OSSE
Student Hearing Office
December 02, 2013

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

Adult Student,[1]

Petitioner,

Date Issued: December 2, 2013

Hearing Officer: Melanie Byrd Chisholm

v.

District of Columbia Public Schools,

Respondent.

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

The student is repeating the 9th grade. The student is assigned to School B however is attending School C. The student is currently a general education student and has not been identified as a student with disabilities eligible for special education and related services.

On September 20, 2013, Petitioner filed a Due Process Complaint (Complaint) against Respondent District of Columbia Public Schools (DCPS), alleging that DCPS denied the student a free appropriate public education (FAPE) by failing to by failing to adhere to Child Find obligations at least as far back as November 2011; refusing to evaluate the student between May and August 2013 following initial referrals for special education evaluations/assessments; failing to issue prior written notice advising the parent of their decision to refuse to evaluate the student after referrals for special education services in August 2013; failing to find the student eligible for special education and related services on August 8, 2013 despite having data to support such a finding; and failing to offer the student a school, in August 2013, capable of providing him special education services that meet his needs. As relief for this alleged denial of FAPE, Petitioner requested, *inter alia*, that within 10 days, for DCPS to provide reimbursement for tuition and transportation to School C; placement in and funding for School C; independent comprehensive psychological, vocational, speech-language, psychiatric, neurological and functional behavioral assessments; within 30 calendar days of the receipt of the final independent assessment, for DCPS to convene a meeting to review the evaluations and create and appropriate

[1] Personal identification information is provided in Appendix A.

individualized education program (IEP) and a behavior intervention plan (BIP) for the student; and compensatory education.

On September 30, 2013, Respondent filed a timely Response to the Complaint. The Respondent amended its Response on October 22, 2013. In its Responses, Respondent asserted that: for the 2011-2012 school years, DCPS was unable to determine if the student had a disability because the student had significant and severe attendance issues; a request to evaluate the student was made in May 2013; within 120 days of the request to evaluate the student, DCPS made a determination that the student was not eligible for special education and related services; prior to making the eligibility determination, DCPS informed the Petitioner that data in addition to a court ordered psychological would be necessary to find the student eligible for special education and related services; due in part to the student's truancy issues, DCPS did not have an opportunity to implement interventions prior to making an eligibility determination for the student; DCPS proposed that a second meeting be convened to discuss the student's eligibility after DCPS had an opportunity to observe the student; the Petitioner failed to show for the second meeting in August 2013; DCPS is willing to reconsider the student's eligibility following the receipt of additional data; on September 5, 2013, DCPS convened a meeting to develop a plan to reevaluate the student's eligibility for special education and related services; the Petitioner did not attend the September 5, 2013 meeting; DCPS did not refuse to evaluate the student; the Petitioner did not agree that further assessments were necessary; and the student's assigned location of services is appropriate for an adult student with minimal credits.

On October 4, 2013, the parties participated in a Resolution Meeting. The parties concluded the Resolution Meeting process by failing to reach an agreement however the parties agreed to continue to attempt to resolve the matter during the 30-day resolution period. Accordingly, the parties agreed that the 45-day timeline started to run on October 21, 2013, following the conclusion of the 30-day resolution period, and ends on December 4, 2013. The Hearing Officer Determination (HOD) is due on December 4, 2013.

On October 18, 2013, Hearing Officer Melanie Chisholm convened a prehearing conference and led the parties through a discussion of the issues, relief sought and related matters. The Hearing Officer issued the Prehearing Order on October 23, 2013. The Prehearing Order clearly outlined the issues to be decided in this matter. Both parties were given three (3) business days to review the Order to advise the hearing officer if the Order overlooked or misstated any item. On October 25, 2013, the Petitioner objected to the time period outlined in Issues #1 and #4 and requested broader language for Issue #3. A Revised Prehearing Order was issued on November 19, 2013.

