District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Parent, on behalf of Student,[1]	)	**Room: 2003**
	)	
Petitioner,	)	**Date Issued: July 22, 2016**
	)	
v.	)	**Case No.: 2016-0096**
	)	
District of Columbia Public Schools,	)	**Hearings: 6/29 and 7/12 (2016)**
	)	
Respondent.	)	**Hearing Officer: Michael Lazan**

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving a X year old student who is eligible for services as a student with autism.

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 April 20, 2016 in regard to the Student. Respondent filed a response to the Complaint on May 5, 2016. The resolution period expired on May 20, 2016.

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 May 5, 2016, 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 May 10, 2016 summarizing the rules to be applied in this hearing and identifying the issues in the case.

This matter came to hearing on June 29, 2016. At the hearing, the recording equipment malfunctioned, resulting in Petitioner not completing her case and Respondent not even starting theirs. Accordingly, the parties jointly decided to set a new date in this case to finish the testimony. The parties also jointly agreed to extend the decisional timelines to July 22, 2016 to allow the hearing officer to render a decision. As a result, Petitioner filed Consent Motion for Extension of Time to Resolve Hearing on June 30, 2016, as revised on July 1, 2016. ("the Motion"). The Motion sought to extend the decisional timeline eighteen days, to July 22, 2016. An Interim Order on Continuance Motion was thereafter signed by CHO Dietrich ordering the decisional timeline to be changed to July 22, 2016.

At both hearing dates, Petitioner was represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioners moved into evidence Exhibits 1-8. There were no objections. Exhibits 1-8 were admitted. Witness A, a DCPS representative who led the IEP meetings in question, and Petitioner testified on the June 29, 2016 date. On the July 12, 2016 date, Petitioner continued to testify, as did Witness B from School A. Respondent called Witness C, a psychologist at the IEP

meetings (expert: clinical psychology), and recalled Witness A. Respondent moved into evidence Exhibits 1-10. Petitioner objected to Exhibits 3-9. Exhibit 6 was then withdrawn, and Exhibit 9 was withdrawn except for the pages 294-296. All objections were overruled except for the objections to Exhibit 7, where objections were sustained except for pages 277-284. Exhibits 1-5, 7 (pages 277-284), 8, 9 (pages 294-296), and 10 were admitted.

At the close of the hearing, the parties presented closing statements. Both sides then submitted post-hearing email submissions on July 18, 2016.

IV. Credibility

I found all the witnesses had some credibility in this proceeding. I did find Witness A to be somewhat resistant to questioning, such as when he was asked whether the school assignment was discussed at the meeting. The answer was clearly no, as he eventually indicated after repeated questioning from Petitioner's counsel.

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 Respondent fail to provide a placement/location of services for the Student at the November, 2015 and February 2016 IEP meetings? If so, did Respondent act in contravention of the terms of an HOD, cases such as Eley v. District of Columbia, 59 IDELR 189 (D.D.C. 2012), and 34 CFR 300.350(c)(1)? If so, did DCPS deny the Student a FAPE?

2. Did Respondent fail to allow the parent to "meaningfully participate" in the aforementioned IEP meetings by refusing to discuss issues relating to the "manner" of

the specialized instruction such as environment, student teacher ratio, and amount of 1:1 instruction? If so, did DCPS act in contravention of 34 CFR Sect. 300.321 and the principles of such cases as Deal v. Hamilton County Board of Educ., 392 F.3d 840 (6th Cir. 2004)? If so, did DCPS deny the Student a FAPE?

As relief, Petitioner seeks tuition payment/reimbursement to School A for the 2015-2016 school year (to the extent it has not been paid for by DCPS). Petitioner is also seeking tuition payment for School A for the 2016-2017 school year.

VI. Findings of Fact

1. The Student is an X year old who is eligible for services as a student with autism. The Student has delays associated with autism, such as difficulties interacting with other students, fixating on objects, insisting on carrying objects in the hand, elopement, not participate in preferred activities, and use of little to no language. The Student's behavioral difficulties are so pronounced that some evaluators have stated that the Student is not testable, though there are also speech evaluations in the record suggesting testing is possible in certain situations. The Student has difficulty attending to instruction and following the general procedural flow of the classroom. (P-6-3, 8)

2. An HOD was written as a result of a Due Process Complaint filed on behalf of this Student in October, 2015. The order of IHO Coles Ruff dated October 5, 2015 placed the Student at School A, a non-public school for students with disabilities, from the start of the 2015-2016 school year until an MDT meeting was conducted and DCPS issued a Prior Written Notice and/or Location of Services letter. A location of services was to be selected at the meeting. (P-1-19)

