

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
1050 First Street, NE, 3rd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
November 17, 2020

PARENTS, on behalf of STUDENT, ¹	Date Issued: November 17, 2020
Petitioners,	Hearing Officer: Peter B. Vaden
v.	Case No: 2020–0147
D.C. OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION,	Online Video Conference Hearing
Respondent.	Hearing Dates: October 28 and 29, 2020 November 6, 2020

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the parents (PETITIONERS) under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In this administrative due process proceeding, Petitioners allege that Student has been denied a free appropriate public education (FAPE) by the failure of Respondent D.C. Office of the State Superintendent of Education (OSSE) to offer Student a suitable residential placement, in accordance with Student’s Individualized Education Program (IEP).

Petitioners’ Due Process Complaint, filed on August 21, 2020, named District of Columbia Public Schools (DCPS) and OSSE as Respondents. The undersigned hearing officer was appointed on August 24, 2020. On September 3, 2020, I convened a

¹ Personal identification information is provided in Appendix A.

telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. On September 3, 2020, the parties met for a resolution session and were unable to resolve the issues in dispute. By orders issued on October 16, 2020 and November 4, 2020, I granted unopposed continuance requests of Petitioners and OSSE respectively. My final decision in this case is now due by November 20, 2020.

On October 21, 2020, Petitioners moved to dismiss DCPS as a respondent on the basis of a settlement between Petitioners and DCPS. By order issued October 24, 2020, over OSSE's opposition, I dismissed DCPS as a party.

Due to the closing of the hearing rooms at the Office of Dispute Resolution in the wake of the Coronavirus outbreak, the due process hearing was held online and recorded, using the Microsoft Teams video conference platform. The hearing, which was closed to the public, was convened before the undersigned impartial hearing officer on October 28 and 29 and November 6, 2020. MOTHER appeared online for the hearing and was represented by PETITIONERS' COUNSEL. Respondent OSSE was represented by PROGRAM MANAGER and by OSSE'S COUNSEL.

Counsel for the parties made opening statements. Petitioners called as witnesses Mother, PSYCHIATRIST, EDUCATIONAL CONSULTANT, CLINICAL THERAPIST and DIRECTOR OF EDUCATION. OSSE called as witnesses Program Manager and CHIEF EXECUTIVE OFFICER. Petitioners re-called Psychiatrist as a rebuttal witness. Petitioners' Exhibits P-1 through P-28 and OSSE's Exhibits R-1 through R-13 were all

admitted into evidence without objection.

At the conclusion of Petitioners' case-in-chief, OSSE's Counsel made an oral motion to strike Petitioners' evidence for failure to establish a *prima facie* case. I denied the motion.

On the third day of the hearing, after the taking of the evidence, counsel for the respective parties made oral closing arguments. The parties were granted leave until November 9, 2020 to submit, by email, citations to persuasive or controlling authority. Counsel for both parties timely submitted citations to authority, which they deemed relevant.

JURISDICTION

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The issues remaining for determination in this case, after dismissal of DCPS as a respondent, are:

- a. Did OSSE deny Student and Student's family a FAPE by failing to appropriately place Student for the 2020-2021 school year?
- b. Is RESIDENTIAL CENTER 1 a proper placement for Student?

For relief, Petitioners request that OSSE be ordered to reimburse them for their expenses already paid to Residential Center 1 from Student's start date of June 29, 2020 and that OSSE be ordered to place and fund Student at Residential Center 1 for the

2020-2021 school year.

FINDINGS OF FACT

After considering all of the evidence received at the due process hearing in this case, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE young adult, is a resident of the District of Columbia. A court in Idaho has determined that Student is an incapacitated person and has issued Letters of General Co-Guardianship appointing the parents as Student's general co-guardians. Testimony of Mother, See Finding of Fact No. 30, *infra*.

2. Student has been determined eligible for special education by DCPS under the Autism Spectrum Disorder (ASD) disability classification. Exhibit R-3.

3. In an April 2018 neuropsychological evaluation, Student's core cognitive capacities were found to be sound, but testing also revealed several areas of vulnerability, primarily within the Attention and Executive Functioning and Written Expression domains. Exhibit P-8.

4. For the 2019-2020 school year, Student was enrolled in City School, a DCPS public school. Due to mental health issues, Student stopped attending school in November 2019. From January 2020 through the end of the school year, Student was under home instruction due to ongoing psychiatric illness. Exhibit P-7.

5. DCPS school buildings have been closed since March 16, 2020 due to the Coronavirus pandemic. Hearing Officer Notice.

6. In May 2020, Psychiatrist prepared a psychiatric summary of Student's

psychiatric illnesses and learning difficulties. I adopt the following facts and findings from Psychiatrist's summary, none of which has been disputed by OSSE: Student has a long history of psychiatric and learning difficulties including Attention Deficit Hyperactivity Disorder (ADHD) and Asperger's Disorder. Student has had significant difficulty with Anxiety and with the social, emotional and educational demands of school beginning as early as the 2nd grade. During the 2016-2017 school year, Student experienced what was likely a Manic and then a Major Depressive Episode that necessitated placement on medical leave. The course of Student's illness varied greatly over the next two years and included periods of psychosis, delusional religious thinking, and a serious suicide attempt and ideation. Prior to fall 2018, Student was hospitalized at hospitals in Virginia and Maryland. In the 2019-2020 school year at City School, Student did well in some classes and poorly in others. Student's behaviors fit with Student's diagnosis of Autism Spectrum Disorder. Student is easily influenced by peers and will mimic their behavior, including negative peer behavior. In November of 2019, Student experienced another episode of psychotic illness. Student was hospitalized at a psychiatric hospital in Washington, D.C. for several weeks. After being discharged, Student reacted poorly to an antipsychotic medication and developed a state of catatonia that lasted for more than 4 weeks. In January and February 2020, Student developed a clear episode of mania, leading to another 3-week hospitalization at a hospital in Maryland, from where Student was discharged on April 8, 2020. As of May 2020, Student's psychiatric diagnoses were Bipolar Disorder, ASD, ADHD-combined

type and Specific Learning Disorder with impairments in reading and in written expression. Exhibit P-7, Testimony of Psychiatrist.

