

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Parent, ¹)	
Through Student,)	Room: 2004
)	HOD Due Date: November 22, 2015
Petitioner,)	Date Issued: November 22, 2015
)	Case No.: 2015-0298
v.)	Hearing Date: November 6, 2015
)	Hearing Officer: Michael Lazan
)	
District of Columbia Public Schools,)	
)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving a [REDACTED] year old student (“the Student”) who is currently eligible for services as a student with Multiple Disabilities (Emotional Disturbance, Other Health Impairment).

A Due Process Complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on September 8, 2015 in regard to the Student. On September 11, 2015, Respondent filed a response. A resolution meeting was held on September 18, 2015. The resolution period expired on October 8, 2015.

II. Subject Matter Jurisdiction

¹Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act (“IDEIA”), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

III. Procedural History

On September 30, 2015, a prehearing conference was held. Douglas Tyrka, Esq., counsel for Petitioner, appeared. William Jaffe, Esq., counsel for Respondent, appeared.

A prehearing conference order issued on October 5, 2015 summarizing the rules to be applied in this hearing and identifying the issues in the case.

On November 6, 2015, the hearing was held. This was a closed proceeding. Petitioner was represented by Douglas Tyrka, Esq. Respondent was represented by William Jaffe, Esq. Petitioner moved into evidence Exhibits 1-15, 17-21, and 25. There were no objections. Exhibits 1-15, 17-21, and 25 were admitted. Respondent moved into evidence Exhibits 1-10. There were no objections. Exhibits 1-10 were admitted.

Petitioner presented as witnesses: Petitioner; Witness A, Head of School, School A; and Witness B, an educational advocate and consultant. Respondent presented Witness C, a resolution specialist; and Witness D, a program monitor.

IV. Credibility

I found the testimony of all witnesses to be credible in this proceeding. All witnesses presented testimony with reasonable candor, and there were no material inconsistencies established in connection to any witness. Further, no witness was impeached in any meaningful way.

V. Issues

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the issues to be determined are as follows:

1. Did DCPS propose an educational program that did not include sufficient instruction in the “regular education” environment in the August, 2015 IEP? If so, did DCPS fail to provide the Student with a program in her Least Restrictive Environment (“LRE”), as per such authority as 20 U.S.C. Sect. 1412(a)(5)(A) and 5 DCMR Sect. 3011.1? If so, did DCPS deny the Student a FAPE?

2. Did DCPS fail to propose and then provide a location of services for the Student for the 2015-2016 school year? If so, did DCPS fail to have an IEP in effect for the Student “at the beginning of each school year” pursuant to 34 C.F.R. Sect. 300.323(a)? If so, did DCPS deny the Student a FAPE?

3. Did DCPS fail to propose and then provide the Student with an IEP and a placement/location of services for the summer, 2015? If so, If so, did DCPS fail to have an IEP in effect for the Student “at the beginning of each school year” pursuant to 34 C.F.R. Sect. 300.323(a)? If so, did DCPS deny the Student a FAPE?

As relief, Petitioner seeks payment of tuition at School A for the 2015-2016 school year, and reimbursement for tuition at School B for the summer of 2015.

VI. Findings of Fact

1. The Student is a [REDACTED] year old Student who is eligible for services as a student with Multiple Disabilities. She currently attends a non-public school in the District of Columbia, School A, which is a “general education” school that does not

contain classes taught by special education teachers. She is above grade level in reading, writing, and the social sciences. (P-2-1; Testimony of Petitioner)

2. She is a “bright and insightful young lady” with a history of recurrent suicidal ideation. She is reported to have low self-image, moodiness, depression, and little ability to cope with distress. She has a history of poor relations with peers, being bullied, and promiscuity. (P-2-14)

3. Though she has been diagnosed with Major Depression, Attention Deficit Hyperactivity Disorder, and Math Disorder, the Student attended general education schools until spring, 2014. For █████ grade, during the 2013-2014 school year, the Student attended School C, a non-public general education school. Her grades were A and B in all subjects except in mathematics, where she received an F. (P-4-1; P-2-14)

4. She had to leave School C in spring, 2014 because of psychiatric issues. On or about between April, 2014 and May, 2014, the Student was suicidal. At or about this time, she was admitted to a psychiatric facility three different times and was then sent to an “outward bound” program in the state of Utah at the advice of a consultant. (P-2-14; Testimony of Petitioner)

