

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, NE, 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
October 24, 2014

PETITIONERS,
on behalf of STUDENT,¹

Date Issued: October 24, 2014

Petitioners,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Office of Dispute Resolution,
Washington, D.C.

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioners (the Petitioners or PARENTS), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (DCMR). In their Due Process Complaint, Petitioners seek reimbursement from Respondent District of Columbia Public Schools (DCPS) for Student's private placement at NONPUBLIC SCHOOL.

¹ Personal identification information is provided in Appendix A.

Student, an AGE child, is a resident of the District of Columbia. Petitioners' Due Process Complaint, filed on August 19, 2014, named DCPS as respondent. The parties met for a resolution session on September 11, 2014 and did not reach an agreement. On September 3, 2014, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. The 45-day period for issuance of this decision began on September 19, 2014.

On September 10, 2014, Petitioners filed a motion for "stay-put" protection, which I granted by order entered September 18, 2014. On October 15, 2014, DCPS filed a motion for partial summary decision, which I denied by order entered October 17, 2014.

The due process hearing was held before this Impartial Hearing Officer on October 22, 2014 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. Petitioner, FATHER, appeared in person, and Petitioners were represented by PETITIONERS' COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL and DCPS' CO-COUNSEL.

Father testified and Petitioners called as witnesses SCHOOL DIRECTOR and SPECIAL EDUCATION CONSULTANT. DCPS called as witnesses LEA REP and OCCUPATIONAL THERAPIST. Petitioners' Exhibits P-1 through P-20 were admitted into evidence without objection, except for Exhibits P-17 and P-18, which were not offered. Respondent's Exhibit R-1 through R-7 and R-10 through R-22 were admitted into evidence, including Exhibits R-1 through R-7 and R-10 through R-14 which were admitted over Petitioners' objections. Petitioners' objection to Exhibit R-9 was sustained. At the end of Petitioners' case in chief, DCPS' Counsel made a motion for a

directed finding against Petitioners which I denied.² Neither party requested leave to file a post-hearing memorandum.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the September 3, 2014

Prehearing Order:

- Whether DCPS denied the student a free appropriate public education (FAPE) by failing to propose an appropriate program or placement for him for the 2014-2015 school year, including failing to propose a self-contained setting for lunch and recess and failing to address lunch and recess on the July 9, 2014 Individualized Education Program (IEP), and failing to include 90 minutes per week of speech and language therapy;
- Whether DCPS denied the student a FAPE by failing to include the Parents in the decision-making process for the student’s proposed placement at CITY ELEMENTARY SCHOOL; and
- Whether City Elementary School is a suitable placement for the student.

For relief, Petitioners seek public funding from DCPS for Student’s enrollment in Nonpublic School for the 2014-2015 school year.

FINDINGS OF FACT

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

1. Student, an AGE child, resides with Parents in the District of Columbia.

² I took under advisement DCPS’ motion for a directed finding on the issue of whether DCPS failed to include the Parents in the decision-making process for the student’s proposed placement at City Elementary School. In this decision, based upon the evidence at the hearing, I find against the Petitioners on that issue and I now deny the motion for a directed finding.

Student is currently enrolled in GRADE at Nonpublic School. Testimony of Father.

2. Student is a “child with a disability” as defined by the IDEA and eligible for special education and related services under the primary disability classification Autism Spectrum Disorder (ASD). Exhibit P-9.

3. Student has attended Nonpublic School since the 2012-2013 school year. Nonpublic School is a private day school in suburban Maryland, serving children with special needs. Testimony of School Director.

4. On March 21, 2014, Petitioners brought a prior due process complaint against DCPS (Case No. 2014-0137), in which they alleged that DCPS denied Student a FAPE for the 2012-2013 and 2013-2014 school years, by, *inter alia*, failing to provide IEPs for Student. Following a two-day due process hearing, Hearing Officer Keith Seat issued a Hearing Officer Determination on June 24, 2014 (the June 24, 2014 HOD). In his decision Hearing Officer Seat determined that DCPS had denied Student a FAPE for the 2012-2013 and 2013-2014 school years because DCPS did not have in place finalized IEPs at the beginning of the respective school years. Hearing Officer Seat ordered DCPS to reimburse the Parents for Student’s tuition at Nonpublic School for the 2012-2013 and 2013-2014 school years and ordered DCPS to convene a meeting to develop an updated IEP for Student and to involve the Parents in the school selection process for the 2014-2015 school year. Exhibit P-7.³

5. On July 9, 2014, DCPS convened an IEP meeting for Student at its Private/Religious School Enrollment office. Father, Petitioners’ Counsel, School Director and a school psychologist from Nonpublic School attended the meeting.