7. In his May 2020 Psychiatric Summary, Psychiatrist recommended as follows for Student:

- Student requires a small structured academic environment that can be focused both on psychiatric rehabilitation and social and emotional growth. Necessary components of the appropriate school for Student would include:
 - Integrated curriculum focused on the development of social and communication skills in adolescents presenting with ASD.
 - Sufficient academic rigor to prepare Student for a transition to college. Peers should be of average or above average cognitive ability.
 - Psychiatric and clinical staff with expertise in managing and supporting individuals with significant psychiatric illness.
 - Curriculum would include weekly individual therapy, and group therapy 2-3 times a week.
 - The school should provide a year-long academic and therapeutic program. Given Student's age it's imperative that this transition to the appropriate school begin as soon as possible, ideally in the summer of 2020.
 - Given Student's tendency to integrate negative behavior it's important that the school's students not have histories of aggressive behavior and/or substance abuse.
 - A residential program or therapeutic boarding school offers Student the best opportunity to meet the social, emotional, and academic challenges that lay ahead. Without such a placement it is likely that the pattern of psychiatric illness, social isolation, and academic stagnation that has existed over the last two and half years will continue.

Exhibit P-7.

8. On May 14, 2020, Psychiatrist's May 2020 psychiatric summary was presented to Student's City School IEP team at a video conference meeting. Mother, PETITIONERS' COUNSEL 2 and Educational Consultant participated in the meeting. At the meeting, the IEP team conducted the annual review of Student's DCPS IEP. The IEP team was in agreement on Student's annual IEP goals. The IEP team discussed that Student had not been in school since November 2019 and that Student would benefit from continued behavioral support services to learn skills to regulate and cope with varying emotions and social interactions with peers, to maintain focus, organization and attention through assignment and task completion, and would benefit from learning complex social skills to improve interactions with peers. The IEP team agreed that Student required 26 hours per week of Specialized Instruction outside the general education setting and 240 minutes per month of Behavioral Support Services. The IEP does not provide for group therapy services. The IEP team determined that Student did not require Extended School Year (ESY) services. Exhibit P-9.

9. At the May 14, 2020 meeting, Petitioners' Counsel 2 also recommended a full time residential placement for Student at a school that has a psychiatrist on staff. The IEP team agreed with making a referral to OSSE for a change-in-placement (CIP) review. Exhibit P-9.

10. On June 25, 2020, a CIP meeting for Student was convened with OSSE REPRESENTATIVE. Mother informed the team that Student had been seeing a Psychiatrist outside of school and that the parents had been working to get Student into

an intensive outpatient program. Although OSSE did not agree that Student needed a change in placement, OSSE accepted the decision of Student's IEP team that Student required a residential placement and agreed to start the location assignment process. At the meeting, Mother reported that the family planned to enroll Student at Residential Center 1 on June 29, 2020. Petitioners' Counsel 2 asked that OSSE consider Residential Center 1 for Student's placement. OSSE Representative advised that she must exhaust all programs on the OSSE-approved nonpublic school list first. Exhibit P-14.

11. On or about June 26, 2020, OSSE made placement referrals for Student to five nonpublic residential programs on OSSE's list of approved schools. On July 1, 2020, OSSE Representative wrote Mother by email that OSSE had received denial notifications from four of these schools and that OSSE was making referrals to six additional OSSE-approved schools, including RESIDENTIAL CENTER 2. On July 17, 2020, OSSE Representative wrote Mother that OSSE had received an acceptance notification for Student from Residential Center 2. OSSE Representative wrote that Residential Center 2 had a significant wait list for their program, as a result of a protocol for admittance of new students due to the COVID pandemic, and that the predicted wait for admission was 12-14 weeks. Exhibit P-16. None of the other residential programs to which OSSE had made referrals accepted Student. Testimony of Program Manager. On July 17, 2020, OSSE Representative notified the parents by email that OSSE would issue a Notice of Location Assignment for Student to attend Residential Center 2. Exhibit R-18.

12. On or about June 4, 2020, Mother completed an admissions application for Student to Residential Center 1. Student was accepted at Residential Center 1 on June 10, 2020. Exhibits P-11, P-12.

13. On June 15, 2020, Petitioners' Counsel wrote DCPS that Student would attend Residential Center 1 for the 2020-2021 school year and requested that DCPS place and fund Student at Residential Center 1. Petitioners' Counsel wrote that they did not believe that an appropriate special education program for Student had been identified or offered by DCPS for the upcoming school year and, that should DCPS refuse the parents' request for funding at Residential Center 1, they reserved the right to seek funding for their unilateral placement of Student at that facility. Petitioners' Counsel requested DCPS to share this information with OSSE. Exhibit R-11. The parents enrolled Student at Residential Center 1 on or about June 29, 2020. Exhibit R-18.

14. On July 30, 2020, Petitioners' Counsel 2 wrote DCPS and OSSE by email that Mother had learned, allegedly, that the students typically in the Residential Center 2 program had IQ scores ranging from 35 to 70 and had an Intellectual Disability diagnosis, that there were many students who were nonverbal and that the parents had significant concerns about the appropriateness of the Residential Center 2 for Student, especially that there would be no appropriate peer group for Student. Counsel also advised of the parents' concern about the predicted 12-14 week wait list and that Student would not be able to begin in the Residential Center 2 program immediately.

Petitioners' Counsel 2 again requested that a referral be sent to Residential Center 1, which they believed to be an appropriate placement for Student. Exhibit P-18.

15. OSSE representative responded by email on July 30, 2020 that while Residential Center 2 was able to serve students with a classification of intellectually disabled (ID), it also served students with Autism; that Residential Center 2 is a residential program specifically designed to work with students with Autism; that Residential Center 2's admissions team had read Student's documents, including the IEP and evaluations, and determined that they could serve Student and meet Student's varied needs; that Residential Center 2 was on OSSE's certificate of approval (COA) list, meaning the program must abide by the "rigorous" requirements, including but not limited to, having staff that are certified to teach students with disabilities, staff that have passed background checks, and facilities that meet safety codes; that Residential Center 2, in southern Virginia, met the legal requirement for placement as close as possible to the student's home and that OSSE was not familiar with the program at Residential Center 1, which was not a program on OSSE's approved list. OSSE Representative wrote that OSSE would not be sending a referral for Student to Residential Center 1. OSSE Representative also wrote that DCPS should discuss with Student's IEP team providing comparable services for Student, pending the student's entry to Residential Center 2. Exhibit P-19.

16. On August 28, 2020, a DCPS representative wrote the parents to advise that it was DCPS's position that it had made a FAPE available to the student with an

appropriate IEP and a placement decision for a residential placement; that OSSE had determined the location of services (LOS) to implement the IEP and placement; and that OSSE had notified the parents that it had determined that Student's LOS would be at Residential Center 2. DCPS gave notice that if the parents chose not to enroll Student at Residential Center 2, DCPS would consider Student a parentally-placed private school student. Exhibit P-20.