5. In October, 2014, she enrolled at Treatment Center A where she attended School B, which used a “levels” system to provide structure and support for the Student. The Student made “good progress” in regard to self-calming strategies at School B. The Student also had good grades at the school, namely, A or A- grades. (P-2-14; P-4-1; Testimony of Petitioner)

6. On April 29, 2015, IHO Peter Vaden ordered DCPS to pay tuition at School B through to the last day of the DCPS school year, in June, 2015. The order also

stated: “(i)f it has not already done so, within 30 calendar days of the entry of the Order, DCPS shall convene an eligibility team to determine Student’s eligibility for special education and related services and, if Student is determined eligible, within the said 30 calendar day period, ensure that an IEP team is convened to develop an IEP and educational placement for her, pursuant to 34 CFR § 300.320, *et seq.*” In satisfaction of that order, DCPS paid the parent for tuition at School B during the 2014-2015 school year exclusive of \$355. (P-1-19; Testimony of Petitioner)

7. DCPS determined that the Student was eligible for services on May 20, 2015. Notwithstanding the language of the IHO Vaden’s order, which required an IEP meeting within thirty days of his order, DCPS did not contact the parent to set up an IEP meeting until June 11, 2015. Thereafter, there were multiple attempts to set up a date for an IEP meeting, but it was difficult to find a mutually agreeable date. There was no IEP for the Student through August 5, 2015, when she was discharged from School B. (Testimony of Petitioner; Testimony of Witness B; Testimony of Witness C; P-2-1)

8. The Student’s expenses at Treatment Center A for July and August, 2015 totaled \$14,889.95, including the cost of a family visit to the school, the cost of the Student’s “home pass,” and the cost of tuition. (P-6-3)

9. Given the difficulties in arranging for an IEP meeting, Petitioner’s counsel proposed creating an IEP by email in or about August, 2015. This was agreed to by DCPS because they were worried about getting the IEP written by the beginning of the school year. At the time, Witness C stated in an email that “(i)t makes me a little nervous to wait until the following week to get the IEP together, as the start of the school year is fast approaching and I want to ensure we have the right placement ready for [the

Student].” DCPS then proposed language in the IEP relating to present levels of performance and goals. Petitioner negotiated the terms of the IEP, which was ultimately agreed upon except for the specialized instruction. (Testimony of Petitioner; Testimony of Witness C; P-12-1-2)

10. The IEP, dated August 13, 2015, indicated that the Student needed behavioral support in order to be successful in a school setting. Mathematics, Reading and Writing were the designated areas of academic concern. The IEP indicated that Attention Deficit Hyperactivity Disorder, math disability, anxiety and fragile self esteem negatively impacted her classroom performance. It also stated that, when the Student becomes overwhelmed, she engaged in “shut down behavior” and anxiety prevented her from completing a task. It found that the Student would benefit from a small, quiet, supportive environment that can “simultaneously work to remediate her weakness in math and allow her access to an accelerated, college preparatory program in other subjects where she excels.” The IEP also determined that the Student had Emotional/Social/Behavioral issues. It stated that she required redirection, verbal reinforcements, repetition of directions, verbal prompts and reminders and other behavioral supports to successfully participate in the general education curriculum. Those behavioral support services included counseling and consultation with teachers. In terms of services, the IEP recommended specialized instruction for twenty-five hours per week outside general education, and 240 minutes per month of behavioral support services. (P-2)

11. The IEP contains a section called Least Restrictive Environment which states: “(t)his section describes student needs that require removal from general education

to receive the following special education and related services.” It also states that “(t)he nature and/or severity of the disability must be such that the student can only make progress on IEP goals and objectives by being removed from the general education classroom to receive these services.” In describing the support services that were previously provided to the Student in general education, it merely stated “(t)he Student is currently in a full-time placement.” (P-2-18)

12. Meanwhile, the parent was seeking a general education non-public school for the Student for the 2015-2016 school year. A therapist told her that the Student needed to be around many general education students, in a very small school, with no bullying, a supportive environment, and a school that was educationally challenging for her. The parent found School A online, visited it, and decided School A was the best place for her in late July, 2015. (Testimony of Petitioner)

