DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
1150 5th Street, S.E.
Washington, DC 20003

2010 NOV -5 PM 2:31
STUDENT HEARING OFFICE

Through

Petitioner,

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

Date Issued: November 8, 2010

Hearing Officer: Kimm Massey, Esq.

Case No:

Hearing Dates: October 21 and 22, 2010
Room: 2004

HEARING OFFICER DETERMINATION

BACKGROUND

Student is a year-old girl, who attends a private school located in the District of Columbia. DCPS is partially funding Student's tuition at the private school pursuant to a "Stay Put" Order.

On July 23, 2010, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS denied Student a free appropriate public education ("FAPE") by (1) failing to propose an appropriate IEP for SY 2010/11; (2) failing to propose an appropriate level of services in Student's IEP for SY 2010/11; (3) failing to propose speech and language services for SY 2010/11; and (4) failing to propose an appropriate placement for SY 2010/11. As relief for these alleged denials of FAPE, Petitioner requested placement and funding for SY 2010/11, including reimbursement for the expenses already paid, at the private school Student currently attends, with all related fees and costs.

On August 5, 2010, DCPS filed its Response to the Complaint, asserting that a series of IEP meetings were held for Student, that Parents and their attorney participated in all the meetings, but Parents ultimately disagreed with the combination setting and the other components of the educational program DCPS proposed for Student for SY 2010/11. DCPS also asserted that Student's current private school is not the proper placement for her, and that even if the private

school is proper, the requested relief should be denied because, *inter alia*, Parents failed to give proper notice of their intent to place Student in the private school, and Parent and the private school failed to cooperate with DCPS's attempts to gather evaluation data for Student.

On August 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. The hearing officer determined that the allegations in the Complaint were all encompassed in the following two claims: (1) an allegedly inappropriate IEP for SY 2010/11 (because an inappropriate level of services was proposed and no speech and language services were included in the IEP); and (2) an allegedly inappropriate placement for SY 2010/11. Petitioner did not disagree. Petitioner indicated its intent to file a motion for determination of current educational placement. When DCPS stated its opinion that the proposed DCPS neighborhood school is Student's "stay put" placement because Student has never been placed at the private school, Petitioner countered that the previous HOD, which placed Student at her current school during SY 2009/10, was less than clear on this issue. The hearing officer issued the Prehearing Order on August 24, 2010.

On August 10, Petitioner's counsel filed a Letter Motion for Continuance, but the hearing officer denied the continuance request because it failed to take into account the Initial Hearing Officer Order, which had rescheduled the due process hearings from the dates provisionally set by the Student Hearing Office.

On August 20, 2010, Petitioner filed a second Letter Motion for Continuance, seeking to reschedule the matter to October 21 and 22, 2010 due to the unavailability of Petitioners' counsel and most of Petitioner's witnesses on the scheduled hearing dates, and indicating that DCPS had agreed to the continuance. On August 26, 2010, the hearing officer issued an Interim Order on Continuance Motion that granted the requested continuance.

On September 16, 2010, Petitioner filed Parents' Motion for Stay-Put Protection, seeking an Order requiring DCPS to maintain Student's educational placement at the private school during the pendency of the instant proceedings. On September 23, 2010, DCPS filed its Response to the Motion for Stay-Put Protection, asserting therein that the below hearing officer lacked jurisdiction to decide the Motion because (1) the previous hearing officer's HOD was final and could not be altered by collateral action, and (2) Petitioner appealed the previous HOD to federal court, which meant that any stay-put request had to be made to the court. On September 23, 2010, Petitioner filed a Reply to DCPS's Response. On October 1, 2010, the hearing officer issued an Order Granting in Part Parents' Motion for Stay Put Protection, which preserved the status quo by maintaining Student at her current private placement, but only required DCPS to partially fund the placement using the formula set forth in the previous HOD.

By disclosure letters dated October 13, 2010, Petitioner disclosed seventy-two documents (Petitioner's Exhibits 1 – 72); and by letter dated October 15, 2010, Petitioner disclosed an additional witness resume (Petitioner's Exhibit 73). By disclosure letter dated October 8, 2010, DCPS disclosed fifteen documents (DCPS-1 through DCPS-15); and by supplemental disclosure letter dated October 14, 2010, DCPS disclosed three additional documents (DCPS-16 through DCPS-18).

The hearing officer convened the initial due process hearing on October 21, 2010.[1] Petitioner's disclosed documents were admitted into the record without objection, with DCPS reserving the right to object at the conclusion of Petitioner's case to documents that had been rendered irrelevant as a result of Petitioner's case.[2] However, DCPS objected to Petitioner's intent to introduce testimony from the witness, whose resume was disclosed by Petitioner on October 15, 2010, on the ground that the document was not disclosed five business days before the first hearing. Once the hearing officer ruled that Petitioner would be allowed to present the testimony on the second day of the hearing, DCPS agreed to allow the testimony to be presented on the first day so that Petitioner could conclude its case. Petitioner also presented at the hearing an additional document, which was a witness resume, for admission into the record. DCPS objected to the admission of the document, and the hearing officer excluded the document as untimely disclosed pursuant to 34 C.F.R. § 300.512(a)(3).