17. Residential Center 2 is a for-profit therapeutic treatment center in southern Virginia, serving students with intellectual disabilities and ASD disabilities. At its main campus, it serves some 58 residential students, aged 10-22 years and 24 day students, aged 5 to 22 years. Approximately one-half of the students in the residential program are intellectually disabled. At the high school level, there are some 20 students, including about 10 students on the diploma track. None of the diploma track students has an intellectual disability. Testimony of Chief Executive Officer.²

² In her testimony at the due process hearing, Educational Consultant, who did not claim to have made an on-site visit to Residential Center 2, testified that she had spoken by telephone the day before with the Chief Operating Officer (COO) of Residential Center 2. According to Educational Consultant, COO told her that all students at Residential Center 2 were coded with Intellectual Disabilities and were low functioning, that all students have a history of aggressive behaviors – either homicidal or suicidal thoughts if not past attempts – as well as low cognitive scores. Educational Consultant also stated that COO told her that only two residential students at Residential Center 2 were on the high school diploma track. COO was not called to testify at the due process hearing and COO's alleged statements conflicted with much of the testimony of Chief Executive Officer, who testified at length under oath. While hearsay evidence is not barred in due process hearings where the rules of evidence are not binding, I find that COO's alleged out-of-court statements are entitled to less probative weight than the sworn testimony of Chief Executive Officer. *See, e.g., McAllister v. District of Columbia*, 45 F. Supp. 3d 72, 75 (D.D.C. 2014) (Rules of evidence are loosely construed

18. Residential Center 2 serves students who need a higher level of care than a group home, but do not need an acute setting. Most of the residential students at Residential Center 2 are sent there because prior, less restrictive, placements in the home community had not been successful. It would be fairly uncommon for an applicant for Residential Center 2 not to have a history of aggression, but those students do not necessarily show aggression at Residential Center 2. In a recent survey, over half of the students at Residential Center 2 had no aggressive episodes over a 5 month period. Residential Center 2 tries to screen out applicants with suicidal, homicidal or extreme aggressive behaviors and students with a profile of active substance abuse.

Testimony of Chief Executive Officer.

19. Residential Center 2 offers 27.5 hours per week of instruction. Residential Center 2's classrooms, for more independently functioning high school students with ASD, are located on a separate floor of the school building. There are 4 classrooms with up to 10 students per class. Each class is taught by a teacher certified in special education, assisted by two paraprofessionals. Students move between classrooms for different subjects. In addition to direct teaching, the school uses the Edgenuity online curriculum, which provides instruction in standard courses and electives from Grade 4 through Grade 12, including advanced placement and remedial courses. Residential

an administrative due process hearing.) I also discount the opinions of Educational Consultant to the extent they were based on the alleged statements of COO and not on on-site observations at the facility.

Center 2 is licensed by the Virginia Department of Education and is accredited by Cognia, a non-governmental organization that accredits primary and secondary schools throughout the United States. Testimony of Chief Executive Officer. Residential Center 2 holds a current COA issued by OSSE. Testimony of Program Manager.

20. Residential Center 2 employs a psychiatrist as its full-time chief medical officer. The psychiatrist meets with each residential student at least once per week. The school also has licensed therapists, supervised by the Clinical Director, who meet with each student three times per week and also provide weekly family therapy and family engagement. Mental health technicians, who serve as the classroom paraprofessionals, are also trained by the therapist to support the students throughout the day. Group therapy is not provided at Residential Center 2. Testimony of Chief Executive Officer.

21. Residential Center 2 residential students with ASD disabilities are housed in a designated cottage, with separate dorm areas for males and females. There is a cafeteria for all students in a separate building. Testimony of Chief Executive Officer.

22. The cost per student for Residential Center 2 is approximately \$17,170 per month. Testimony of Chief Executive Officer.

23. Residential Center 1 is a for-profit residential treatment program, located some 2,400 miles from Washington, D.C., for students and other clients with persistent mental illness. Residential Center 1 is a facility of “last resort.” Most of its clients have had multiple placements before reaching Residential Center 1. Some of the clients are oppositional and have a history of “acting out.” The program tries to teach its clients

independent living. Testimony of Clinical Therapist.

24. Residential Center 1 provides education for those clients who need it. It does not follow a school term, but offers rolling admissions. Students are grouped by age, with adolescents and young adults in separate cohorts. Residential Center 1's school is accredited by Cognia and is licensed by the state of Idaho. Testimony of Director of Education.

25. Since August 2020, Student has been in Residential Center 1's intensive young adult program, for clients aged 18 to 26 years, including nonstudents. Of this group, there are 8 to 10 students on varying learning plans. Two or three of the students, including Student, are working toward high school diplomas. The other students are working on programs for college re-entry or are pursuing a vocational path. The school meets for 3½ hours each school day, with academic support also available in the afternoons. The class is taught by two rotating teachers, with only one teacher present on a given day. One of the rotating teachers is certified in social sciences. The other teacher does not have a current teaching certification. The students in the class work independently with direction and support from the teacher. Because of security concerns, students in the intensive young adult program use only printed materials and do not have access to online learning programs. Testimony of Director of Education.

26. Student arrived at Residential Center 1 on June 29 2020. Exhibit R-18. At the time of Student's arrival, Student was actively psychotic, could not focus for more than a few seconds and could not track conversations. Student was placed in

Residential Center 1's stabilization unit initially and, for the first month, was not able to go to school at all. Testimony of Clinical Therapist. In September 2020, Student started in the intensive young adult program class and is taking government and English courses. Student has passed the first semester requirements for these courses. Student is doing better day-by-day. Student is attentive in class, working hard and starting to build relationships. Student passed the first semester requirements for both the government class and the English class. Testimony of Director of Education.

27. At Residential Center 1, Student receives group therapy every day, individual therapy twice a week and family session therapy once a week. The program staff, including physicians, therapists and teachers, meet regularly and go over each client every two weeks. Testimony of Clinical Therapist.

28. The cost of Residential Center 1 is about \$16,000 per month, which the parents have been paying since Student entered the program in late June 2020. Testimony of Mother.

29. On August 6, 2020, an Idaho state court issued Letters of Temporary Co-Guardianship to Father and Mother to be temporary co-guardians for Student through November 8, 2020, to be entitled to the custody of the person of Student and to exercise the following power, *inter alia*, to make provision for the care, comfort and maintenance of Student. Exhibit P-19.

30. On November 16, 2020, the Idaho state court issued Letters of General Co-Guardianship appointing Father and Mother as general co-guardians over Student.

(Petitioners' Counsel provided copies of these orders, by email, to the hearing officer on November 17, 2020. Full state court citation provided in Appendix A.)

CONCLUSIONS OF LAW

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

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioners in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by the public agency, in this case OSSE, the agency shall hold the burden of persuasion on the appropriateness of the proposed placement; provided that the Petitioners shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. The burden of persuasion shall be met by a preponderance of the evidence. See D.C. Code § 38-2571.03(6).