13. DCPS was not informed that the parent had visited School A. (Testimony of Witness C; Testimony of Petitioner)

14. After completing the IEP in August, 2015, DCPS began to look into the possibility of placing the Student at a non-public special education school. DCPS contacted School D in this connection in or about during the third week of August, since the team could not refer her to School D until the IEP was written. School D received the Student’s records on or about September 9, 2015 and then proceeded to try to interview the parent and Student. (Testimony of Witness C; R-5-2)

15. School D serves students with complex social and emotional needs, and there is an emphasis on family therapy. It provides an environment for students who are “stepping down” from the residential treatment process. The school offers instruction

with social skills groups, there are opportunities to teach student how to deal with peers and adults, and there are “many” therapists on staff. (Testimony of Witness C)

16. Even though Petitioner had committed to School A for the Student, she ended up visiting School D. Petitioner then told DCPS that she was not interested in having her daughter attend School D because there was insufficient academic rigor. (Testimony of Witness C; Testimony of Witness D)

17. The Student started at School A on August 26, 2015. The school is a small, college preparatory school with about sixty students, classes with ten to twelve students, and a significant number of students without special needs. Some of the classrooms have fireplaces in them. Some of the classrooms have three or four children in them. The school does have a certified special education teacher on staff. This teacher is a resource room teacher to work with homework and executive functioning issues, and she is also the school’s music teacher. There is a college counselor at the school, who doubles as the school counselor. The school costs \$ 28,000 a year. (Testimony of Witness B; Testimony of Petitioner)

18. School A has seven week cycles with four primary subjects, and “community meetings” once a week. There is a “homework club,” and the students have access to a computer. The school allows the Student to use a calculator, allows for flexible scheduling and also allows her to take breaks and receive extended time. As of the date of hearing, the Student had not received any services from the special education teacher. As of the date of hearing, the Student had not met with the school counselor. (Testimony of Witness B)

19. The Student is currently taking two English classes and two Social Studies classes. She will take her Math class in spring. The Student has displayed no behavioral challenges. There has been some emotional “turmoil” and she has met with the head of school, then returning to class. Thus far, at School A, she has received grades of B or B- in all classes. (Testimony of Witness B; P-5-1)

20. The Student also gets support through an organization which provides her with a mentor. The mentor meets with her for two hours a week and also provides her with twenty four hour a day, seven days a week phone access. This organization also provides the parent with a one hour weekly therapy session and twenty four hour a day, seven days a week phone access. It also provides two hours per month of family therapy. The organization has no affiliation with School A. (Testimony of Petitioner)

21. After the Student began at School A, Petitioner received an IEP from DCPS and was informed that DCPS was recommending School D. (Testimony of Petitioner)

VII. Conclusions of Law

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

The burden of proof in a special education due process hearing lies with the party seeking relief. 5-E DCMR 3030.3; Schaffer v. Weast, 546 U.S. 49 (2005).

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conformance with a written IEP (i.e., free and appropriate

public education, or “FAPE”). 20 U.S.C. Sects. 1400(d)(1(A), 1401(9)(D), 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Shaffer v. Weast, 546 U.S. 49, 51 (2005).

Pursuant to the Supreme Court's decision in Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, “provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005).

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: (i) Impeded the child's right to a FAPE; (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) Caused a deprivation of educational benefit. 34 CFR Sect. 300.513(a).

The District may be required to pay for educational services obtained for a student by a student's parent if the services offered by the District are inadequate or inappropriate (“first criterion,”) the services selected by the parent are appropriate (“second criterion”), and equitable considerations support the parent's claim (“third criterion”), even if the private school in which the parents have placed the child is unapproved. School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359 (1985); Florence County School District Four et al. v. Carter by Carter, 510 U.S. 7 (1993).

1. Did DCPS propose an educational program that did not include sufficient instruction in the “regular education” environment in the August, 2015 IEP? If so, did DCPS fail to provide the Student with a program in her Least Restrictive Environment (“LRE”), as per such authority as 20 U.S.C. § 1412(a)(5)(A) and 5 DCMR 3011.1? If so, did DCPS deny the Student a FAPE?