On November 13, 2013, Petitioner filed Disclosures including twenty-eight (28) exhibits and eight (8) witnesses.[2] On November 13, 2013, Respondent filed Disclosures including sixteen (16) exhibits and five (5) witnesses.

The due process hearing commenced at approximately 9:12 a.m.[3] on November 20, 2013 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2004. The Petitioner elected for the hearing to be closed.

[2] A list of exhibits is attached as Appendix B. A list of witnesses who testified is included in Appendix A.

Petitioner's Exhibits 1-28 were admitted without objection. Respondent's Exhibits 1-16 were admitted without objection.

The hearing recessed at approximately 3:46 p.m. on November 20, 2013 and resumed at 9:00 a.m. on November 26, 2013. The hearing concluded at approximately 12:56 p.m. on November 26, 2013, following closing statements by both parties.

Jurisdiction

The hearing was conducted and this decision was written pursuant to the Individuals with Disabilities Education Act (IDEA), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E-30.

ISSUES

The issues to be determined are as follows:

1. Whether DCPS failed to identify, locate and evaluate the student for special education and related services from November 2011 through present?
2. Whether DCPS failed to timely evaluate the student following a May 2013 request for an evaluation, and if so, whether this failure constitutes a denial of a FAPE?
3. Whether DCPS failed to provide prior written notice of its decisions regarding conducting additional assessments of the student and the student's eligibility on August 8, 2013, and if so, whether this failure constitutes a denial of a FAPE?
4. Whether DCPS denied the student a FAPE by failing to find the student eligible for special education and related services as a student with a specific learning disability (SLD) or as a student with an emotional disturbance (ED) on August 8, 2013?

FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. During the student's first year in 1st grade, the student was absent from school for 21 days. (Petitioner's Exhibit 4; Respondent's Exhibit 6)
2. During the student's second year in 1st grade, the student was absent from school for 27 days. (Petitioner's Exhibit 4; Respondent's Exhibit 6)
3. During the student's 2nd grade year, the student was absent from school for five days. (Petitioner's Exhibit 4)
4. During the student's 3rd grade year, the student was absent from school for ten days. (Petitioner's Exhibit 4; Respondent's Exhibit 6)

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[3] At the scheduled time to begin the due process hearing, the Hearing Officer and counsel for both parties were present. The Petitioner arrived at 9:12 a.m.

5. During the student's 4th grade year, the student was absent from school for 18 days. (Petitioner's Exhibit 4)
6. During the student's 5th grade year, the student was absent from school for 40 days. (Petitioner's Exhibit 4; Respondent's Exhibit 6)
7. During the 2007-2008 school year, the student was performing below grade level in reading and writing, was displaying truancy behaviors and distracted others when in class. Based on these factors, the student was referred to the Student Support Team (SST). (Petitioner's Exhibit 7; Respondent's Exhibit 7, 8 and 9)
8. At the end of the 2007-2008 school year, the student received two C's, four D's, three F's and one U. (Petitioner's Exhibit 8; Respondent's Exhibit 7, 8 and 9)
9. During the 2007-2008 school year, the student was absent from academic classes between 21 and 34 days. (Petitioner's Exhibit 8; Respondent's Exhibits 7, 8 and 9)
10. During the 2009-2010 school year, the student received one C and five D's. (Petitioner's Exhibit 8; Respondent's Exhibit 10)
11. During the 2009-2010 school year, the student was absent from academic classes between 37 and 76 days. (Petitioner's Exhibit 8; Respondent's Exhibit 10)
12. During the 2010-2011 school year, the student's first year in 9th grade, with the exception of Reading Workshop, the student failed all classes. (Petitioner's Exhibit 12; Respondent's Exhibits 11 and 12)
13. During the 2010-2011 school year, the student was absent 62.5 days. (Petitioner's Exhibit 12; Respondent's Exhibits 11 and 12)
14. In October 2011, one quarter into the student's second year in 9th grade, the student was receiving failing grades in all of his classes. (Petitioner's Exhibit 12; Respondent's Exhibit 12)
15. At the end of the first quarter of the 2011-2012 school year, the student had been absent 26 days and tardy 10 days. Six of the student's eight teachers commented that the student had excessive absences. (Petitioner's Exhibit 12; Respondent's Exhibit 12)
16. When the student attended class during the 2011-2012 school year, the student was a capable student and did well. (Teacher's Testimony)
17. By the end of the 2011-2012 school year, with the exception of English where the student earned the grade letter "D," the student failed all classes. (Petitioner's Exhibit 12; Respondent's Exhibit 13)
18. During the 2011-2012 school year, thee student had between 43 and 99 absences in classes during the school year. (Petitioners' Exhibit 12; Respondent's Exhibit 13)
19. For the 4th quarter of the 2012-2013 school year, the student received eight F's. (Petitioner's Exhibit 12; Respondent's Exhibit 14)
20. During the 2012-2013 school year, the student had 356 unexcused absences from classes and 174 excused absences from classes. (Petitioner's Exhibit 15)
21. The student is significantly below age and grade level expectations in his ability to read and do mathematical calculations. (Petitioner's Exhibits 20 and 25)
22. The student's low grades were largely a result of poor attendance. (Petitioner's Exhibits 8, 12, 14; Respondent's Exhibits 5, 7, 8, 9, 10, 11, 12, 13 and 14; Teacher's Testimony)

