District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
810 First Street, NE, 2nd Floor, Washington, DC 20002
(202) 698-3819 www.osse.dc.gov

Parents, on behalf of Student,[1]	)	**Room: 2003**
Petitioner,	)	**Date Issued: February 12, 2016**
v.	)	**Case No.: 2015-0320**
District of Columbia Public Schools,	)	**Hearings: 2/1 and 2/2 (2016)**
Respondent.	)	**Hearing Officer: Michael Lazan**

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving a [redacted]-year-old student who is eligible for services as a student with Multiple Disabilities.

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 29, 2015 in regard to the Student. An amended Complaint was filed on November 3, 2015. Respondent filed a response to the amended Complaint on November 17, 2015. The resolution period expired on December 3, 2015.

II. Subject Matter Jurisdiction

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

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

the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

III. Procedural History

On December 4, 2015, this Hearing Officer held a prehearing conference. Attorney A, Esq., counsel for Petitioners, appeared. Attorney B, Esq. counsel for Respondent, appeared.

A prehearing conference order issued on December 8, 2015 summarizing the rules to be applied in this hearing and identifying the issues in the case.

On December 4, 2015, Respondent filed Consent Motion for Continuance. As a result, CHO Virginia Dietrich signed an Interim Order on Continuance Motion on December 8, 2016 extending the timelines in this case twenty-six days. The HOD was then due on February 12, 2016.

Two days before the first hearing date, Petitioners filed Motion for Leave to File Summary Decision. The parties orally argued this motion before the hearing officer on January 29, 2016, and during argument, Petitioners withdrew the motion.

Two hearing dates followed, on February 1, 2016 and February 2, 2016. This was a closed proceeding. Petitioners were represented by Attorney C, Esq. and Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioners moved into evidence Exhibits 1-52. Objections were filed on Exhibits 2, 3, 9, 16, and 24. These objections were overruled. Exhibits 1-52 were admitted. Respondent moved into evidence Exhibits 1-10 and 12. Petitioners objected to Exhibits 1-5. These objections were overruled. Exhibits 1-10 and 12 were admitted.

At the close of the hearing, the parties presented closing statements. Petitioners chose to exercise an option to submit a post-hearing email outlining authority that supported their position. This email was sent to the hearing officer on February 5, 2016.

Petitioners presented as witnesses: Parent; Witness A, an educational consultant (Expert: special education with emphasis on programming); Witness B, the Academic Director at School A; Witness C, President/CEO of Academy A (Expert: therapeutic placement and rehabilitation counseling); Witness D, a psychologist (Expert: clinical psychology); and Witness E, Clinical Director of School A (Expert: clinical counseling). Respondent presented as witnesses: Witness F, a Compliance Specialist (Expert: provision of specialized instruction), and Witness G, a psychologist (Expert: school psychology).

IV. Credibility

I found all the witnesses had some credibility in this proceeding. I did find the parent to be particularly credible with respect to the disputed facts at the June, 2015 IEP meeting. The parent provided detail about the meeting that was corroborated by documents in the record. Moreover, DCPS failed to call Psychologist A to rebut claims that she recommended a residential placement for the Student at the meeting. Finally, I found Witness D particularly credible and free of bias given her well-written report and consistent testimony.

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 fail to write an IEP for the Student by the start of 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 CFR Sect. 300.323(a)? If so, did DCPS deny the Student a FAPE?

2. Did DCPS fail to recommend an appropriate placement for the Student for the 2015-2016 school year? If so, did DCPS act in contravention of 34 CFR Sect. 300.116 and/or precedent such as Gellert v. District of Columbia, 435 F. Supp.2d 18 (D.D.C. 2006)? If so, did DCPS deny the Student a FAPE?

3. Did DCPS fail to discuss the Student's school at the IEP meeting in October, 2015? If so, did DCPS violate 34 CFR Sect. 116(a)(1) and 34 CFR Sect. 300.327? If so, did DCPS deny the Student a FAPE?