DCPS's disclosed documents were admitted into the record without objection, with Petitioner also reserving the right to object to irrelevant documents upon the conclusion of DCPS's case.[3] Thereafter, as a preliminary matter, Petitioner asserted that the burden of proof rested on DCPS in this case because Petitioner won the previous case, but the hearing officer rejected that assertion. The hearing officer then received opening statements, and Petitioner presented the testimony of its witnesses and concluded its case. DCPS made a motion for a directed verdict, and after receiving argument from the parties and examining the evidence, the hearing officer determined that Petitioner had produced evidence sufficient to withstand the motion for directed verdict. During the course of the initial hearing, the hearing officer and the parties agreed that DCPS would present a complete and accurate copy of Student's current IEP at the second hearing. After DCPS presented the testimony of its first witnesses, the hearing officer adjourned for the day.

The hearing officer reconvened the due process hearing on October 22, 2010. DCPS produced the promised current IEP, and it was determined that the IEP differed in several respects from the IEP Petitioner produced in its disclosures. Petitioner's counsel pointed out some of the differnce, then the hearing officer decided to admit the IEP as Hearing Officer's Exhibit 1. Once DCPS had presented testimony from all of its remaining witnesses, Petitioner requested permission to file written closing statements. After considerable discussion, it was determined that the parties would be allowed until October 29, 2010 to file written closing statements, and Petitioner would request a continuance to extend the HOD due date by 7-days.[4] Having received all of the evidence and addressed all of the procedural matters raised, the hearing officer brought the hearing to a close.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEIA"), 20 U.S.C.

---

[1] Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.
[2] DCPS subsequently failed to make any objections to Petitioner's documents at the close of Petitioner's. When DCPS later objected to Petitioner's Exhibit 8 during DCPS's case, the hearing officer overruled the objection.
[3] Petitioner did not object to any of DCPS's documents.
[4] Petitioner filed the promised continuance request on October 25, 2010. The hearing officer issued a Continuance Order on October 26, 2010, which the chief hearing officer subsequently altered, signed and returned to the hearing officer on October 28, 2010. The hearing officer issued the chief hearing officer's Continuance Order to the parties on October 28, 2010. The parties also filed their written closing statements on the agreed-upon deadline.

§§ 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.").

ISSUES

The issues to be determined are as follows:

1. Did DCPS provide Student with an inappropriate IEP for SY 2010/11 because the level of services proposed was inappropriate and no speech and language services were included in the IEP?

2. Did DCPS provide Student with an inappropriate placement for SY 2010/11 by proposing a combination general education/special education setting at the neighborhood DCPS elementary school, despite parent's desire for Student to remain at the private school she is currently attending?

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. Beginning in kindergarten, Student attended at Parents' expense a private school that offered a traditional elementary school program with progressive elements. The school offered class sizes of approximately 20 children per class. Parents also provided outside therapy for Student. After three years, Student had to leave the school because she had lost all of her friends, was unable to make new friends, was performing below grade level in all areas, was shredding her clothes due to anxiety, and was generally angry and upset in school.[5]

2. On January 17 and 18, 2008, Student received a full Neuropsychological Evaluation to examine whether she had attention problems and her difficulties in school with reading and writing. Based on Student's performance on the various assessments administered, the evaluator rendered the following diagnostic impressions: attention deficit hyperactivity disorder ("ADHD") with associated executive dysfunction; anxiety disorder; rule out language disorder (expressive and receptive); and signs of learning disabilities in the areas of reading and written expression. The evaluator recommended consideration of medication for ADHD, speech and language pathologist services, and various accommodations and supports, including direct academic interventions in reading, handwriting, and written expression.[6]

[5] Testimony of mother.
[6] Petitioner's Exhibit 3; DCPS-3.

3. Student's problems with executive functioning have an impact across all areas of her functioning. As a result, Student often needs 1-to-1 or 2-to-1 guidance and a class size of no more than 12 students. Student also needs a great deal of highly structured supportive feedback in a highly structured environment with a low student/teacher ratio, where the teachers can redirect, guide, scaffold, slow down, re-teach, teach at Student's level, which is below grade level, and take other steps needed.[7]

4. Student attended the summer program at her current private school during Summer 2008. In July 2008, the current private school issued a Speech-Language Therapy Summer Progress Report, which indicated that Student's therapy over the summer had focused on language fluency and phonology. These skills were addressed through computer programs for reading and spelling, as well as through the use of trade books and clinician-made activities. The report revealed that Student had demonstrated steady progress in the areas targeted, but recommended continued intervention.[8]

