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

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

Through

Petitioner,

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

Date Issued: December 20, 2010

Hearing Officer: Kimm Massey, Esq.

Case No:

Hearing Dates: December 9 and 10, 2010

Room: 2004

HEARING OFFICER DETERMINATION

BACKGROUND

Student is a year-old girl, who attends a full-time private school located outside of the District of Columbia, where she was unilaterally placed by Parents in the second semester of school year ("SY") 2009/10.

On October 7, 2010, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS failed to provide Student with a FAPE for all or part of SY 2009/10, failed to provide an alternative to Student's then existing placement for the second semester of SY 2009/10, failed to issue a timely Prior Notice at the January 15, 2010 meeting, and failed to properly monitor Student at her DCPS-funded private placement during SY 2009/10. Petitioner also raised the issues of whether Student received educational benefit at her unilateral placement from January 24, 2010 through the end of SY 2009/10, whether Parents' unilateral placement was proper under IDEA, and whether Parents are entitled to reimbursement for Student's tuition and transportation costs for the unilateral placement from January 2010 through the end of SY 2009/10.

On October 15, 2010, DCPS filed a Due Process Complaint Disposition form, which had been signed by both parties and indicated that the parties had failed to reach an agreement regarding the Complaint and wished to proceed to a due process hearing. As a result, the resolution period for this case ended on October 15, 2010, and the 45-day timeline was reset to run from October 16, 2010 through November 29, 2010.

On October 19, 2010, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. DCPS had not filed a Response but represented that it would do so by midnight of October 19th. With respect to the claims asserted, the hearing officer noted that she planned to pay close attention to the evidence concerning whether Parents timely notified DCPS of their dissatisfaction with the DCPS-funded private school, and that various issues would be merged for purposes of analysis and conclusions in the instant HOD given the interrelatedness and overlap of the issues. The hearing officer also pointed out that Petitioner's claims concerning the unilateral placement were conditionally relevant, in that a denial of FAPE would have to be proven before those claims became relevant; however, as a practical matter, Petitioner would be allowed to present evidence concerning all claims at the due process hearings. Finally, upon discussing dates and times for the due process hearing, it became clear that although the hearing officer and DCPS were available on November 9 and 12, which would have been well within the new 45-day timeline, Petitioner was unwilling to move forward on those dates due to the unavailability of Petitioner's key witness. Ultimately, it was determined that the parties and the hearing officer were available on December 7, 9 and 10, which dates were beyond the new 45-day timeline but within the original 75-day timeline for this case. Hence, Petitioner requested, and the hearing officer granted, permission to file a continuance motion to extend the timeline back out to the original 75-day timeline so that the hearings could be held in December. The hearing officer issued a Prehearing Order on October 19, 2010.

On October 19, 2010, prior to the midnight deadline, DCPS filed its Response. In its Response, DCPS primarily asserted that 1) it had developed appropriate IEPs and placement for Student and reviewed and revised the IEPs appropriately, and the DCPS-funded private placement indicated that it had implemented the IEP and had never indicated that it could no longer provide an appropriate placement for Student, 2) it had at all times complied with the obligation to monitor students placed at the private placement at issue, 3) it provided notice to Parent and Petitioner's counsel that it would not reimburse Parents for the unilateral placement, so any alleged harm from not providing proper notice of the refusal to reimburse was *de minimis*, 4) it has sole discretion to choose the educational site for students, all parties agreed at the most recent IEP meeting that the placement and site were appropriate, the site did not indicate that it could no longer provide an appropriate education to Student, and in any event, Petitioner can be denied reimbursement for failure to provide appropriate notice of educational issues that may have required the attention of the IEP team and/or failure to provide a reasonable time for DCPS to investigate and evaluate the issues. DCPS further asserted that it made an alternative placement in a private school's autism program available to Student, but Parents declined the program.¹

On October 20, 2010, Petitioner filed its Unopposed Motion for Continuance. The hearing officer granted the Motion by an Interim Order on Continuance Motion, which was signed by the hearing officer on October 26, 2010, and by the chief hearing officer on October 27, 2010.

¹ In fairness, the hearing officer notes Petitioner's position that the alternative placement may have been offered by DCPS during SY 2009/10 but was not actually available for Student to attend until SY 2010/11.

By their respective disclosure letters dated December 2, 2010, Petitioner disclosed twenty-four documents (Petitioner's Exhibits 1 through 24), including three documents with subsections (Petitioner's Exhibits 2a-b, 22a-c, and 23a-c), and DCPS disclosed three documents (DCPS-1 through DCPS-3).