23. When the student puts forth effort into his classwork, he is capable and performs well. (Petitioner's Exhibits 4 and 14; Respondent's Exhibit 5; School C Director of Academics' Testimony; Teacher's Testimony)
24. The student's discipline referrals were largely a result of the student's disruptive and truant behavior. (Petitioner's Exhibits 9 and 13)
25. The student may have been diagnosed with ADHD. (Petitioner's Exhibit 25)
26. The student has a history of physical abuse and a history of homicidal and suicidal ideation. (Petitioner's Exhibit 25; Community Support Worker's Testimony; School C Director of Academics' Testimony)
27. The student has a history and diagnosis of cannabis abuse. (Petitioner's Exhibit 25)
28. In February 2012, a psychoeducational evaluation of the student was conducted. (Petitioner's Exhibit 25)
29. During the student's interview for the February 2012 evaluation, the student was not truthful during the entirety of his interview with the evaluator. (Petitioner's Exhibit 25)
30. In February 2012, on the Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV), the student's full-scale intelligence quotient (FSIQ) was measured at 75. (Petitioner's Exhibit 25)
31. In February 2012, the student scored a 64 in Broad Reading and a 61 in Broad Math on the Woodcock-Johnson Test of Achievement – Third Edition (WJ-III). (Petitioner's Exhibit 25)
32. In February 2012, the student was functioning in Broad Reading at the 3.8 grade level and the 9-2 age equivalency; and in Broad Math at the 4.0 grade level and the 9-5 age equivalency. (Petitioner's Exhibits 20 and 25)
33. In February 2012, on the Millon Adolescent Clinical Intervention (MACI), the student appeared to be socially isolated and reported that he felt lonely, like peers did not like him and that he did not have friends with the exception of his family members. (Petitioner's Exhibit 25)
34. In February 2012, the student was diagnosed with Mood Disorder NOS. (Petitioner's Exhibit 25)
35. During the student's February 2012 evaluation, the student did not score in the clinically significant range in Somatic Preoccupations, Pain or Eating Dysfunctions. (Petitioner's Exhibit 25)
36. DCPS received a request to evaluate the student in May 2013. (Stipulated Fact)
37. On May 23, 2013, the parent, through the attorney's paralegal, provided a copy of the February 14, 2012 Confidential Psycho-Educational Evaluation ordered by the Family Court – Court Social Services Division to DCPS. (Petitioner's Exhibit 2)
38. On May 24, 2013, DCPS agreed that conducting another comprehensive psychological evaluation would be redundant and subsequently agreed to hold the eligibility meeting without conducting any additional assessments. (Petitioner's Exhibit 2)
39. On August 8, 2013, the multidisciplinary team (MDT) met to complete the evaluation process and make a determination of eligibility. (Petitioner's Exhibits 2, 16, 17, 18, 19 and 20; Parent's Testimony; Paralegal's Testimony; Advocate's Testimony; LEA Representative's Testimony; Special Education Coordinator's Testimony)

