OSSE
Student Hearing Office
March 15, 2013

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

Parents, on behalf of Student[1],

Petitioners,

v.

District of Columbia Public Schools,
Respondent.

Hearing Officer: Gary L. Lieber

HEARING OFFICER'S DETERMINATION

Introduction and Procedural Background

This case was brought as a due process complaint pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended 20 U.S.C. §1400 *et. seq.* and Title 5-E, Chapter 5-E-30 of the District of Columbia Municipal Regulations. Petitioners are the Parents of Student, [redacted]. Petitioners allege that Student was denied a Free Appropriate Public Education ("FAPE") because (a) the IEP failed to provide sufficient specialized support in the nature of behavioral intervention in a self-contained classroom necessary for a student with high functioning autism to obtain a meaningful education benefit; and (b) because Petitioners were denied a meaningful opportunity to

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[1] Personal identification information is provided in Appendix A and the Appendix must be removed prior to distribution.

participate in the IEP process. Petitioners further allege that since FAPE was not being provided to the Student, Parents' decision to place Student in a private school for the school year 2012-2013 was necessary to access FAPE and, that, therefore they are entitled to reimbursement from Respondent for the cost of tuition and related services from the non-public school in which Parents unilaterally enrolled Student for the 2012-2013 school year. See P. Exh. 1.[2]

The Due Process Complaint was filed on December 21, 2012 (P. Exh. 1). Respondent District of Columbia Public Schools ("DCPS") filed a response to the Due Process Complaint on January 4, 2013, in which it denied that it violated IDEA and otherwise denied Student FAPE. Respondent further asserted in its response that the unilateral placement of Student was a "calculated plan" and that such action was both unreasonable and without the proper notice as required by certain regulations[3] resulting in them effectively being deemed ineligible for such reimbursement. On January 23, 2013, the undersigned conducted a prehearing conference (H.O. Exh. C.) On January 24, 2013, the parties held a Resolution Meeting which did not result in an agreement that would dispense with the need for the Due Process Complaint Hearing (H.O. Exh. D). On January 29, 2013, a Prehearing Order was issued which, *inter alia*, set the date for the Due Process Hearing as February 26, March 4 and March 5, 2013 (H.O. Exh. C). Five-day disclosures were timely

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[2] The Hearing Officer's Exhibits shall be referred to as H.O. Exh. _____; Petitioner's Exhibits as P. Exh. _____; and Respondent's Exhibits as R. Exh. _____.
[3] See H.O. Exh. B, p. 6; see also 34 CFR §148 (d)(1)(i-ii) and (3).

filed on February 19, 2013. The hearing was conducted on February 26, March 4 and March 5, 2013. The hearing was closed to the public and was electronically recorded. Both parties were represented by counsel.[4]

The Record of Evidence

The Petitioners called five witnesses of which one was called in rebuttal: Pediatric Neuropsychologist who testified as an expert in the area of Pediatric Neuropsychology and Autism; Director Multiple Learning Needs at the non-public school; the Assistant Director and Director of Admissions at the non-public school; the mother of Student; and in rebuttal the father of Student.

The Respondent called five witnesses: Student's first grade teacher at the public school in school year 2011-2012; Principal of that public school; Respondent's Special Education Administrator; Special Education Teacher; and LEA representative for the public school.

The following exhibits were admitted: Petitioners' 1-35[5], Respondent's 3-10, 11 (pp. 1-7 only) and R. Exh. 12.[6]

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[4] A continuance was granted at the request of Petitioners extending the due date for this Hearing Officer's Determination ("HOD") from March 6 to March 15, 2013 (H.O. Exhs. E & F). A second motion for continuance was filed on March 7, 2013 by Petitioner, for the purpose of permitting a review of the transcript of the proceedings and the filing of post-hearing briefs. That motion was denied by the Chief Hearing Officer on March 7, 2013. Post-hearing briefs were timely filed on March 8, 2013, and those briefs have been duly considered by this Hearing Officer.

[5] P. Exh. 35 is the 2010-2011 IEP dated March 10, 2011. It was originally marked in the five-day disclosures as Respondent's Exhibit 1, but was not offered by Respondent. I admitted it over Respondent's objection. R. Exh. 12 was a complete signed version of the 2012 IEP, which was incomplete as R-2.

[6] R.Exh. 12 was not part of the original disclosures but was admitted with consent as it merely serves to complete R. Exh. 2 which was incomplete as it lacked certain pages from the IEP.

Jurisdiction

This Hearing Officer has jurisdiction pursuant to IDEA, 20 U.S.C. §1415, the statute's implementing regulations at 34 C.F.R. §300.511 and 300.513 and the District of Columbia Code of Municipal Regulations ("DCMR") at 5-E §3029 and 5-E §3030. This decision constitutes the Hearing Officer's Determination, the authority for which is set forth in 20 U.S.C. §1415 (f)(3)(E) and 34 C.F.R. §300.513.

