

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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NIKITA PETTIES, <u>et al.</u> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 95-0148 (PLF)
	)	
THE DISTRICT OF COLUMBIA, <u>et al.</u> ,	)	OSM Case No. 39.1 et. seq.
	)	Hearing Proceedings
Defendants.	)	
_____	)	

**REPORT AND RECOMMENDATIONS OF THE SPECIAL MASTER  
IN THE MATTER OF DIAGNOSTIC CONSULTANTS, LLC.**

This report is filed pursuant to the November 8, 2004 Payment Order (“Payment Order”). Diagnostic Consultants, LLC. (“DiCon”), provides related services to students from the District of Columbia. Between October 2008 and February 2010, DiCon submitted invoices to either the District of Columbia Public Schools (“DCPS”) or the Office for the State Superintendent of Education (“OSSE”) for various evaluations conducted on students between June 2008 and January 2010. At the time of the hearing, the Office of the Special Master had received eight letters requesting dispute hearings for the following invoices: Invoice 42008 (hearing request dated October 7, 2008), Invoice 652008 (hearing request dated October 7, 2008), Invoice 752008 (hearing request dated October 7, 2008), Invoice 3 (hearing request dated December 26, 2008), Invoice 5 (hearing request dated February 17, 2009), Invoice 8 (hearing request dated February 17, 2009), Invoice 9 (hearing request dated March 31, 2009), Invoice 11 (hearing request dated April 2, 2009), Invoice 12 (hearing request dated May 18,

2009)<sup>1</sup>, Invoice 13 (hearing request dated June 4, 2009), Invoice 14NP (hearing request dated June 4, 2009), Invoice 17 (hearing request dated July 30, 2009), Invoice 18 (hearing request dated July 30, 2009), Invoice 19 (hearing request dated September 5, 2009) and Invoice 20 (hearing request dated September 5, 2009).<sup>2</sup> The following sixteen invoices are under review in these proceedings: Invoices 652008, 752008, 3, 5, 8, 9, 11, 13, 14NP, 17P, 18P, 19P, 20P, 29P, 31NP and 32NP. Invoices 752008, 9, 11, 13, 14NP, 17P, 18P, 19P, 20P, 29P, 31NP and 32NP are reviewed on their merits while Invoices 652008, 3, 5 and 8 will be reviewed on procedural grounds.

The defendant argues that its financial obligations for the invoices submitted must align with the rate schedule set forth in two documents: Superintendent Directive 530.6 dated March 20, 2002 (“2002 Rate Directive”)<sup>3</sup> or the Chancellor’s Rate Directive on Individual Education Evaluations dated July 9, 2008 (“Chancellor’s Directive”)<sup>4</sup>, and that the rates invoiced by plaintiffs do not align with either directive. The defendant also maintains that for those evaluations not listed on either rate schedule, the provider must bill according to rates that are reasonable. Plaintiffs argue that they have billed according to reasonable, prevailing or market

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<sup>1</sup> Report and Recommendation issued July 1, 2009: Dkt. 1661.

<sup>2</sup> By letter dated February 2, 2010 DiCon introduced for consideration twenty additional invoices that had been disputed by DCPS and OSSE between August 2009 and January 2010. DiCon had not filed any previous requests for hearings with respect to these new invoices. Counsel for DiCon argued that his client believed that the twenty invoices, specifically 15P, 15NP, 16NP, 17NP, 18NP, 21NP, 23P, 23NP, 24P, 25P, 25NP, 26P, 27P, 27NP, 28P, 28NP, 29P, 30P, 31NP and 32NP would be included or consolidated with the pending complaints. The defendant objected to the inclusion of all except invoices 31NP and 32NP on the grounds that the Payment Order clearly requires requests for hearings to be filed with the Office of the Special Master within 10 days of the receipt of a final administrative decision. The Special Master concluded that invoices that had not been timely submitted would not be considered as the Payment Order is very specific about the need to file prompt requests for hearing. By this ruling, invoices 15P, 15NP, 16NP, 17NP, 18NP, 21NP, 23P, 23NP, 24P, 25P, 25NP, 26P, 27P, 27NP and 28P were excluded from consideration. (See March 3, 2010 hearing transcript - Attachment I1- pg. 25 through pg. 31)

<sup>3</sup> 2002 Rate Directive included herewith as Attachment A.

<sup>4</sup> Chancellor’s Directive included herewith as Attachment B.

rates, and must be reimbursed in full whether or not charges align with the 2002 Rate Directive or the Chancellor's Directive.