40. Prior to the August 8, 2013 MDT meeting, DCPS did not implement scientific, research-based interventions to assess the student's ability to meet academic standards or to demonstrate academic improvement. (Paralegal's Testimony; Advocate's Testimony; LEA Representative's Testimony; Special Education Coordinator's Testimony)
41. The Special Education Coordinator, an attendance counselor, a general education teacher, the School Psychologist, the student, the Advocate, a Juvenile Center worker, the Parent, the Paralegal, a special education teacher and the CBI Worker were present at the August 8, 2013 MDT meeting. (Petitioner's Exhibit 17 and 18; Parent's Testimony; Paralegal's Testimony; Advocate's Testimony; CBI Worker's Testimony; LEA Representative's Testimony; Special Education Coordinator's Testimony)
42. The August 8, 2013 MDT meeting was highly contentious, with the parent, paralegal and advocate insisting that the student met the eligibility criteria for both SLD and ED and the special education coordinator and school psychologist asserting that DCPS did not have adequate data, specifically information regarding the student's response to interventions, to determine that the student met the eligibility criteria for ED. (Petitioner's Exhibits 2, 16, 17, 18, 19 and 20; Parent's Testimony; Paralegal's Testimony; Advocate's Testimony; LEA Representative's Testimony; Special Education Coordinator's Testimony)
43. On August 8, 2013, DCPS determined that the student did not meet the criteria for SLD because the student did not display a discrepancy between achievement (as measured by the academic evaluation) and measured ability (as measured by the intellectual evaluation) of two years below the student's chronological age and at least two standard deviations below the student's cognitive ability as measured by the standardized diagnostic instruments and procedures. (Petitioner's Exhibits 2, 16, 17, 18, 19 and 20; Paralegal's Testimony; Advocate's Testimony; LEA Representative's Testimony; Special Education Coordinator's Testimony)
44. On August 8, 2013, DCPS determined that the student did not meet the criteria for SLD because the student had a lack of appropriate instruction in academic areas due to years of chronic truancy. (Petitioner's Exhibits 16, 17, 18 and 19; Paralegal's Testimony; Advocate's Testimony; LEA Representative's Testimony; Special Education Coordinator's Testimony)
45. The August 8, 2013 MDT did not discuss whether cultural factors or environmental or economic disadvantage could have impacted the student's academic performance. (Petitioner's Exhibits 2, 17 and18; Paralegal's Testimony; Advocate's Testimony; LEA Representative's Testimony; Special Education Coordinator's Testimony)
46. On August 8, 2013, DCPS had not conducted all assessments necessary to determine whether the student was a student with disabilities. (Petitioner's Exhibits 2, 17 and18; Paralegal's Testimony; Advocate's Testimony; School C Director of Academics' Testimony; LEA Representative's Testimony; Special Education Coordinator's Testimony)
47. On August 8, 2013, the student was not found eligible for special education and related services. (Stipulated Fact)
48. On August 14, 2013, the student, through his attorney, notified DCPS of his intention to unilaterally enroll in School C. (Petitioner's Exhibit 2)