5. Student also received private speech and language services from the current private school during SY 2008/09, while she continued to attend her prior traditional private school. On May 2009, the current private school issued a Speech and Language Progress Report, which indicated that Student had continued to work on vulnerabilities in phonological awareness and reading fluency during SY 2008/09 during weekly 60-minute sessions, in which computer programs for reading and spelling, as well as trade books and clinician-made activities, were used. The Report noted that Student's profile remained consistent with the diagnosis of Reading Disorder, Unspecified and recommended increased speech and language services at he rate of two 45-minute sessions per week. The Report further noted that Student had recently been admitted to the Lab School for SY 2009/10, so the diagnosis and treatment recommendations could be amended based upon the results of a comprehensive speech-language evaluation that had been scheduled.[9]

6. On May 21, 2009, Mother completed a DCPS Office of Special Education ("OSE") referral packet for Student, listing the following as Parents' concerns: "[Student] has difficulty focusing on her school work, working independently and listening to and understanding questions. She is very anxious and has difficulty with impulse control. She is below grade level in reading and writing. She requires speech and language tutoring." The forms further indicate that Student was taking Focalin medication. Student's teacher at her then private placement completed a form concerning Student and indicated, *inter alia*, the following: Student would benefit from the support of specialized teaches and a class size with less than 10 children; she needs the one-on-one support of the classroom teacher throughout the day; the pressure of her school/classroom environment has added to her anxieties and Student constantly chews her clothing, writing utensils, and other supplies; she also has a difficult time forming positive relationships with her peers an constantly craves the attention of adults.[10]

---

[7] Testimony of curriculum specialist.
[8] Petitioner's Exhibit 4.
[9] Petitioner's Exhibit 9.
[10] Petitioner's Exhibit 8.

7. In July 2009, the current private school issued another Speech and Language Summer Report for Student, which indicated that Student had received diagnostic speech-language testing during the summer school program. The evaluation included administration of the following assessments: the Test of Auditory-Processing Skills-3rd Edition; the Peabody Picture Vocabulary Test-4th Edition; the Expressive Vocabulary Test-2nd Edition; the Clinical Evaluation of Language Fundamentals-4th Edition; portions of the Comprehensive Test of Phonological Processing; the Phonological Awareness Test 2; the Test of Word Reading Efficiency; the Gray Oral Reading Tests-4th Edition; the Test of Written Spelling-4th Edition; and a portion of the Oral and Written Language Scales. Student received standard scores within the average range on the majority (54 of 82) of the subtests administered, and a number of the below average scores (5) were within a point of the average range. However, based on the assessment results, as well as information obtained from Student's files, the evaluator concluded that Student's linguistic profile was consistent with the diagnoses of Mixed Receptive-Expressive Language Disorder and Reading Disorder, Unspecified. The evaluator also opined that Student was at risk for a diagnosis of Disorder of Written Expression. The evaluator noted that as a full-time Student at the current private school during SY 2009/10, Student would receive classroom-based work offered by her teachers and the speech-language pathologist, who would be integrated into her classroom, and the evaluator also recommended pull-out speech and language therapy twice weekly, in the form of one individual 40-45 minute session and one small group 40-45 minute session per week.[11]

8. Parents unilaterally placed Student at her current private school for SY 2008/09 after concluding that DCPS had failed to timely complete the requested initial special education evaluation of Student. The current private school provides Student with a full-time program of special education and related services.[12]

9. On October 26, 2009, Student's current private school developed an educational program for Student that required her to receive 32.75 hours per week of specialized instruction; speech/language services individually for 45 minutes per week, in a group for 45 minutes per week, and via integrated services; and occupational therapy services individually for 45 minutes per week and via integrated services.[13]

10. On October 26, 2009, DCPS conducted an Educational Evaluation for Student. Student was 8.8 years old at the time of the evaluation, and she received scores on the Wechsler Individual Achievement Test-II demonstrating that she was performing at the following age equivalencies ("AE"): 7:4 AE in pseudoword decoding and numerical operations; 7:8 AE in math reasoning and spelling; 8.0 AE in word reading and written expression; 11:0 in listening comprehension; and 11:8 AE in reading comprehension. Nevertheless, the evaluator ultimately Student's test results and her prior cognitive test scores ranging

[11] Petitioner's Exhibit 10.
[12] *See* Petitioner's Exhibit 18; DCPS-1.
[13] Petitioner's Exhibit 12.

from the Borderline to High Average range suggested the previous classification of LD with ADHD.[14]

11. On November 17, 2009, Parents filed a due process Complaint against DCPS, alleging that DCPS had failed to timely evaluate Student, determine her eligibility for special education and related services, and propose an IEP and an appropriate placement for SY 2009/10. As relief for the alleged denial of a FAPE, Parents sought to obtain public funding for their unilateral placement of Student at her current private school.[15]