The first part of this decision will provide information on the procedures leading to the hearing on the merits. The second part will summarize the evidence presented at the hearings on March 2 and March 10, 2010. The third and final section will discuss the evidence and report recommendations.

I. Procedural Background

In a letter dated May 6, 2009, parties were directed by the Special Master to prepare for an evidentiary hearing by developing and presenting discovery plans. In a separate communication dated May 7, 2009, the Special Master directed Petties class counsel to facilitate the consolidation of discovery for DiCon, and another plaintiff, Interdynamics, Inc. ("Interdynamics"), who had an identical claim against the defendant for a comparably large volume of invoices. Following a joint teleconference<sup>5</sup> held on June 8, 2009 parties' joint discovery schedule<sup>6</sup> was circulated on June 26, 2009 by counsel for DiCon. By such schedule, proceedings involving DiCon occurred as follows:

Date	Event
7/20/2009	Joint request for admissions and discovery requests received from DiCon counsel
7/28/2009	DiCon requests settlement discussions with DCPS
11/12/2009	Special Master schedules pre-trial conference for Nov 23, 2009

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<sup>5</sup> Conference 1: At this conference, DiCon was represented by Kyung Dickerson, Esq., Interdynamics by Patricia Hammar, Esq., the District by Quinne Harris-Lindsey and Virginia Crisman. Counsel for the Petties class, Patrick Wojahn also participated.

<sup>6</sup> Joint Discovery Schedule included herewith as Attachment C.

A pre-trial conference<sup>7</sup> was convened by the Special Master on November 23, 2009 to determine progress with discovery. By the conclusion of the meeting, parties had agreed to the formulation of the issue for adjudication: “Did DCPS err when it failed to pay Invoice # X in full? If yes, what is the appropriate remedy?” It was agreed that a determination that the amount of payment was in error could entail one of the following:

- A. that DCPS failed to pay the reasonable, prevailing or market rate;
- B. that DCPS failed to take note of a Hearing Officer’s direction to disregard the Chancellor’s Rate Directive;
- C. that DCPS failed to respond timely to the providers invoice or objections; and/or
- D. that the Chancellor’s Rate Directive did not cover the evaluation in question.

Parties also agreed to meet and prepare written stipulations pertaining to each invoice in dispute, and to submit witness lists and prehearing briefs according to directions laid out by the Special Master in a Scheduling Order (“December 2 Scheduling Order”)<sup>8</sup> resulting from the meeting.

The sole discovery issue in dispute at the time of the conference was a disagreement regarding the defendant’s obligation to furnish information on the development of the rates in the Chancellor’s Directive. It was agreed during the conference that this information would only be relevant if the plaintiffs were not able to show that the rates invoiced were the reasonable, prevailing or market rates. If that outcome was reached, evidence on the appropriateness of the defendant’s methodology would be required. The December 2 Scheduling Order further laid out proceedings as follows :

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<sup>7</sup> Conference 2: At this conference, DiCon was represented by Dr. Syretta James, Interdynamics was represented by Patricia Hammar, Esq., and the District of Columbia was represented by Quinne Harris-Lindsey, Esq. Counsel for the Petties class, Patrick Wojahn, Esq., also participated.

<sup>8</sup> December 2 Scheduling Order included herewith as Attachment D.

<b>Date</b>	<b>Event</b>
2009/12/21	DiCon meets with DCPS
2010/01/13	Prehearing Disclosure of Documents and Lists of Witnesses and Briefs due
2010/01/14	Prehearing Conference
2010/01/19	Presentation of DiCon Case

On December 23, 2009, counsel for OSSE entered a formalized request as the agency of interest for the disputed invoices involving students receiving services in non-public schools and therefore under OSSE's purview.<sup>9</sup> Pre-hearing briefs and supporting documentation were received by the Special Master from DCPS and OSSE<sup>10</sup> on January 13, 2010. Counsel for the Petties class also submitted a brief outlining their position. By communication circulated on December 23, 2009, the Special Master was informed that DiCon and OSSE were unable to meet as directed by the December 2 Scheduling Order. DiCon, in lieu of a pre-hearing brief, submitted a Motion for Amendment of the Scheduling Order to postpone proceedings involving it as a plaintiff, as a result of its inability to meet with DCPS.<sup>11</sup>

A pre-hearing conference<sup>12</sup> with the defendant and both plaintiffs was convened before the Special Master on January 14, 2010.<sup>13</sup> The purpose of this conference was to acknowledge pre-hearing statements and enter them onto the record; organize and schedule hearing proceedings and resolve outstanding matters. The conference's resulting Scheduling Order<sup>14</sup>

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<sup>9</sup> Statement of Interest included herewith as Attachment E.