49. The August 14, 2013 notice stated that the student was taking the action because DCPS failed to locate, identify and find the student eligible for special education and related services. (Petitioner's Exhibit 2)
50. The student's assigned location of services for the 2013-2014 school year is School B. (Stipulated Fact)
51. The Child and Family Services Agency (CFSA) has been involved with the student's family since 2007. (Petitioner's Exhibit 25)
52. The student had one criminal charge in 2008, one criminal charge in 2009, one criminal charge in 2010, one criminal charge in 2012 and one criminal charge in 2013. (Petitioner's Exhibit 25)
53. School C is a private, special education year-round program with a vocational focus. (School C Director of Academics' Testimony)
54. All teachers at School C are content certified in their respective areas and teachers without a special education certification are assisted by a teacher with a special education certification. (School C Director of Academics' Testimony)
55. School C is a school with a COA from OSSE and provides all IEP services. (School C Director of Academics' Testimony)
56. At School C, the student is enrolled in English, Algebra, Physics, Government, Carpentry and Mechanics. (School C Director of Academics' Testimony; Student's Testimony)
57. The student is attending school at School C and is cooperative, willing to learn, completes homework, does not interrupt in class, comes to class prepared and is responding well to coaching and coaxing. (School C Director of Academics' Testimony)
58. School C is not charging the student or parent for tuition, fees or transportation. (School C Director of Academics' Testimony)

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:

Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. 5 DCMR §E-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. 5 DCMR §E-3030.3. The recognized standard is the preponderance of the evidence. *See N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

Issue #1

"Child find" is the affirmative, ongoing obligation of states and local districts to identify, locate, and evaluate all children with disabilities residing within the jurisdiction that either have, or are suspected of having, disabilities and need special education as a result of those disabilities.

See 34 CFR 300.111. A State must have in effect policies and procedures to ensure that all children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated; and a practical method is developed and implemented to determine which children are currently receiving needed special education and related services. 34 CFR §300.111(a). Child find also includes children who are suspected of being a child with a disability under §300.8 and in need of special education, even though they are advancing from grade to grade. 34 CFR §300.111(c)(1).

The standard for triggering the Child Find duty is suspicion of a disability rather than actual knowledge of a qualifying disability. *See Regional School District Board of Educ. v. Mr. and Ms. M. ex rel. MM,* 15 IDELR 8 (D. Conn. 2009); *Torrance United School District v. E.M.,* 51 IDELR 11 (M.D. Calif. 2009); *District of Columbia Public Schs,* 111 LRP 25929 (SEA DC March 25, 2011). However, the LEA must have a reason to suspect that a student has a disability. *See E.J. by Tom J. and Ruth J. v. San Carlos Elementary Sch. Dist.* 803 F. Supp. 2d 1024 (N.D.Cal. 2011) (allegations that a California district knew about a student's anxiety disorder for years before it referred her for an evaluation were not enough to show that the district violated its child find obligation because the student's teachers had no reason to believe she needed special education services); *J.G. v. Douglas County Sch. Dist.* 552 F.3d 786, 803 (9th Cir. 2008) (although the parents requested initial evaluations in May 2003 and attended the district's child find day in June 2003, the district had no reason to suspect that the students had autism until it was contacted by the twins' private service provider); *Long v. District of Columbia,* 780 F. Supp. 2d 49 (D.D.C. 2011) (the district's child find duty was triggered when a private psychologist diagnosed the student with a learning disability). To establish a procedural violation of "child find," a parent must show school officials overlooked clear signs of disability. *Board of Educ. of Fayette County, Kentucky v. L.M.*, 47 IDELR 122 (6th Cir. 2007).

In the present case, the Petitioner alleged that DCPS failed to identify, locate and evaluate the student for special education and related services from November 2011 through present. The Respondent argued that when the student attended school, the student was capable of completing classwork and that the student's failing grades were the result of poor attendance rather than an inability to be academically successful.

During the 2007-2008 school year, the student was referred to the SST. At that time, the student was performing below grade level in reading and writing, was displaying truancy behaviors and distracted others when in class. The record does not include the outcome of the SST referral however the record is clear that the student's truancy behaviors and poor academic performance continued. During the 2010-2011 school year, the student's first year in 9th grade, with the exception of Reading Workshop, the student failed all classes.