12. On November 12, 2009, a DCPS speech/language pathologist conducted a classroom observation of Student. There were 11 students and 5 educators in the classroom initially, and the class was working on a speech and occupational therapy activity. Thereafter, the other students left for science while Student and a fellow classmate remained in the room for reading, at which point the classmate began to read by himself while Student received 1:1 services. Student was unable to answer all the questions asked, she needed assistance reading for content, and minor difficulties with fluency became evident as Student read aloud. Thereafter, Student and four of her classmates transitioned to art class. Based on this observation, as well as Student's scores on her Summer 2009 speech and language evaluation, the speech/language pathologist determined that Student did not meet DCPS's standard for speech and language services. With respect to the evaluation, DCPS's standards required that a Student's scores must be 1½ standard deviations below average to qualify for speech and language services. However, Student's scores were primarily within the average range or within a few points of the average range on the various subtests. Her scores that fell within DCPS's standard were in the areas of phonological processing and reading, which could appropriately be addressed by either a reading teacher or a special education teacher. Hence, DCPS included some of the speech and language goals from the current private school's educational program in the DCPS IEP. Moreover, the diagnosed speech and language disorders were rendered by the current private school and appear to relate to written language and reading. DCPS does not write diagnoses in the manner stated on the 2009 speech and language evaluation.[16]

13. On January 29, 2010, an independent hearing officer issued a Hearing Officer Decision ("HOD") resolving Parents' November 17, 2009 Complaint. The hearing officer determined that DCPS had impeded Student's right to a FAPE by failing to timely conduct her initial evaluation. As relief, the hearing officer 1) ordered DCPS to complete the initial evaluation of Student, 2) ordered the parties to determine the appropriate disability for Student, and 3) ordered DCPS to partially reimburse Parents for the tuition and related costs they incurred to send Student to her current private school as a unilateral placement for SY 2009/10. The hearing officer reduced the amount of reimbursement awarded to Parents after concluding that Petitioners had failed to proactively participate

[14] Petitioner's Exhibit 13; DCPS-2.
[15] *See* Petitioner's Exhibit 18; DCPS-1.
[16] Petitioner's Exhibit 14; DCPS-4; testimony of DCPS speech-language pathologist.

in the initial evaluation process and that the unilateral placement was more restrictive than necessary.[17]

14. On February 5, 2010, DCPS convened an MDT meeting for Student. Once DCPS stated its intent to present its evaluations/reviews of Student, current Petitioner's counsel stated his opinion that DCPS was not to develop an IEP for Student, but pursuant to the 1/29/10 IEP, was only to determine Student's eligibility classification. The DCPS speech/language pathologist, who observed Student in November 2009, presented her review of the current private school's speech language report and the results of her observation before recommending 1) that Student did not qualify for speech/language services according to DCPS's criteria, and 2) that any needs noted in the private school's report could be addressed by reading goals. Petitioner's counsel objected to these recommendations. Later in the meeting, when DCPS inquired whether the DCPS team members had enough information to determine Student's eligibility and classification, Petitioner's counsel and Parent objected to the process and stated their intent to leave the meeting. When DCPS determined that Student was eligible as LD, Petitioner's counsel interjected before he left that the classification should be OHI. Ultimately, Petitioner's counsel and Parent left the meeting, and the remaining team members agreed to reconvene to determine eligibility and classification and develop an IEP if Student proved eligible.[18]

15. On February 24, 2010, Student's current private school updated/revised its educational program for Student. Under the revised educational program, Student was to continue to receive 32.75 hours per week of specialized instruction, 2.25 hours per week of related services in group and individual settings, and related services via integrated services.[19]

16. On March 9, 2010, DCPS convened another MDT meeting for Student to complete the eligibility determination process. Petitioner's counsel disagreed with DCPS's criteria for LD on the ground that it did not comport with federal law and was not supported by the findings of Student's current private school. When DCPS responded that hit had not been provided with the information from the current school, Petitioner's counsel asserted that the team had more time to gather documentation because it was only tasked with developing the IEP for SY 2010/11. DCPS maintained that it had enough information to make a classification determination of LD; however, Petitioner's counsel, Parent and the team members from Student's current private school felt that ADHD with the anxiety component should be reflected in the classification. Petitioner's counsel ultimately stated that eligibility could be finalized with the understanding that it needed to be updated based upon additional documentation to be provided from the current private school. When the team further stated that Student was not eligible for speech and language services pursuant to DCPS guidelines, Petitioner's counsel and the current private school disagreed.[20]

[17] Petitioner's Exhibit 18; DCPS-1.
[18] Petitioner's Exhibit 19; DCPS-5.
[19] Petitioner's Exhibit 25.
[20] Petitioner's Exhibit 30; DCPS-6.