As relief, Petitioners seeks tuition reimbursement at School A for the 2015-2016 school year until the next IEP meeting.

VI. Findings of Fact

1. The Student is a [redacted]-year old who is eligible for services as a student with Multiple Disabilities. He has limited insight into his personal vulnerabilities. He is easily overwhelmed and stressed, has sleep and depression issues, and has been diagnosed with Anxiety Disorder, Depressive Disorder, Language Disorder, Developmental Coordination Disorder, Attention Deficit Hyperactivity Disorder -- Combined Presentation ("ADHD"), and Specific Learning Disorder with Impairment in Written Expression. (P-3; P-9-9; P-31)

2. He has experienced difficulty in performing to his potential ever since age two. Accordingly, for grades K-9, the Student went to School B, a special education

private school in Washington, D.C. He was evaluated in 2011 evaluation by Evaluator A, who found that the Student had a general index score of 120 on the Wechsler Intelligence Scale for Children – IV ("WISC-IV"), with weaknesses in perceptual reasoning, coding and digit span. Achievement testing results found that the Student was at the sixth grade level in broad reading and math, but only the third grade level in writing, with weaknesses in reading and math fluency. He was retested in 2014 by the same evaluator. The Student's scores on the WISC-IV ranged from 82nd percentile in verbal comprehension index to the fourth percentile in working memory. Again there were weaknesses in coding and digit span. Woodcock-Johnson II testing found that the Student was at the 11th grade level in broad reading, but the 7th grade level in broad math and broad writing. (Testimony of parent; P-9-3; P-2-27-29)

3. During the seventh and eighth grade, the Student's academic difficulties became more pronounced. He experienced social difficulties, poor anger management, and he destroyed property. He began stealing from his parents, selling marijuana, and spending a lot of time in his room, depressed. Then, his parents separated in August, 2014, and he lived with his mother in the family home. His behavior regressed further. In [redacted] grade, near the start of the 2014-2015 school year, he was suspended for a marijuana-related offense at school. He was spending time with a negative peer group, not focusing in classroom, not learning, was failing classes, and engaging in school avoidance. (Testimony of parent; P-9-3-4)

4. By December, 2014, he was failing every subject. He was also going to be expelled for misbehavior. Accordingly, he withdrew from the school, got a private tutor, and worked at home for a few months. This approach did not meet with success.

He was depressed, locked up in his room, and resisted the tutoring. As a result, Petitioners sent him to a wilderness program, Program A. He was resistant to going to such a program, so Petitioners had to "take" him in the middle of the night. (Testimony of parent)

5. A questionnaire filled out by the student in February, 2015 indicated that he has lost interest in the things he used to enjoy, sometimes feels worthless or guilty, and has trouble with sleep. He wanted to hurt himself, has made a suicide plan, and has cut himself, burned himself, or otherwise hurt himself. He described his mother as constantly nagging, yelling and thinking things were worse than they are. He noted that he used marijuana one to three times a month and had used MDMA-Ecstasy. He denied he had a drug problem, but indicated that he had sold drugs. He said he had a history of lying excessively, often broke the rules at home, argued with adults, and had a hard time paying attention and being organized. He had panic attacks, was worried and generally anxious, and had trouble trusting others. (P-5-2-13)

6. On February 9, 2015, Petitioners sent letter to DCPS requesting to reopen the IEP process and get the Student an IEP and a school. They enclosed the recent report from Evaluator A. DCPS received this letter and set up an evaluation with staff, who wanted to observe the Student. (P-7; P-6; Testimony of parent; Testimony of Witness F)

7 There was an IEP meeting scheduled for March 10, 2015, but this had to be rescheduled because of the weather and because the DCPS psychologist had not reviewed the whole Evaluator A report. (P-8-; P-10; Testimony of parent)