<sup>10</sup> A request by OSSE to discard and delete its pre-hearing submission was granted by the Special Master.

<sup>11</sup> Submissions included herewith as Attachments F.

<sup>12</sup>Conference 3: At this conference, Interdynamics was represented by Patricia Hammar, Esq., DiCon was represented by Mr. Gerald Tillman, Esq., and the District of Columbia was represented by Quinne Harris-Lindsey, Esq. Counsel for the Petties class, Patrick Wojahn, Esq., also participated.

<sup>13</sup> Meeting Agenda included herewith as Attachment G.

<sup>14</sup> Scheduling Order attached herewith as Attachment H.

granted DiCon's request for a postponement, and directed it to review DCPS' list of alleged invoices in dispute<sup>15</sup>. DiCon was to meet with OSSE and DCPS on January 29, 2010 in an effort to reach consensus on the invoices in dispute, and jointly prepare a spreadsheet listing all such invoices. The list along with DiCon's prehearing briefs and witness lists would be due on February 5, 2010 and would contain the following information with respect to each student for whom an invoice was disputed:

- A. The name of the student to whom a service was provided;
- B. The service provided to the student;
- C. The amount invoiced for the service provided to the student;
- D. The number and date of the invoice;
- E. Whether DCPS paid the invoice in part or did not pay the invoice at all; and if paid in part, the amount paid;
- F. The date that DCPS or OSSE issued a Final Administrative Determination ("FAD");
- G. The date that the provider requested a hearing regarding the invoice;
- H. If relevant, the language used by a Hearing Officer with respect to payment;
- I. If relevant, the language used in a funding letter, settlement agreement or other document with respect to payment;
- J. Whether the evaluation or assessment listed on the invoice is listed on the Chancellor's Rate Directive; and
- K. Whether DiCon [was] contesting the timeliness with respect to the invoice.

In the event that parties were unable to agree to the information above, a teleconference would be convened to determine the matter's disposition. Presentation of DiCon's case was slated for

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<sup>15</sup> Submitted as Attachment 4 to DCPS' January 13, 2010 prehearing brief.

February 11 and February 20, 2010. With regard to examination of the invoices during the hearing, parties agreed to the following:

- A. Parties' pre-hearing submissions would be considered opening statements.
- B. To facilitate an organized review of the case, the invoices in dispute would be divided into four categories and examined, as agreed at the November 29, 2009 meeting, with the following question in mind: "Did DCPS err when it failed to pay Invoice # X in full? If yes, what is the appropriate remedy?" The plaintiff would present its case for review as laid out below:
  - i. Category A Invoices: Invoices paid in err because Hearing Officer (or settlement agreement or letter) specifically directed DCPS to disregard Chancellor's Directive or expressly referred to "reasonable" rate, "market" rate or "prevailing" rate:
    - Introduction of underlying document;
    - Testimony regarding rate billed; and
    - Cross examination of witness(es).
  - ii. Category B Invoices: Invoices paid in err because [the] evaluation [invoiced] is not identified on Chancellor's Directive:
    - Testimony regarding evaluation and how it differed from evaluation identified in Chancellor's Directive; and
    - Cross examination of witness(es).
  - iii. Category C Invoices: Invoices paid in err because the document authorizing the evaluation is silent as to whether the cost of evaluation should be bound to the Chancellor's Directive although evaluation is specifically listed on the Directive.
  - iv. Category D Invoices: Invoices paid in err because the document authorizing the evaluation specifies that the cost of evaluation should be bound to the Chancellor's Directive, and the evaluation is specifically listed on the Directive.