17. On March 9, 2010, DCPS issued a Prior Written Notice-Identification, which notified Parents that DCPS proposed to determine Student eligible as a student with an SLD.[21]

18. On March 9, 2010, Petitioner's counsel issued a written "Parental Statement" to the MDT members, which "formally object[ed]" to the March 9, 2010 MDT meeting on the ground that it directly contravened the 1/29/10 HOD. Counsel maintained that the initial evaluation and eligibility determination ordered in the HOD had been completed at Student's MDT meeting in February 2010. Counsel further asserted that DCPS's attempt to draft an IEP at the March 9, 2010 MDT meeting was not ordered by the HOD and was pointless in view of DCPS's obligation to fund Student through the end of SY 2009/10, and that the meeting to develop a new IEP for Student should not occur until the end of the school year.[22]

19. In March 2010, the current private school issued an Annual Speech and Language Report, which indicated that Student's skills related to reading and writing remained inconsistent, although Student was making progress in both. The report further noted Student's inconsistent ability to use executive functioning skills to identify the steps in an activity, which was particularly more notable in small groups and within the classroom environment, but did not appear to be a problem in a one-to-one setting where the task at hand included a specific structure and expectation. The report stated that overall, Student inconsistently used strategies across contexts but had made good gains during the year in all areas. Goals to be addressed in the next school year included semantics, syntax, language fluency, executive functioning, and phonology. Finally, the report recommended the addition of the diagnosis of Disorder of Written Expression to Student's Mixed Receptive-Expressive Language Disorder and Reading Disorder diagnoses.[23]

20. On May 26, 2010, Student's current private school updated/revised its educational program for Student. Under the revised educational program, Student was to continue to receive 32.75 hours per week of specialized instruction, 2.25 hours per week of related services in group and individual settings, and related services via integrated services. The IEP included the results of a Woodcock-Johnson III Tests of Achievement that was administered to student on May 5, 2010, when she was 9 years and 2 months old. Student's performance on the assessment resulted in the following age equivalencies: total achievement – 8:4 AE; broad reading – 8:3 AE; broad math – 8:8 AE; broad written language – 7:11 AE; academic skills – 8:4 AE; academic fluency – 7:5 AE; academic knowledge – 9:9 AE.[24]

21. On May 26, 2010, DCPS convened the annual IEP meeting for Student, with the relevant team members from Student's current private school participating by phone. Once again, the team members disagreed with respect to Student's need for speech-language services, with the DCPS team members insisting that Student did not qualify under DCPS

[21] Petitioner's Exhibit 28.
[22] Petitioner's Exhibit 28.
[23] Petitioner's Exhibit 33.
[24] Petitioner's Exhibit 37.

guidelines, and the current private school's team members and Parents insisting that Student did qualify for such services based on the private school's evaluation. The private school's program coordinator gave an update on Student's progress, which indicated, *inter alia*, that Student displayed poor working memory and organizational skills, required a lot of repetition and constant reassuring, displayed anxiety when things were not as she expected, responded well to the behavior management program, required a lot of modeling and reminders to use strategies, and needed predictability, structure, and routine. The team reviewed the private school's draft educational plan for Student. DCPS was prepared to continue forward and complete the annual IEP process, but Parents and Petitioner's counsel had to leave. The parties agreed to schedule another date to complete the annual review.[25]

22. On June 8, 2010, DCPS reconvened Student's annual IEP meeting, and the team members from Student's current private school participated by phone again. DCPS had prepared a DCPS draft IEP that was based on the private school's draft educational plan and included present levels of performance provided by the private school. The team conducted an in-depth review of every section of the IEP. DCPS agreed to make many of the changes to Student's goals that Petitioner's counsel and/or Parent requested. DCPS also agreed to include some of the speech-language goals from the private school educational plan in the "Reading" section of the DCPS IEP, since DCPS had previously determined that Student was not eligible for speech and language services. With respect to location of services, Parents were of the opinion that Student required the individualized support she had been receiving at the private school and that she would not be able to function at the DCPS neighborhood school, which they had visited several times before deciding to place Student at the private school again. DCPS maintained that the neighborhood school could meet Student's needs. Moreover, at Petitioner's counsel's request for clarification, the MDT team stated its consensus that the team had not placed Student at the private school during the series of MDT meetings that had been held since February 2010. Ultimately, the team agreed to reconvene in June to complete the IEP process.[26]

23. On June 15, 2010, DCPS reconvened Student's annual IEP meeting. The team members from Student's current private school did not participate by phone or otherwise in this final meeting. With respect to the hours of specialized instruction and related services, Parent and the advocate were of the opinion that Student needs a full-time setting in a small setting, which the current private school was providing, so she should stay there. However, DCPS indicated that the IEP hours should be related to the goals. Hence, DCPS proposed increasing Student's specialized instruction in reading from 30 minutes per day to 60 minutes per day, with 30 minutes to be provided outside of general education and 30 minutes to be provided in the general education setting. DCPS also proposed increasing Student's specialized instruction in math to 60 minutes per day in the general education setting; increasing her specialized instruction in written language to 120 minutes per week, with 60 minutes to be provided in the general education setting and 60 minutes to be provided outside of general education; and increasing her general