8. A psychological evaluation was conducted by Witness D dated March 16, 2015, which occurred while the Student was still at the wilderness program. The

evaluator tested him on a variety of behavioral measures and concluded that he has engaged in dishonesty, manipulation, and disregard for house rules, as aggravated by his family dynamic. He was diagnosed with Unspecified Depressive Disorder, ADHD–Combined Type, Oppositional Defiant Disorder, and Parent-Child Relational Problem. Other testing showed that he had elevated scores in depression, "oppositionality," emotional regulation, unpredictable moods, irritability, poor sense of self, external issues, temper, loneliness, blaming others, and getting angry when demands placed on him. The evaluator felt that a residential treatment center would be helpful to him because it is highly structured, predictable, because of his low insight, because he would be around other children with similar problems, and because all peer interactions are supervised. She also pointed out that, for substance disorder issues, an extended period of abstinence was recommended. She also pointed out that he needs more than just treatment for substance abuse, and that the substance abuse is a symptom of an overall problem, that they are all "blended together, the ODD and ADHD and substance abuse." Finally, the evaluator did indicate that parents' split had something to do with the Student's difficulties. (Testimony of Witness D; P-9)

9. On April 8, 2015, Petitioners sent a letter to DCPS. The letter provided DCPS with the Witness D report. Additionally, Petitioners notified DCPS that the Student would be going to Academy A, a day treatment program, after completing Program A, which he finished in mid-April. (P-11; Testimony of parent)

10. The Student then attended Academy A, which is located in Rockville, Maryland. It is a day treatment hospital, not a school *per se*, but they provide instructional support because there is a special education teacher and learning specialist

on site. There are also tutors that assist the children so that they will "keep up" and "be okay" when they come back to school. They also provide an online educational system for the children. They specialize in taking children who have been in wilderness settings and transitioning them into coming back home. He was at the program for nine hours a day. (Testimony of Witness C)

11. At Academy A, the Student had trouble engaging in the academics. He would try, and then last for ten to fifteen minutes at a time. He had poor attentiveness and impulsivity, and he regularly failed his drug tests. Then, he tested positive for "bath salts," which caused Academy A staff to become worried about his safety and the safety of the other children. As a result, they recommended that he transfer to a rehabilitation facility, and suggested Facility A. (Testimony of Witness C)

12. An IEP meeting was scheduled for May 28, 2015. This meeting was cancelled because the DCPS psychologist, Psychologist A, had not reviewed Witness C's report. (Testimony of Witness F; Testimony of parent; P-13)

13. There was an IEP meeting held on June 12, 2015. The team reviewed evaluations and the IEP was discussed. Psychologist A from DCPS had reviewed the evaluations, and she specifically recommended residential treatment for the Student. The parents became upset, and Psychologist A said that she understood that is hard for the parents when a student requires a residential placement. A teacher that was at the meeting agreed with Psychologist A that a residential placement was needed. Then, the team started to talk about possible residential schools for the Student. The parents asked for a list of schools, and were told they would get a list from DCPS. Also at the meeting, DCPS presented a draft IEP with the same goals and "present levels" as the previous IEP.

There was no request for a Functional Behavior Assessment ("FBA") from DCPS at this time. No IEP was created as a result of this meeting. (Testimony of parent; Testimony of Witness F)

14. On June 25, 2015, DCPS sent the parent an email requesting an FBA for the Student. (Testimony of Witness F)

15. In early July, 2015, the Student was arrested for a marijuana-related offense in [redacted] Virginia. The Student then was sent to Facility A, which is located in [redacted] On or about August 11, 2015, Petitioners asked DCPS for an IEP because the Student was about to be completing the program at Facility A. By September 11, 2015, no IEP meeting had been scheduled. As a result, Petitioners relied on the recommendations of Facility A staff and sent the student to School A, a residential school setting in [redacted] on or about September 21, 2015. Petitioners thought highly of School A in part because they had a Lindamood-Bell learning specialist, and also because the school a therapist that they liked. (P-21; P-24; Testimony of parent)