³ At the due process hearing in the instant case, Petitioners’ Counsel represented that the time period for appealing the June 24, 2014 HOD has lapsed and that no judicial appeal had been filed.

Exhibit R-20. The DCPS representatives incorporated in the IEP the annual goals for Student which were recommended by School Director. School Director shared with the IEP team that Student needs 1:1 support throughout the school day. Testimony of School Director.

6. The July 9, 2014 HOD provided that Student would receive 25.5 hours per week of Specialized Instruction outside the general education setting. For related services, the IEP provided that Student would receive four hours per month of Speech-Language Pathology, 360 minutes per month of Occupational Therapy and 30 minutes per week of Behavioral Support Services. The IEP also provided that Student would receive 120 minutes per month of Occupational Therapy Consultation Services. Exhibit R-20. The provision for 25.5 hours of Specialized Instruction made this a full-time IEP. Testimony of LEA Rep.

7. By letter of July 21, 2014, DCPS informed Father that the location of special education services for Student would be City Elementary School's Communication and Education Support (CES) program. Exhibit P-10. During the week of July 28, 2014 DCPS convened a Location of Service meeting which Father attended. This was when Father received the July 21, 2014 letter. The meeting was originally scheduled for July 22, 2014 and was postponed at Father's request. At the meeting, DCPS AUTISM TEAM SPECIALIST discussed the program at CES. Autism Team Specialist provided Father information about the student to teacher ratio, the academic level of other children in the program, and other information. Father arranged to visit the CES program on September 16, 2014. Testimony of Father.

8. By letter of August 4, 2014, PETITIONERS' COUNSEL 2 wrote DCPS LEA REPRESENTATIVE 2 and informed him that the Parents formally rejected the CES

Program and continued to seek Student's placement at Nonpublic School. In his letter Petitioners' Counsel 2 specified the following objections to DCPS' proposed IEP and placement:

- 1. The reflection of Student as a kindergartner in the IEP (you are to get back to us this week with information as to how that can be corrected);*
- 2. The absence of the identification of the IEP team members who attended last week's meeting;*
- 3. The failure to include recess and lunch in the IEP at all;*
- 4. The inability of the proposed program at City Elementary School to implement the IEP as drafted;*
- 5. The failure to provide for a full-time, self-contained special education program;*
- 6. The failure of the IEP team to include six hours per month of Speech and Language services;*
- 7. The box concerning prior supports in the general education setting is filled in incorrectly;*
- 8. The ESY goals and services are incomplete and incorrectly proposed;*
- 9. The IEP calls for Student to receive applied behavior analysis specialized instruction, a service that he is neither receiving nor benefitting from; and*
- 10. The failure to both include the placement on the IEP or to involve the Parents in the decision-making process for placement.*

Exhibit P-12.

9. By letter of August 11, 2014, the Parents notified DCPS that they did not believe that DCPS had offered an appropriate special education program for Student for the 2014-2015 school year and that Student would continue to attend Nonpublic School. The Parents requested DCPS to place and fund Student at Nonpublic School. Exhibit P-13. On August 19, 2014, Petitioners' Counsel filed the due process complaint in this

case. By letter of August 20, 2014, DCPS' Project Coordinator wrote the Parents that DCPS' position was it had made FAPE available to Student with an appropriate IEP and placement in Student's Least Restrictive Environment, and that DCPS would not agree to fund Student's placement at Nonpublic School for the 2014-2015 school year. Exhibit P-15.

10. In early September 2014, the Parents executed an enrollment agreement for Student to attend Nonpublic School for the 2014-2015 school year. Subsequently, on September 16, 2014, Father and Special Education Consultant visited City Elementary School. At that point, the Parents had already decided that Student would remain at Nonpublic School, but Father wanted to see the CES Program at City Elementary School for himself. Testimony of Father.

11. At the CES Program, Student would be placed in a self-contained class of up to eight special education students, taught by a special education teacher and an instructional aide. At the present time, there are six children enrolled. One of the children in the class is assigned a dedicated aide. Hence, the student to adult ratio would be approximately 7:3. With the exception of "Specials" – art, music and physical education – all courses and lunch are provided in the self-contained classroom. For art and music, the CES students join nondisabled students in a regular education classroom. The CES students sit at a separate table. The art and music teachers provide differentiated instruction to the CES students. Recess is scheduled for 30 minutes each day. CES students are sent to the playground with same-grade nondisabled students. CES paraprofessionals accompany the CES students to recess. Testimony of LEA Rep.