[25] Petitioner's Exhibit 38.
[26] Petitioner's Exhibit 44; DCPS-8.

specialized instruction from 15 minutes per day to 30 minutes per day in the general education setting. However, in light of Parents' disagreement with the proposed levels of service and the ongoing discussion that ensued, the DCPS SEC failed to make all of the proposed changes on the June 15, 2010 DCPS IEP. With respect to placement, DCPS proposed the neighborhood DCPS school or either of two other DCPS elementary schools, while Parent and the advocate wanted Student to remain in the current private school. Parent and the advocate rejected the DCPS proposed placements, as well as the proposed program, on the ground that they were not intensive enough to meet Student's needs. Parents indicated their belief that Student continues to require the current private school, as well as their intent to seek public funding of that placement and stay-put protection under IDEIA.[27]

24. On July 1, 2010, DCPS issued a Prior Written Notice for Student with a two-page typewritten attachment explaining why DCPS rejected Parents' request that the IEP team place Student at the current private school for SY 2010/11. DCPS explained that the 3 DCPS team members, who observed Student at the private school, were concerned that the level of restrictiveness at the private school was too high and believed that Student's needs could be met at her neighborhood DCPS school. The Notice indicates that DCPS had offered a less restrictive placement, with appropriate supports, that would allow Student to interact with and learn from non-disabled students. DCPS noted that the 1/29/10 HOD included the previous hearing officer's opinion that the current private school is too restrictive for Student, and DCPS also cited to and set forth relevant section(s) of the IDEIA regulations and the D.C. Code. DCPS listed the assessments and other documentation it relied upon in making its decision, as well as other options considered by the team and other options offered by the team.[28]

25. On July 23, 2010, Petitioner's counsel filed the Complaint that initiated this action.

26. Parents acknowledge that the DCPS neighborhood school is a lovely school that recently has been renovated and expanded. However, Parents believe that Student is not ready to return to a mainstream setting at this time. Mother believes that the DCPS school is too big and cannot offer the support Student needs. Indeed, Mother believes that the current private school is the only place appropriate for Student at this time, and Mother's intent all along was to have Student remain at the current private school.[29]

27. Father also acknowledges that Parents went into the IEP process that began in February 2010 with the feeling that Student needed to remain at her current private school, and he asserts that Parents made no secret of their position. Student loves her current private school and is doing well there. Father went to visit the neighborhood DCPS school in connection with the IEP process. He saw at least 3 classes, and 2 of the classes had 1 autistic child each with a shadow aide. Each of the autistic children experienced a total breakdown with screaming and crying while Father was watching, and Father was of the opinion that such a breakdown would have totally taken Student off task – probably for

[27] Petitioner's Exhibit 47; DCPS-9; IHO-1.
[28] Petitioner's Exhibit 49; DCPS-10.
[29] Testimony of Parents – both mother and father individually.

the entire school day. Each of the 3 classes Father visited had approximately 22 to 24 children with only 1 instructor besides the shadow aide, with the exception of the kindergarten class he visited. Father's impression was that the DCPS neighborhood school was just like the traditional private school Student initially attended, except the DCPS school had many more items on the walls. Father does not believe that Student would be able to handle the environment at the DCPS neighborhood school.[30]

28. Although Father visited the neighborhood school, there is no evidence that he and/or Mother ever visited the other two DCPS school DCPS proposed at Student's June 15, 2010 IEP meeting to determine their suitability for Student.

29. The DCPS neighborhood school is a small public school that serves 265 pre-K through 5th grade students in 12 classes. There are 2 classes per grade level. The school is housed in 2 historic buildings, 1 of which has recently been renovated. The school offers responsive classrooms that focus on social and academic instruction. It is a "full inclusion" school with a small but very diverse special education population, in that special education students make up only 5 to 8% of the population and their disabilities include Down's Syndrome, autism, and ADHD, as well as other diverse disabilities. The school also services a population of ESL students. The school has 3 full-time special education teachers, who are assigned by grade level. The special education teacher for the 3rd, 4th, and 5th grades serves approximately 8 students. The school has a behavior support person who provides services in small groups, in class, and 1-on-1. There is also a social worker assigned to the school who works with every student.