Following the plaintiff's presentation of its case, the defendant would present its case for each invoice category as follows:

- Testimony rebutting the claim that the provider's rates are reasonable, prevailing or market rates;
- Testimony supporting the claim that the evaluation or assessment not listed on the Chancellor's Directive is subject to the rate paid;
- Testimony that DCPS has been uniform in the application of the Chancellor's Directive; and

- Optional cross by plaintiff after each issue or at the conclusion of each witness's testimony.
- C. Regarding a separate contested issue of law raised by DCPS in its pre-hearing submission: “[w]hether the hearing office has authority to waive or suspend D.C. Law, specifically 5 D.C.M.R. Section 3027.5,” parties were directed to submit briefs in time to allow the question to be resolved prior to the beginning of the evidentiary proceedings.
- D. Regarding timeliness, DCPS had stipulated in their pre-hearing submission to the following:
  - i. All of the invoices that are the subject of this payment dispute were timely disputed by DCPS and objected to by vendors;
  - ii. DCPS issued timely final administrative decisions for each disputed invoice; and
  - iii. [the] vendor filed timely requested proceedings for each disputed invoice.

The Special Master requested stipulations for the record to this effect from the plaintiffs.

During parties' discussions to create a joint list of disputed invoices, a disagreement arose between OSSE and DiCon with regard to invoices for which Final Administrative Decisions (“FAD”) had been issued by the defendant, but hearing requests had not been formally presented to the Office of the Special Master in the form permitted by the Payment Order. By letter dated February 2, 2010, DiCon sought to include such invoices with those under the ongoing proceedings. By letter dated February 4, 2010, OSSE opposed this request.

The issue of contested law and all other matters were briefed<sup>16</sup> in full by January 20, 2010 and resolved in time for the scheduled start of evidentiary hearings. However, proceedings slated for February 11 and 16, 2010 commenced on March 2, 2010 instead, due to

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<sup>16</sup> There were two motions filed : One from Petties class counsel to reopen discovery and to compel information relating to the development of Chancellor's Directive regarding independent educational evaluation rates, or in the alternative, a motion to strike specific entries from the record in 35.2 et seq; and a joint motion *in limine* from Petties class counsel and Interdynamics seeking to preclude the testimony of any expert witness listed by DCPS. By Order from the Special Master dated January 27, 2010, both motions were denied.



severe weather.<sup>17</sup> The hearings were convened at the Offices of the Special Master in suite 500 of 1201 F Street, N.W. Washington D.C. 20004 beginning at 10:00am on March 2 and adjourning at 4:45pm that day until 10:00am on March 10, 2010. Hearing proceedings in this matter concluded at 11:44 am on March 10.<sup>18</sup>

II. Evidentiary Proceeding

March 2, 2010

DiCon was represented by Tilman Gerald, Esq.; the District of Columbia was represented by Quinne Harris-Lindsey, Esq., and Daniel Kim, Esq., both of DCPS, and Virginia Crisman, Esq. of OSSE. Counsel for the Petties class, Patrick Wojahn, Esq., also participated. Also present were Dr. Alice Thomas of DiCon, Yvonne Smith of OSSE and Dr. Rona Fields. Dr. Thomas and Ms. Smith represented their respective agencies as witnesses, while Dr. Fields served as an expert witness for DiCon. Through the course of proceedings, the following documents were entered onto the record by the Special Master as exhibits:

- A. Special Master Exhibits A1 and A2: Payment Orders in Petties:
  - i. Special Master Exhibit A1 - August 5, 2009 Payment Order; and
  - ii. Special Master Exhibit A2 - November 8, 2004 Payment Order.
- B. Special Master Exhibit B: Chancellor's Rate Directive of July 9, 2008.
- C. DiCon Exhibit 1: Summary of Description of Disputed Invoices.

As an initial matter, disputed invoices with timeliness issues were addressed.<sup>19</sup> It was established that Invoice 5 had been paid in full. Discussions regarding Invoices 8<sup>20</sup> and

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<sup>17</sup> Prehearing briefs were received from all parties on February 19, 2010. Due to a mis-numbering of attachments, DiCon submitted an amended copy of its documentation on February 22, 2010.

<sup>18</sup> Included herewith as Attachment I1 and I2 are transcripts from both sessions of hearings.

<sup>19</sup> All invoices with timeliness issues fell under DCPS' purview. OSSE did not participate as a defendant in this portion of the hearing.

6152008 were tabled till the end of proceedings for the morning to allow time for the parties to exchange further documentation.<sup>21</sup> Proceedings involving the parties' case in chief began with the Special Master clarifying which invoices fell into the four categories described in the December 2 Scheduling Order. A list categorizing the invoices had been prepared by DiCon, and was submitted into evidence and marked DiCon Exhibit 1<sup>22</sup>.