The hearing officer convened the initial due process hearing on December 9, 2010.² Petitioner's Exhibits 1 - 16 and 24 were admitted into the record without objection, Petitioner's Exhibit 18 was excluded for lack of clear relevance to SY 2009/10, and the hearing officer conditionally overruled DCPS's objection to Petitioner's Exhibits 17 and 19 - 23 as hearsay and on grounds of relevance but agreed to weigh the documents in accordance with DCPS's objection to the extent appropriate. DCPS did not offer DCPS-1 for admission to the record. Instead, DCPS offered only DCPS-2, which consisted of pages numbered 336 through 479, and DCPS-3 consisting of an expert's CV. Petitioner objected to DCPS-2 on the ground that it contained extensive documentation concerning SY 2008/09, but the hearing officer admitted the documents into the record over objection and agreed to weight the documents in accordance with the objection to the extent appropriate. Petitioner was also granted permission to include in the administrative record a sealed document, which the hearing officer labeled "Excluded P-25" and included in the binder containing Petitioner's Exhibits. The excluded exhibit contained a proffer of the testimony from a desired witness from the DCPS-funded previous prior placement who, according to Petitioner's counsel, unexpectedly refused to testify on the eve of trial. The exhibit will not be taken into account by the hearing officer in this matter, and was included only for purposes of preserving the testimony for purposes of appeal.

Once Petitioner presented its opening statement and DCPS reserved its opening statement until the start of its case, Petitioner presented the testimony of all of its witnesses and rested its case. Thereafter, DCPS made a motion for a directed finding, asserting that Petitioner had failed to demonstrate that the DCPS-funded previous private placement was not implementing Student's IEP. The hearing officer received argument from both counsel but ultimately denied the motion, on the ground that the evidence Petitioner presented was sufficient to raise a question concerning DCPS's provision of a FAPE, which entails more than the implementation of the IEP. The hearing then adjourned the hearing until the next day.

The hearing officer reconvened the due process hearing on December 10, 2010. DCPS presented the testimony of all of its desired witnesses, with the exception of one witness whose testimony the hearing officer excluded on Petitioner's objection because the witness did not have access to the parties' disclosures. Moreover, as the witness was from the alternative private placement DCPS made available to Student for SY 2010/11, and there was no dispute that the placement was not made available until SY 2010/11, the hearing officer determined that the relevance of the desired witness's testimony was limited at best. After DCPS rested its case, the hearing officer received closing statements and concluded the hearing.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEIA"), 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.").

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

ISSUES

The issues to be determined are as follows:

1. Did DCPS fail to provide Student a FAPE during SY 2009/10 by failing to provide an appropriate placement, failing to monitor Student at her DCPS-funded private placement, failing to provide an alternative placement for the second semester of SY 2009/10, and/or failing to issue a timely Prior Notice at the January 15, 2010 meeting?
2. If so, did Student receive educational benefit at Parents' unilateral placement from January 24, 2010 through the end of SY 2009/10, was the unilateral placement proper under IDEIA, and were the actions taken by Parents reasonable, such that Parents are entitled to reimbursement for the tuition and transportation costs they incurred for the unilateral placement from January 24, 2010 through the end of SY 2009/10?

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 is a ten-year old girl, who has been diagnosed with Asperger's syndrome since she was 3½ years old. At present, Student is taking a variety of medications, including Concerta and Ritalin to address her ADHD symptoms, Prozac for mood stabilization, Zertec for allergies, Melatonin to help with sleep, and an additional medication intended to help Student stop biting her hands and picking at her skin. Student's most recent Cognitive Evaluation, which was conducted on March 6, 2008 and consisted of the administration of the Wechsler Intelligence Scale for Children – Fourth Edition, indicates that Student received a Full Scale IQ score of 126, which falls within the Superior Range, as well as scores in the Superior Range on the Perceptual Reasoning and Processing Speed indices. Student's scores on the Verbal Comprehension and Working Memory indices were in the High Average Range. The administrative record does not contain recent psychological, clinical or social/emotional testing for Student. However, one of the main effects of Student's Asperger's syndrome is that she has deficits in social learning, problems with social judgment, and is lacking in social skills.³
2. By a Hearing Officer's Determination ("HOD") dated June 1, 2007, Parents were awarded reimbursement for Student's tuition and related services for SY 2006/07, and Student was awarded "'stay put' protections," at a full-time private special education school in the District of Columbia. Hence, Parents were aware that DCPS was funding Student's education at the private school.^{4,5}

³ Testimony of Mother; testimony of educational consultant; Petitioner's Exhibit 6.

⁴ Parents also were awarded reimbursement for Student's tuition and related services at another educational institution for SY 2005-2006.