16. School A provides students with four academic periods, group therapy four days a week, and family therapy through Skype. One to one instruction is provided. There are some classes that are animal-based and farm-based. He receives instruction at the "learning center" on the campus two days a week, including a program with the Lindamood-Bell methodology taught by a certified reading specialist. None of the teachers are special education-certified, though some are content-area certified. The school require students to do community service work. It has a certificate of approval from the State of [redacted] (Testimony of Witness B)

17. The Student improved at School A. He found a peer group that was healthy, his "drug talk" and "gang talk" decreased, and he has presented as someone who wants to learn and is respectful and polite. He was "redirectable" and had a "great" relationship with the teachers. (Testimony of Witness B; Testimony of Witness E)

18. Meanwhile, DCPS had assigned the matter to Witness G, another psychologist. Witness G was told by an administrator to take a "second look" at the case. She was told not to talk to Psychologist A in taking a second look, and she was told that Psychologist A had recommended a residential setting. She reviewed the documents concluded that the substance abuse seemed "pretty serious" since the Student had been in a hospital treatment program, as well as more than one facility. Nevertheless, she concluded that the Student did not need a residential setting. (Testimony of Witness F; Testimony of Witness G)

19. No IEP meeting was scheduled in August-September, 2015, because of scheduling difficulties. Then, through communications with Petitioners' counsel, DCPS learned about the Due Process Complaint in this case. The parents proposed conducting the resolution meeting for the case and the IEP meeting at the same time, and DCPS agreed. (P-25; Testimony of Witness F)

20. An IEP meeting was held on October 22, 2015. The team agreed on goals, and on the "placement page," agreed on 30 hours of specialized instruction outside general education. There was agreement on behavioral support services and classroom aids and services. The main disagreement was the issue of residential placement. The IEP created on October 22, 2015 recommended specialized instruction, 30 hours per week, outside general education, with 240 minutes per week of behavioral support

services. Preferential seating and a location with minimal distractions were recommended. The IEP contains goals in Emotional, Social and Behavioral Development, Written Expression, Reading, and Mathematics. (P-31; Testimony of Witness F)

21. After the IEP meeting in October, 2015, DCPS sought out day programs, and on December 9, 2013, the School C reached out to the student to see if there was interest in the student's attendance. Petitioners were not responsive to School C's overtures, and showed no willingness to move the Student to the school. (P-36; Testimony of Witness F)

22. From September, 2015 through the present, the Student has remained at School A. His anticipated discharge is in June, 2017, which is when he is supposed to complete the program's academic and programmatic requirements. Though the Student has made progress academically and socially, he is still struggling with depressive symptoms. His report card dated January 14, 2016 revealed "great change" according to his English teacher, who gave him a C+. In Life Science, he received a B + grade. (P-40-5; P-38-2; P-41)

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 DCMR Sect. 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, 546 U.S. at 51.

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).

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 prong,") the services selected by the parent are appropriate ("second prong"), and equitable considerations support the parent's claim ("third prong"), 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).

On the first prong, the Petitioner should show that the District denied the Student a FAPE. A FAPE is offered to a student when (a) the District complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits. While Districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA. Pursuant to

the IDEA, when procedural violations are alleged, an administrative officer may find that a child did not receive a FAPE only if the procedural inadequacies (a) impeded the child's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to the child, or (c) caused a deprivation of educational benefits. 20 U.S.C. Sect. 1415(f)(1)(E)(ii); 34 C.F.R. Sect. 300.513(a)(2).

A. FIRST PRONG

Issue # 1. Did DCPS fail to write an IEP for the Student by the start of 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 CFR Sect. 300.323(a)? If so, did DCPS deny the Student a FAPE?