Dr. Alice Thomas, founder and president of DiCon, testified regarding her academic and professional background as well as her certifications and licensure. Dr. Thomas testified on the nature of services DiCon delivers and the types of populations it serves. She was questioned on the methodologies she had applied, as owner of DiCon, in establishing its rates. Dr. Thomas testified that in 2008, when she established DiCon, she had surveyed the rates of five or six clinician colleagues and hospitals that conducted evaluations that DiCon intended to conduct. This survey resulted in a range of fees which Dr. Thomas used as a reference when DiCon's rates were developed. Dr. Thomas stated that she found rates allowed by the Chancellor's Directive to be inadequate for some evaluations<sup>23</sup>, in some instances more commensurate with compensation for student clinicians performing under the supervision of a skilled professional. Dr. Thomas was cross-examined on the personnel structure at DiCon, as well as the correct components and time allotments, in her judgment, for each evaluation listed on the disputed

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<sup>20</sup> At the end of proceedings that day, it was concluded that the defendant would pay the invoice in full.

<sup>21</sup> DCPS contended that it had never received Objections from DiCon, hence the lack of an FAD. DiCon contended that it had submitted Objections *via* fax. The Special Master asked DiCon to circulate copies of the alleged faxes.

<sup>22</sup> Included herewith as Attachment J.

<sup>23</sup> For a comprehensive psychological evaluation for instance, the Chancellor's Directive allows for an hourly cap of \$145.00 or a maximum cap of \$2,030.00. By Dr. Thomas' estimation, such an evaluation could involve thirty hours worth of work, and could not be performed within the bounds of best practices by a professional of her licensure within 14 hours.

invoices. She was examined in considerable depth on which five or six clinician colleagues and hospitals she had used as a point of reference for her rates, and how she had carried out her research at these establishments. Dr. Thomas did not produce any written material regarding the cost survey she had made.

Dr Rona Fields, a DC-licensed clinical psychologist with over twenty years of experience, was presented as an expert witness for the plaintiff. She discussed her experience as a service provider to DCPS students. She was questioned by the Special Master about her experience with insurance companies and how their rate structure differed or compared with that of DCPS. According to Dr. Fields' testimony, rates for the evaluations in question could legitimately vary considerably beyond the scope allowed by the Chancellor's Directive depending on the nature of the evaluation being conducted and the needs of child being examined.

By the conclusion of testimony for the day, it had been determined that there were 39 disputed invoices which fell under Category A – invoices that were not paid in full, even though the HOD, SA or funding letter either 1) specifically directed DCPS to disregard the Chancellor's Directive, or 2) expressly defer to reasonable rate, market rate or prevailing rate. There were no invoices falling within Category B – invoices for evaluations not listed at all on the Chancellor's Directive. The Special Master directed parties to present arguments for invoices falling within the two remaining categories: C – where the authorizing document was silent with respect to the Chancellor's Directive; and D – where the authorizing document requires DCPS to comply with the Chancellor's Directive.

Plaintiff's attorney asked that a standard of reasonableness be applied to invoices falling within both of the remaining categories. DCPS' stated that in so far as the Chancellor's

Directive had not been disqualified as reasonable, it was the standard by which DCPS' employees were obligated to adhere and would remain the guideline against which DCPS paid DiCon. According to OSSE, to the extent an invoice's authorization is totally silent, the Chancellor's Rate Directive established the rate with which the two agencies (OSSE and DCPS) are compelled to conform. Counsel for the Petties class maintained that the Chancellor's Rate Directive had not been involved and promulgated under the federal court order, specifically because defendants neither consulted with the class counsel nor gave them an opportunity to comment on the Directive. As such, the Chancellor's Rate Directive could not be relied upon in cases where an evaluation's authorizing documentation remained silent on which rates should be applied in its payment. The defendant reiterated its objection to class counsel's participation, and this concluded the presentation of the plaintiff's case.

DCPS proffered testimony for the next session of hearings, stating its intention to present billing and finance managers as witnesses for each agency. Hearing proceedings were adjourned at 4:45pm on March 2, to be continued at 10:00am on March 10, 2010.

March 10, 2010

At the second session, DiCon was represented by Tilman Gerald, Esq.; the District of Columbia was represented by Quinne Harris-Lindsey, Esq., and Daniel Kim, Esq., both of DCPS, and Virginia Crisman, Esq. of OSSE. Counsel for the Petties class, Patrick Wojahn, Esq., also participated. Dr. Alice Thomas of DiCon, Yvonne Smith of OSSE and Mr. Gregory Hall of DCPS were also present. Mr. Hall and Ms. Smith, billing specialists at DCPS and OSSE, represented their respective agencies as witnesses.