3. The meeting followed in November, 2015. The purpose of the November, 2015 meeting was to develop an IEP per the recent HOD. The team went through the Student's present levels, issues and current services. At the meeting, there was a discussion relating to the Student's sensory processing challenges, which were a main concern of the parent. However, the actual requirements for the Student's placement and program for the forthcoming year were not discussed because the parent had to leave the meeting to attend to the Student. Counsel for the parent did not want to proceed without the parent present. (P-6-16; Testimony of Witness A; Testimony of Petitioner)

4. This meeting continued on February 3, 2016. At the start of the meeting, DCPS distributed a draft. Petitioner and counsel stated that they wanted to discuss the disputed portions of the draft, in particular regarding how the special education hours were to be delivered. Instead of allowing this inquiry, Witness A stated that the process would continue to proceed with additional discussions of the Student's current performance, and that the parent would have an opportunity to discuss her specific requests for program later. (Testimony of Petitioner; Testimony of Witness A; Testimony of Witness C)

5. The meeting then continued, with various representatives from DCPS and School A talking as well as the parent, who discussed some of the Student's triggers. The related services providers also spoke. Witness A asked questions about the Student's current classes, such as how many children were in the class, when the Student needed 1:1 instruction, when the Student can be with the whole class, and when the Student needs a small "side" lesson. Questions were asked of the parent about the

Student's known word vocabulary, and what the Student can and cannot do. Petitioner suggested to DCPS that they wanted to discuss the Student's particular school location at the meeting, but DCPS would not discuss this issue. (Testimony of Witness A; Testimony of Witness C; Testimony of Petitioner; P-5)

6. After about 40 minutes, Witness A asked whether there were questions regarding hours, and Petitioner answered in the affirmative. Counsel for Petitioner then expressed concerns regarding the specifics of the specialized instruction. Counsel then clarified that Petitioner was concerned about the size of the classroom and the student/teacher ratio. However, the speech and language pathologist then stated that she needed to leave shortly. The meeting then turned to a discussion of speech and language hours. (P-5)

7. At a certain point, Petitioner again had to leave the meeting to take care of the Student. Counsel for the parent then sought to discuss the remaining issues pertaining to the size of the classroom and the student/teacher ratio in the classroom. DCPS felt that the meeting had ended when the Petitioner left and would not discuss the issues with counsel, who represented that he was authorized to discuss the remaining issues on behalf of the Petitioner. DCPS then "closed out" the meeting. (Testimony of Witness A; Testimony of Witness C; P-5; P-4)

8. During testimony, DCPS made clear its position that "class size" does not have to be discussed at an IEP meeting. Witness C particularly stated that teachers and service providers need to determine the size of the small group since "you never know" what the numbers need to be. (Testimony of Witness A; Testimony of Witness C; Testimony of Petitioner)

9. The IEP dated February 3, 2016 found the Student to be eligible for services as a student with Autism Spectrum Disorder. It stated that the Student's behavior affects others in the classroom, and that the Student has difficulty with attending to classroom instruction and following the general procedural flow of the classroom. The IEP includes math goals, reading goals, daily living skills goals, speech and language goals, and emotional, social and behavioral development goals, and motor skills/physical development goals. It also says that formal academic assessments of the student were not possible because of the Student's inability to interact with evaluators. It says that the Student engages in limited social interactions and will elope. The IEP recommends 26.0 hours of specialized instruction outside general education with 4 hours per month of speech-language therapy outside general education, 120 minutes per month of occupational therapy outside general education, and 4 hours per month of behavioral support services outside general education. The IEP indicated that the instruction be provided in a "small group, highly structured setting." (P-6)

10. A day after this meeting, on February 4, 2016, a location of services letter was issued for the Student to attend School B. (P-3-1)

11. The parents were offered an opportunity to visit School B, but did not accept the invitation. (P-7-3; Testimony of Witness A; Testimony of Petitioner)

12. In late March and early April, 2016, there was an email exchange between Witness A and Petitioner's counsel during which Petitioner's counsel requested reconsideration of the IEP so that there could be discussion of issues such as class size. DCPS indicated that it would not reconsider the Student's IEP. (P-7-1-2)

13. For the 2015-2016 school year, the Student attended School A. The school services students from grades pre-kindergarten through 12, and has a Certificate of Approval from OSSE. There is an upper school, a middle school, and a lower school. The Student is enrolled in the [redacted] school. School A services only students with disabilities, such as children with speech and language disability, other health impairment, multiple disabilities, and autism. (Testimony of Witness B)