Issue # 2. Did DCPS fail to recommend an appropriate placement for the Student for the 2015-2016 school year? If so, did DCPS act in contravention of 34 CFR Sect. 300.116 and/or precedent such as Gellert v. District of Columbia, 435 F. Supp.2d 18 (D.D.C. 2006)? 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 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 is no dispute that DCPS did not have an IEP in effect for the Student at the beginning of the school year. There was no IEP for the Student at all until October, 2015. Nor was a placement offered to this Student by the beginning of the school year. In fact, no placement was located for the Student until School C expressed interest in December, 2015.

DCPS does not argue that there are any exceptions to the requirement to provide an IEP and a placement by the start of the school year. Moreover, the facts here do not suggest creating an exception here. DCPS has been on notice that this Student needed an IEP since February, 2015. Petitioner sent DCPS the evaluations by Evaluator A and Witness D, and notified DCPS when the Student went to Academy A in April, 2015, which is located in Maryland. He was available for assessment at that time. Then, in August, 2015, Petitioner provided DCPS with a reminder that Student A needed an IEP. They also provided DCPS with notice that the Student would be attending School A in September, 2015.

Though DCPS did ultimately offer an IEP and found a school, these were offered and found too late. Certainly, the Student cannot have been expected to stay home for three or so months before receiving the IEP and receiving overtures from the placement at School C. As a result, DCPS deprived the Student of educational benefit, and therefore a FAPE, when it failed to offer the Student an IEP or placement by the start of the school year in September, 2015.

Issue #3: Did DCPS fail to discuss the Student's school at the IEP meeting in October, 2015? If so, did DCPS violate 34 CFR Sect. 116(a)(1) and 34 CFR Sect. 300.327? If so, did DCPS deny the Student a FAPE?

Petitioners argued that she did not participate in the decision-making process that resulted in the selection of any school at the IEP meeting. In this connection, Petitioners point to cases which suggest that the school selection be made at the IEP meeting, such as in A.K. ex rel. J.K. v. Alexandria City Sch. Bd., 484 F.3d 682 (4th Cir. 2007).

While A.K. does in fact stand for the proposition that school selection be made at the IEP meeting, many cases do not find that school has to be selected at the IEP meeting.

See, e.g., T.Y. v. N.Y.C. Dep't of Educ., 584 F.3d 412, 419 (2d Cir. 2009); A.W. ex rel. Wilson v. Fairfax Cnty. Sch. Bd., 372 F.3d 674, 683 n.10 (4th Cir. 2004); White v. Ascension Parish School Board, 343 F.3d 373 (5th Cir. 2003). Within the Circuit, I have reviewed Eley v. District of Columbia, 2012 WK 3656471 (D.D.C. 2012), where the court, in a slip opinion, did rule that the school should have been selected at the IEP meeting. However in Eley, as in A.K., the court was influenced by the fact that – like here -- the student did not have a school to attend at the beginning of the school year. Eley has not been influential in this Circuit. In fact, there is no reported case that cites to the decision in Eley, at least for the proposition at issue here.

I have already found that DCPS denied the Student a FAPE by not offering an IEP and placement by the start of the school year. Given the lack of clear legal support for the argument in Issue #3, I decline to find DCPS denied the Student a FAPE on this basis as well. Accordingly, I find that DCPS did not deny the Student a FAPE by failing to discuss school placement at the IEP meeting in October, 2015.

Nevertheless, since I have found for Petitioners on the other two FAPE issues in the Due Process Complaint, Petitioners prevail on "first prong."

B. SECOND PRONG.

On the second prong, 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").

The undisputed testimony is that the parents relied on the recommendations of Academy A staff and sent the student to School A, a residential school setting, on or about September 21, 2015. At the school, the Student received four academic periods, group therapy, family therapy, and reading instruction in a "learning center" for two days a week. One to one instruction was and is provided to him, and he was required to do community service work.

There is undisputed testimony that the Student has improved at School A. He is in a peer group that is healthy, his "drug talk" and "gang talk" have lessened, he has been "redirectable" and has a "great" relationship with the teachers. His grades have been relatively good, and he has been motivated to attend school. His school avoidance issues have subsided, and he has not been able to use drugs while he is there because of the restrictions inherent to a residential school setting.