Analysis

- Did OSSE deny Student and Student's family a FAPE by failing to appropriately place Student for the 2020-2021 school year?
- Is Residential Center 1 a proper placement for Student?

In this proceeding, the parents seek reimbursement from OSSE for their unilateral placement of Student at Residential Center 1, a residential treatment center,

beginning June 29, 2020. Under the IDEA, parents who unilaterally decide to place their disabled child in a private school, without obtaining the consent of local school officials, “do so at their own financial risk.” *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (*quoting Sch. Comm. of the Town of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 374, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)). However, “[i]f a school system fails to provide a [disabled] student with an appropriate education and such education is offered at a private school, the school system may be liable to reimburse the [parents] for the cost of private education.” *Z. B. v. District of Columbia*, 888 F.3d 515, 519 (D.C. Cir. 2018) (citing 20 U.S.C. § 1412(a)(10)(C)(ii); *Leggett v. District of Columbia*, 793 F.3d 59, 63 (D.C. Cir. 2015)). “As interpreted by the Supreme Court, IDEA requires school districts to reimburse parents for their private-school expenses if (1) school officials failed to offer the child a free appropriate public education in a public or private school; (2) the private-school placement chosen by the parents was otherwise “proper under the Act”; and (3) the equities weigh in favor of reimbursement—that is, the parents did not otherwise act “unreasonabl[y].” *Leggett, supra*, at 66-67, (citing *Carter, supra*, 510 U.S. at 15–16, 114 S.Ct. 361; 20 U.S.C. § 1412(10)(C)(iii)(III).)

In the present case, Student’s DCPS IEP team determined in June 2020 that Student required a residential educational placement for the 2020-2021 school year. The parents contend that OSSE denied Student a FAPE by not offering a placement at an appropriate residential school and that they are entitled to reimbursement from

OSSE for their expenses to enroll Student at Residential Center 1. OSSE maintains that it offered Student a FAPE by providing an appropriate placement at Residential Center 2. Petitioners made a *prima facie* showing that the proposed Residential Center 2 placement was not appropriate. Therefore, OSSE must shoulder the burden of persuasion on the appropriateness of the proposed placement.

1. Parents' Standing in this Case.

Student reached the age of majority under District of Columbia law on 18TH BIRTHDAY. The District of Columbia, as permitted by the IDEA, transfers parental rights under the Act to the child upon reaching the age of majority, with several enumerated exceptions. *See* 20 U.S.C. § 1415(m); D.C. Code § 46-101, 5E DCMR § 3035.1.

In *Latynski-Rossiter v. District of Columbia*, 928 F. Supp. 2d 57, 60–61 (D.D.C. 2013), U.S. District Judge Rudolph Contreras pronounced that a student's parents have standing to sue for private school tuition reimbursement based on alleged IDEA violations that occurred before their child's eighteenth birthday and that this right does not dissipate simply because the child reaches the age of majority. *Id.* at 60-61. Following this precedent, I find that the parents have standing to sue for reimbursement of Student's private school expenses which they incurred before Student reached the age of majority.

In *Latynski-Rossiter*, Judge Contreras did not address whether parents have standing to sue for reimbursement expenses incurred *after* the student reaches the age

of majority. One of the exceptions to transfer of IDEA rights enumerated in the DCMR occurs when a student has been declared a legally incapacitated individual by a court of competent jurisdiction, and a legal guardian has been appointed by the court to make decisions for the student, including educational decisions. *See* 5E DCMR § 3035.1.(a). In the present case, on August 6, 2020, [REDACTED], an Idaho state court issued Letters of Temporary Co-Guardianship over Student to the parents. This temporary guardianship order expired on November 8, 2020. On November 16, 2020, the same Idaho state court issued Letters of Permanent Co-Guardianship to the parents. (Petitioners' Counsel provided copies of the Permanent Co-Guardianship orders to the hearing officer on November 17, 2020.)

Under Idaho state law, a guardian, entitled to custody of his ward, shall make provision for the care, comfort and maintenance of his ward, and, "whenever appropriate, arrange for his training and education." Idaho Code Ann. § 15-5-312(b). I find that under the August 4, 2020 Letters of Temporary CO-Guardianship and the November 16, 2020 Letters of General Co-Guardianship, the parents were entitled to custody of Student and to make decisions, including educational decisions, for Student. Therefore, under 5E DCMR § 3035.1, Student's rights under the IDEA did not transfer to Student when the Letters of Temporary Co-Guardianship were in effect or as of the issuance of the Letters of General Co-Guardianship. For the short period from November 8 to November 16, 2020 when Student was not under a guardianship, the parents continued to serve as *de facto* co-guardians. For purposed of the standing

analysis, I will deem Student have been under the guardianship of the parents from August 6, 2020 through the present time.

I conclude, therefore, that the parents had standing to prosecute their due process complaint and may seek reimbursement for their private school expenses incurred for Student from June 2020 through the present.

2. Can OSSE, as the District of Columbia's State Education Agency, be liable in this case?

In order to provide a FAPE after an IEP is developed, the public agency must provide the student a placement in a school that is capable of implementing the IEP. *See Johnson v. District of Columbia*, 962 F. Supp. 2d 263, 268 (D.D.C. 2013). Both OSSE and DCPS are District of Columbia "public agencies" as defined by the IDEA. *See* 34 C.F.R. § 300.33. In most reported judicial decisions in this jurisdiction, such as *Leggett and Z.B., supra*, the parents sought reimbursement from the local education agency (LEA) for the unilateral placement of their children at private schools. In this proceeding, the parents seek relief against the state education agency (SEA), OSSE, not DCPS which is Student's LEA.³ Neither Petitioners nor OSSE appear to dispute that OSSE may be liable. I agree. In the District of Columbia, responsibility for making FAPE available to a student with a disability, including conducting evaluations and developing IEPs, lies, in the first instance with the student's LEA. *See* 5E DCMR §

³ Petitioners originally named both OSSE and DCPS as respondents. Following a settlement between Petitioners and DCPS, on motion of the Petitioners, I dismissed DCPS as a respondent.

3002.1. But, if an LEA anticipates that it may be unable to implement a student's IEP, OSSE shall cooperate with the LEA to provide a placement in a more restrictive setting and OSSE shall be responsible for paying the costs of education when the student is placed at a nonpublic special education school or program. *See id.*, §§ 3011.2, 3011.3.

Here, it is undisputed that DCPS notified OSSE that Student required a more restrictive residential placement – which DCPS was unable to provide. Therefore, the responsibility for providing Student a residential placement for the 2020-2021 school year fell to OSSE and OSSE may be liable for denial of FAPE if it failed to offer Student an appropriate nonpublic placement.