Mr. Hall testified in his capacity as the Financial Manager at DCPS' Office of Special Education on the breadth of his duties and experience. He also testified, as proffered, on the

underlying policies guiding his team in the processing of invoices. According to his testimony, the Chancellor's Directive is the sole governing document against which his team processes and pays providers for evaluations listed on the Directive. For specific evaluations, he testified to DiCon's rates being higher than average than other providers billing DCPS for the same evaluations.

Ms. Yvonne Smith's testimony followed. As OSSE's rebuttal witness, she spoke on her experience and duties as Manager for the Invoice Verification Unit. She maintained that OSSE relied on the Chancellor's Rate Directive in determining payments to providers for evaluations. She also described DiCon's rates as high in comparison to invoices received by OSSE from other providers for identical evaluations.<sup>24</sup> At the conclusion of Ms. Smith's testimony, the Special Master examined the witnesses for a short time to clarify certain aspects of their testimony.

Neither party provided written or oral closing arguments. Instead, parties pre-hearing submissions were considered their respective arguments of law. Prior to the adjournment of the evidentiary hearing proceedings, parties were informed by the Special Master to expect copies of transcripts for both sessions of the hearings to be circulated for comment once they were ready. By letter dated March 29, 2010, transcripts from both sessions of the hearing proceedings were circulated to parties. Parties' comments pertaining thereto were received by the Office of the Special Master within seven calendar days of dispatch.<sup>25</sup>

Following a review of all documents and testimony before her in this matter, the Special Master determined that the plaintiff, DiCon, Inc., had failed to support its contention

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<sup>24</sup> OSSE Exhibit 1: Range of rates billed to OSSE by a selection of providers for evaluations, included herewith as Attachment K.

<sup>25</sup> Parties' comments and corrections to transcripts included herewith as Attachment L.

that it had billed the defendant according to a “reasonable” rate for all four categories of the disputed invoices. The August 10, 2010 Order of the Special Master detailing such determination also directed parties to prepare for a new set of hearings. At such hearings, the defendant will be required to show that the rates at which it paid the plaintiff for the services billed on the invoices in question were reasonable.<sup>26</sup>

III. Discussion and Recommendations

Disputes involving procedural issues

During the course of discussions leading up to the hearing and at the hearing itself, the parties disputed certain invoices on procedural grounds.

- A. DiCon 5152008 involved assessments for eleven students. At the hearing DCPS indicated that this invoice had been paid in full and payment was acknowledged by counsel for DiCon as well.
- B. DiCon 6152008 involved the invoice for seven students. DCPS disputed the cost of seven evaluations on the basis that the rates exceeded the Chancellors Directive. DCPS claimed at the hearing (and evidently in the months leading up to the hearing) that it did not receive any further information from DiCon. Under the Payment Order, DiCon claims that it did submit objections to the DCPS by fax and that DCPS’ failure to issue a final administrative decision required full payment of the invoice. At the hearing counsel for DiCon was asked to present the original copy of the fax to DCPS showing that an objection had been timely made by the provider.

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<sup>26</sup> Included herewith as Attachment M.

No such documentation was produced and there is, consequently, no basis on which to find that DCPS erred in assuming that DiCon had acquiesced to full payment.<sup>27</sup>

- C. DiCon Invoice 3 involves a dispute over 6,880.00. In its request for a hearing, DiCon maintained that the final administrative decision referenced the wrong students and that DCPS' initial dispute notice was incomplete. At the hearing, the Special Master directed that Invoice 3 be reserved for a summary argument once it was determined whether any other invoices fell within the same category. No other invoices involved the same, or similar, circumstances but no argument was made with regard to Invoice 3. Counsel for DiCon did not raise the matter with the Special Master at the time of the hearing, or upon the receipt of the transcript. Nevertheless, rather than waive DiCon's opportunity to assert its claim, an opportunity will be made for DiCon and DCPS to present their arguments with respect to the alleged procedural defects in Invoice 3.
- D. Invoice Number 5 had been paid in full by DCPS as of the date of the March 2 hearing.
- E. Following the first day of the hearing, DCPS examined the timeliness of Invoice Number 8 and determined that DiCon was correct in its assertion that the letter of dispute was one day late. Accordingly, on March 10, 2010 DiCon was awarded the full amount of the invoice.