The IDEA requires that children with disabilities be placed in the “least restrictive environment.” This means, “to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” N.T. v. District of Columbia, 839 F. Supp.2d 29, 34-35 (D.D.C. 2012); Dist. of Columbia v. Nelson, 811 F. Supp. 2d 508, 514-15 (D.D.C. 2011); 20 U.S.C. Sect. 1412(a)(5)(A); 5 DCMR Sect. 3011.1; 34 C.F.R. Sect. 300.114(a)(2), 34 C.F.R. Sect. 300.116. Mainstreaming is not only a "laudable goal" but is also a “requirement of the Act.” Devries v. Fairfax County Sch. Bd., 882 F.2d 876, 878 (4th Cir.1989).

In the seminal case of Oberti v. Board of Educ., 995 F.2d 1204 (3d Cir. 1993), the Third Circuit Court of Appeals explained the duties of school districts to provide an education to students with disabilities in the least restrictive environment. The Third Circuit set forth a test to determine whether students have been appropriately mainstreamed by a District: (1) whether the District has made reasonable efforts to accommodate the child in a regular education classroom; (2) whether there are the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) whether there are possible negative effects of the inclusion of the child on the education of the other students in the class. Id., at 1217-1218. The Oberti court continued to explain that, if after considering these factors, the court determines

that the District was justified in removing the child from the regular classroom and providing education in a segregated, special education class, the court must consider whether the school has included the child in school programs with nondisabled children to the maximum extent appropriate.

In this case, where there was no IEP meeting, the testimony and evidence makes clear that DCPS decided to provide the Student with twenty five hours of specialized instruction outside general education without considering the Oberti factors. The IEP contains a section called Least Restrictive Environment, which is on the IEP form to insure that school district comply with the LRE requirements. The section states: “This section describes student needs that require removal from general education to receive the following special education and related services.” It also states that “(t)he nature and/or severity of the disability must be such that the student can only make progress on IEP goals and objectives by being removed from the general education classroom to receive these services.” The section also asks the IEP team to “(d)escribe supplemental supports and services that were previously attempting in a general education setting.”

However, the team did not describe *any* such supports and services or reference any period of time when the Student had received accommodations in the general education environment. Instead, the IEP stated that “(t)his student is currently in a full time placement.” Even if a student had been in a full time placement, it is incumbent upon the team to assess what supports were possible in a general education. Especially in this context, where the Student had been in general education for such a long time prior to 2014, the team should not have assumed that the student continued to need a full time placement in order to succeed. The Student’s situation had clearly changed by the

date of the IEP in August, 2015. Her time as a residential treatment center had provided her with tools such as calming strategies that made the Student better able to handle the pressure that would come from a general education setting. It is important to note that the Student is above grade level in reading, writing, and social sciences, which suggests that the Student would benefit from the more competitive academic environment in regular education classes in those subjects if appropriate supplemental aids and supports were put in place. At the very least, there should have been an attempt by the District to try supplemental aids and services before concluding that the Student had to be in a placement as restrictive as the one that was proposed.²

As a result of the foregoing, I find that DCPS was not justified in recommending twenty five hours of specialized instruction outside general education for the 2015-2016 school year. DCPS denied the Student educational benefit by failing to consider whether the Student could benefit from at least some regular education academic classes with appropriate supplemental aids and services. DCPS accordingly denied the Student a FAPE for the 2015-2016 school year.

2. Did DCPS fail to propose and then provide a location of services for the Student for the 2015-2016 school year? If so, did DCPS fail to have an IEP in effect for the Student “at the beginning of each school year” pursuant to 34 C.F.R. Sect. 300.323(a)? If so, did DCPS deny the Student a FAPE?

3. Did DCPS fail to propose and then provide the Student with an IEP and a placement/location of services for the summer, 2015? If so, If so, did DCPS fail to have an IEP in effect for the Student “at the beginning of each school year” pursuant to 34 C.F.R. Sect. 300.323(a)? If so, did DCPS deny the Student a FAPE?

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is determined at least annually and is

² There is no evidence that there were any possible negative effects of the inclusion of the child in general education on the education of the other students in the class. Nevertheless, the other factors in the Oberti test are clearly more important considerations for this Student.

based on the child's IEP. 34 CFR Sect. 300.116(b)(1)(2). *At the beginning of each school year*, each public agency must have *in effect*, for each child with a disability within its jurisdiction, an IEP, as defined in Sec. 300.320. 34 C.F.R. Sect. 300.323(a)(emphasis added).