3. Was Residential Center 2 capable of substantially implementing Student's IEP?

The student in this case has been diagnosed with Bipolar Disorder, ASD, ADHD-combined type and Specific Learning Disorder. For the 2019-2020 school year, Student was enrolled in City School, a DCPS public school. Due to deteriorating mental health, Student stopped attending school in November 2019 and was placed on DCPS' Home and Hospital Instruction Program (HHIP). At meetings on May 14, 2020 and June 25, 2020, Student's DCPS IEP team decided that Student required a more restrictive educational placement. Specifically, the May 14, 2020 IEP provided for Student to receive 26 hours per week of Specialized Instruction outside the general education setting and 240 min per month of Behavioral Support Services. (The appropriateness of Student's DCPS IEP is not at issue in this proceeding.) At the June

25, 2020 change-in-placement meeting with OSSE, Student's IEP team decided that Student required a residential placement. On July 17, 2020, OSSE identified Residential Center 2 as the nonpublic school to which Student would be assigned. The parents contend that Student's proposed placement at Residential Center 2 was not appropriate.

As U.S. District Judge Rudolph Contreras explained in *N.W. v. District of Columbia*, 253 F. Supp. 3d 5 (D.D.C. 2017), the IDEA "requires school districts to 'offer [] placement in a school that can fulfill the requirements set forth in [the student's] IEP' *O.O. ex rel. Pabo v. District of Columbia*, 573 F.Supp.2d 41, 53 (D.D.C. 2008). The school need not perfectly satisfy the IEP, but cannot commit a material failure, or leave 'more than a minor discrepancy between the services a school provides to a disabled child and the services required by that child's IEP.' *James v. District of Columbia*, 194 F.Supp.3d 131, 139 (D.D.C. 2016) (citing *Holman v. District of Columbia*, 153 F.Supp.3d 386, 389–90 (D.D.C. 2016))." *N.W.* at 16-17.

In the context of a reimbursement claim under the Supreme Court's holdings in the *Burlington-Carter* cases, the Second Circuit Court of Appeals has explained that challenges to a school district's proposed placement school must be evaluated *prospectively* (i.e., at the time of the parents' unilateral placement decision) and cannot be based on "mere speculation." "While it is speculative to conclude that a school with the capacity to implement a given student's IEP will simply fail to adhere to that plan's mandates, it is not speculative to find that an IEP cannot be implemented at a proposed

school that lacks the services required by the IEP.” *M.O. v. New York City Dep’t of Educ.*, 793 F.3d 236, 244 (2d Cir. 2015). *See, also, e.g., Jones v. District of Columbia*, No. 115CV01505BAHGMH, 2017 WL 10651264, at 10 (D.D.C. Jan. 31, 2017) (An IEP is reviewed prospectively and not in hindsight), report and recommendation adopted, No. CV 15-1505 (BAH-GMH), 2017 WL 10651306 (D.D.C. Feb. 22, 2017).

Because offering placement in an appropriate school is an element of implementing the IEP, *see O.O., supra*, 573 F. Supp. 2d at 53, the hearing officer will consider the appropriateness of OSSE’s proposed placement for Student by determining whether Residential Center 2 was capable of “substantially implementing” the May 14, 2020 IEP, including Student’s requirement for a residential setting as agreed at the June 25, 2020 change-in-placement meeting. *See Johnson, supra*, 962 F. Supp. 2d at 268.

Residential Center 2 is a for profit therapeutic treatment center in southern Virginia, serving students with intellectual disabilities and ASD disabilities. Students at Residential Center 2 need a higher level of care than a group home, but do not need an acute setting. At its main campus, Residential Center 2 serves some 58 residential students, aged 10-22 years, and 24 day students, aged 5 to 22 years. Residential Center 2 offers 27.5 hours per week of instruction. At the high school level, there are some 20 students, including about 10 students on the diploma track. The school provides a separate area for more independently functioning high school students with ASD disabilities. There are 4 classroom with up to 10 students per classroom. Each class is

taught by a teacher certified in special education, assisted by two paraprofessionals. In addition to direct teaching, the school uses the Edgenuity online curriculum which provides instruction in standard courses and electives, including advanced placement and remedial courses. Residential Center 2's education program is accredited by Cognia, a non-governmental organization that accredits primary and secondary schools throughout the United States.

As a residential treatment center, Residential Center 2 employs a psychiatrist as its full-time chief medical officer. The psychiatrist meets with each student at least once per week. The school also has licensed therapists, supervised by the Clinical Director, who meet with each student three times per week and also provide family therapy and family engagement each week. Mental health technicians, who also serve as the classroom paraprofessionals, are trained by the therapist to support the students throughout the day.

Student's DCPS IEP provides for Student to receive 26 hours per week of Specialized Instruction and 240 minutes per month of Behavioral Support Services in a residential setting. Petitioners do not dispute that Residential Center 2 is able to substantially fulfill the requirements for services in Student's IEP. Petitioners' Counsel argues that Residential Center 2 is not appropriate for Student primarily because of the student make-up at the facility, including that the majority of the center's students have an intellectual disability or are functioning below Student's academic and adaptive skills level and most of the student population had a history of aggression before being sent to

the residential treatment facility. Petitioners' experts, Psychiatrist and Educational Consultant, both opined that this student mix was not appropriate for Student who has a propensity to imitate the behaviors of peers.

With regard to the concern that Residential Center 2 serves a lower functioning student population, Chief Executive Officer testified that the center's population is made up of approximately equal numbers of children who do, and who do not, have intellectual disabilities. Student would be grouped, both in the classroom and in the residential cottage, with more independently functioning students. As to student aggression, Chief Executive Officer explained that as a residential treatment facility, Residential Center 2 receives referrals for students with mental health diagnoses, for whom services in the local community have failed – and that aggressive behavior is what typically leads to the decision in the community to make a residential placement.⁴ However, those students do not necessarily show aggression at Residential Center 2 and in a recent survey, over half of the students at the residential treatment facility had no aggressive episodes over a 5 month period.

Assuming that the parents and their expert witnesses are correct that Student would be better served in a residential setting with a population of peers more like Student, that is, among students with average cognitive abilities who do not have

⁴ Chief Executive Officer's description of his school's student population is not unlike the characterization of Residential Center 2, which Clinical Therapist described as a "program of last resort" for clients with severe and persistent mental illness, sometimes with oppositional behaviors, who had been in multiple prior placements.

histories of aggressive behaviors, the IDEA only required OSSE to offer Student placement in a school that was able to fulfill the requirements set forth in the May 14, 2020 IEP. Student's IEP does not require that Student be separated from other students who may be lower functioning or have histories of aggression. *See N.W., supra*, 253 F. Supp. 3d at 16-17. *See, also, K.B. v. District of Columbia*, No. CV 13-0649 (RC), 2015 WL 5191330, at 13 (D.D.C. Sept. 4, 2015) ("Although the IDEA entitles a student to an appropriate placement, it does not require that a state provide a student with the program or location of services of his choice.") *See, also, Kerkam v. McKenzie*, 862 F.2d 884, 886 (D.C.Cir.1988) (Proof that loving parents can craft a better program than a state offers does not, alone, entitle them to prevail under the IDEA.)