Statement of the Issues and Relief Requested

1. Whether the Respondent has failed to provide FAPE to Student by not including within the IEP special education and intervention support reasonably calculated to enable Student to obtain a meaningful education benefit?

2. Whether Respondent has failed to provide FAPE by not allowing Parents to meaningfully participate in the IEP process?

3. Assuming that the IEP failed to provide FAPE as suggested by the above, was Respondent's placement "inappropriate"? If it was inappropriate, was the non-public school where Student was unilaterally placed by Parents able to provide a meaningful educational benefit?

As relief, Petitioners request that this Hearing Officer find that Respondent failed to provide FAPE and issue an order requiring Respondent to reimburse Parents for the cost incurred in placing Student at non-public school and to allow him to remain at that school until an appropriate placement is provided.

Findings of Fact

After consideration of all of the evidence, the Hearing Officer makes the following findings of fact:

1. Student is a [redacted] child. He was described as bright, sweet, imaginative, generally happy (P. Exh. 25, p. 71[7]; Testimony of Mother). In March 2010, he was diagnosed with autism spectrum disorder by Respondent (P. Exh. 25, p. 77).

2. As a child with autism spectrum disorder, this Student faces a variety of challenges. Among other things, he has difficulty with social interaction, primarily with his peers. This is manifested in several ways: he does not easily play with other children and he has great difficulty in maintaining a regular interactive conversation with others. He regularly needs to be prompted to stay on task. If not regularly and continuously prompted, he will play by himself and will thus not participate in classroom activities. He is dysregulated in a social environment and that condition worsens as the number of people and amount of noise grow larger and louder. In such cases, he will most easily become unable to participate with the others present, whether that is in a classroom or at recess or at lunch. He frequently speaks in script, repeating over and over the same phrases that are not responsive to the statements of others (P. Exh. 20, P. Exh. 25, Testimony of First Grade Teacher, Testimony of Pediatric Neuropsychologist/Expert).

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[7] Page numbers are to the Bates-stamped pages in Petitioners' and Respondent's Exhibits.

3. Student attended _____ Elementary School, his neighborhood school, since pre-kindergarten. In kindergarten, during the school year 2010-2011, he had an IEP that provided specialized services and related services (P. Exh. 34). In first grade, his IEP, dated February 15, 2012, contained a variety of goals in the areas of written expression, communication/speech and language, emotional, social, and behavioral development (R. Exh. 12).

4. Under Area of Concern – Emotional, Social and Behavioral Development, Student's Present Level of Educational Performance is described as follows:

> _____ is a 6 year old Caucasian male who is enrolled in Mrs. _____ first grade classroom at _____ ES. _____ has a pleasant personality and he is a very well-mannered individual. ____ seems to respond well to one-on-one support and instruction. ____ has been diagnosed with a social learning disorder (Autism Spectrum Disorder) and accordingly, he has difficulty recognizing and responding to social cues, initiating interactions with other classmates, participating in small and large groups classroom/school activities, etc. A recent Neuropsychological Evaluation (December 2010) indicates that _____ continues to struggle with multiple aspects of social functioning and he exhibits significant mannerisms associated with Autism Spectrum Disorder (preservative thinking, narrow range of interests, difficulty sustaining reciprocal interactions, etc.) _____ social learning challenges impact his ability to be successful in the general education classroom setting. (R. Exh. 12, p. 4)

Under that same category, his needs are described as follows:

> _____ needs behavioral support services/classroom support services so that he can build social skills and communication skills. _____ is able to express his needs; however, he continues

> [sic] have difficulty interacting with others, participating in small and large group activities, etc. Behavioral support services will allow _____ to discuss and model appropriate "social behavior" (including recognizing/responding to social cues, initiating interactions with others, etc.). Behavioral support services will also help _____ to build social skills in a nurturing manner so that he can be more successful in the general education setting. *Id.* at p. 5.

And finally, under that same category, under Impact on the Student, his IEP states:

> _____'s social learning challenges impact his ability to maintain healthy relationships with peers and participate in small group/large group activities. At times, _____ tends to "be in his own world" and he has difficulty following the format of a classroom activity (especially during sports class or when he is in a highly stimulating environment). Behavioral support services/classroom services will allow _____ to learn valuable skills so that he can display improved social-emotional functioning in the school setting. *Id.*

5. Under goals for Emotional, Social and Behavioral Development, the following three goals are identified: making available to Student various stories, games, role-playing exercises to assist in development of social skills; participate in small group setting in a role playing or real life activity; and within the classroom setting be supported by verbal prompting so as to engage in small group activity (P. Exh. 4, p. 5). Petitioners and Respondent stipulated that these goals as well as all the goals set forth in this IEP were "appropriate" for purposes of compliance with IDEA (Stipulation of Counsel).