In October 2011, one quarter into the student's second year in 9th grade, the student was receiving failing grades in all of his classes. At the end of the first quarter, the student had been absent 26 days and tardy 10 days. Six of the student's eight teachers commented that the student had excessive absences. The student's Social Studies Teacher from the 2011-2012 school year testified that the student earned very low grades in class, largely as a result of poor attendance.

The Teacher testified that the student was a capable student and did well in class however it was difficult to ascertain the student's strengths and weaknesses because the student was rarely in class. The Teacher acknowledged that he "remembered thinking" that the student was identified as a student with disabilities. By the end of the 2011-2012 school year, with the exception of English where the student earned the grade letter "D," the student failed all classes. The student had between 43 and 99 absences in specific classes during the school year.

In November 2011, the student was not diagnosed with a qualifying disability. However, it was not necessary for the student to have a qualifying disability for DCPS to have a suspicion that the student had a disability. The Hearing Officer understands the Respondent's argument that the LEA attributed the student's failing grades to his truancy however DCPS has an "affirmative duty" to address a student's truancy. *R.B. v. Mastery Charter School*, 762 F. Supp.2d 745 (E.D. Pa 2010) (District had duty to respond to absences through educational intervention).

The Hearing Officer concludes that DCPS' Child Find obligation was triggered in November 2011. At the end of the first quarter of the 2011-2012 school year, the student received failing grades in all classes and had significant absences. While the student's failing grades may have been a result of the student's failure to attend class, the student had failed all classes the prior year and the record does not contain evidence that DCPS attempted to address the student's truancy or take any steps to determine if the student's continued failures were the result of a disability rather than a lack of instruction. There were clear signs that the student may have had a disability, therefore, the Hearing Officer concludes that DCPS failed to take affirmative steps to locate, identify and evaluate the student pursuant to its Child Find obligation.

When a child is identified as potentially requiring special education services, the LEA has a duty to complete the evaluation process and failure to complete the process constitutes a denial of a FAPE. 20 U.S.C. § 1414(b)(2)(A)(i); *see also N.G. v. Dist. of Columbia*, 556 F. Supp. 2d 11 (D. D.C. 2008); *Blackman v. District of Columbia*, 277 F. Supp. 2d 71, 79 (D.D.C. 2003) (failure to provide a timely eligibility determination creates a substantive harm and constitutes a denial of a FAPE).

The Petitioner met its burden with respect to Issue #1.

<u>Issue #2</u>

Under the IDEA, a state must, *inter alia*, identify and evaluate children with disabilities, and develop an "individual education program" for each child with a disability. *See* 20 U.S.C. §§1412(a)(3)(A),(a)(4). An initial evaluation must be conducted within 60 days of receiving parental consent for the evaluation; or if the State establishes a timeframe within which the evaluation must be conducted, within that timeframe. The timeframe must include the procedures to determine if the child is a child with a disability under §300.8 and to determine the educational needs of the child. *See* 34 CFR §300.301(c). The District of Columbia has established a 120-day timeline. *See* D.C. Code §38-2561.02. The 120-day period for evaluation in the District of Columbia is the period for evaluation and determination of eligibility. *D.L. v. District of Columbia*, 845 F. Supp. 2d 1, 05-1437 (RCL) (D.D.C. November 16, 2011).

In the present case, it is uncontested that the parent, through her attorney on May 7, 2013, requested that the student be evaluated for special education and related services. On May 23, 2013, the parent, through the attorney's paralegal, provided a copy of the February 14, 2012 Confidential Psycho-Educational Evaluation ordered by the Family Court – Court Social Services Division to DCPS. On May 24, 2013, DCPS agreed that conducting another comprehensive psychological evaluation would be redundant and subsequently agreed to hold the eligibility meeting without conducting any additional assessments.