    The proposed class for Student is a combined 4th and 5th grade class of 22 students that utilizes the inclusion model. The classroom teacher is one of the Chancellor's highly recommended teachers. The students in the class primarily work in small groups, and there is very little whole group instruction. There is 1 assistant teacher who works across the two 4th and 5th grade classrooms, as well as 1 ESL teacher who works with the 3rd, 4th, and 5th grade classrooms. As a result, there is often more than 1 adult in the classroom with the 22 students.[31]

30. The teacher for the combined 4th and 5th grade class that Student would be assigned to at the DCPS neighborhood school has worked with students with various disabilities over the course of her 9 years of teaching for DCPS, including ED, LD, SLD, ADD, ADHD, and autism. Of the 22 students in the class, 3 are special education students and 2 receive English language learner services. All students receive writing, reading and math instruction in the morning. With respect to writing and reading, the students' skill levels range from the 2nd to 6th grade levels. The students are presented with a 5-10 minute mini-lesson in a large group, but they are mostly taught in small groups. The teacher normally puts the special education students in a small group and works with them further after the general lesson before they begin the class work. The special education teacher sometimes pulls out the special education students if needed. For math, the students are divided into 3 groups based on the level of support needed. The students receive small group instruction from the teacher, with a teacher aide in the room, and a

[30] Testimony of father.
[31] Testimony of principal of DCPS neighborhood school; testimony of DCPS general education teacher.

higher level curriculum is provided for those students who wish to push further through independent study. The teacher has no concerns about her ability to implement Student's IEP. The teacher does a lot of scaffolding with questions to help the students determine relevant information, graphic organizers are used in her class, she uses visual schedules, emphasizes routines in class, provides extra time when needed, and has students who need breaks. The teacher is also familiar with and can work with students with executive dysfunction; she uses checklists and routines for those students.[32]

31. On September 16, 2010, the current private school issued an Addendum to Student's most recent Speech-Language Assessment. Subtests from 4 different tests were administered, and this time Student scored 1½ standard deviations below the average range on many of the subtests. Neither the current private school nor Petitioner's counsel provided DCPS's speech/language pathologist with a copy of this report. Had either done so, the speech/language pathologist would have suggested an IEP meeting within 30 days to review the assessment, and DCPS's speech/language pathologist likely would have opined at the meeting that Student qualified for speech and language services according to DCPS's guidelines.[33]

32. Now that Student has been attending the current private school for more than one academic year, she is no longer anxious, is establishing friendships and social relationships, and is progressing on IEP goals. Although Student had a successful year during SY 2009/10, her impulsivity and difficulty reading social cues negatively affected her social interactions with peers, and her poor executive functioning skills affected her initiation, planning, organization, sequencing, and maintenance of focus to complete tasks. Nevertheless, Student has made progress since she began attending her current private school, and given the interventions that have provided to her, it would appear that she no longer requires the extremely small and restrictive setting offered by her current private school.[34]

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. Appropriateness of IEP

The FAPE required by IDEIA is tailored to the unique needs of each child with a disability by means of an IEP. *Board of Education of the Hendrick Hudson Central School District, Westchester County, et al., v. Rowley et al.,* 458 U.S. 176, 182 (1982). Hence, IDEIA regulations identify the IEP as the vehicle through which a FAPE is delivered. *See* 34 C.F.R. § 300.17(d). Nevertheless, an LEA is not required to furnish every special service necessary to maximize each handicapped child's potential. To the contrary, the LEA satisfies its obligation to

[32] Testimony of DCPS general education teacher.
[33] Petitioner's Exhibit 66; testimony of DCPS speech and language pathologist.
[34] Testimony of curriculum specialist; Petitioner's Exhibit 50; testimony of DCPS psychologist.

provide the "basic floor of opportunity" required under IDEIA by providing access to specialized instruction and related services which are individually designed to provide educational benefit to the disabled child. *See Rowley*, 458 U.S. 176.

a. Proposed Level of Services

In this case, Petitioner has argued that DCPS's proposed level of services proposed in DCPS's June 15, 2010 IEP is inappropriate because Student requires more hours of service than the proposed IEP provides. On the other hand, DCPS maintains that the proposed IEP is appropriate for Student.

The evidence in this case is unclear as to exactly how many hours of service DCPS is proposing for Student. However, a review of the notes for the June 15, 2010 IEP meeting, together with a review of IHO-1, suggests that DCPS was proposing to provide Student with 870 minutes, or approximately 13 hours, of specialized instruction per week, plus 45 minutes per week of occupational therapy services and 30 minutes per month of behavioral support services. Moreover, at least half of the proposed specialized instruction is to be provided in the general education setting.

DCPS's proposed level of services is a drastic reduction from the 35 hours of specialized instruction in a full-time special education environment Student has been receiving since SY 2009/10 at her current private school. However, while the evidence in this case proves that Student has benefited greatly from the educational programming she has received at her current private school, the evidence also tends to prove that because of the progress Student has made since SY 2009/10, she no longer requires the intensive, full-time services she is receiving at the current private school. Indeed, according to the 1/29/10 HOD, which both parties relied upon in their written closing statements, the current private school was from the start more restrictive than necessary for Student.