DCPS points out that the school does not have certified special education teachers, but this is not a requirement for tuition reimbursement under Florence County, which underscores that a parental placement must only be "proper under the Act" and does not have to comply with local or state regulatory requirements. DCPS's position is also that the instruction here was not "specialized instruction," but the record establishes that the delivery of the instruction was provided through an alternate schedule in an

alternative setting so that the Student could receive access to curriculum. 34 C.F.R. Sect. 300.39 ("(s)pecially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction: (i) To address the unique needs of the child that result from the child's disability; and (ii)To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children).

DCPS's primary objection is that the Student does not need a residential setting, pointing out that the Student could benefit from a day school if he were to receive drug treatment. DCPS also contended that the Student's needs are mainly drug-based. There are numerous problems with this argument. First, as pointed out by the Circuit in Leggett v. District of Columbia, 793 F.3d 59, 70-73 (D.C. Cir. 2015), the parents here had no choice. Without an offer of a program or placement from DCPS, and with the Student in need of a placement after going to rehabilitation, they had to find a school themselves. The record shows that School A was a reasonable option. As testified to by Witnesses A and D, the Student's needs were *not* exclusively drug-based. Witness D's report makes this clear. This evaluator tested the Student and diagnosed him with Unspecified Depressive Disorder, ADHD–Combined Type, Oppositional Defiant Disorder, and Parent-Child Relational Problem. Other testing showed that he had elevated scores in depression, "oppositionality," emotional regulation, unpredictable moods, irritability, poor sense of self, external issues, temper, loneliness, blaming others, and getting angry when demands placed on him. The evaluator felt that a residential treatment center would work for him because it is highly structured, predictable, because of his low

insight, because he would be around other children with similar problems, and because all peer interactions are supervised. She also pointed out that, for substance disorder issues, an extended period of abstinence was recommended. She also pointed out that he needs more than just treatment for substance abuse, and that the substance abuse is a symptom of an overall problem, that they are all "blended together, the ODD and ADHD and substance abuse." This evaluator proved prescient, since the Student then did poorly at a day treatment center. As explained by the director of the program, Witness C, the Student could not engage in the academics in the program. He would try, and then stay attentive for ten to fifteen minutes, and then stop focusing. Overall, he had poor attentiveness and impulsivity, and he regularly failed his drug tests. He was then transferred to a rehabilitation facility. After going to the rehabilitation facility, he needed a school. School A was specifically recommended by the facility.

Petitioners' decision to send the Student to a residential school was not theirs only. Respondent's own evaluator, Psychologist A, also concluded that the Student needed a residential school. Even Witness G, who testified for DCPS, admitted the Student's emotional issues were serious. It was reasonable for the parents to conclude that he needed a residential setting under these facts. McKenzie v. Smith, 771 F.2d 1527, 1534 (D.C.Cir.1985)(quoting Kruelle v. New Castle County School District, 642 F.2d 687, 693 (3d Cir.1981))(residential placement is unnecessary to the student's education if it is "'a response to medical, social or emotional problems that are segregable from the learning process.'")

In sum, I find this case quite similar to Leggett, where the Student had significant emotional problems, DCPS failed to offer a placement, and the parent found a residential

setting that had been recommended by an evaluator. Petitioners have shown that the placement is proper under the Act. Accordingly, Petitioners prevail on "prong two."

C. THIRD PRONG.

On the third criterion, the IDEA allows that tuition reimbursement 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 CSE 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 CSE 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.

The Supreme Court has suggested that the statutory factors are a non-exhaustive list. Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 241 (2009)("The clauses of Sect. 1412(a)(10)(C) are . . . best read as elucidative rather than exhaustive."). In addition, courts have broad discretion to consider the range of all relevant facts in determining whether and to what extent awarding relief is equitable. See Florence County, 510 U.S. at 16. Among the most important of these is "whether the parents have cooperated with

the [District] throughout the process to ensure their child receive a FAPE." Bettinger v. N.Y.C. Bd. of Educ., 2007 WL 4208560, at *6 (S.D.N.Y. Nov. 20, 2007).