14. The Student's classroom at School A has four students in the class first semester, and three students thereafter. When the Student first came to the school, the Student was a flight risk, but the Student has "settled in" and made significant progress since adjusting. The Student is working on beginning foundations in phonics, basic math skills, counting and correspondence, and is beginning to write the Student's name. The Student is now improving in his ability to join a group, can join in favored activities, and has required breaks for academically based activities after fifteen to twenty minutes. (Testimony of Witness B; P-8-1)

15. While at School A, a speech and language pathologist works with the Student in a group, three times a week for forty-five minutes, with the special education teacher in the room. Occupational therapy is provided through computer-based instruction, again for three times a week, for forty-five minutes. Behavioral support services were provided through a certified guidance counselor. (Testimony of Witness B)

16. In terms of the Student's sensory needs, much of the furniture in the school is designed to support attentional issues. There are specialized chairs, materials on the desk that makes it "less busy," and cubicles around the desk so the visual systems

are less cluttered. The Student also receives movement breaks, gets prompts, and a rewards system is employed. (Testimony of Witness B)

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

1. Did Respondent fail to provide a placement/location of services for the Student at the November, 2015 and February 2016 IEP meetings? If so, did Respondent act in contravention of the terms of an HOD, cases such as Eley v. District of Columbia, 59 IDELR 189 (D.D.C. 2012), and 34 CFR 300.350(c)(1)? If so, did DCPS deny the Student a FAPE?

2. Did Respondent fail to allow the parent to "meaningfully participate" in the aforementioned IEP meetings by refusing to discuss issues relating to the "manner" of the specialized instruction such as environment, student teacher ratio, and amount of 1:1 instruction? If so, did DCPS act in contravention of 34 CFR Sect. 300.321 and the principles of such cases as Deal v. Hamilton County Board of Educ., 392 F.3d 840 (6th Cir. 2004)? If so, did DCPS deny the Student a FAPE?

Firstly, Petitioner argued that she did not participate in school selection at the IEP meeting, and there is no question that this is the case. The question is whether this practice is lawful or not in the District of Columbia.

There are some cases in support of Petitioner's argument, such as A.K. ex rel. J.K. v. Alexandria City Sch. Bd., 484 F.3d 682 (4th Cir. 2007), and there are also cases to the contrary, such as T.Y. v. N.Y.C. Dep't of Educ., 584 F.3d 412, 419 (2d Cir. 2009). Cf. A.W. ex rel. Wilson v. Fairfax Cnty. Sch. Bd., 372 F.3d 674, 683 n.10 (4th Cir. 2004)(suggesting parents do not have rights to select school); White v. Ascension Parish School Board, 343 F.3d 373 (5th Cir. 2003)(same). Within the Circuit, I have reviewed Eley v. District of Columbia, 2012 WL 3656471 (D.D.C. 2012), where the court, in a slip opinion, did rule that the Student's school should have been selected by the IEP team at the IEP meeting. However, in Eley, as in A.K., the court was influenced by the fact that the student did not have a school to attend at the beginning of the school year. This decision in Eley, which is an unpublished decision, 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.

Petitioner points to a variety of regulatory authority in support of her position, such as 34 C.F.R. Sect. 300.501(c)(1) which relates to the right to participate in the decisions pertaining to the student's educational "placement." However, the term "placement" means more than the school, as defined by courts. It is admittedly somewhat confusing that the word "placement" does not really amount to its "plain meaning" as a "place" in this analysis, as noted by Judge Howell in another decision in the Eley matter. Eley v. District of Columbia, 47 F.Supp.3d 1, 9-10 (D.D.C., 2014) Still,

this is the way the Circuit ruled in Lunceford v. District of Columbia, 745 F.2d 1577, 1583, (D.C. Cir. 1984) in a decision written by now-Supreme Court Justice Ruth Bader Ginsburg. Judge Ginsburg found that, in certain circumstances, students can be transferred from school to school even during "stay-put" so long as the educational placement is the same, i.e., that the services at the schools are fundamentally the same. Lunceford suggests that school district have a certain amount of discretion in regard to placement, which is in support of DCPS's position that it can select a school as long as the school is able to implement the provisions of the IEP.

The HOD by Hearing Officer Ruff does in fact indicate that the upcoming MDT meeting should determine a location of services for the Student. (P-1-19) As a result, DCPS's actions here clearly violated the HOD, which is unlawful, inappropriate, and frankly disrespectful of the hearing process. However, the Circuit has recently ruled that enforcement claims such as this are not properly before hearing officers given the statutory text and structure of 20 U.S.C. Sect. 1415(i)(2)(A) of the Act. B.D. v. District of Columbia, 817 F.3d 792, 801 (D.C. Cir. 2016) I must therefore decline to rule that I have jurisdiction over this contention.