3. Moving forward, DCPS continued to fund Student's placement at the private school Student had attended during SY 2006/07. Parents were pleased with Student's progress at the school for the first two years, SY 2006/07 and SY 2007/08. At the start of SY 2008/09, however, Student was placed in the school's gifted and talented program in a different classroom with a different teacher, which resulted in a number of issues for Student from Parents' perspective. For example, Parents were concerned that Student's classroom was much too small, the teacher's speech was chaotic and constantly off-topic, Student brought home little to no homework which prevented Parents from keeping track of her progress, and the teacher often lost her temper and yelled at the students. Parents met with the Head of School three times during SY 2008/09. Student's class was moved to a larger room in January 2009, which resulted in some improvement. Moreover, when Parents met with the Head of School at the end of SY 2008/09 and requested a different teacher for the next school year, the Head of School assured parents that Student would obtain a better result in the coming school year.⁶
4. Thereafter, Parents attended Student's IEP meeting near the end of SY 2008/09 and agreed with Student's goals and objectives, as well as Student's continued placement at the DCPS-funded private school for SY 2009/10. Parents' did not discuss their concerns about Student's teacher during SY 2008/09 because the teacher was present at the meeting. In any event, DCPS was not present at the meeting and had not attended the meeting held during the previous school year either. In fact, DCPS had not attended any of Student's IEP meetings at the DCPS-funded private school except for the very first meeting where the educational placement at the school was established. Moreover, once Student was placed at the DCPS-funded private school, Parents never spoke to by phone or dealt with anyone from DCPS again. Instead, they dealt directly with the private school.⁷
5. Student's most recent educational plan, which is dated May 21, 2009, lists her disability as Autism and provides for her to receive 27.25 hours per week of specialized instruction, 75 minutes per week of speech and language services, 90 minutes per week of psychological services, and 60 minutes per week of occupational therapy services, for a total of 30 hours per week of specialized instruction and related services in a special education environment. Student's IEP contains goals and objectives in academic and related services areas, as well as numerous goals and objectives in the areas of classroom adaptation, speech and language/pragmatic language, social-emotional, and sensory processing to address her deficient social skills and problems self-regulating.⁸
6. At Student's May 21, 2009 IEP meeting, Mother signed a Receipt indicating that she had received a Procedural Manual for Parents from the Associate Head of School for the DCPS-funded private school.⁹

⁵ Petitioner's Exhibit 5; testimony of Parents.

⁶ Testimony of Mother.

⁷ Testimony of Mother; Testimony of Father; *See* Petitioner's Exhibit 9.

⁸ Petitioner's Exhibit 9.

⁹ DCPS Exhibit 2, p. 421.

7. At the start of SY 2009/10, Student received a different teacher and Mother was very satisfied and hopeful that there would be a change for the better. However, Student eventually began arriving at home with pencil drawings all over her khaki pants and would only say that she was bored at school. As Student was again receiving minimal to no homework, Parents were unable to judge Student's progress in school. Moreover, on the mornings when Father went to the school, the teacher was never there, the room was chaotic with only the assistant teacher present, and the assistant teacher did not do a good job of controlling the room.¹⁰
8. Based on his observations and knowledge of the DCPS-funded private school, Father felt the school was dysfunctional as an organization and saw no hope of fixing it. There was no headmaster, a temporary head of lower school, low teacher morale because the teachers had been asked to work without pay for some time, and parental involvement had decreased. The Board of Trustees was running the school.¹¹
9. Throughout this entire period during SY 2008/09 and the beginning of SY 2009/10, the DCPS-funded private school was issuing Progress Reports indicating that Student was making satisfactory progress. Hence, Student's Semester 1 Report for SY 2008/09 indicates that Student had either "Mastered" or was "Developing" all of the skills being taught in all of her subjects, including Classroom Function/Social Development, with the exception of Mathematics, where Student's skills in line plots, line graphs, and frequency tables; fractions, mixed numbers and decimals; algebraic expressions; and several other substantive areas were "Emergent;" and Physical Education, where Student's ability to analyze the effects of physical activity on the body system was "Emergent."
Student's Semester 2 Report for SY 2008/09 indicates that Student had either "Mastered" or was "Developing" all of the skills being taught in all of her subjects, including the areas of Classroom Function/Social Development.
Student's First Semester Report for SY 2009/10, dated January 27, 2010, indicates, *inter alia*, that Student made progress in Math while maintaining computation skills previously learned and excelled in the geometry unit; made "incredible progress" in Language Arts; was an eager participant in Science and brought her own background knowledge to class, which she shared with her classmates; was an "excellent student" in Social Studies; was functioning well overall in the classroom; was evolving into an "amazing, self-directed artist" in Art; and generally enjoyed Physical Education and always showed great enthusiasm, although she sometimes withdrew herself from an activity when she became frustrated.¹²
10. Similarly, Student's IEP Quarterly Updates for Quarter 4 of SY 2008/09 through Quarter 2 of SY 2009/10 indicate that Student generally was making consistent progress towards her IEP goals, although Student was making inconsistent progress on some skills, and was working toward mastery or had mastered other skills.¹³

¹⁰ Testimony of Mother; testimony of Father.

¹¹ Testimony of Father.

¹² DCPS Exhibit 2, pp. 353 - 386.

¹³ Petitioner's Exhibit 12; DCPS Exhibit 2, pp. 387 - 394.

11. Student's educational consultant conducted an observation of Student at the DCPS-funded private school on November 20, 2009. The consultant has been working with Student since Student was 4 years old and has observed Student in school 14 times over the years. The consultant observed Student at least once, and sometimes more, during each of the four years Student has attended the DCPS-funded private school.