On the equities, the facts here favor the parents. No placement was offered to the parents at the start of the school year. At least one federal court has held that that fact alone should result in the parents prevailing on this prong. N.R. on behalf of T.R. v. Department of Education of the City School Dist. of the City of New York, 2009 WL 874061 at *7 (S.D.N.Y. 2009)(the school district's "abdication of its responsibility to provide . . . FAPE is so clear from the record . . . and the law's imposition of this duty on the [school district] is so well-settled—that ... the equities favor the parents"); cf. R.B. and H.Z. v. New York City Dep't of Educ., 713 F. Supp.2d 235 (S.D.N.Y. 2010)(District did not provide final notice; parent not required to provide notice under third criterion).

Moreover, the District's reconvened IEP meeting in October was suspect in terms of equities. Psychologist A had represented to Petitioners that a residential setting was appropriate. Then, a DCPS administrator effectively overruled Psychologist A and decided to conduct a new review with a new evaluator, Witness G. *Notably, Witness G was directed not to speak to the Psychologist A in assessing the Student.* This second evaluator, not surprisingly, concluded that the Student did not need a residential placement.

Additionally, Petitioners kept Respondent abreast of all developments in this case. They sent DCPS multiple notices, sent DCPS all relevant evaluations, and let DCPS know clearly that they were going to need a placement by the beginning of the school year.

DCPS pointed to Forest Grove School Dist. v. T.A., 638 F.3d 1234, 1236 (9th Cir. 2011), the final decision in a case that had previously resulted in a major United States Supreme Court decision. In Forest Grove, the Court denied reimbursement to the parents. However, in Forest Grove, the Student went directly from a wilderness program to a residential school. No day treatment program was tried for the student in the interim. The court also concluded that the parents enrolled the student at the residential school solely because of his drug problems. That is not the case here. As noted, Petitioners tried to place the Student at a day program after he came from the wilderness program. Petitioners were not eager to send this Student to a residential program. The record suggests that the idea came from qualified evaluators, as well as DCPS's own psychologist. Moreover, it is clear from the record that the reason for the placement was not solely because of drug problems. In addition to the other reasons discussed earlier in regard to "prong two," the parent specifically testified that she selected the school, at least in part, because she wanted the Student to be exposed to a reading program that the school offered.

As a result, I conclude that Petitioners prevail on "prong three" and should be awarded tuition reimbursement through to the date of the next IEP meeting, as requested. However, it is not clear on this record whether the Student continues to need a residential program. As a result, I will remand the matter back to the IEP team to determine if the Student might benefit from a change of placement at this point in the year. In this connection, the IEP team should consider the criteria suggested by the Circuit in Leggett to determine whether a mid-year transfer is appropriate, i.e., 1) was the IEP in fact adequate? 2) would returning to [the District's recommended school] unduly disrupt the

Student's education? 3) were the Student's tuition, room and board, and other fees refundable mid-year? Leggett, 793 F.3d at 74.

VII. Order

As a result of the foregoing, I hereby order the following:

1. Respondent shall pay Petitioners for tuition and related expenses at School A for the 2015-2016 school year through to the date of the next IEP meeting;

2. The District shall reconvene the IEP within thirty days to determine if School A continues to be appropriate for the Student, in accord with this decision.

Dated: February 12, 2016
Corrected: February 24, 2016

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Petitioner's Representative: Attorney A, Esq.
Petitioner's Representative: Attorney C, Esq.
Respondent's Representative: Attorney B, Esq.
OSSE Division of Specialized Education
Contact.resolution@dc.gov
Chief Hearing Officer

X. 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: February 12, 2016

Michael Lazan
Impartial Hearing Officer