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

Student Hearing Office  
1150 5<sup>th</sup> Street, S.E.  
Washington, DC 20003

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Through

Petitioner,

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

Date Issued: September 23, 2010

Hearing Officer: Kimm Massey, Esq.

Case No:

Hearing Date: September 17, 2010

Room: 1

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**HEARING OFFICER DETERMINATION**

**BACKGROUND**

Student is a \_\_\_\_\_ year-old male. Student's current IEP, which is dated May 5, 2010, indicates that he is multiply disabled and requires him to receive 28 hours per week of specialized instruction and 2 hours per week of behavioral support services.

On August 23, 2010, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS failed to provide an appropriate placement, or indeed any placement, for Student for SY 2010/11. For all practical purposes, DCPS did not respond to the Complaint.<sup>1</sup>

On August 23, 2010, Petitioner also filed Petitioner's Motion for an Expedited Hearing, asserting that Parent had secured a slot for Student at an appropriate private school and had begun paying the tuition himself, but his savings would be exhausted after he paid Student's tuition through September 2010. DCPS did not respond to the Motion. On August 30, 2010, the hearing officer

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<sup>1</sup> DCPS did not file a Response to the Complaint until 7:40 pm on September 16, 2010, which was the evening immediately preceding the September 17, 2010 due process hearing for this case. As a result, the hearing officer held that DCPS's untimely Response and the attachments thereto, including a Prior Notice of Placement to the neighborhood school that DCPS issued on September 16th, would be excluded from the administrative record for this case on the ground that the admission of the last-minute documents would be highly prejudicial to Petitioner.

entered an Order Granting Petitioner's Motion for an Expedited Hearing, which granted Petitioner a non-discipline expedited hearing pursuant to § 1008(b) of the Student Hearing Office's Standard Operating Procedures.

On September 7, 2010, the hearing officer convened a prehearing conference and attempted to lead the parties through a discussion of the issues, defenses, relief sought, and related matters. Counsel for DCPS represented that he had been unable to obtain any information about the case from his client, so he had secured Petitioner's counsel's permission to delay filing DCPS's Response until September 10, 2010, exactly one week prior to the expedited hearing. Given the hearing officer's inability to conduct a meaningful discussion in light of DCPS counsel's lack of information, the hearing officer brought the conference to a close. The hearing officer issued the Prehearing Order on September 10, 2010.

By their respective disclosure letters dated September 13, 2010, DCPS disclosed two documents (DCPS-1 and DCPS-2), and Petitioner disclosed on document (Petitioner's Exhibit 1).

The hearing officer convened the due process hearing on September 17, 2010.<sup>2</sup> The parties' disclosed documents were admitted into the record without objection, although Petitioner's counsel pointed out that the May 5, 2010 IEP it disclosed was much more comprehensive than the May 5, 2010 IEP included in DCPS's disclosure. DCPS's counsel conceded that his client had failed to issue a PNOP until September 16, 2010, the day before the due process hearing.<sup>3</sup> Thereafter, the hearing officer ruled (1) that DCPS's Response would be excluded from the administrative record for the reason noted in footnote 1, above, and (2) that as DCPS had failed to timely raise a defense, (i) it would be precluded from introducing evidence concerning the neighborhood school on grounds of undue prejudice and lack of timely participation in the administrative process, and (ii) it would be limited to presenting testimony going to the appropriateness of the private school Parent had chosen for Student. At the conclusion of Petitioner's case, DCPS made a motion for a default judgment on the issue of appropriate placement, contending that Petitioner had failed to prove the private school chosen by Parent is proper or appropriate for Student. The hearing officer ruled that the motion would be taken under advisement and decided in the instant HOD.

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.").

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

<sup>3</sup> DCPS's statement of conceded facts included information about options provided to Parent at a prior IEP meeting; however, for purposes of this HOD, the only relevant fact is that the PNOP was not issued until the day before the due process hearing.

## ISSUES

The issue to be determined is as follows:

1. In light of DCPS's acknowledged failure to provide a placement for Student to attend by or before the start of SY 2010/11, is Petitioner entitled to reimbursement and funding for the private school Parent has been paying for Student to attend?