6. Student's first grade class consisted of 24 students, a full-time general education teacher and a full-time teacher's aide. Until April 2012, the

school had a roving aide that often assisted with the first grade class. She left to go to another school and was not immediately replaced. None of these teachers had received any significant training in dealing with children on the autism spectrum. Student required an enormous amount of special attention in class. It was estimated that an adult needed to be within several feet of him in order that he remain on task 85%-90% of the time. This was accomplished by utilizing a variety of teachers, including the teaching specialists (art, music, etc.) combining with the two teachers in the classroom (Testimony of Teacher; P. Exh. 20, p. 55).

7. Academically, Student was at his best at reading. He struggled mightily with written expression, speech and mathematics. His First Grade Teacher said that although he generally made "progress" in his subject areas, he would do best in a small classroom setting of no more than 10 students and preferably less (Testimony of Teacher). In answering an undated questionnaire prepared by Student's treating pediatric neuropsychologist, Student's First Grade Teacher answered the following question some time shortly before the February 15, 2012 IEP meeting:

> 4. How many hours of _____ and _____ time is devoted to _____ on a typical day? In other words, how much adult support on a daily basis does _____ need in order for him to achieve his school tasks?
>
> Ideally _____ would have full-time support from either teacher to stay on task and complete his assignment. Realistically, _____ receives dedicated support from either teacher about 80-90% of a typical

> day (minus lunch and recess). This includes: sitting near _____ on the carpet, sitting at _____ table during independent, partner, and group work times; working with _____ directly to scaffold assignments (providing physical and verbal prompts throughout the assignment); encouraging _____ to participate appropriately in partnerships, small group lessons, and large group activities both in the classroom and in specials. ____ is completely independent during lunch and does fine at recess, as long as the teachers on duty recognize him (most/all of the teaches [sic] at _____ know _____ and understand that he probably won't come immediately if you call and may get aggressive toward a student he doesn't know who approaches him in an unfamiliar way so they respond appropriately to him). (P. Exh. 20, p. 55)

8. Events throughout Student's first half of first grade demonstrated that the Student was having trouble adjusting to what was a more rigorous academic program preventing him from better accessing his academics. By email dated September 7, 2011, the First Grade Teacher advised Student's Mother of an incident that had happened in the classroom a few days earlier where Student was out of control, and was "using art materials unsafely." The Teacher added, "I think the structure of the day may be getting to him." The Teacher asked to meet with the Mother to "brainstorm" what could be done to allow Student to be safe and to learn. The parent responded thanking the teacher for her "thought and compassion" and offering some suggestions and offering to meet soon (P. Exh. 5; Testimony of Mother).[8]

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[8] Mother was very involved in school activity. This was at its height in kindergarten when Mother served as an unofficial art assistant for the class. This had to be sharply curtailed in first grade due to the fact that there was an art instructor and because the informality of the environment that was present in kindergarten at this school was not present in first grade (Testimony of Parent).

9. Thereafter, Mother would see Teacher nearly every day usually at the end of school when she picked him up, but sometimes also in the morning during drop-off. The academics, as noted, were more rigorous and Mother became more concerned that Student was becoming more and more dysregulated. She observed this personally from her attendance at regular field trips and was advised of the situation from conversations with First Grade Teacher (Testimony of Mother).

10. As Mother became more and more concerned, she consulted with Pediatric Neuropsychologist. Pediatric Neuropsychologist had extensive experience treating autistic children and had created a center dedicated to that study. He was qualified during this proceeding as an expert in Pediatric Neuropsychology and Autism. His organization had previously conducted an evaluation of Student in December 2010 (P. Exh. 25; Testimony of Pediatric Neuropsychologist). Pediatric Neuropsychologist reviewed the May 20, 2010 evaluation and met with the parents and the Student in late 2011 (Testimony of Pediatric Neuropsychologist).

11. At the request of Parent, the Pediatric Neuropsychologist attended the IEP meeting on February 15, 2012. Also in attendance were both parents, the First Grade Teacher, the Occupational Therapist, the School's Special Education Teacher, the LEA Special Education Coordinator, the School Psychologist, the School Social Worker and the Evaluator. No one from Respondent's special autism team was in attendance. The only person to take any notes was the Pediatric Neuropsychologist. At the meeting, <u>all</u> persons

who spoke, including the First Grade Teacher, agreed that Student needed one-on-one support in order to direct or redirect his behavior positively. They all agreed this was somewhat being provided in first grade on an *ad hoc* basis without the assistance of anyone who has an expertise in autism. The collective conclusion of those who addressed the issue was that Student must have an individual aide with training and experience in autism to obtain satisfactory access to the curriculum and/or classrooms with a smaller number of students led by a teacher with an autism background (P. Exh. 21; Testimony of Mother; Testimony of Pediatric Neuropsychologist; Testimony of Special Education Teacher).