12. Since the 2013-2014 school year, Student has been placed in an intensive language-learning based class at Nonpublic School, for children who have more severe

language and learning difficulties. There are four children in the classroom taught by a special education teacher and three other adults, for a 1:1 student-adult ratio. The physical classroom consists of a regular classroom space with two adjacent pull-out rooms, for when a student may need a small setting for 1:1 academic support or quiet sensory support. Student and the other children work at individual study carrels, which are facing the wall to minimize distractions. Student also regularly uses the “quiet” room. Testimony of School Director.

13. Student has challenges with engagement, attention, regulating himself and processing in a group, which requires that he receive intensive support throughout the academic day. He exhibits significant challenges with reciprocating and with engagement. He is very limited in his ability to communicate and requires prompting with any type of pen and paper task and to comment verbally. Student was not placed in a less intensive classroom at Nonpublic School, because he was unable to engage and to work independently in a group setting. Testimony of School Director.

14. Student has responded well to the intensive classroom program at Nonpublic School. He has shown some progress in his ability to engage and to reciprocate with adults. He is able to understand his daily school schedule. He is now able to attend to task for up to ten minutes and, for more than 50 to 60 percent of the day, is able to work on academic activities. Since being in the program, Student has become able to understand letters, to identify some sight words, to recognize many numbers and to count by 10's to 100. He is able to perform some simple addition with manipulatives. Testimony of School Director.

15. Previously Student would only eat lunch, if in a room by himself. He is now able to sit in a classroom and eat lunch with three other students. He needs to be

prompted throughout the lunch period to not become distracted away from eating and he requires fine motor assistance to open food containers and zip-lock bags. Testimony of School Director.

16. Nonpublic School enrolls only children with disabilities. It operates on a 11-month schedule. Nonpublic School holds a current Certificate of Approval from the D.C. Office of the State Superintendent of Education (OSSE). The annual tuition is approximately \$64,000 for the 11-month program, plus additional charges for speech-language, occupational therapy and counseling related services. Testimony of School Director.

CONCLUSIONS OF LAW

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

Burden of Proof

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

Analysis

1. Did DCPS deny Student a FAPE by failing to propose an appropriate program or placement for him for the 2014-2015 school year, including failing to propose a self-contained setting for lunch and recess and failing to address lunch and recess on the July 9, 2014 IEP, and failing to include 90 minutes per week of speech and language therapy?

The Petitioners contend that DCPS' proposed July 9, 2014 IEP is inappropriate for Student because it does not provide a self-contained setting for lunch and recess and only provides 60 minutes per week of speech and language instruction. DCPS responds that its proposed IEP meets the requirements of the IDEA and that City Elementary School is able to implement the IEP.

In *K.S. v. District of Columbia*, 962 F.Supp.2d 216 (D.D.C.2013), U.S. District Judge Boasberg reviewed case law precedents on the requirements for an appropriate IEP:

The IEP must be formulated in accordance with the terms of IDEA and “should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 200, 204, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). IDEA also requires that children with disabilities be placed in the “least restrictive environment” so that they can be educated in an integrated setting with children who do not have disabilities to the maximum extent appropriate. *See* [20 U.S.C.] § 1412(a)(5)(A). . . . IDEA provides a “basic floor of opportunity” for students, *Rowley*, 458 U.S. at 201, 102 S.Ct. 3034, rather than “a potential-maximizing education.” *Id.* at 197 n. 21, 102 S.Ct. 3034 . . .

Courts have consistently underscored that the “appropriateness of an IEP is not a question of whether it will guarantee educational benefits, but rather whether it is reasonably calculated to do so”; thus, “the court judges the IEP prospectively and looks to the IEP’s goals and methodology at the time of its implementation.” Report⁴ at 11 (citing *Thompson R2–J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148–49 (10th Cir.2008)). . . .

An IEP, nevertheless, need not conform to a parent’s wishes in order to be sufficient or appropriate. *See Shaw v. Dist. of Columbia*, 238 F.Supp.2d 127, 139 (D.D.C.2002) (IDEA does not provide for an “education . . . designed according to the parent’s desires”) (citation omitted). While parents may desire “more services and more individualized attention,” when the IEP meets the requirements discussed above, such additions are not required.

K.S., 962 F.Supp.2d at 220-222.