By this section, and as of the issuance of this report and recommendation, disputes regarding the following invoices have been resolved: Invoices 5152008, 6152008, 5 and 8.

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<sup>27</sup> Section V(b) of the Payment Order states, in part, "If a provider fails to submit a written objection within this timeframe, then the amount paid by the defendants will be understood to be accepted by the school or provider as payment in full."

Disputes on the merits

As indicated above, disputes were separated into four categories. The first involved invoices for services where the language authorizing payment (i.e., HOD, SA or funding letter) directs payment of “reasonable”, “prevailing” or “market rate.”

The rates charged by DiCon exceed those permitted by the Chancellor’s Directive, as the chart below illustrates.

<b>Type of Assessment</b>	<b>Maximum under Chancellor’s directive (\$)</b>	<b>Maximum number of hours allowed</b>	<b>Rate invoiced by DiCon (\$)</b>
Educational	960	7	1,000
Social History	160	2	850 and 950
Clinical	Not listed separately		1,200
Cognitive	Not listed separately		1,300 and 1,450
Occupational	630	7	1,400
Speech/Language	900	10	1,100 and 1,400
Neuropsychological	3,000	15	3,600 and 3,800
Comprehensive	2,030	14	3,850 and 3,900
Physical Therapy	630	7	1,200
Psychiatric	1,015	7	1,500

It is possible that the rates charged by DiCon are reasonable but the evidence introduced at the hearing did not prove that. Dr. Thomas and Dr. Fields both testified regarding the necessary components of professional evaluations, such as comprehensive psychological and neuropsychological examinations. Dr. Thomas testified that it takes between 20 and 30 hours to do a psychological and between 22 and 30 hours to perform a neuropsychological evaluation; Dr. Fields estimated that a proper neurological evaluation would take between 22 and 24 hours to complete (including scoring and report writing). Both described impediments



to “quick” assessments and the importance of obtaining the best information possible from a child so the evaluator can determine all the ways the child can perform and find an appropriate educational program.

Yet, DiCon’s invoicing method does not indicate how many hours were devoted to any particular assessment of a student or the hourly rate that was applied. All assessments within the same category are generally billed the same, although variations do appear. The origin for this flat fee billing is unclear. When asked how DiCon’s rates were first established Dr. Thomas testified that she researched rates for assessments by asking colleagues what they charged. According to her testimony, Dr. Thomas found a range of rates, from 250 an hour to 600 an hour.<sup>28</sup> Thomas asked clinicians that she knew as well as professional staff at the National Rehabilitation Center (“NRC”) and the Children’s Medical Center (“CMC”). She later provided more specific answers regarding the various assessments performed by DiCon.

1. Comprehensive psychological evaluations – NRC has an hourly rate of \$400; a contract employee told Dr. Thomas about the cost of a comprehensive psychological at Kennedy Krieger which are is in the range of \$3,000 to \$4,000;
2. Neuropsychological evaluation - NRC has an hourly rate of \$400;
3. Occupational therapy evaluation - At Children’s Medial Center this evaluation takes 6 to 7 hours;
4. Psychological evaluations – conversation with five clinicians revealed a range form \$250 to \$600 an hour;

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<sup>28</sup> She also testified that DiCon’s rates were associated with the length of time it takes to do particular evaluations. It is not clear how or why hourly rates would affect or be affected by the length of time a particular evaluation takes. However, this statement was not clarified in either direct or cross examination.

5. Speech/language evaluations – conversations with two private clinicians revealed that they both charged \$225 an hour;<sup>29</sup>
6. There was no testimony regarding the rates for a psychiatric examination. Dr. Thomas testified that DiCon does not do psychiatric evaluations although Invoices 9 and 13P contain a total of five bills for psychiatric evaluations.

We are all aware of the patchwork health care system in our country today and the lack of rational practices that can make a single band-aid cost upwards of \$5.00 dollars at a hospital. Evaluations of the cognitive and emotional status of children with disabilities can be seen as part of that patchwork quilt, or at least an extension of it and, thus, it is not surprising to find a range of charges for an evaluation like a neuropsychological assessment. Nevertheless, when entering the field, a business must exercise a degree of diligence if it seeks to establish fees that are within the prevailing market rate for the area, or are otherwise to be considered as reasonable. Establishing rates by calling a handful of former colleagues to get their rates does not meet the standard of diligence that is required. There are literally hundreds of individuals and companies providing these services to a dozen school systems in the area, as well as at the request of parents and guardians of children experiencing educational or emotional difficulties. No doubt the conversations that Dr. Thomas had with colleagues were helpful in many respects but they do not, without more, establish the reasonableness of the rates billed to DCPS and OSSE.