12. At the end of the meeting, there was not a commitment made that a dedicated aide would be provided even though the educators who voiced an opinion at the meeting said an aide was required. Furthermore, there was no commitment of providing a smaller classroom or a more structured setting that would address his need for a more quiet, less overwhelming environment. Rather, the IEP provided services as follows: 2 hrs. of specialized instruction per week in a generalized education setting and the following related services: Behavioral Support Services – 90 minutes per week in a general education setting and 30 minutes per week outside the general education setting; Occupational Therapy – 240 minutes outside the general education setting; 240 minutes per month of Speech-Language Pathology – 120 minutes within the general education setting and 120 minutes per outside the General Education setting (R. Exh. 12).

The Parents refused to consent to this IEP, believing that it fell far short of what was necessary to allow Student to meet his academic needs and goals.

13. Thereafter, Parents embarked on an effort to convince the Respondent to provide more behavioral support to Student, by providing a one-on-one aide or some other form of support that would better allow him to access his education. In this regard, she attempted to reach the School's Special Education Coordinator inquiring about the possibility of an aide being assigned to Student. First, she tried reaching the Coordinator on the phone, but her calls were not returned.[9] She then wrote her an email on March 9, 2012, seeking information and asking that a specific autism specialist employed by DCPS conduct a classroom evaluation (Testimony of Mother). When she did not hear from the Coordinator, she wrote again on March 22, 2012, reiterating the need for the observation and a follow-up IEP meeting (P. Exh. 8; Testimony of Mother). Mother heard nothing and a month later she wrote again. She was becoming discouraged and worrying that Student's situation would further deteriorate when he entered the second grade in August 2012 (P. Exh. 9; Testimony of Mother). Finally, on April 12, the Special Education Teacher wrote back – five weeks after the original communication. She advised Mother that a "Frequency Behavior Assessment" (FBA) followed by a Behavior Intervention Plan (BIP) must precede any consideration of a dedicated aide. She also stated that, "I am sure the IEP was finalized following

[9] The Special Education Coordinator did not testify and this testimony was thus not refuted.

the meeting . . . to ensure we have services in place" (P. Exh. 9; Testimony of Mother).

14. On April 19, 2012, Mother emailed Special Education Coordinator stating at the opening, "It has taken me several days to respond to your note, because every time I have sat down to write it I am reminded again of how angry and frustrated I am with the way _____ needs have been handled by you and your team." She noted that it took three letters to get her attention and that the thrust of her response was not consistent with the expressions made at the February 15, 2012 meeting. She invited her to respond, but that did not happen (P. Exh. 10; Testimony of Mother).

15. Parallel to her efforts with the Special Education Teacher, Mother sent an email on March 9 to Respondent's Autism Specialist that had occasionally come to the School and assisted First Grade Teacher with Student. In that correspondence, she asked her to schedule a full observation of Student so that some information could be presented at his IEP meeting. She thanked her for her past service and asked the Autism Specialist to get in touch with her. She also gave the Autism Specialist her phone number. No such observation ever took place (P. Exh. 7; Testimony of Mother).

16. On March 2, 2012, the School Social Worker conducted a Functional Assessment Interview with the First Grade Teacher in which the following points, among others, were made: Student requires the assistance of the Assistant Teacher through most of the school day both academically and

socially. " _____ does not spontaneously communicate with his [sic] anyone including his classmates; as a result we are not clear on how to support him in a positive direction." The memo continues, " _____ will often refuse to comply with directives given by teacher. He will become defiant, talk back to the teacher such as 'shut up' or just say 'no.' He can be disrespectful and not compliant" (P. Exh. 16, p. 42). The Social Worker recommended a BIP. *Id.* at p. 47. The Parent did not see this document until the IEP meeting of June 14, 2012 (Testimony of Mother).

17. On April 18, 2012, a Prior Written Notice was sent to the Parents advising them that "[a]dditional information on emotional, social and behavioral concerns are warranted for this student." No date is listed on the PWN and the Mother wrote on the Notice, "When is this going to happen? When can we expect the results[?] When will the team reconvene w/the autism specialist? (P. Exh. 17; Testimony of Mother)

18. By email of April 19, 2012, the First Grade Teacher advised Mother that the roving school aide that had assisted Student during various times during the day was reassigned. Teacher noted ". . . given the [sic] _____ does not have an aide listed on his IEP, this support has not be [sic] guaranteed" (P. Exh. 11; Testimony of First Grade Teacher).