On the other hand, the evidence is lacking in support for the conclusion that Student can receive educational benefit from a mere 14 hours per week of specialized instruction, most of which will be delivered in a general education setting. Hence, despite Student's progress at her current private school, by the end of SY 2009/10 her impulsivity, difficulty reading social cues, and poor executive functioning continued to negatively impact her progress. Indeed, as a result of her poor executive functioning, Student continues to frequently require 1-to-1 or 2-to-1 guidance, and it is highly doubtful that Student would be able to receive such guidance under an IEP that provides for 14 hours per week of specialized instruction primarily in the general education setting. As a result, the hearing officer concludes that Petitioner has met its burden of proving that DCPS failed to propose an IEP for Student that contains a sufficient amount of specialized instruction to provide her with educational benefit.

Unfortunately, although the evidence proves that Student needs less than 35 hours of service in a full-time special education setting but more than approximately 14 hours per week of services in a mostly general education setting, the evidence in this case is insufficient to permit the hearing officer to determine exactly what would be an appropriate amount of specialized instruction. Therefore, the hearing officer will order the parties to participate in another IEP meeting for the

purpose of allowing Student's IEP team another opportunity to determine exactly how much specialized instruction and related services Student requires to receive educational benefit in light of the guidance provided herein.

b. Speech and Language Services

With respect to Petitioner's claim that DCPS's proposed IEP is inappropriate for failure to provide Student with speech and language services, the evidence is clear in this case that although DCPS incorporated some of Student's speech and language goals in the reading section of its proposed IEP, the evaluation data available to DCPS at the time the IEP was developed indicated that Student did not qualify for speech and language services under DCPS's guidelines. As a result, the hearing officer finds no denial of FAPE by DCPS as a result of its failure to include speech and language services on the IEP. Nevertheless, evaluation data obtained subsequent to the development of DCPS's June 15, 2010 IEP indicates, according to DCPS's very own speech and language pathologist, that Student now qualifies for speech and language services under DCPS's guidelines. As a result, the hearing officer will order DCPS to instruct Student's IEP team to determine the amount of speech and language services Student requires and to develop appropriate goals for such services at the IEP at the meeting to be ordered in connection with this case.

2. Placement

Under IDEIA, 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). 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).

In this case, Petitioner argues that the DCPS neighborhood school DCPS has proposed as a placement for Student is inappropriate because it is an inclusion school that would require Student to be placed in a class with 22 other students. On the other hand, DCPS argues that the proposed DCPS placement is appropriate because it can implement the proposed IEP.

The hearing officer has already concluded herein that the proposed IEP is inappropriate for Student in that it does not provide a sufficient level of specialized instruction. The hearing officer also notes that the evidence in this case proves that DCPS's proposed placement of the

neighborhood school would result in Student being placed in a combined 4th and 5th grade class with 22 students and 1 teacher, who would receive periodic support from an assistant teacher who is assigned to cover a total of four classrooms, whereas the evidence in this case tends to prove that Student requires a class size of no more than 12 students. Moreover, DCPS's proposed placement would place Student in a general education class in a full inclusion school, whereas the evidence in this case tends to prove that Student requires a highly structured environment that can provide her with highly structured supportive feedback. Under these circumstances, the hearing officer concludes that DCPS's proposed placement is an inappropriate placement for Student.

Based on the evidence in this case, which clearly demonstrates that Student is receiving educational benefits at her current private placement, the hearing officer concludes that the private placement is proper under IDEIA. However, the evidence in this case also proves that DCPS offered to place Student at either of two additional DCPS schools besides her neighborhood school at the June 15, 2010 IEP meeting, but Parents rejected those proposed placements without even visiting the schools and announced their belief that Student continued to require the services of the current private placement, as well as their intent to seek public funding for that placement and stay-put protection under IDEIA. Thereafter, the entire summer passed without Parents making any attempt to visit the other two proposed placements or request additional potential placements besides the current private school and the DCPS schools that had already been proposed. Based on this evidence, the hearing officer concludes that Parents' actions were unreasonable and warrant a reduction in the amount of reimbursement awarded. Nevertheless, the hearing officer will only reduce reimbursement by 33% in light of the strong possibility that DCPS would have only been willing to offer placements that could implement the inappropriate IEP it had developed for Student, with the result that a suitable placement likely would not have been agreed upon anyway.

ORDER

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

1. Petitioner is hereby awarded a private placement at Student's current private school for SY 2010/11; however, DCPS shall only be required to fund 67% of the costs of said placement, both retroactively to the start of the school year and prospectively through the end of the school year.

2. On or before February 20, 2011, DCPS shall convene an IEP meeting for Student for purposes of allowing Student's IEP team another opportunity to determine exactly how much specialized instruction and related services Student requires to receive educational benefit in light of the guidance provided herein, and allowing the IEP team an opportunity to determine the amount of speech and language services Student requires and to develop appropriate goals for such services.

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: 11/8/2010

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