The consultant's November 20, 2009 observation of Student lasted for approximately two hours. During that time, the consultant observed Student in the hall putting her items away. At the time, there were a lot of disruptions in the classroom, as a number of the students were having problems. Although both the teacher and the teacher's assistant were in the classroom, no instruction was being presented and the teacher was primarily trying to manage the students who were having problems. Student did her morning work, as instructed; however, after the morning work, the teacher did not give the class any specific direction. The teacher ultimately left to take one of the problem students to the OT room. Once the teacher left, the assistant gave the remaining students gum and candy as reinforcement for completing the morning work but did not provide the students with any instruction. Student moved to the back of the room, where she curled up in a corner with a book. She was clearly anxious and chewing on her nails. Student eventually returned to her desk.

The teacher returned to the room after approximately one-half hour, but then she was in and out of the room dealing with the problem behaviors of other students. Student appeared to be highly anxious during this time, as she was using scissors with pressure to try to cut a pencil, rubbing the sharp end of the scissors against the edge of the desk to cut the desk, and drawing on her clothes.

During the 2-hour observation, the consultant did not observe Student interacting with the other students until the last 15 minutes, when the teacher came back into the room and began teaching about Aesop's fables, which required the students to pair up. The consultant also did not observe Student using any of her verbal strategies during the observation.

The consultant was very worried about Student's emotional well-being as a result of what she saw during the observation, especially since Student's IEP contains many goals concerning cooperating, playing and interacting with her peers. The consultant felt that Student's situation was "critical." Based on the observation, the consultant advised Parents to remove Student from the DCPS-funded private school.¹⁴

12. Mother was very shocked by the educational consultant's report based on the November 20, 2009 observation, even though Mother knew that one of the children in the class was explosive. Mother felt that she should have been made aware of the pencil and desk cutting before she heard it from the educational consultant. The educational consultant initially recommended removing Student from the DCPS-funded private school, even if she had to be home schooled. Ultimately, however, the educational consultant recommended another full-time private special education school for Student. Parents went to an Open House at the new school in early December and subsequently began the application process for Student.¹⁵

¹⁴ Testimony of educational consultant.

¹⁵ Testimony of Mother.

13. On or about December 9, 2009, the educational consultant met with the lower school counselor from the DCPS-funded private school, and the counselor acknowledged that there were concerns about Student's class, that the grouping of students in the class was not the best for Student, and that the student the teacher took to the OT room during the consultant's observation was having a hard time and creating a lot of disruption in the class. The option of moving Student to another classroom with 11 students, who were not as bright or intelligent as Student, was discussed, but neither the counselor nor the consultant felt that would be a good idea. The consultant was of the opinion that Student needed to have a curriculum geared to gifted children, which she would not have received if she were moved to the other classroom.

Based on the 2-hour observation and the consultant's discussion with the lower school counselor at the DCPS-funded private school, the consultant formed the opinions that Student was not benefiting from her educational placement at the school during Fall 2009, that Student was regressing, and that Student's situation at the school was harmful to her from a social/emotional perspective.¹⁶

14. Mother also had a face-to-face discussion with the lower school counselor, who apparently by then was the Acting Head of the Lower School. This individual understood and validated Mother's concern and could only offer the possibility of a transfer for Student to the other class with 11 students, where Student would be held back academically. However, the Acting Head of the Lower School did not think the other class would be best for Student and did not wholeheartedly recommend the other class. The Acting Head of the Lower School actually thought it would have been best to keep Student academically stimulated and get the behavioral problems in Student's then existing class under control, but there were no real solutions for that. After the conversation with the Acting Head of the Lower School, Parent did not have any further conversations with anyone else at the DCPS-funded private school until she sent a January 12, 2010 letter to the school indicating Parents' intent to withdraw Student and enroll her at another full-time private special education school.¹⁷

15. The consultant was aware that there were LEA representatives. The consultant also was aware that the LEA – that is, DCPS, needed to be made aware of Student's issues at the DCPS-funded private school. However, the consultant was of the opinion that the DCPS-funded private school should have advised DCPS of the situation, or Parents should have instructed their attorney to advise DCPS of the situation. Although the consultant felt the LEA should have been involved with Parents in finding a new placement for Student, the consultant began discussing a new placement with Parents shortly after the November 20, 2010 observation. DCPS was not involved in the discussions. The consultant was aware that the new placement she had identified for Student was not an accredited program; however, she was not aware of whether or not the school had a Certificate of Approval from OSSE.

Moreover, although the consultant has in the past advised other parents to request another IEP meeting, the consultant did not advise Parents to request another IEP

¹⁶ Testimony of educational consultant.

¹⁷ Testimony of Mother; see Petitioner's Exhibit 14.

meeting. Similarly, although the consultant is of the opinion that a “critical” situation is an IEP problem, neither she nor Parents requested an IEP meeting.¹⁸

16. Parents also continued to be represented by the attorney who successfully represented them in their 2007 administrative action against DCPS during the period of time at issue in this action. They spoke with the attorney in May 2009 and then spoke with her again in December 2009.¹⁹ Ultimately, that same attorney initiated the instant action on Parent’s behalf.