19. The Mother continued to reach out to Respondent's officials for assistance. On May 1, 2012, she emailed the School's Special Education Teacher asking when Student's observation would be held so that changes to

the IEP could be considered. The Case Manager responded the next day stating the "First _____'s IEP was finalized on February 15, 2012." She then recited that the Social Worker will conduct research to create an FBA which will lead to a BIP. She closed by saying, "[j]ust so you know, we have long way to go before there is an observation performed by Special Education Department (Central Office)" (P. Exh. 12; Testimony of Mother). The Mother wrote back on May 3, 2012, via email advising the Special Education Teacher that she and her husband had not agreed to the IEP. She also asked for more specifics as to when the FBA and the BIP were to occur given that, among other things, that she had asked for this process to begin months ago (P. Exh. 13; Testimony of Mother). On May 12, 2012, the Special Education Teacher wrote back stating that although the IEP was finalized ". . . we can reconvene at a later date, *i.e.*, the beginning of the school year or after the FBA results. Just to let you know, 60 days is the length we have to complete the request" (P. Exh. 14).

20. On June 8, 2012, a Letter of Invitation for June 21, 2012, was sent and soon thereafter received by Parents inviting them to a meeting to review the recent evaluations regarding Student (P. Exh. 18).

21. The meeting was rescheduled and occurred on June 14, 2012. This was the last day of school. In attendance were the Parents, the Pediatric Neuropsychologist (by phone), the First Grade Teacher, the Assistant Teacher, the Special Education Teacher, Respondent's evaluator and possibly the Speech Pathologist (Testimony of Mother). Again, the Pediatric

Neuropsychologist was the only person who took notes. The Social Worker proposed a BIP for second grade. There were no plans proposed to provide a special autism aide or teacher or anyone in the classroom that would provide specialized instruction to Student. The Pediatric Neuropsychologist asserted that Student required one-on-one support in a small structured class setting. As was the case during the initial February 15, 2012 IEP meeting, no representative of Respondent challenged that contention. The Pediatric Neuropsychologist included his "impressions" at the end of the notes indicating that the Plan put forth was inappropriate and actually provided for less staff than the Student received in first grade since there would be one teacher and an aide that was there only part of the day (P. Exh. 19, Testimony of Pediatric Neuropsychologist). The Parents left the meeting in despair (Testimony of Mother).

22. There were rumors starting in early Spring that a High Functioning Autism Program would be established at _____ Elementary School that would include a full-time teacher with credentials teaching autistic children. However, despite assertions to the contrary, I conclude that this program remained at the rumor stage. I conclude in this respect that no promises were made to the Parents regarding availability of such a program commencing in the 2012-2013 school year. As to this determination, I rely upon the following: the overall credibility of both Parents including the undersigned's evaluation of both their testimony and demeanor, particularly the Mother who gave extensive testimony that both Parents were committed to the School, that it was their

neighborhood school and that up until the time of the first IEP meeting, they had substantial faith in the school staff and Respondent's special education program. I also rely on the fact that while the Autism Specialist testified that she sent an email to the Mother advising her that a High Functioning Autism program was to be established at _____ Elementary School, that email was never produced. Indeed, such a HFA program was not referenced in <u>any</u> documents proffered in the case by either side. In this respect, Respondent's own Special Education Administrator stated on cross-examination that placement in a HFA program would normally be referenced in an IEP (Testimony of Special Education Administrator). Finally, I rely upon internal inconsistencies within the testimony of Respondent's witnesses: while the Autism Specialist for Respondent claimed that the staff was aware of it in the Spring of 2012, the Principal testified that while he was aware that Respondent was planning a program at _____ Elementary School that would serve autistic children on a system-wide basis, he only told the Special Education Administrator and no one else. It strains credulity to believe that if Respondent had definitively decided to establish such a program, it would be reasonable that there would have been written communication about it, particularly to the Parents of Student since they had lobbied for something like this for months and Respondent's Special Education Coordinator had asserted that the Student was the primary reason for the program in the first place. Similarly, if the HFA was such a certainty, one might have expected the IEP to be revised by no later than the June 14 meeting at least by referencing that

Student would receive more heightened and structured services. Yet, the IEP was not revised (R. Exh. 12; Testimony of Mother).

23. The Parents faced a dilemma. Despite their inquiries, they were not receiving assurances that _____ Elementary School would provide for their son the specialized instruction and small classroom size that they, and the professional they had hired to give them expert opinion, had advised. They preferred to remain at _____ Elementary School, but they eventually concluded that that was not in the interest of their son. They began inquiring of private schools in late February or early March after the February IEP meetings. They held out hope that it would make sense to remain at _____ Elementary School but that hope effectively evaporated after the June 14 meeting. They had to make a decision or the spot for the Student at _____ School, the private school eventually selected out of several visited, would be taken by someone else. They signed a contract for the 2012-2013 school year in early July 2012 (Testimony of Mother).