In this case, there was no IEP meeting. The IEP was written via email, which is not permissible since the applicable regulation requires a “team meeting” with one or more parents present. 34 C.F.R. Sect. 300.320(a); 34 C.F.R. Sect. 300.322(a).

Moreover, the IEP is dated August 13, 2015, which almost three months after the Student was determined to be eligible for services. By that time, the Student’s summer services had ended. Additionally, no placement was offered to the Student for the summer, 2015. It is clear that DCPS denied the Student educational benefit for the summer of 2015, as DCPS admitted at the hearing by promising to pay the Student’s tuition at School B for the summer of 2015 as requested by the parent.

In regard to the 2015-2016 school year, similar analysis applies. While there was an IEP written prior the start of the school year, there was no placement offered to the parent by the first day, which was August 26, 2015. Indeed, DCPS did not even send a preliminary “information packet” to the proposed placement, School D, until after the school year had started. It was only on September 9, 2015 that School D received the Student’s records from DCPS. Thereafter, School D started the process of trying to interview Petitioner and the Student. DCPS presents no authority to suggest that it is permissible to be so late with an educational placement. On the contrary, the D.C. Circuit has recently opined that the failure to provide an IEP and placement by the beginning of the school year should be termed a substantive violation unless it is

“obviously” not substantivel. Leggett v. District of Columbia, 793 F.3d 59, 68 (D.C. Cir., 2015) Here, the Student would have missed several weeks of school were she to have gone to School D. I find that, at least for this Student, missing the first few weeks of school was a substantive violation that denied her a FAPE.

I find DCPS denied the Student educational benefit, and therefore a FAPE, by failing to have an IEP or a placement for the Student for the summer, 2015. I find Further that DCPS denied the Student educational benefit, and therefore a FAPE, by failing to have an IEP in effect by the start of the 2015-2016 school year.

REMEDY

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 (1993). 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. Sect. 300.148(c) (2012); see also Florence Cnty., 510 U.S. at 15 (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”).

Even if the parental placement is “proper under the act,” tuition may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of

unreasonableness with respect to the actions taken by the parents. 20 U.S.C. Sect. 1412(a)(10)(C)(iii). In particular, tuition may be denied or reduced if parents do not inform the IEP team of their intent to place their child in a private school at public expense, nor provide the school district with written notice stating their concerns and their intent with remove the child within ten business days before such removal. 34 CFR Sect. 148(d)(i), (ii). Under 20 U.S.C. Sect. 1412(a)(10)(C)(iii), a denial or reduction in reimbursement is discretionary.³

1. Summer, 2015.

There is no genuine issue with respect to the appropriateness of the placement at School B. DCPS admitted that the placement was appropriate at the hearing, and promised that it would reimburse the parent for all expenses during the summer, 2015. The record confirms that this placement was proper. The IEP makes clear that the Student made progress at this site, where she received good grades in all classes. Moreover, the Student benefitted from the program by learning calming strategies such as journaling or taking a break at School B. DCPS's IEP characterized this progress as "tremendous." I will accordingly order reimbursement for expenses at School B, as per the itemized list submitted by the Petitioner.

2. School A.

³ In Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005), the Circuit laid forth rules for determining when it is appropriate for IHOs to order funding of non-public placements even if the parent has not placed the Student in a non-public school. First, the court indicated that "(i)f no suitable public school is available, the [school system] must pay the costs of sending the child to an appropriate private school." Id. At 9 (citing Jenkins v. Squillacote, 935 F.2d 303, 305 (D.C.Cir.1991)). The Circuit then explained that such relief "must be tailored" to meet a student's "unique needs." Id. At 11-12 (citing to Florence County School Dist. v. Carter, 510 U.S. 7, 16 (1993)). To inform this individualized assessment, courts must consider "all relevant factors" including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. Id. at 12.

Petitioner seeks tuition payment of \$28,000 in connection to the Student's tuition for 2015-2016 at School A, a "general education" preparatory school. Respondent suggests that, because it is a "general education" school, School A cannot be the basis of a reimbursement or tuition payment claim under Florence County.