Petitioners' experts also opined that Residential Center 2 is not appropriate for Student because the center does not offer group therapy. Although Psychiatrist recommended group therapy for Student in his May 2020 psychiatric summary, group therapy is not provided as a service in Student's DCPS IEP. The adequacy of the services in the May 14, 2020 IEP is not at issue in this case.

In summary, I conclude that OSSE has met its burden of persuasion that at the time it made the location assignment for Student on July 17, 2020, Residential Center 2 could fulfill the requirements set forth in Student's DCPS IEP. *See N.W., supra*. Residential Center 2 had a valid Certificate of Approval (COA) from OSSE and was the program with an opening for Student closest to Student's residence. *See D.C. Code § 38-2561.03(b)(1)(B); 5E DCMR § 3013.7*. I find, therefore, that Residential Center 2 was an

appropriate placement for Student.

4. Did OSSE timely implement the IEP team's residential placement decision?

On June 25, 2020, Student's IEP team decided that Student required a change in placement to a residential setting. OSSE promptly initiated admission referrals for Student to 11 schools on the agency's approved list of residential schools for students with disabilities. Of these 11 schools, only Residential Center 2 offered Student admission. On July 17, 2020, OSSE issued a Notification of Location Assignment for Student's placement at Residential Center 2. The same day, OSSE Representative wrote Mother that Residential Center 2 had a significant wait list for their program, as a result of a protocol for admitting new students due to the Coronavirus pandemic, and that Student's predicted wait for admission was 12 to 14 weeks. Petitioners contend that this deferral of Student's placement was too long and resulted in a denial of FAPE. I deem this to be a failure-to-implement claim, for which Petitioners must shoulder the burden of persuasion. *See, e.g. Middleton v. District of Columbia*, 312 F. Supp. 3d 113, 144 (D.D.C. 2018) (Moving party must demonstrate that the district failed to implement substantial or significant provisions of the IEP.)

The IDEA does not set a specific time period for implementation of an IEP, but requires that special education and related services must be made available "[a]s soon as possible following development of the IEP." 34 C.F.R. § 300.323(c)(2). As the Second Circuit Court of Appeals explained in *D.D. ex rel. V.D. v. New York City Bd. of Educ.*,

465 F.3d 503 (2d Cir. 2006), *opinion amended on denial of reh'g*, 480 F.3d 138 (2d Cir. 2007),

[The IDEA regulations require] only that IEPs be implemented “as soon as possible,” not “immediately, or within 30 days” as Plaintiffs assert. In 1997, Congress amended various parts of the IDEA. Pub.L. No. 105–17, 111 Stat. 37. The Secretary of Education subsequently published a notice of proposed rule making in the Federal Register to amend certain portions of the regulations governing the IDEA. 62 Fed.Reg. 55026 (Oct. 22, 1997). The notice invited comments on the proposed regulatory changes. *Id.* With respect to [former regulation § 300.342], several commentators stated that the terms “as soon as possible” (in the regulation itself) and “undue delay” (in the accompanying commentary) were “not meaningful” and requested that the Secretary define or clarify those terms. 64 Fed.Reg. 12406, 12579 (Mar. 12, 1999). Commentators also recommended that the Secretary impose an “outside timeline,” such as 15 days, for the implementation of IEPs following the meetings. *Id.* The Secretary declined these suggestions, stating it “would not be appropriate to add an outside timeline under [former section § 300.342(b)] for implementing IEPs, especially when there is not a specific statutory basis to do so.” *Id.* Nevertheless, the Secretary commented that “with very limited exceptions” IEPs “should be implemented without undue delay following the IEP meetings.” *Id.* The Secretary listed the following examples of “situations” that may warrant “a short delay”:

(1) when the IEP meetings occur at the end of the school year or during the summer, and the IEP team determines that the child does not need special education and related services until the next school year begins[] or (2) when there are circumstances that require a short delay in the provision of services (*e.g.*, finding a qualified service provider, or making transportation arrangements for the child).

Id. Based on this commentary, we conclude that [former regulation § 300.342(b)(1)(ii)] means what it says: States must implement a student’s IEP “as soon as possible” after it has been developed. In other words, Plaintiffs’ right to a free appropriate public education requires that their IEPs be implemented as soon as possible. “As soon as possible” is, by design, a flexible requirement. It permits some delay between when the IEP is developed and when the IEP is implemented. It does not impose a rigid, outside time frame for implementation. Moreover, the requirement necessitates a specific inquiry into the causes of the delay. Factors to be considered include, but are not limited to: (1) the length of the delay, (2) the reasons for the delay, including the availability of the mandated

educational services, and (3) the steps taken to overcome whatever obstacles have delayed prompt implementation of the IEP. Nonetheless, just because the as-soon-as-possible requirement is flexible does not mean it lacks a breaking point. “It is no doubt true that administrative delays, in certain circumstances, can violate the IDEA by depriving a student of his right to a ‘free appropriate public education.’” [*Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377, 381 (2d Cir.2003)].

D.D., supra at 513-14. *See, also, I.L. through Taylor v. Knox Cty. Bd. of Educ.*, 257 F. Supp. 3d 946, 980 (E.D. Tenn. 2017), *aff’d on other grounds sub nom. I.L. by & through Taylor v. Tennessee Dep’t of Educ.*, 739 F. App’x 319 (6th Cir. 2018) (“As soon as possible” means “without undue delay.”)

In the present case, in order to fulfill the requirements of the May 14, 2020 IEP, OSSE’s task was to notify the parents of a location of services for Student in time for the start of the 2020-2021 school year. *See, e.g., Hirsch v. McKenzie*, No. CIV.A. 85-3199, 1987 WL 13964, at 3 (D.D.C. July 6, 1987) (Since student had no educational placement at the beginning of school year, parents had no choice but to initiate unilateral private placement.) However, when OSSE issued the notice of location for Residential School 2 on July 17, 2020, OSSE had been informed that the school would not have an opening for Student for 12 to 14 weeks. That is, Student would not be able to start at the residential facility until October 12, 2020 at the earliest, some seven weeks after the beginning of the 2020-2021 school year. In fact, the delay could have been much longer. Chief Executive Officer testified that Residential Center 2 had students who had been on its wait list for up to two years and that older students tended to have a longer wait.