24. Petitioners gave notice of their decision to cease having Student attend _____Elementary School and intended to enroll Student at _____ Non-Public School by letter dated June 21, 2012 from Counsel to the Principal of _____ Elementary School (P. Exh. 2). By letter dated June 27, 2012, Respondent advised Parents' Counsel that it did not agree to reimbursement for Student to attend _____Non-Public School because _____ Elementary School was able to provide FAPE (P. Exh. 3).

25 Student was enrolled in the second grade at _____ [non-public] School since the beginning of second grade. The Mother believes he is making significant progress. He is now doing his homework which she described as "remarkable" and is more relaxed (Testimony of Mother). The school is a well-known school exclusively for disabled children. Respondent's Special Education Administrator stated that the school had very good programming (Testimony of Special Education Administrator). Student's second grade class consists of five students, four of whom are autistic. The fifth has multiple disabilities not including autism spectrum disorder. There is a head teacher, two assistant teachers plus three other aides providing one-on-one assistance to three of the five students. Thus, there are six adults and five students in the class. The teachers are able to prompt Student in the normal course without affecting the remainder of the class and Student is able to understand his responsibilities and act accordingly. He is now beginning to interact with his fellow students. By all accounts progress is being made in the context of his disability and he is accessing his educational studies (Testimony of Director, Multiple Learning Needs for Non-Public School; P. Exh. 28; P. Exh. 29).

26. The tuition at _____ School, including special education services (counseling services, occupational therapy, and speech therapy), is $51,997.00 (P. Exh. 30). The Petitioners have paid that amount in its entirety (Testimony of Mother; P. Exh. 34).

27. The High Functioning Autism Program did commence at _____ Elementary School at the beginning of 2012-2013 school year. It is staffed by a Special Education Teacher with experience with autism and two aides (Testimony of Teacher). No witnesses with first hand knowledge of the program testified on behalf of Respondent.

Analysis and Legal Conclusions

The Individuals with Disabilities Education Act ("IDEA") provides that States and Territories, including the District of Columbia, that receive Federal educational financial assistance must establish policies and procedures to ensure that they extend a "Free Appropriate Public Education" to children with disabilities. Free Appropriate Public Education or FAPE is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability." 20 U.S.C §1401(28); *see also* 34 C.F.R. § 300.39 and DCMR Title 5-E § 3001.1. The term "child with a disability" is defined to mean a child with any one of a certain named type of condition or impairment that "by reason thereof, needs special education and related services." 20 U.S.C. §1401(3)(i) and (ii). The statue provides that States may issue their own regulations supplementing the Federal scheme. Accordingly, the District of Columbia has enacted its own provision defining a student with a disability. District of Columbia Code § 38.2561.01(14) and DCMR Title 5-E § 3001. In order to comply with IDEA, each State and Territory receiving Federal educational assistance must act affirmatively to ensure that "all children with disabilities residing in the State . . . regardless of the severity of their

disabilities, and who are in need of special education and related services, are identified, located and evaluated." *Reid v. District of Columbia*, 401 F.3d 516, 518-519 (D.C. Cir. 2005). "Once such children are identified, a 'team' including the child's parents and select teachers, as well as a representative of the local educational agency with knowledge about the school's resources and curriculum, develops an 'individualized education program' or 'IEP' for the child." *Id.* at 519 citing 20 U.S.C. §§1412(a)(4), 1414(d).

While the Public Schools are required to provide FAPE, ". . . it does not guarantee any particular outcome or any particular level of education." *N.T. v. District of Columbia*, 112 LRP 2066 at slip op. 3 (D.D.C. 2012) citing *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 192 (1982). Implicit in the concept of FAPE "is the requirement that the education to which access is provided be sufficient to confer <u>some educational benefit</u> . . . ." *Rowley*, 458 U.S. at 200 (emphasis added).

The burden of proof in a due process hearing is borne by the party that initiated that action. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); DCMR Title 5-E, Chapter 5-E §3030.14.

Petitioners' Claim That the IEP Did Not Meet the *Rowley* Standard of Providing an Educational Benefit

The Petitioners' primary claim is that the IEP did not meet the Student's educational needs and thus Respondent denied Student FAPE. Petitioners further claim that when FAPE is denied under such circumstances, they are legally permitted to enroll their child in another school, including a non-public

school as long as that school does meet the *Rowley* test of providing an educational benefit. Respondent contends that the IEP meets the *Rowley* standard and points out that Petitioners agreed that the goals of the IEP were proper. Respondent also accuses the Petitioners of bad faith, if not obstruction, in the process by not allowing the BIP to proceed as announced at the June 14, 2012 meeting.