Plaintiff did not introduce evidence that other agencies or clients pay the rates that are billed to DCPS and OSSE and it may be that the only students who receive evaluations from

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<sup>29</sup> DiCon also performs functional behavior assessments and vocational assessments but those assessments were not the subject of any disputed invoices in the proceeding.

DiCon are ones who attend DCPS schools or a placement funded by the District. Accordingly, the plaintiff can not justify the charges based on the fact that the same rates are paid by other jurisdictions. Indeed, there was no evidence that the rates billed DCPS and OSSE have ever been paid by a parent or guardian or other entity.

In sum, the methodology for establishing the rates was insufficiently precise to find that the rates billed are “reasonable”, “prevailing” or “market” rates.

The second category under consideration at the hearing was characterized as those invoices for evaluations which were not listed on the Chancellor’s Directive. At first blush, it appeared that the only invoice in this category was a “psychosocial” evaluation of student M.B., invoiced as part of Invoice 14NP. The psychosocial history does not appear on the Chancellor’s Directive. According to Dr. Thomas, a “psychosocial” examination is more extensive than a mere social history. However, as the parties explored this matter at the hearing, it became clear that this particular evaluation was not authorized by the funding letter and as a result, OSSE was not required to reimburse DiCon for its administration.<sup>30</sup>

As indicated above, the third and fourth categories were argued by counsel. The third category involved those evaluations where the document authorizing the evaluation is silent as to whether the cost of evaluation is bound by the Chancellor’s Directive although evaluation is specifically listed on the Directive. Counsel for the plaintiff argued that if the HOD is silent as to the rate, then “reasonableness” should apply, not the Chancellor’s Rate. DCPS argued that no employees with DCPS have the authority to make payments that exceed the amounts allowed in the Chancellor’s Directive. Having found that the plaintiff did not prove that its

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<sup>30</sup> The funding letter specifically provides as follows: “This letter authorizes your client to obtain an independent comprehensive psychological evaluation (which includes cognitive, educational, and clinical components as well as a social history) . . . ”(emphasis added).

rates were reasonable, it is unnecessary to decide in this instance whether an HOD or other authorizing document that is silent as to the rate to be applied would permit a rate in excess of the Chancellor's Directive.

The fourth category involves those invoices where the document authorizing the evaluation specifies that the cost of evaluation should be bound to the Chancellor's Directive, and the evaluation is specifically listed on the Directive. This rule for this category is self-evident. If a Hearing Officer holds, or the parties agree, that the cost of the evaluation is to be governed by the Chancellor's Directive, no invoice for a cost above that need be paid by DCPS or OSSE.

Finally, it is necessary to address part of the defendants' argument that DiCon failed to avail itself of the opportunity for approval because it did not respond to requests for further documentation and did not request an exception under the Chancellor's Directive. Section II(D)(2) states: "Exceptions to the rate schedule may be allowed when the requesting party can demonstrate circumstances justifying the payment of costs in excess of the established maximum rates." It is true that DiCon did not invoke this section in any correspondence with DCPS or OSSE. However, whether it would have been worthwhile to do so is doubtful. The Billing Manager for DCPS was unequivocal in his testimony that his section would not pay more than what was on the Chancellor's Directive. The manager of the Invoice Verification Unit at OSSE testified that if a provider invoked that section she would need to go to management for advice.

A policy like the Chancellor's Directive should be construed in such a manner that every word is given meaning and no provision is treated as mere surplusage. The defendant is

encouraged to examine the language of the Chancellor's Directive and give meaning to the language in section II (D) (2).

Conclusion

Inasmuch as the plaintiff has failed to show that its rates are reasonable or prevailing market rates, it is necessary to determine whether the Chancellor's Rates – and those paid by DCPS and OSSE – can be sustained as reasonable in those instances where an HOD, settlement agreement or funding letter requires payment or reimbursement of reasonable costs. Accordingly, the parties are requested to stipulate as to each evaluation that remains in dispute after this decision. Once the parties have submitted such stipulation, arrangements will be made for prehearing briefs and a date for a hearing will be set. At that hearing, a discussion of the DiCon's objections in Invoice 3 will also be heard.

Respectfully submitted

Elise Baach  
Special Master

Date: February 17, 2011