The Second Circuit's analysis from *D.D., supra*, supports a specific inquiry into the justification for this delay. "Factors to be considered include, but are not limited to: (1) the length of the delay, (2) the reasons for the delay, including the availability of the mandated educational services, and (3) the steps taken to overcome whatever obstacles have delayed prompt implementation of the IEP." *Id.* at 514. Here, the length of the delay was at least seven weeks after the start of the school year. The reasons for the delay were two-fold, both beyond OSSE's control. After the June 25, 2020 change-in-placement meeting, OSSE acted expeditiously to identify an appropriate residential placement for Student, but of the 11 OSSE-approved residential schools to which OSSE made referrals, only Residential Center 2 admitted Student. Residential Center 2 always has a wait list, which in July 2020 was longer than usual due to Coronavirus protocols.

On the third delay factor to be considered from the *D.D.* decision, namely the steps taken by OSSE to overcome the obstacles which delayed prompt implementation of Student's IEP, OSSE comes up short. The hearing officer recognizes that OSSE was caught between the requirements of District of Columbia law which barred its placing Student in a nonpublic program which did not have an OSSE COA, *see* D.C. Code § 38-2561.03(b)(1)(B), and the IDEA's mandate to implement the IEP as soon as possible. But when none of the residential programs on OSSE's approved list was able to admit Student for the start of the 2020-2021 school year, OSSE still had options. First, OSSE could have invited appropriate residential programs that did not have a COA to apply for approval. *See* 5A DCMR § 2800.2 *et seq.* If this procedure were impracticable, OSSE

could have sought an order from a court or a special education hearing officer to place Student at an unapproved nonpublic school or program. *See* D.C. Code § 38-2651.03(b).

OSSE was informed, as early as June 25, 2020, that Student had been accepted for immediate admission at Residential Center 1, which did not have an OSSE COA. OSSE Representative wrote that OSSE would not be sending a referral for Student to Residential Center 1. But there was no evidence at the due process hearing, that OSSE investigated the suitability of Residential Center 1 or inquired into whether Residential Center 1 would be able to fulfill Student's IEP. Nor was there evidence that OSSE considered placing Student at any other residential program that was not already on OSSE's approved school list. On these facts, I find that OSSE has not shown that it took all reasonable steps to overcome the obstacles which delayed prompt implementation of Student's residential placement. *See, D.D., supra*. I conclude, therefore, that Petitioners have met their burden of persuasion that OSSE's failure to provide a residential placement for Student near the start of the 2020-2021 school year was a denial of FAPE. *See M.G. v. District of Columbia*, 246 F. Supp. 3d 1, 12 (D.D.C. 2017), citing *Leggett, supra* at 72. (Where no school placement was provided until well after the school year had already begun, parent was left with the nonpublic general education school as the only school reasonably calculated to offer educational benefit.)

5. Tuition Reimbursement.

Having found that OSSE denied Student a FAPE by failing to implement Student's IEP requirement for a residential placement by the beginning of 2020-2021

school year, I turn to the other two requirements for tuition reimbursement pronounced in the *Leggett* decision – that the private school chosen by the parents, Residential Center 1, was proper and that the parents did not otherwise act unreasonably.

In *Leggett*, analogizing to the standard for IEP appropriateness from the U.S. Supreme Court’s decision in *Bd. of Ed. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176 (1982), the D.C. Circuit held that for the private school chosen by the parents to be proper, it need be “reasonably calculated to enable the child to receive educational benefits.” *Leggett, supra*, at 71. The *Leggett* decision was issued prior to the Supreme Court’s decision in *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, ——— U.S. ———, 137 S.Ct. 988, 197 L.Ed.2d 335 (2017), which expanded upon the IEP appropriateness standard from *Rowley*. In *Endrew F.*, the Supreme Court held that the IDEA requires that an IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.*, 137 S. Ct. at 999.

In *L.H. v. Hamilton Cty. Dep’t of Educ.*, 900 F.3d 779 (6th Cir. 2018), the Sixth Circuit Court of Appeals explained the requirements which a private school must satisfy to be found “proper” after the *Endrew F.* decision:

To award reimbursement, the State ALJ or district court must find both that: (1) the public school violated the IDEA and (2) the private school is appropriate under the IDEA. *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993). This means that, even though the IDEA’s requirements do not apply to private schools, *id.* at 13-14, 114 S.Ct. 361, for reimbursement purposes, the private school must satisfy the substantive IEP requirement, *i.e.*, it must be “reasonably

calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S.Ct. at 999. But the private school need not meet the full public school standards. 34 C.F.R. § 300.148 ("A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by [state and local education agencies].") (codifying *Florence Cnty.*); see also *C.B. v. Garden Grove Unified Sch. Dist.*, 635 F.3d 1155, 1159 (9th Cir. 2011) ("To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.") (quoting with approval *Frank G. v. Bd. of Educ.*, 459 F.3d 356, 365 (2d Cir. 2006)).

L.H., 900 F.3d at 791. Drawing on the *Leggett* and *L.H.* decisions, I conclude that for the parent's Residential Center 1 placement to be proper, it must have been reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

On June 29, 2020, the parents unilaterally placed Student at Residential Center 1. Residential Center 1 and OSSE's proposed placement, Residential Center 2, have much in common. Both are state-licensed residential treatment facilities for individuals with mental disorders, for whom prior placements in their home communities had failed. Both facilities offer psychiatric healthcare and intensive therapy. Both centers operate schools, integrated with the therapy programs, which are accredited by Cognia, a nationwide non-governmental school accreditation organization.

For purposes of this case, the crucial difference between the two treatment facilities is that Residential Center 1 offered Student a placement in June 2020, while

Residential Center 2 was not expected to have an opening for at least seven weeks after the beginning of the 2020-2021 school year. Given the severity of Student's mental health and disability challenges, having a placement that was available at the start of the school year was critical. In fact, when Student arrived at Residential Center 1 on June 29, 2020, Student was in a psychotic state which required a lengthy period of stabilization.

Student has attended Residential Center 1's school with regularity since September 2020. Student is now reported to be working hard, attentive in class and engaging with peers. Student is taking for-credit government and English classes and has passed the first semester in both courses. According to Clinical Therapist, Director of Education and Mother, Student is doing well in the Residential Center 1 education program. I find that the Petitioners have established that Residential Center 1 provides educational instruction specially designed to meet Student's unique needs, supported by psychiatric and therapeutic services which Student requires to benefit from instruction. *See Frank G., supra*, 459 F.3d at 365. (Parents need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.) I conclude that the parents' choice of Residential Center 1 was reasonably calculated to enable Student to make progress appropriate in light of Student's very challenging circumstances. The parents' unilateral placement of Student at Residential Center 1 was, therefore, proper under the Supreme Court's *Burlington-*

Carter standard.