On August 8, 2013, the MDT met to complete the evaluation process and make a determination of eligibility. The meeting was highly contentious, with the parent, paralegal and advocate insisting that the student met the eligibility criteria for both SLD and ED and the special education coordinator and school psychologist asserting that DCPS did not have adequate data, specifically information regarding the student's response to interventions, to determine that the student met the eligibility criteria for ED. The special education coordinator and school psychologist did not believe that the student met the criteria for SLD because the student did not display a discrepancy between achievement (as measured by the academic evaluation) and measured ability (as measured by the intellectual evaluation) of two years below the student's chronological age and at least two standard deviations below the student's cognitive ability as measured by the standardized diagnostic instruments and procedures. Additionally, the special education coordinator and school psychologist believed that the student was excluded from an SLD eligibility determination because the student had a lack of appropriate instruction in academic areas due to years of chronic truancy.

Evaluation is defined as, "procedures used in accordance with §§300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs." 34 CFR §300.15. In conducting an evaluation, an LEA must "use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability" and the content of the child's IEP. 34 CFR §300.304(b). IDEA regulations at 34 CFR §300.304(c)(4) require a student to be "assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities."

Based on the date of the parent's request for an evaluation, DCPS should have conducted a comprehensive evaluation of the student and determined if the student is a child with a disability by September 4, 2013. The Hearing Officer concludes that although DCPS held a meeting to determine if the student was eligible within the 120 day timeline, DCPS did not complete all of the necessary evaluation procedures within 120 days as required by 34 CFR §300.301 and D.C. Code §38-2561.02. Specifically, in the 120 day timeline, DCPS did not ensure that the student was assessed in all areas related to the suspected disabilities and did not complete the procedures necessary to determine whether the student had a disability. As discussed in Issue #4, the Hearing Officer agrees that DCPS did not have adequate data on August 8, 2013 to determine that the student was eligible for special education and related services however DCPS' obligation was to gather all of the necessary data prior to the eligibility meeting.

Although the student has not yet been determined to be a student with a disability, because an evaluation and eligibility determination is a prerequisite to preparing an IEP, DCPS' failure to timely evaluate the student or determine his eligibility by the September 4, 2013 deadline ensured that he would not receive a timely IEP, thus, denying him a FAPE. *G.G. v. District of Columbia,* 60 IDELR 183, 113 LRP 7373 (D.D.C. February 20, 2013*); N.B. v. Hellgate Elementary Sch. Dist.,* 541 F.3d 1202, 1209 (9th Cir. 2008) (school district's failure to adequately evaluate student was a procedural error that effectively prevented development of an IEP "reasonably calculated to provide [student] with a meaningful educational benefit," and thus constituted denial of a FAPE); *K.I. ex rel. Jennie I. v. Montgomery Pub. Sch.,* 895 F. Supp. 2d 1283, 1294 (M.D. Ala. 2011) (school district falling short of properly evaluating student procedurally violated the IDEA and effectively meant the failure to provide an adequate IEP, thereby denying her of a FAPE); *Blackman v. District of Columbia,* 277 F. Supp. 2d 71, 79 (D.D.C. 2003) (failure to provide a timely eligibility determination creates a substantive harm and constitutes a denial of a FAPE); *Bush ex rel. A.H. v. District of Columbia,* 579 F. Supp. 2d 22, 32 (D.D.C. 2008).

The Petitioner met its burden with respect to Issue #2.

Issue #3

Pursuant to 34 CFR §300.503, a public agency must give written notice to the parents of a child with a disability a reasonable time before the public agency proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. The notice must include a description of the action proposed, an explanation of why the agency proposes or refuses to take the action, a statement that the parents have protections under the procedural safeguards, sources for parents to contact to obtain assistance in understanding the provisions of the IDEA, a description of other options that IEP Team considered and the reasons why those options were rejected, and a description of other factors that are relevant to the agency's proposal or refusal. A failure to provide prior written notice is a procedural violation.