## 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's current IEP, dated May 5, 2010, identifies Student as having multiple disabilities and requires Student to receive 28 hours per week of specialized instruction and 2 hours per week of behavioral support services.<sup>4</sup>
2. At Student's May 5, 2010 IEP meeting, the team noted the possibility that Student's classification would be changed from ED to LD and/or OHI. The Meeting Notes also indicate the team's acknowledgement that Student was aging out of the private school he was attending at that time with DCPS funding and would need to transition to middle school.<sup>5</sup>
3. Ultimately, Student's disability was changed on May 5, 2010 to LD and OHI (ADD). Parent declined to sign Student's May 5, 2010 IEP until a placement had been determined for Student, even though Parent agreed with the goals included in the IEP.<sup>6</sup>
4. Parent looked into 6 public schools and 8 private schools before choosing a private school for Student to attend during SY 2010/11. Parent mentioned at the May 5, 2010 IEP meeting two of the private schools he was considering for Student, including the school Student currently is attending. Among the public schools Parent considered were the several options proposed by DCPS. Parent provided DCPS with his opinion about the options DCPS had offered after he visited those schools, and then Parent waited for a response for DCPS, but DCPS failed to respond.<sup>7</sup>
5. Student applied for and was initially accepted for admission into the private school he is currently attending during the Winter/Spring of 2010. However, Parent did not enroll Student at the school until the start of SY 2010/11 after DCPS had failed to provide any school placement at all for Student.<sup>8</sup>

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<sup>4</sup> Petitioner's Exhibit 1; DCPS-2.

<sup>5</sup> DCPS-1.

<sup>6</sup> Testimony of Parent; Petitioner's Exhibit 1.

<sup>7</sup> Testimony of Parent.

<sup>8</sup> Testimony of Parent.

6. The tuition for the private school Student currently attends is approximately \$36,000 per year. To date, Parent has paid approximately \$5,000 for Student to attend the school through the end of September 2010.<sup>9</sup>
7. Parent is of the opinion that Student is doing well at the private school he has been attending since the start of SY 2010/11, even though Parent acknowledges that Student has only been attending the school for a short time. Parent has been monitoring Student's work, which Student does on his own. Moreover, at back-to-school night on September 16, 2010, Student's teachers informed Parent of their respective opinions that Student has been doing well at the school thus far.<sup>10</sup>
8. The private school Student attends services children from 5th through 12th grades, ages 10 to 20, with language-based disabilities. The school also services Students with OHI if the condition impacts learning. The focus is on literacy remediation, with the use of technology. The school offers a student/teacher ratio of no more than 8 to 1, and in reading tutorial the student/teacher ratio varies from 2 to 1 up to 5 to 1. The school has the ability to implement Student's IEP by meeting the content and substance of the IEP. The school has a licensed social worker, who would provide Student with 2 hours per week of counseling. As the school offers instruction from 8:30 am to 3:30 pm on Mondays through Thursdays and from 8:30 am to 1 pm on Fridays, to the extent that the school may offer slightly more specialized instruction than Student's IEP requires, the IEP will be adjusted at Student's 30-day review meeting. The school's teachers have the following certifications: 41% of the teachers are certified in special education, with all remaining teachers working toward special education certification; and 90% of the teachers are certified in their content area. DCPS has placed students at the private school by means other than an administrative due process hearing.<sup>11</sup>
9. Petitioner's evidence concerning the private school was provided primarily by the Director of Admissions of the private school, who was able to give detailed information about the school itself. However, with respect to Student, the Director of Admissions was only able to say that Student appeared to be doing well as far as she could tell, but the Director of Education for the school would probably know more about Student's performance. As Petitioner failed to disclose the Director of Education as a possible witness at the due process hearing, Petitioner was precluded from introducing testimony from the Director of Education.

### 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:

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<sup>9</sup> Testimony of Parent.

<sup>10</sup> Testimony of Parent.

<sup>11</sup> Testimony of private school Director of Admission.

## Legal Standards

Under IDEA, a public agency must provide an appropriate educational placement for each child with a disability, so that the child's needs for special education and related services can be met. See 34 C.F.R. § 300.17; 34 C.F.R. §§ 300.114-300.120. "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)).

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).

"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)).

## Analysis

In this case, the undisputed evidence is clear that DCPS failed to provide Student with any school placement at all by the start of SY 2010/11. Indeed, even after Petitioner initiated the instant action on August 23, 2010, the first day of SY 2010/11, DCPS failed to respond to the Complaint or to propose a possible school placement for Student in a timely enough manner for the hearing officer to consider DCPS's position in this case. As a result, the hearing officer concludes that DCPS violated its obligations under IDEA by failing to provide a school placement for Student for SY 2010/11.