Lastly, the *Leggett* decision requires that the “equities weigh in favor of reimbursement — that is, the parents did not otherwise act ‘unreasonabl[y].” *Leggett*, 793 F.3d at 67. Reimbursement may be “reduced or denied” if the parents failed to notify school officials of their intent to withdraw the child or otherwise acted unreasonably. *Leggett, supra*, 793 F.3d at 63. The IDEA provides that the cost of reimbursement for private school may be reduced or denied if —

- (i) At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
- (ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section.

34 CFR § 300.148(d).

In this case, Petitioners have not shown that *after* OSSE notified them on July 17, 2020 that it was assigning Student to Residential Center 2, the parents expressly informed OSSE or DCPS that they were rejecting the Residential Center 2 placement. However, on June 15, 2020, over a month before OSSE made a location assignment for Student, Petitioners’ Counsel wrote DCPS that the parents intended to enroll Student, at public expense, in Residential Center 1 for the 2020-2021 school year, in effect rejecting *in advance* any placement of Student at an OSSE-approved school. The parents

unilaterally placed Student at Residential Center 1 on June 29, 2020, 18 days before OSSE assigned Student to Residential Center 2. It is clear that the parents failed to provide the statutorily required notice that they were rejecting the Nonpublic School 2 placement at least ten business days prior to their removal of Student from DCPS.

But, as the Court explained in *Schoenbach v. District of Columbia*, 309 F. Supp. 2d 71 (D.D.C. 2004), while hearing officers “*may* reduce or deny reimbursement- the text of IDEA does not compel them to. 20 U.S.C. § 1412(a)(10)(C)(iii) (“The cost of reimbursement [for unilateral private placements by parents] *may* be reduced or denied”) (emphasis added). Just as a court need not allow recovery for a merely technical violation of IDEA without any showing of substantive harm, *see [Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist., 328 F.3d 804, 811-12 (5th Cir. 2003)]*, the mere fact that parents violated the notice provision may not, in itself, justify reducing or denying tuition reimbursement.” *Schoenbach*, 309 F.Supp. 2d at 85. *See, also, C.L. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826, 840 (2d Cir. 2014) (Equitable consideration is whether the parents obstructed or were uncooperative in the school district’s efforts to meet its obligations under the IDEA.)

In the present case, there was no evidence that the parents obstructed or were in any way uncooperative with OSSE’s efforts to identify a suitable residential placement for Student. OSSE was simply unable to make a suitable residential placement for Student in time for the start of the 2020-2021 school year, because the only OSSE-approved program which admitted Student did not expect an opening until at least the

second week in October. I conclude, therefore, that it would not be equitable to deny the parents reimbursement on account of their not notifying OSSE of their rejection of Residential Center 2 before they unilaterally placed Student at Residential Center 1.

Notwithstanding, the parents are not entitled to reimbursement from OSSE for their unilateral placement of Student at Residential Center 1 for the summer of 2020.⁵ As U.S. District Judge Contreras explained in *N.W., supra*, the IDEA only requires the District to offer placement in a school that can fulfill the requirements set forth in the student's IEP. In this case, Student's May 14, 2020 IEP was developed for the 2020-2021 regular school year and did not provide for Extended School Year (ESY) services.⁶ See Exhibits R-3, R-5. Therefore, OSSE was only required to offer a nonpublic school placement to Student in time for the beginning of the 2020-2021 school year. I conclude that OSSE should only be required to reimburse the parents for Residential Center 1 expenses from the start of the DCPS 2020-2021 school year, and for a reasonable period before then for Student to settle in at the facility.⁷

⁵ Residential Center 1 has rolling admissions and does not operate on a school year calendar.

⁶ In his June 15, 2020 letter to DCPS, Petitioners' Counsel gave notice that the parents did not believe that an appropriate special education program had been offered by DCPS for "the upcoming school year" and that Student would attend Residential Center 1 for the 2020-2021 school year.

⁷ DCPS schools have been closed since March 16, 2020 due to the Coronavirus pandemic. Based on prior year DCPS calendars, the hearing officer assumes that in the normal course, the DCPS 2020-2021 regular school year would have started on or about Monday, August 24, 2020. I find that an additional week would be a reasonable period for Student to settle in at the residential treatment center and for orientation before starting school. As equitable relief, I will, therefore, order OSSE to reimburse the parents for their covered Residential Center 1 expenses beginning August 17, 2020.

6. Prospective placement for the remainder of the 2020-2021 school year

The parents also request that I order OSSE to fund Student's ongoing placement at Residential School 1 for the remainder of the 2020-2021 school year. I decline to do so for several reasons. The most important of these is that Residential School 1 cannot fulfill Student's IEP. Student's IEP provides for Student to receive 26.5 hours per week of Specialized Instruction Services. Residential School 1 only provides Student 17.5 hours of school per week and offers no special education services taught by special education teachers. Residential School 1 also has not been evaluated by OSSE to ensure that it complies with applicable District of Columbia statutes and regulations for private schools serving students with disabilities. *See* D.C. Code § 38–2561.07. Finally, there has been no competent investigation by a qualified special education professional to assess whether the educational program at Residential School 1 is adequate to enable Student to make progress appropriate in light of Student's circumstances. *See Middleton, supra*, 312 F. Supp. 3d at 134. (DCPS denied student a FAPE by selecting an educational placement that was not reasonably calculated to enable ■■■ to make progress appropriate in light of ■■■ circumstances.)

In order not to unduly disrupt Student's education and therapy at Residential Center 1, I will order OSSE to fund Student's continued placement at the facility through the end of DCPS' second term, which ends on January 29, 2021. *Cf. Branham v. Government of the Dist. of Columbia*, 427 F.3d 7, 12-13 (D.C. Cir. 2005) (Asking whether setting aside placement order might disrupt child's education.) This decision is

without prejudice to any decision by OSSE, with the concurrence of Petitioners and Student's DCPS IEP team, to further extend Student's placement at Residential Center 1.

ORDER

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

1. Upon receipt of documentation of payment by the parents, as may be reasonably required, OSSE shall, without undue delay, reimburse the parents their costs for covered tuition and related expenses, including covered transportation expenses, for Student's enrollment at Residential Center 1 from August 17, 2020 through the present and shall continue to fund Student's placement at Residential Center 1 through the end of the second term of DCPS' the 2020-2021 school year and
2. All other relief requested by the Petitioners herein is denied.

Date: November 17, 2020

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

NOTICE OF RIGHT TO APPEAL

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

Case No. 2020-0147
Hearing Officer Determination
November 17, 2020

cc: Counsel of Record
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