It is well-established that a child with a disability placed in a non-public school by a parent or guardian because of a good faith belief that the public school does not provide educational benefit under *Rowley* does so at its own risk. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993). Parents may only be reimbursed for their costs associated with the non-public school if (1) the public placement was inappropriate and did not provide FAPE and (2) that the non-public school placement was appropriate and did provide FAPE. *Florence County*, 510 U.S. at 15; *Alfono v. District of Columbia*, 422 F. Supp. 2d 1, 5 (D.D.C. 2006).

I find that the IEP was severely deficient. The overwhelming evidence in this case was that the Student would benefit from more focused attention in a smaller group learning environment or class. The picture essentially painted by the First Grade Teacher and the Mother, both of whom I deem extremely credible, is that of a student that was not capable of processing his education through much of the first grade. The picture painted is that of a teacher, an aide and occasionally some other staff member providing *ad hoc* benefit to a child requiring near one hundred percent adult supervision in a classroom of

at least twenty students on any given day. Either the other students' learning experience is sacrificed due to the absence of teacher attention or Student is ignored or treated as secondary -- not because the staff wishes to do so because the evidence is that the in-class staff went out of their way to assist Student – but because the sheer number of students in conjunction with the presence of one student that required full-time attention -- perforce dictates that either the class or the disabled student is short-changed. As such, I find that the IEP of February 2012 (R. Exh. 12) is insufficient because, as a practical matter, it rests upon a "plan" of, as the witnesses stated, cobbling together enough resources on a day-to-day, hour-by-hour basis in an effort to provide FAPE to a student with High Functioning Autism. I do not believe that FAPE can be met under these circumstances as to this particular Student.

The courts have determined that it is incumbent upon the applicable Public School System to include the specific behavioral support services in the IEP. *See e.g., N.T. v. District of Columbia*, 112 LRP 2066 at slip. op. 4 ("Additionally, there is ample support in both the administrative hearing and the administrative record that the IEP was deficient by not providing for small class size for N.T. ('During core academic time, N.T. continues to benefit from small group instruction . . . . She is able to focus better when she is in a small group.'")); *Sudbury Pub. Schs. v. Mass. Dep't of Elementary and Secondary Educ.*, 762 F. Supp. 2d 254 (D. Mass. 2010) (reliance on small classrooms as part of conclusion that IEP was not appropriate).

Respondent avers that notwithstanding the literal language contained in the IEP, FAPE can be provided through the High Functioning Autism Program. I reject that contention. First, as noted by the Special Education Administrator, the terms of the HFA particularly as it impacted this Student, must be set forth in the IEP itself. *N.S. v. District of Columbia*, 709 F. Supp. 2d 57, 73 (D.D.C. 2010)("One of the purposes of the IEP is to ensure that the services provided are formalized in a written document that can be assessed by parents and challenged if necessary.") Second, and equally important, the Petitioners here are not required to wait patiently months on end for Respondent to roll out this program. Perhaps Respondent acted as efficiently as it could in developing the program and it was not ready until August 2012. Whether it did or did not is not relevant. In *N.S. v. District of Columbia*, 709 F. Supp. at 73, a case on all four's with this case, the court stated, "Plaintiffs cannot be penalized for refusing to rely on a hope that appropriate services would be provided after an initial test period." There, the court held that the public school did not provide FAPE when "everyone agreed that he [the Student] needed specialized instruction in a 'small structured environment. . . .'" *Id.* at 72. With respect to the concept of possible services to be provided, the court rejected that theory declaring "the MDT/IEP Team meeting notes do not indicate N.S.'s parents were told that N.S. would be provided with specialized services, and [redacted] testified that although the possibility of adding pullout sessions for N.S. was discussed, that message was not clearly communicated at the meeting." *Id.* at 71. As noted in the Findings of Fact, I

have concluded that Petitioners were not advised that this Program was even remotely foreseeable at _____ Elementary School in time for the 2012 school year, let alone that its establishment was certain. See Findings of Fact, ¶22.

Having concluded that the IEP did not provide FAPE, I must determine whether _____ Non-Public School is appropriate. I find that it does and shall order that Respondent reimburse Petitioners for the cost of tuition and related expenses. I recognize that _____ Non-Public School is not the least restrictive environment (LRE) and that the statute places a preference for disabled and not disabled children attending school together. While that remains an essential tenet of IDEA, it is not a factor in a situation like this where the public school has been deemed an inappropriate placement. *See, e.g., E.S. & M.S. v. Katonah-Lewisboro Sch. Dist.*, 742 F. Supp. 2d 417, 444-45 (S. D. N. Y. 2010), *aff'd,* 487 Fed. Appx. 619 (2d Cir. 2012)("The right of parental placement would be vitiated if the courts were to find that such a private school placement violated IDEA's mainstreaming requirement.")