In light of DCPS's failure to provide a school placement for Student for SY 2010, Petitioner has requested relief in the form of funding for SY 2010/11 for Student's current unilateral private placement by Parent, including reimbursement to the extent appropriate. As the hearing officer has already determined that DCPS violated IDEA in this case, an award of funding/reimbursement for Student's current private placement is proper only if the hearing officer also determines that the education provided by said school is reasonably calculated to enable Student to receive educational benefits.

The evidence in this case demonstrates that although Student has only been attending his current private school a short time – approximately one month, he is doing well at the school so far and has been able to do his own work. Student's current disability classifications are LD and OHI (for ADD), and his current private school services Students with language-based disabilities. The school also services Students with OHI if the condition impacts learning. The school offers a low student/teacher ratio and has the ability to implement Student's IEP by meeting both the content and the substance of the IEP. The annual tuition at the school is approximately \$36,000, and DCPS has placed other students at the school by means other than an administrative due process hearing.

At the due process hearing in this case, DCPS sought a default judgment on the issue of the appropriateness of Student's current private placement, arguing that Petitioner failed to prove that the private school is proper or appropriate in terms of providing educational benefit. In opposition to DCPS's motion for default judgment, Petitioner argued that the standard of demonstrating educational benefit is very low, and that it has said standard by providing evidence that the private school can implement Student's IEP and Student is doing well at the private school. Upon consideration of the evidence and the parties' arguments, as well as the hearing officer's own legal research, the hearing officer has determined that the standard of proving a private school can provide educational benefit is not nearly as low as Petitioner contends. *See N.G. v. District of Columbia, supra*. Hence, it would have been highly beneficial in this case if Petitioner had presented more detailed evidence tending to prove that Student's current private placement can provide and is providing Student with educational benefits. On the other hand, the hearing officer is aware that Student has been attending the private school for only a short period of time, and the hearing officer also acknowledges that the limited evidence provided by Parent was undisputed and tends to address the factors set forth in *N.G. v. District of Columbia*. As a result, the hearing officer will deny DCPS's motion for a default judgment.

The hearing officer further concludes that although Petitioner has presented evidence sufficient to withstand DCPS's motion for a default judgment, Petitioner has failed to fully meet its burden of proving that the unilateral private placement in this case is actually providing Student with educational benefits. *See e.g., N.G. v. District of Columbia, 556 F.Supp.2d at 38-39* (court found unilateral private placements were reasonably calculated to enable the child to receive educational benefits where plaintiff provided evidence of the child's disabilities and how they manifested, opinions of two physicians that the child was benefiting from the manifest structure of the programs, affidavits of the child's teachers addressing how they dealt with the child's disabilities, in-depth evaluations provided by the teachers, and evidence of significant academic progress). However, in light of the limited period of time Student has been attending the private school, as well as DCPS's failure to provide Student with any placement at all for SY 2010/11 for all practical purposes, the hearing officer will award Student an interim placement at the private school for the first half of SY 2010/11, with said placement to become Student's permanent placement for the remainder of SY 2010/11 if Petitioner can demonstrate to the satisfaction of Student's IEP team at a December 2010 IEP/MDT meeting that Student has made academic progress at the school. *See Wirta v. District of Columbia, supra* (court found private school was an appropriate placement where, *inter alia*, student's grade equivalence scores on standardized tests had increased and student made significant academic gains).

**ORDER**

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

1. DCPS's Motion for Default Judgment is **DENIED**.
2. DCPS shall reimburse Parent for the tuition he has already paid for Student to attend private school from August 23, 2010 through the end of September 2010, and DCPS shall also fund Student's tuition at said private school through the end of December 2010 as an interim placement for Student for the first half of SY 2010/11.
3. DCPS shall convene an IEP/MDT meeting for Student during the month of December 2010, and if Petitioner can demonstrate to the satisfaction of Student's IEP team that Student has made academic progress at the private school, the school shall become Student's permanent placement for the remainder of SY 2010/11.
4. Should DCPS fail to convene the meeting ordered in Paragraph 3 through no fault of Petitioner and/or his representatives, then DCPS shall continue to fund Student's tuition at the private school for the remainder of SY 2010/11 until it holds the meeting. However, if Petitioner fails to cooperate with DCPS's efforts to convene the meeting, said lack of cooperation shall be weighed against Petitioner when determining Student's educational placement for the remainder of SY 2010/11.

**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: 9/23/2010

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