Lunch and Recess

⁴ U.S. Magistrate Judge Kay’s Report and Recommendation, June 10, 2013

The Parents contend that the July 9, 2014 IEP was inappropriate because it did not provide for Student's lunch and recess to be provided in an outside of general education, self-contained, setting. The IDEA Least Restrictive Environment (LRE) implementing regulations require that, in providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals and recess periods, the public agency must ensure that each child with a disability participates with nondisabled children in extracurricular services and activities to the maximum extent appropriate to the needs of that child. The public agency must also ensure that each child with a disability has the supplementary aids and services determined by the child's IEP Team to be appropriate and necessary for the child to participate in nonacademic settings. *See* 34 CFR § 300.117.

Here, the Parents offered considerable uncontested evidence that Student requires 1:1 adult attention at lunch, to keep him "on task" while eating, and at recess out of safety concerns. However, the Parents did not show that a self-contained setting is Student's LRE for lunch and recess. I find that the Petitioners have not met their burden of proof to establish that Student's disability requires that his lunch and recess be provided in an outside of general education, self-contained, setting as they allege, or that the July 9, 2014 IEP is inappropriate because it does not address lunch and recess. (Whether the July 9, 2014 IEP should have specified that Student would be provided supplementary aids and services for lunch and recess was not raised as an issue in this case.)

Speech and Language Therapy

The proposed July 9, 2014 IEP would provide Student four hours per month of Speech-Language Pathology services. At the IEP meeting, there was a discussion of how

much speech and language services Student needed. The DCPS representatives on the IEP team requested the Nonpublic School representatives to provide a justification for the 90 minutes per week of services that Student had been receiving at the private school. Student's speech-language pathologist drafted a justification for Student's continuing to receive 90 minutes per week of services.⁵ This justification stated that 90 minutes per week of speech and language services were "highly beneficial" for Student. School Director, who qualified as an expert in speech-language pathology for children, likewise opined that Student would "benefit" from 90 minutes per week of speech and language services. However, the Parents have not shown that four hours per month of speech and language services, as proposed in the IEP, would not have provided the Student educational benefit, even if 90 minutes per week would be more beneficial. The role of the Hearing Officer is not to determine whether DCPS has offered the best services, but "whether the services offered confer the child with a meaningful benefit." *See K.S. v. District of Columbia, supra*, 961 F.Supp.2d at 221-222. "The relevant inquiry is the amount of related services *necessary* to allow [the student] to function appropriately in the educational context." *Kugler v. Vance*, 30 IDELR 749 (D. Md. Feb. 8, 1999) (emphasis supplied). I find that the Petitioners have not established that the July 9, 2014 IEP provision for four hours per month of speech and language services was not sufficient to confer Student with meaningful benefit.

One-on-One Support

At Nonpublic School, Student receives 1:1 adult support throughout the school day. Both School Director and Special Education Consultant opined in their testimony that Student requires that level of support to make educational progress. However, the

⁵ There was no evidence that this written justification was provided to DCPS.

Parents did not request a dedicated aide for Student at the July 9, 2014 IEP meeting⁶ and in their due process complaint, they did not identify the failure to provide a 1:1 aide as a shortcoming of the IEP. *See Prehearing Order*, Sep. 5, 2014 (Parties and their counsel will be held to the matters agreed upon, ordered, or otherwise set forth in this Order.) I therefore decline to consider whether the IEP was inappropriate because it does not provide for 1:1 adult support to Student throughout the school day.

2. Was City Elementary School a suitable placement for Student?

By letter of July 21, 2014, DCPS informed the Parents that the location of services to implement Student's IEP would be the CES Program at City Elementary School. The Petitioners contend that the CES Program is not a suitable placement. DCPS responds that the CES Program is capable of implementing the July 9, 2014 IEP.

Under the IDEA, DCPS is obligated to devise IEPs for each eligible child, "mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs." *Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir.1991) (citations omitted.) "If no suitable public school is available, the District must pay the costs of sending the child to an appropriate private school, *see School Comm. of the Town of Burlington, Mass. v. Department of Educ. of Mass.*, 471 U.S. 359, 369, 105 S.Ct. 1996, 2002, 85 L.Ed.2d 385 (1985) (" *Town of Burlington* "); however, if there is an "appropriate" public school program available, i.e., one "reasonably calculated to enable the child to receive educational benefits," the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child," *see Kerkam v. Superintendent, D.C. Public Schools*, 931 F.2d 84, 86 (D.C.Cir.1991) (quoting

⁶ Representation of Petitioner's Counsel in closing argument.

Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)).” *Jenkins, supra*.

The July 9, 2014 IEP specified that Student would receive 25.5 hours per week of Specialized Instruction outside the general education setting. As DCPS’ witness, LEA Rep testified, this was a “full-time” IEP. Therefore, I conclude that the IEP would require that Student be provided all of his academic instruction outside the general education setting. Petitioner’s expert, Special Education Consultant opined that Student needs this full-time program because, even with the intensity of the program at Nonpublic School, his rate of progress is very slow. Education Director testified that at Nonpublic School, for “Specials” classes, the teachers go to Student’s classroom to provide instruction because Student becomes too disregulated in, and cannot handle, new environments. She testified that there are days when Student can work with only two students at a time due to sensory overload.

City Elementary School does not offer self-contained classes for Specials. According to LEA Rep, all of the students in the CES Program go to a large mainstream classroom for art and music classes, where they are seated at a separate table from the nondisabled peers. I find that mainstreaming Student for Specials classes would be contrary to the July 9, 2014 IEP’s requirement to provide Student full-time instruction in an outside of general education setting, and would not meet Student’s needs resulting from his ASD disorder, as explained by Principal and Special Education Consultant. I conclude that with the proposed placement of Student at the CES Program at City Elementary School, DCPS failed to offer Student a FAPE by not matching him with a school that is capable of fulfilling the requirements of his IEP. *See O.O. ex rel. Pabo v. District of Columbia*, 573 F.Supp.2d 41, 53 (D.D.C.2008) (DCPS is required to offer the

student “placement in a school that can fulfill the requirements set forth in the IEP.”)

3. Did DCPS deny Student a FAPE by failing to include the Parents in the decision-making process for Student’s proposed placement at City Elementary School?

The IDEA requires that for all IEP team meetings, the education agency take steps to ensure that the parent is present or is afforded the opportunity to participate. *See* 34 CFR § 300.322(a). Conduct by the district that seriously infringes upon a parent’s opportunity to participate in the IEP formulation process will result in a denial of a FAPE. *See, e.g., A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 164 (D.D.C.2005). Although Father, as well as Petitioner’s Counsel, were active participants in the July 9, 2014, IEP meeting, the Parents contend that their opportunity to participate was unlawfully circumscribed because, under DCPS procedures, it was left to the DCPS location of services (LOS) team to identify a site to implement the IEP and the Parents were excluded from that process.

The IDEA requires parental involvement regarding any decisions “on the educational placement of their child.” *See Aikens v. District of Columbia*, 950 F.Supp.2d 186, 190 (D.D.C. 2013), citing 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.116(a)(1), 300.327. It appears to be unsettled in this jurisdiction whether DCPS’ delegation of site selection to its LOS team comports with the requirements of the IDEA for parental involvement in placement decisions. *See, e.g., Aikens v. District of Columbia*, 950 F.Supp.2d 186, 191 (D.D.C.2013) (“[E]ducational placement refers to ‘the classes, individualized attention and additional services a child will receive—rather than the ‘bricks and mortar’ of the specific school.” *Id.*, citing *T.Y. v. N.Y.C. Dep’t of Educ.*, 584 F.3d 412, 419 (2d Cir.2009); *James v. District of Columbia*, 949 F.Supp.2d 1343 (D.D.C.2013) (“While the IDEA requires a student’s parents to be part of the team that

creates the IEP and determines the educational placement of the child, it does not explicitly require parental participation in site selection.” *Id.* at 138, citation and internal quotation omitted.) *But see Eley v. District of Columbia*, 2014 WL 2507937, 11 (D.D.C. Jun. 4, 2014) (Location where educational services are to be implemented is a vital portion of a student’s educational placement.)

It is not necessary to decide in this case whether DCPS’ delegation of site selection to its LOS team is permitted by the IDEA, because I find that the Parents were involved in the City Elementary School placement decision for Student. DCPS notified the Parents by letter of July 21, 2014 that Student would receive his special education services at City Elementary School. A location of services meeting was scheduled for July 22, 2014 between the Parents and DCPS’ Autism Team Specialist to discuss the program at City Elementary School and for the Autism Team Specialist to try to answer the Parents’ questions about the program. After the Parents notified DCPS on August 11, 2014 that Student would remain at Nonpublic School, Father still visited the CES program on September 16, 2014, observed the classroom and met with the City Elementary School Principal. Special Education Consultant accompanied Father on the school visit but was not allowed to observe in the classroom. Although DCPS assigned Student to City Elementary School and refused the Parents’ request to place him at Nonpublic School, I find that DCPS complied with the IDEA’s requirement to involve the Parents in the City Elementary School placement decision for Student. *Cf. T.Y., supra*, 584 F.3d at 420 (“The parents’ actions suggest that they seek a “veto” over school choice, rather than “input”—a power the IDEA clearly does not grant them.” *Id.*)