17. Parents did not advise DCPS of their dissatisfaction with Student’s program at the DCPS-funded private school until December 28, 2009, when they sent a letter to the DCPS Deputy Chancellor for Special Education. In the letter, Parents provided a detailed explanation of the perceived problems concerning Student, stated that they had been exploring alternatives and planned to enroll Student at another full-time private special education school at DCPS expense, pending her acceptance, no sooner than 10 business days from the date of the letter, and offered to meet with DCPS to learn what options DCPS could offer if their chosen school was not acceptable to DCPS.

In sending the letter, Parents were relying upon the Procedural Manual for Parents that mother received at every IEP meeting she attended for Student. Specifically, Parents relied upon a section of the Manuals, which instructs parents to give the LEA notice of their intent to remove their child to a private school by either rejecting the LEA’s offer of FAPE at the last IEP meeting prior to removing the child, or by giving the LEA written notice of any concerns 10 business days before removing the child.²⁰

18. The DCPS Compliance Case Manager #1 contacted Parents in January 2010, said he had received Parents’ December 28, 2009 letter, and asked to have a meeting. The meeting was scheduled for January 15, 2010 at the DCPS-funded private school. At the time of the telephone conversation, Parents had not yet removed Student from the school; however, Parents removed Student from the school on January 14, 2010, the day before the scheduled meeting with DCPS, and placed her in the school Parents identified in their December 28, 2010 letter to DCPS.

The attendees at the January 15th meeting included the Compliance Case Manager #1, Petitioner’s counsel, Parents, and the Associate Head of School at the DCPS-funded private school and the LEA representative, both of whom attended by phone. The parties present discussed Parents’ concerns about the DCPS-funded school and DCPS offered certain options to address the concerns, but there was no resolution of the matter. DCPS explicitly stated that it would not fund the unilateral placement chosen by Parents because the school has no Certificate of Approval from OSSE and the school does not accept publicly funded Students. Moreover, the DCPS-funded private school and the LEA representative indicated that Student was making progress. Indeed, the DCPS-funded public school felt that it could continue implementing the IEP and wanted to continue working with Student. However, Parents stated that they planned to keep Student at their unilateral placement.

¹⁸ Testimony of consultant.

¹⁹ Testimony of Mother.

²⁰ Testimony of Mother; Petitioner’s Exhibit 13; *see, e.g.*, Petitioner’s Exhibit 2b, p. 16.

DCPS was of the opinion that the DCPS-funded private school continued to be an appropriate location of services, and the LEA representative/Program Manager for Nonpublics defended the school fairly vigorously. Nevertheless, DCPS made a good faith effort to find another placement for Student and ultimately settled on one particular private school within the District, which offered an Asperger's program, because that was the school Parents seemed to want. Although DCPS seemed to be of the opinion that Student could attend the school immediately, DCPS instructed Parents to begin the application process, which ultimately proved to be quite a long process.²¹

19. DCPS would have preferred to learn of Parents' concerns about Student while she was still attending the DCPS-funded private school so that DCPS could have offered additional assistance to Student, such as leveraging tutors, providing additional support services for academics, and funding a girls group to address social skills issues. Indeed, DCPS stated this position to Parents at the January 15, 2010 meeting.²²
20. Parents began the application process at the DCPS-recommended private school with the Asperger's Program in January 2010, and by way of an acceptance letter issued on April 22, 2010, the school offered Student an acceptance that was to begin on July 6, 2010. DCPS never spoke with the school about admitting Student prior to her completion of the admissions process. Indeed, when DCPS initially spoke with the school, the school indicated that it did not have a space available for Student for the second semester of SY 2009/10 but would let DCPS know if an opening arose.²³
21. Parents decided to reject the placement at the DCPS-recommended school, but they never notified DCPS of their decision because the DCPS Compliance Case Manager #1 never asked them to inform him of their decision. Moreover, between the January 15, 2010 meeting and June 22, 2010, when the Compliance Case Manager #1 sent an email regarding Student to Petitioner's counsel, Mother's only communication with DCPS was her January 25, 2010 email to the Compliance Case Manager #1.²⁴
22. On July 2, 2010, the DCPS Compliance Case Manager #1 sent Petitioner's counsel an email stating that DCPS would fund Student at the DCPS-recommended private school with the Asperger's program. DCPS intended this email to serve as its Prior Written Notice to Parents.²⁵
23. Some of the things an LEA does to fulfill its responsibility to monitor nonpublic placements for special education students include participating in IEP meetings, conducting observations, keeping in touch with the nonpublic school, and communicating with Parents.²⁶

²¹ Testimony of Mother; Testimony of DCPS Compliance Case Manager #1.

²² Testimony of Compliance Case Manager #1.

²³ Testimony of Mother; Petitioner's Exhibit 15, p. 2; Petitioner's Exhibit 16; testimony of Compliance Case Manager #1.

²⁴ Testimony of Mother.

²⁵ Testimony of the Compliance Case Manager #1.

²⁶ Testimony of the Compliance Case Manager #1.