By all accounts, Student is progressing reasonably well at _____ Non-Public School and has in hand those same tools that he lacked at _____ Elementary School that caused the undersigned to find that the IEP there not meeting the standards of *Rowley*. Thus, Student is in a very small class with a low student-teacher ratio that best enables him to remain on task. And only by remaining on task can Student attain the educational benefit guaranteed by IDEA. That Student is assessing educational curriculum was

corroborated by Mother and by the Pediatric Neuropsychologist in an extensive report (Testimony of Mother; P. Exh. 24).

Finally, I reject Respondent's contention that Petitioner's reimbursement request should be denied because they acted in bad faith during this process and that the evidence points to the fact that they never intended to enroll Student in _____ Elementary School for second grade. I find that there is no such evidence. The Respondent points to the BIP that Parents rejected when it was introduced at the June 14, 2012 meeting. However, it is abundantly clear that the Petitioners had pleaded with Respondent as early as late February or early March to start a process that would include a BIP. Respondent's proposal of BIP in June was too late and a product of Respondent's delay. Beyond this, there is no evidence that Petitioners analyzed this entire situation with anything but an open mind. This was their neighborhood school and Student had attended this school since he was three. Petitioners had every intention of having their child remain there and only changed their minds when Respondent failed to address Student's real needs in the IEP.[10]

Alternatively, Petitioners Assert that Respondent Denied FAPE by Failing to Meaningfully Allow Petitioners to Participate in the IEP Process

Petitioners assert in the alternative, that they were denied meaningful participation in the IEP process. "The Act imposes upon the school district the

[10] It is unclear from Respondent's post hearing brief whether it is alleging that reimbursement should be denied or reduced because of an alleged failure to comply with 34 CFR §300.148(d)(1)(ii). To the extent it is being argued, this claim is rejected as notice was given. See Findings of Fact ¶ 24.

duty to conduct a meaningful meeting with the appropriate parties." *W. G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23*, 960 F. 2d 1479, 1485 (9th Cir. 1992). This means, among other things, that the LEA must keep an open mind and allow the parents or guardian a real opportunity to assist in crafting the IEP.

This did not happen in this case. The logical conclusion from this set of facts is that the decision makers---not necessarily the teachers at _____ Elementary School---never considered the idea of smaller classrooms, or a designated aide or anything other than what was in the IEP. The clear facts are that anyone who voiced an opinion - - including Student's classroom teacher and his Mother - - indicated that the *status quo* as confirmed by the February 2012 IEP was not succeeding and that Student was not accessing his curriculum because he needed more adult supervision. Despite these statements made clear by all those who expressed an opinion, the requests fell on deaf ears. Moreover, for months the Respondent's agents in charge ignored the Parents' inquiries. This strongly suggests the absence of an open mind and a "predetermination" not to consider the ideas of the Parents and others. This is a procedural violation of IDEA which I independently find to be a violation of FAPE because it did result in harm to the Student by virtue of the proximate relationship between Respondent's conduct and the failure of the Student to assess his education. Consequently, I alternatively rule that FAPE has been denied on this basis as well. *See W. G. v. Board of Trustees of Target Range Sch. Dist. No. 23*, 960 F. 2d at 1484 (IEP developed without the "input and

participation" of parents); *P.C. v. Milford Exempted Village Schs.*, 2013 U.S. Dist. LEXIS 7477, at *25 (S.D. Ohio Jan. 17, 2013)(". . . school district had decided to change the disabled student's placement before developing an IEP to support the change."); *Deal v. Hamilton County Bd. of Educ.*, 392 F. 3d 840 (6th Cir. 2004), *cert. denied,* 546 U.S. 936 (2008)(predetermined decision not to consider one-on-one program as a viable option constitutes a violation of IDEA).

ORDER

Based upon the Findings of Fact and Conclusions of Law, the entire record herein including the testimony and exhibits and with due consideration of the arguments and briefs of counsel, it is hereby ORDERED.

1. The Petitioner shall be reimbursed in the amount of $51,997.00, for the cost at _____ School for the 2012-2013 school year. As proof of Parents' payment has already been made in this proceeding, such reimbursement shall occur within thirty (30) days of this Order.

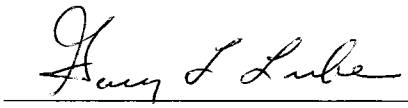
2. The Respondent shall convene an IEP team meeting for this Student for the 2013-2014 school year within thirty (30) days of this Order so as to revise the current IEP. Any dispute that arises out of that process shall be deemed distinct and separate from the issues and findings herein.

3. This case shall be, and is, hereby closed[11].

[11] The Petitioner is the prevailing party.

IT IS HEREBY ORDERED.

Date: 3-15-13



Impartial Hearing Officer

Copies to: All Counsel of Record
District of Columbia Public Schools
Student Hearing Office, OSSE
Chief Hearing Officer, OSSE

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1451(i)(2)(B).