Payment for Unilateral Private School Placement

The Parents seek payment from DCPS for their expenses for Student to attend

Nonpublic School for the 2014-2015 school year. (Although the Parents signed an enrollment contract with Nonpublic School in September 2014, the evidence does not establish whether they have paid the school's tuition fees.) In his decision in *K.E. v. District of Columbia*, 2014 WL 242986 (D.D.C. Jan. 23, 2014), U.S. District Judge Walton explained the circumstances under which Parents must be reimbursed for private school expenses:

Under the IDEA, parents who unilaterally place their child at a private school without the consent of school officials do so at their own financial risk. *Florence Cnty. Sch. Dist. 4 v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284, (1993) (citation omitted). Parents in such situations may be reimbursed only if "the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate," 34 C.F.R. § 300.148©) (2012); *see also Florence Cnty.*, 510 U.S. at 15, 114 S.Ct. 361 (parent may only receive tuition reimbursement "if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act"); *Holland v. District of Columbia*, 71 F.3d 417, 420 n. 3 (D.C.Cir.1995) (noting that the circuit has ordered reimbursement "where the public agency violated [the IDEA] and the parents made an appropriate placement").

K.E., 2014 WL 242986 at 5.

In this decision, I have found that DCPS denied Student a FAPE by failing to offer him a suitable school location that was capable of implementing the full-time, outside of general education, specialized instruction requirements of the proposed July 9, 2014 IEP. The Parents have therefore established the first condition required for reimbursement, failure to make FAPE available. With regard to the second requirement for reimbursement, a private school placement is "proper under the Act" if the education provided by the private school is "reasonably calculated to enable the child to receive educational benefits." *See Florence County, supra*, 510 U.S. at 11, 114 S.Ct. 361. A finding that a private placement is proper "is not solely dependent on a determination

that the private placement is an appropriate placement, but rather is informed based on a factual analysis of all of the events that lead to the selection.” *K.E., supra* at 9 (citing *Maynard v. District of Columbia*, 701 F.Supp.2d 116, 124–25 (D.D.C.2010)).

Nonpublic School holds a current OSSE Certificate of Approval to provide special education services to children with autism. The evidence at the due process hearing was undisputed that Student is receiving educational benefits from Nonpublic School. Special Education Consultant, who has observed Student at Nonpublic School on multiple occasions, reported that Student is progressing in all educational goal areas, except for initiating interaction with other children. She noted, *inter alia*, that Student attends for longer periods of time, shows increased independence in following directions and exhibits decreased self-stimulating behaviors and scripting speech. School Director also testified that Student is making progress in the Nonpublic School program. Student is able to attend to task for longer periods of time and has made objective academic gains in reading and in math. Father testified that Student has less ASD self-stimulating behaviors and scripting speech. In the June 24, 2014 HOD, Hearing Officer Seat concluded that Nonpublic School is proper and appropriate for Student under the U.S. Supreme Court’s criteria set forth in *Burlington School Committee v. Department of Education*, 471 U.S. 359, 105 S.Ct. 1996, 2002, 85 L.Ed.2d 385 (1985) and in *Florence County, supra*. I likewise find that Student’s placement at Nonpublic School is proper under the IDEA and that the Parents are entitled to reimbursement by DCPS for their tuition and related expenses for Student to attend Nonpublic School for the 2014-2015 school year.

ORDER

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

ORDERED:

1. DCPS shall promptly reimburse Parents for Student's tuition expenses for his attendance at Nonpublic School's 11-month 2014-2015 school year program;
2. DCPS shall promptly reimburse Parents for Student's related services and Consultation Services expenses charged by Nonpublic School, within OSSE guidelines, and to the extent such services were specified to be provided to Student in the July 9, 2014 IEP;
3. For tuition and related services expenses for the 2014-2015 school year which have not yet been paid by the Parents, DCPS may remit payment to Nonpublic School directly; and

All other relief requested by Petitioners herein is denied.

Date: October 24, 2014

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

NOTICE OF RIGHT TO APPEAL

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