24. Student has had a very positive experience at the private school where Parents unilaterally placed her. Mother receives detailed weekly updates from the teachers at the unilateral placement. Moreover, the educational consultant observed Student at the unilateral placement in May 2010 and found that Student was well integrated into the school. Parents paid a total of _____ in tuition and fees for Student to attend the unilateral placement from January 14, 2010 through June 2010. Moreover, either Parents or their babysitter drove Student to and from school. A one-way trip to or from the school is 19 miles, which calculated at the rate of _____ cents per mile for two one-way trips to and/or from the school on 90 days of attendance equals _____ although Parents have requested _____ for two round trips to take Student to and from the unilateral placement each school day.²⁷

25. The unilateral placement is a full-time private school located outside of the District of Columbia that first opened in Fall 2009. The school has no accreditation or licensing. The focus at the school is on embedding social pragmatic skills into the school day and providing high academic rigor and interesting experiences through electives. The school tries to help its students learn social skills in the school setting and then generalize those skills throughout life. The school also tries to help its students develop self-regulation skills. The school has a part-time occupational therapist and a part-time speech/language therapist, who work with the entire class. The school also has a full-time board-certified behavior analyst, who works with teachers to develop proactive positive plans and spends time in class so the as to provide consultation to the teachers.²⁸

26. During the second semester of SY 2009/10, Student's class at the unilateral placement contained 9 students, 2 full-time teachers and a classroom assistant who was in the class for most of the day. Moreover, the speech/language therapist, occupational therapist, and behavior analyst would also come into the class throughout the week. Both of the teachers have an undergraduate and a graduate degree, but one of the teachers is not certified, while the other teacher is certified in Connecticut and New York but not locally.

Student was taught math, literacy, science, social studies, social skills, art, music, karate and physical education during second semester of SY 2009/10. Student and her classmates were placed into groupings of 2 to 4 children for instruction, and as a 4th grader, Student was grouped with the more academically advanced students. The school staff developed individual programs for each child in light of Virginia standards of learning.

When Student first began attending the unilateral placement in January 2010, she exhibited extreme introvertedness, self-isolation, and an inability to handle frustrating situations. She would often self-isolate without being verbal and try to find a book to read. By the end of the semester, however, Student was taking very few breaks during the day and she was able to complete her work and do very well on the work. She never intentionally drew on her clothes at the unilateral placement.²⁹

²⁷ Testimony of Parent; testimony of educational consultant; Petitioner's Exhibits 20 and 21; *see also*, Complaint at attached page 4.

²⁸ Testimony of unilateral placement's Head of School.

²⁹ Testimony of teacher at unilateral placement.

27. Student's Quarterly Progress Reports from the unilateral placement for the period extending from January 14, 2010 through the end of SY 2009/10 reveal that Student primarily earned grades of "S" for satisfactory in all areas of focus in Language Arts, Math, Social Studies, Science, and Social Skills; and she primarily earned grades of "O" for outstanding in her electives consisting of art, karate, music, and physical education.³⁰

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:

1. Alleged Denial of FAPE During SY 2009/10

IDEIA defines a FAPE to mean special education and related services that (a) are provided at public expense, under public supervision and direction, and without charge; (b) meet the standards of the SEA; (c) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) are provided in conformity with an IEP that meets the requirements of 34 C.F.R. §§ 300.320 through 300.324. 34 C.F.R. § 300.17. An LEA satisfies its obligation to provide a child with a disability with a FAPE by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction, and the personalized instruction provided should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley*, 458 U.S. 176 (1982).

Furthermore, a public agency must provide written notice that meets the requirements of 34 C.F.R. § 300.503(b) to the parents of a child with a disability a reasonable time before the public agency proposes to or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. 34 C.F.R. § 300.503(a). The notice must include, *inter alia*, a description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, a description of the other options the IEP team considered and why those options were rejected, and a description of other factors that are relevant to the agency's proposal or refusal. 34 C.F.R. § 300.503(b).

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. 34 C.F.R. § 300.513(a)(1). In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2).

In the instant case, Petitioner has alleged that DCPS failed to provide Student a FAPE during SY 2009/10 by failing to provide an appropriate placement for Student, failing to monitor Student at her DCPS-funded private placement, failing to provide an alternative placement for Student for the second semester of SY 2009/10, and failing to issue a timely Prior Notice to Parents at the

³⁰ Petitioner's Exhibits 22a, 22b, and 22c.

January 15, 2010 meeting DCPS convened for Student. However, DCPS's alleged failure to provide an alternative placement and to issue a timely Prior Notice for Student only become relevant upon a finding that DCPS denied Student a FAPE by failing to provide an appropriate placement for and monitor Student. Hence, the two sets of issues will be addressed in turn.

