' proposed June 7, 2010 IEP, the CES IEP team proposed to maintain Student's Specialized Instruction services outside the general education setting, to increase services inside general education and to add substantial new S/L pathology services. To establish entitlement to reimbursement for their unilateral placement of Student at Nonpublic School for the 2010-2011 school year, it was Petitioners' burden to prove that DCPS' June 7, 2010 IEP, which continued and increased the services in Student's successful 2009 IEP, was not reasonably calculated to provide some educational benefit to Student. I find that

Petitioners have not met that burden of proof. Because I find that DCPS' placement of Student at CES under the June 7, 2010 IEP was appropriate for the 2010-2011 school year, there is no need to analyze whether the Parents' unilateral private school placement was proper. *See Anderson, supra*, 606 F.Supp.2d at 90. Petitioners are not entitled to reimbursement.

2. WAS STUDENT DENIED A FAPE BY DCPS' 2011-2012 IEP BECAUSE THE IEP PROVIDED INSUFFICIENT HOURS OF SPECIALIZED INSTRUCTION AND RELATED SERVICES, AND BECAUSE STUDENT REQUIRED A FULL-TIME, OUTSIDE OF GENERAL EDUCATION, PLACEMENT?

I have found in the foregoing section that DCPS made FAPE available to Student at CES for the 2010-2011 school year. DCPS is not required to pay for the education costs of a child at a private school, if the agency made FAPE available to the child and the parents elected to place the child in a private school. *See* 34 CFR § 300.148(a). Under U.S. Department of Education regulations, no parentally-placed private school child with a disability has an individual right to special education and related services. *See* OSEP Memorandum 00-14, 34 IDELR 263, Question 22 (OSEP 2000). Therefore, there is no requirement that a local education agency develop an IEP for parentally-placed private school children. *See Id.*, Question 30. In the present case, however, DCPS volunteered to conduct an annual review of Student's June 7, 2010 IEP, which services the Parents had refused, and to develop a new IEP for the 2011-2012 school year.

On June 1, 2011, DCPS convened an IEP meeting at Nonpublic School to develop an IEP for Student to attend CMS for the 2011-2012 school year. The June 1, 2011 IEP team members adopted the annual goals and present levels of performance, drafted by the staff at Nonpublic School, in its May 19, 2011 IEP. The Nonpublic School representatives on the IEP team maintained that Student required a full time special education program, as provided by the private school, to master these annual goals. The DCPS members of the IEP team insisted that Student could continue to make good academic progress with special education services similar

to those provided at CES staff during the 2009-2010 school year and determined to provide only a general education placement, with pull-out services. The Parents refused DCPS' proposed public school IEP and filed a due process complaint against DCPS.<sup>4</sup>

In light of my finding that DCPS made FAPE available to Student at CES for the 2010-2011 school year and because DCPS was not required to reimburse Parents for their placement of Student at Nonpublic School for that school year, it follows that DCPS was not required to provide FAPE to Student for the 2011-2012 school year, or to develop an IEP for her unless Parents elected to re-enroll her in a DCPS school. Notwithstanding, I find that DCPS' June 1, 2011 IEP did not violate the IDEA. As with DCPS' proposed June 7, 2010 IEP, the June 1, 2011 IEP continued all of the services provided to Student in the successful May 13, 2009 IEP. Further, the IEP would have increased Specialized Instruction services, outside of the general education setting, by 90 minutes per week (a 100 % increase), increased Specialized Instruction inside general education by 225 minutes per week (a 167 % increase) and added 120 minutes per week of S/L services. The Petitioners have not shown that this level of Specialized Instruction and Related Services was not reasonably calculated to provide some educational benefit to Student. *See, Rowley, supra*, 458 U.S. 176 at 201.

#### Summary

In summary, I have found that DCPS' proposed placement of Student at CES for the 2010-2011 school year and at CMS for the 2011-2012 school year did not violate the IDEA. DCPS' proposed June 7 2010 IEP and June 1, 2011 IEP were reasonably calculated to provide educational benefit to Student. Accordingly, DCPS is not required to reimburse Parents for their unilateral placement of Student at Nonpublic School.

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<sup>4</sup> Parents withdrew this due process complaint on October 14, 2011 and filed their present complaint on December 9, 2011. *See* footnote 3, above.

**ORDER**

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

– All relief requested by Petitioners herein is denied.

Date: March 3, 2012

s/ Peter B. Vaden  
Peter B. Vaden, Hearing Officer

**NOTICE OF RIGHT TO APPEAL**

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