In sum, after carefully considering the cases on this issue, I find that the law is simply too unclear to impose a mandate like that on DCPS. Without more decisive authority from the circuit on this point, I decline to find that DCPS denied the Student a FAPE by failing to select the Student's school at the IEP meeting in February, 2016.

Petitioner also contended that she was denied meaningful participation in the IEP process because DCPS refused to discuss issues such as class size at the IEP meetings. As a factual matter, Petitioner has established this. Petitioner or her counsel raised the

issue of class size at least three times during the IEP meeting in February, and DCPS would not engage the parent in any such discussion. DCPS's position that it had no obligation to do so because it was raised by counsel after Petitioner left has no merit. Counsel was clearly working for Petitioner at the time, and DCPS had no reason to doubt that counsel was representing Petitioner's interests.

Courts require that Districts have an "open mind" so that parents may actively and meaningfully participate in the IEP meetings. Deal v. Hamilton County Board of Educ., 392 F.3d 840 (6th Cir. 2004) In Deal, where the school district had a policy not to even consider providing 1:1 ABA instruction for a student, the district was found to have "predetermined" the Student's placement. This case has been cited approvingly on many occasions and in this Circuit on numerous occasions, most recently in Dixon v. District of Columbia, 83 F.Supp.3d 223, 230 (D.D.C. 2015) Though Deal is not squarely on point, this case is similar to Deal in that DCPS would not discuss the possibility of more individualized instruction for a student with autism. They instead took the position that the schools have full discretion to put the Student in any class they wanted as long as that class can be characterized as a "small group."

To this hearing officer, that is an untenable position. The Student here is so unmanageable that it was determined that the Student could not be evaluated -- even in a 1:1 environment. The Student had such difficulties as fixating on objects, insisting on carrying objects in the hand, elopement, not participate in preferred activities, and use of little to no language. Even in a group of three, the Student had trouble joining in. To simply say that the Student should be in a "small group" without specifying the class size, student teacher ratio or the amount of individualized instruction is insufficiently clear to

put a concerned parent on notice about the exact kind of program that is being recommended. The parent is reliant on the IEP to insure that a student receives an appropriate placement. If DCPS is to have discretion on selecting a school based on the IEP, then it must allow parents to raise *specific* issues of concern and then *seriously* consider (and if need be, address) those concerns. At the time the parents must choose whether to accept the school district recommendation or to place the child elsewhere, they have only the IEP to rely on, and therefore the IEP creates considerable reliance interests for the parents. R.E. v. New York City Dept. of Educ., 694 F.3d 167, 186 (2d Cir. 2012)

Judge Lamberth recently discussed these points in Brown v. District of Columbia, No. 15-0043 (RCL) 2016 WL 1452330, at *6-*8 (April 13, 2016 D.D.C.). Stating that the IEP "is critical to the design and functioning of the FAPE," Judge Lamberth referenced Burlington, where the Supreme Court stated that "(t)he Modus Operandi of the Act is the already mentioned 'individualized educational program.' " He underscored that the IEP process is a collaborative process that should be produce an IEP "specific enough to allow parents to understand what services will be provided and make a determination about whether the proposed placement is adequate." (citation omitted) He stated that the IEP meeting and the IEP process "are designed to be transparent, accessible, and interactive" because "(o)therwise, a student and his parents would be in a weak position to inform or perhaps challenge the IEP team's determinations, something the IDEA clearly prioritizes."

In sum, the mere fact that a parent is able to express herself at an IEP meeting is not necessarily enough to pass muster under the IDEA. The school district must

meaningfully respond to all of the parent's concerns for the IEP meeting to have real value and for a parent to truly be engaged in the process. P.F. and S.F. v. Bedford Central School District, No. 15-CV-507 (KBF), 2016 WL 1181712 (March 25, 2016, S.D.N.Y.) Obviously, a school district does not have to agree with all or even any of the parent's concerns at an IEP meeting. But by failing to even consider the parent's concerns about specific class size at the February meeting, DCPS denied the parent an opportunity to meaningfully participate in the IEP process, and therefore denied the Student a FAPE. Petitioner prevails on "prong one."

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 testimony and evidence in this case establishes that School A is proper under the Act. The Student has significant issues in regard to behavior and requires a considerable amount of attention to be able to stay in the classroom, attend to instruction,

and progress academically. School A provided the Student with a classroom with a licensed special education teacher and a favorable student to teacher ratio of 4-1 and then 3-1. This small class size helped the Student. When the Student first came to the school, the Student was a flight risk, but the Student has "settled in" and made significant progress since. The Student has worked on beginning foundations in phonics, basic math skills, counting and correspondence, and writing the Student's name. The Student improved in the ability to join a group, join in "favored" activities, and has gotten the required breaks for academically based activities after fifteen to twenty minutes.