a. Appropriateness of Placement and Alleged Failure to Monitor

With respect to placement, Petitioner maintains that DCPS failed to provide an appropriate placement for Student during SY 2009/10 because the DCPS-funded private school was not implementing Student's IEP in a manner that allowed her to participate in class and make progress towards her IEP goals and objectives targeting her deficient social skills and problems self-regulating. In support of Petitioner's claims, the evidence in this case demonstrates that several of Student's classmates at the DCPS-funded school during SY 2009/10 exhibited frequent behavior problems that resulted in disruptions in the classroom and occupied the teacher's time and attention to the extent that she was sometimes unavailable to provide instruction. Moreover, the assistant teacher was unable to control the classroom in teacher's absence, so the classroom environment was often chaotic. As a result of the frequent disruptions, chaos and lack of consistent instruction in the classroom, Student began drawing on her pants at school and engaging in self-isolating behaviors. Moreover, when Student's educational consultant conducted an observation of Student in the Fall of 2009, the consultant observed Student cutting on a pencil and on her desk with scissors. Student's self-isolating and destructive behaviors represented a regression in her social skills and ability to self-regulate, and tended to indicate that her emotional well-being was being negatively affected. Although the DCPS-funded private school issued Progress Reports indicating that Student was making satisfactory progress during SY 2009/10, the information contained in the reports was directly contradicted by the testimony of Parents and the educational consultant, who had first-hand knowledge of Student's status during SY 2009/10, and DCPS failed to provide any testimonial evidence to corroborate the information in the reports from a witness who had first-hand knowledge of Student's status during the time period at issue.

With respect to monitoring, Petitioner has alleged that DCPS failed to fulfill its obligation to monitor Student's progress at the DCPS-funded school. At the due process hearing in this case, DCPS's Compliance Case Manager #1 testified that an LEA fulfills its responsibility to monitor students in nonpublic placements by, among other things, participating in IEP meetings for the students, conducting observations of the students, keeping in touch with the nonpublic placements, and communicating with the parents of the students. However, in this case, the evidence reveals that after attending the first IEP meeting that established Student's placement at the DCPS-funded private school DCPS did not attend any more of Student's IEP meetings at the school, and that after Student was placed at the school Parents never spoke to by phone or otherwise had any interaction with anyone at DCPS again while Student was attending the school. The administrative record in this case is also devoid of any evidence that DCPS conducted any observations of Student during her tenure at the DCPS-funded private school.

Based on the evidence outlined above, the hearing officer concludes that Petitioner has met its burden of proving that DCPS denied Student a FAPE by failing to provide an appropriate placement for Student during the first semester of SY 2009/10 and failing to monitor Student at

the DCPS-funded private school during the first semester of SY 2009/10 so as to ensure that she being provided a FAPE. See 5 D.C.M.R. § 3030.3; *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005) (the party seeking relief bears the burden of proof).

b. Alleged Failure to Provide an Alternative Placement and Prior Notice

With respect to DCPS's alleged failure to provide an alternative placement for Student during the second semester of SY 2009/10, Petitioner maintains that after it provided DCPS with notice on December 28, 2010 of Parents' dissatisfaction with the DCPS-funded private placement and their intent to remove Student from the school after 10 business days, DCPS failed to provide Student with an alternative placement for the second semester of SY 2009/10. The evidence in this case demonstrates that Parents had already located and applied for Student's admission to an alternative full-time special education school by the time they notified DCPS of their dissatisfaction with the DCPS-funded private placement. Nevertheless, when DCPS requested a January 15, 2010 meeting with Parents, Parents attended the meeting. Moreover, when DCPS recommended a private school located in the District with an Asperger's program for Student, Parents dutifully began the admissions process for Student for the school. However, the evidence in this case reveals that DCPS knew at or shortly after the time it recommended the private school with the Asperger's program for Student that the school did not have a space available for Student during the second semester of SY 2009/10. In addition, when the school finally issued its letter of acceptance for Student on April 22, 2010, it was for Student to begin attending the school's Asperger's program beginning on July 6, 2010. Based on this uncontradicted evidence of record, the hearing officer concludes that Petitioner has met its burden of further demonstrating a denial of FAPE by DCPS due to DCPS's failure to provide Student with an alternative placement during the second semester of SY 2009/10.

With respect to DCPS's alleged failure to provide a Prior Notice during the January 15, 2010 meeting, the hearing officer notes that the administrative record for this case does not contain a Prior Written Notice explaining DCPS's refusal to change Student's educational placement. However, the evidence in this case indicates that at the January 25, 2010 meeting, the parties discussed Parents' concerns about the DCPS-funded private school, as well as DCPS's position that the school remained an appropriate placement for Student, the school's desire to continue working with Student, and other options proposed by DCPS. Moreover, DCPS explicitly informed parents that it would not fund their unilateral placement and explained exactly why it was not willing to do so. Under these circumstances, the hearing officer concludes that DCPS's failure to provide Prior Written Notice at the January 25th meeting was a procedural violation that did not rise to the level of a denial of FAPE under the standard set forth in 34 C.F.R. § 300.531(a)(2).

2. Reimbursement for Parents' Unilateral Placement

“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.” *N.G. v. District of Columbia*, 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)).

Parents who make a unilateral private placement are entitled to reimbursement where a court or hearing officer finds that the public placement violated IDEA and the private school placement is proper under the Act. See *Florence County School District 4 v. Shannon Carter*, 510 U.S. 7 (1993); 34 C.F.R. § 300.148(c). A parental placement may be found to be appropriate by a hearing officer even if it does not meet the State standards that apply to education provided by the SEA and LEAs. 34 C.F.R. § 300.148(c); *N.G. v. District of Columbia*, 556 F.Supp.2d at 38 (citing *Florence County School District 4*, 510 U.S. at 13). However, where a hearing officer finds that the actions taken by Parents in connection with the unilateral placement were unreasonable, reimbursement may be reduced or denied. 34 C.F.R. § 300.148(d)(3).