Courts hold that a unilateral private placement cannot be regarded as proper under the IDEA when it does not, at a minimum, provide some element of special education services to the student. Berger v. Medina City School Dist., 348 F.3d 513, 523 (6th Cir. 2003); accord Frank G v. Board of Educ. of New Hyde Park., 459 F.3d 356, 365 (2d Cir. 2006). Moreover, parents should not inappropriately benefit under the IDEA by choosing a private school that offers "the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not." Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 115 (2d Cir. 2007); see also Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660 (S.D.N.Y. 2005) (the parents failed to sustain their burden of showing that the non-public school offered the student the sort of special education services he needed).

District of Columbia courts are in accord. In Schoenbach v. District of Columbia, 2006 WL 1663426, at *7 (D.D.C. 2006), Judge Rosemary Collyer, citing to Berger, noted that the parents placed their daughter in a private school that did not provide special education services because they believed that a smaller school setting was better for their child. The parents believed that, contrary to her IEP, Anna was ready to be mainstreamed full-time. Judge Collyer denied the parents tuition reimbursement because the school did not provide special education services to the student.

Here, the Student has attended no special education classes at School A, and has received no instruction from any special education teacher at School A. She receives no related services at School A, and does not receive counseling at the school. There is nothing in the record to suggest that the Student receives the behavioral support services that are mandated by her IEP. There is also nothing in the record to state that she receives “redirection, verbal reinforcements, repetition of directions, and verbal prompts and reminders” as the IEP discussed. The Student receives some minor accommodations such as use of a calculator and flexible scheduling, but the record does not establish that these accommodations are specially designed for the Student at School A. While School A does provide small class size and a quiet environment, these are benefits that all Students at School A receive. Special education is “specially designed” instruction to meet the unique needs of a child with a disability, not general education modifications that are otherwise available to regular education students. 34 C.F.R. Sect. 300.39 (a)(1); compare Frank G., 459 F.3d at 365 (tuition awarded where record was clear on accommodations that were specially designed for the student, including adapting the curriculum to meet the Student’s needs, 1:1 work with the teacher, the creation of a communications book, adapting the methodology of instruction allowing him to take tests orally, and services from a teaching assistant who helped the Student “greatly” throughout the day).

There are also issues here in regard to equitable considerations. The IDEA allows that tuition payment may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the

actions taken by the parents. 20 U.S.C. Sect. 1412(a)(10)(C)(iii). With respect to a parents' obligation to raise the appropriateness of an IEP in a timely manner, the IDEA provides that tuition reimbursement may be denied or reduced if parents neither inform the IEP team of their disagreement with its proposed placement and their intent to place their child in a private school at public expense at the most recent IEP meeting prior to their removal of the child from public school, nor provide the school district with written notice stating their concerns and their intent with remove the child within ten business days before such removal. 34 CFR Sect. 148(d)(i), (ii). Under 20 U.S.C. Sect. 1412(a)(10)(C)(iii), a denial or reduction in reimbursement is discretionary.

At the hearing, Petitioner did not present any "ten day notice" to DCPS alerting them that she had decided to place the Student at School A. There is also nothing in the record to suggest that there was any discussion of School A while the parties were negotiating the terms of the IEP in August, 2015. This is true even though the parent testified that she had made her decision about School A in July, 2015. It would certainly have been appropriate for the parent to have told DCPS about the decision to place the Student at School A at the time. Because the parent in effect concealed the decision to place the Student at School A, the equities in this case favor DCPS.

I can certainly understand Petitioner's difficult position here, especially given the situation that the Student was in about eighteen months ago. However, I am constrained by the applicable law and regulations, which require a denial of Petitioner's claim for tuition payment at School A for the 2015-2016 school year.

VIII. Order

As a result of the foregoing:

1. Respondent is hereby ordered to pay for the Student's tuition and expenses at School B for the summer, 2015 in the amount of \$14,889.95;

2. Respondent's request for tuition payment at School A is denied.

Dated: November 22, 2015

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Parent's Representative: Douglas Tyrka, Esq.
Respondent's Representative: William Jaffe, Esq.
OSSE Division of Specialized Education
Contact.resolution@dc.gov
Chief Hearing Officer

IX. Notice of Appeal Rights

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

Date: November 22, 2015

Michael Lazan
Impartial Hearing Officer