The Student also received related services at the school. A speech and language pathologist worked with the Student in a group, three times a week for forty-five minutes, with the special education teacher in the room. Occupational therapy was provided through computer-based instruction, again for three times a week, for forty-five minutes. Behavioral support services were provided through a certified guidance counselor.

The school also met the Student's sensory needs. Furniture in the school was designed to support attentional issues, there were specialized chairs for students with sensory needs, there were materials to make a student's desk "less busy," and there were cubicles around the desk so the visual systems are less cluttered. The Student also received movement breaks, got prompts, and a rewards system was employed on his behalf.

It is noted that the School A placement is a continuation of the placement that was ordered by IHO Ruff for the first part of the 2015-2016 school year. It is beyond cavil that it is preferable to keep a child in the same school during a given school year, and this is especially so with a student with severe disabilities like autism. In Block v. District of

Columbia, 748 F Supp. 891 (D.D.C. 1990) the Court acknowledged that while a public school might be appropriate for a learning disabled student, there was substantial evidence to support a finding that a "mid-year change of placement" would pose a serious educational risk to the student. The Court noted, inter alia, that the learning disabled Student was also emotionally fragile, had transferred from school to school previously, had made progress in the parentally placed school, and that it would be inappropriate for the student to move schools given the student's emotional state. See also Delaware County Intermediate Unit #25 v. Martin, 831 F. Supp.1206 (E.D. Pa. 1993)(noting the importance of allowing a student to finish out a brief school period); Holmes, 680 F. Supp. 40 (D.D.C. 1988)(noting that the proposed District school was in a start-up posture and indicating that "to send the plaintiff to a new school to complete the last semester of schooling would be "insensitive"); Burger v. Murray County School Dist., 612 F. Supp. 434 (N.D. Ga. 1984)("obvious advantages inhere to any child who is permitted to learn in a stable environment. This advantage may have even more meaning to the handicapped child").

In sum, Petitioner has shown that the placement at School A was proper under the act for the 2015-2016 school year, in particular period of time after the issuance of the Location of Services letter in February, 2016. For the foregoing reasons, the Petitioner prevails 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 main issue is the parental refusal to even deign to visit the DCPS placement at School B. The parent did not really offer a clear reason why this was, but it is obvious that the parent was not really willing to even consider a DCPS placement after having gone through the IEP process. While it was reasonable for the parents to have been concerned about continuity of the Student's placement during the

2015-2016 school year, it would have also been reasonable for the parents to view the classrooms at School B to see if they might be appropriate for the Student.

Under the circumstances, the parent prevails on "prong three" and is awarded tuition reimbursement or payment at School A for the 2015-2016 school year, in particular for the time period not covered by IHO Ruff's order. However, given the parent's failure to visit School B, I will exercise my discretion and order a ten percent reduction of the tuition reimbursement or payments, again corresponding to the time period not covered by IHO Ruff's order.

Finally, though not mentioned in the prehearing order and not clearly referenced in the Due Process Complaint, Petitioner is also seeking placement of this Student at School A for the 2016-2017 school year. DCPS objects to consideration of this argument since it was not raised in the prehearing order. I agree that Petitioner should have raised this issue in the prehearing order, especially in view of the vague way that the Due Process Complaint was written. Moreover, even were the relief raised in the Due Process Complaint and in the prehearing order, I do not feel it is appropriate to exercise my discretion and grant such relief since the 2016-2017 school year has not yet started. There is still time for the parties to reconvene a proper IEP meeting and genuinely discuss and address all of the parent's concerns, such as class size, sensory needs, and other issues relating to delivery of instruction. As a result, I will order an IEP meeting within fifteen days to rewrite the IEP so that DCPS can provide the parent appropriate participation in the process and write an IEP that is genuinely the product of deliberation between and among all members of the team.

VII. Order

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

1. Respondent shall reimburse or pay Petitioners for tuition and related expenses at School A for the 2015-2016 school year for the time period not covered by the HOD by IHO Ruff;

2, There shall be a ten percent reduction of reimbursement/payment of all such tuition and related expenses;

3. The parties shall reconvene the IEP within 15 calendar days to comprehensively address all issues raised by the parent in regard to the Student and to develop an appropriate education program that reflects genuine deliberation by the team;

4. Petitioner's other requests for relief are denied.

Dated: July 22, 2016

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Petitioner's Representative: Attorney A, 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: July 22, 2016

Michael Lazan
Impartial Hearing Officer