The evidence in this case reveals that Student's cognitive skills fall within the High Average to Superior ranges of cognitive abilities, but as a result of Asperger's syndrome Student has deficits in social learning, problems with social judgment, and is lacking in social skills. The evidence further reveals that the unilateral placement is a full-time private school that focuses on embedding social pragmatic skills into the school day while providing high academic rigor and interesting experiences through electives. The school tries to help its students learn social skills in the school setting and then generalize those skills throughout life, and the school also tries to help its students develop self-regulation skills. However, the school has no accreditation or licensing, and Student's teachers at the school during the second semester of SY 2009/10 were either not certified at all or not certified in the State where the school is located.

When Student first arrived at the school in January 2010, she exhibited extreme introvertedness and an inability to handle frustrating situations, and she would self-isolate often. By the end of SY 2009/10, however, Student was taking very few breaks during the day and she was able to complete her work and do very well on the work. Student appeared to be well integrated into the school when the educational consultant observed her there, and Student's Quarterly Progress Reports for the second semester of SY 2009/10 reveal that she made satisfactory progress in all academic areas and outstanding progress in her electives. Finally, Student's tuition and fees for attending the unilateral placement from January 14, 2010 through the end of SY 2009/10 amounted to \$20, 381.50, and there is no contention that Student requires a less restrictive environment than the school offers.

Upon careful consideration of the evidence of record concerning Parent's unilateral placement, as outlined above, the hearing concludes that the school is reasonably calculated to enable Student to receive educational benefits, and therefore, is proper and appropriate for Student. As

a result, Parents may be entitled to reimbursement for Student's tuition and fees for the second semester of SY 2009/10.

However, with respect to whether reimbursement will be awarded to Parents, and if so, how much, the hearing officer notes that although Parents were aware that DCPS was funding Student's education at the DCPS-funded private school, Parents failed to provide DCPS with notice of their dissatisfaction with the DCPS-funded private school until they had already located and applied for admission for Student to attend an alternative private school located outside of the District of Columbia. As a result, although DCPS held a meeting to discuss Parents' concerns about the DCPS-funded private school approximately two and one-half weeks after receiving notice of Parents' intent to remove Student from the school, Student had already been removed from the school and enrolled at Parents' unilateral placement by the time the meeting was held, which effectively deprived DCPS of an opportunity to try to resolve Parents' concerns before Student was unilaterally placed by Parents. Moreover, although Parents testified that it was their understanding based on the Procedural Manuals DCPS distributes to Parents at IEP meetings that their only obligation in this case was to give DCPS notice of their intent to unilaterally place Student 10 business days prior to making the placement, the hearing officer notes that at all times relevant to this case Parents employed an educational consultant, who was aware that there were LEA representatives for the DCPS-funded private school, knew that DCPS needed to be made aware of Student's issues at the school, understood that DCPS should have been involved in the process of finding a new placement for Student, and had in the past advised other clients to request an IEP meeting to discuss issues with DCPS. The hearing officer further notes that at all times relevant to this case, Parents continued to be represented by the attorney who successfully represented them in their 2007 administrative action against DCPS. Hence, Parents spoke with said attorney in May 2009, which is the month when Student's most recent IEP was developed, and said attorney ultimately initiated the instant action on Parents' behalf. Yet, neither Parents nor their attorney gave DCPS notice of and an opportunity to address Parents' concerns about the DCPS-funded private school until Parents had already located and applied for Student's admission to an alternative private school located outside of the District of Columbia.

Based on the undisputed evidence of record set forth above, the hearing officer concludes that Parents' failure to provide DCPS with notice of their concerns about the DCPS-funded private school in time for DCPS to address such concerns before Parents unilaterally placed Student in another private school with an intention to seek public payment for said unilateral placement was unreasonable and warrants a reduction in the amount of reimbursement to be awarded to Parents. Therefore, the hearing officer will reduce the amount of reimbursement to be awarded by 33%. In reducing the amount of reimbursement by only 33%, the hearing officer has taken into account (1) the hearing officer's previous finding that DCPS failed to provide an alternative placement for the remainder of the second semester of SY 2009/10 even after receiving notice from Parents, as well as (2) the hearing officer's observation that Parents' delay in providing notice to DCPS deprived DCPS of an opportunity to attempt to address Parents' concerns before the unilateral placement was effected.

ORDER

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

1. Petitioner is hereby awarded reimbursement in the amount of _____ which represents 67% of the tuition and fees Parents' paid for Student to attend the unilateral placement from January 14, 2010 through the end of SY 2009/10, PLUS _____ which represents 67% of the costs of two one-way trips per day to and/or from the unilateral placement when calculated at the rate of _____ per mile for 90 days of attendance, FOR A TOTAL REIMBURSEMENT AWARD OF _____

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 USC §1415(i).

Date: 12/20/2010

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