Procedural violations raise a viable claim only if the procedural violations affect the student's substantive rights under the IDEA. *Lesesne v. District of Columbia,* 447 F.3d 828, 45 IDELR 208 (United States Court of Appeals, District of Columbia (2006)). The IDEA regulations at 34 CFR §300.513(a)(2) state that in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit.

On August 8, 2013, the MDT met to complete the evaluation process and make a determination of eligibility. The meeting was highly contentious, with the parent, paralegal and advocate insisting that the student met the eligibility criteria for both SLD and ED and the special education coordinator and school psychologist asserting that DCPS did not have adequate data to determine that the student was a student with disabilities as defined by 34 CFR §300.8. The paralegal's notes indicated that the "conclusion" of the meeting was that DCPS needed more

data before determining the student's eligibility. The advocate's notes indicated that DCPS determined that there was not enough data to determine that the student was eligible for special education and related services. The parent, paralegal, advocate, CBI worker, special education coordinator and school psychologist all testified that the August 8, 2013 meeting concluded with DCPS not determining that the student was eligible for special education and related services. The Final Eligibility Determination Report provided to the parent following the meeting indicated that the student did not meet all of the required criteria for SLD.

On August 14, 2013, the student, through his attorney, notified DCPS of his intention to unilaterally enroll in School C. The notice specifically stated that the student was taking the action because DCPS failed to locate, identify and find the student eligible for special education and related services. The notice referenced the August 8, 2013 meeting by stating that "when the team met earlier this month to review that evaluation, DCPS refused to find the student eligible for special education services, ignoring data showing he meets the criteria for such services."

The Petitioner argued that DCPS' failure to provide prior written notice to the student significantly impeded his opportunity to participate in his decision-making process in that the student was not able to make a decision regarding unilateral placement. The Hearing Officer is not persuaded by this argument. On August 8, 2013, while it was not clear as to how DCPS would continue with the eligibility process related to suspicion that the student was ED, it was clear that the MDT did not find the student eligible for special education and related services. The student was accompanied to the meeting by a paralegal and an advocate from the law firm hired by the parent and the notes of both of these indicated that DCPS did not find the student eligible for special education and related services during the meeting. Additionally, one week after the meeting, the student's attorney notified DCPS of the student's intention to unilaterally place himself at School C. The student clearly made decisions regarding the provision of FAPE, or lack thereof, and placed himself in a private special education day school with the services to provide educational benefit.

The Hearing Officer concludes that DCPS' failure to provide prior written notice regarding the decision not to find the student eligible for special education and related services on August 8, 2013 was a procedural violation which did not impede the child's right to a FAPE, significantly impede the parent's or student's opportunity to participate in the decision-making process regarding the provision of a FAPE, or cause a deprivation of educational benefit for the student. The student began the 2013-2014 school year at School C, a private special education day school and informed DCPS of this decision seven days after the August 8, 2013 MDT meeting.

The Petitioner failed to meet its burden with respect to Issue #3.

<u>Issue #4</u>

The IDEA and its implementing regulations define "child with a disability" to mean "a child evaluated in accordance with §§300.304 through 300.311 as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, an other health

impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services." 34 CFR §300.8(a). The fact that a child may have a qualifying disability does not necessarily make him "a child with a disability" eligible for special education services under the IDEA. *See Alvin Indep. Sch. Dist. v. A.D.*, 503 F.3d 378, 383 (5th Cir. 2007). The child must also need special education and related services. *Id*.

The Petitioner alleged that DCPS denied the student a FAPE by failing to find the student eligible for special education and related services as a student with SLD or as a student with ED on August 8, 2013. The Respondent argued that the student did not meet the criteria for SLD and that the LEA did not have adequate data to find the student eligible as a student with ED on August 8, 2013.

Specific Learning Disability

Specific learning disability means "a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia." 34 CFR §300.8(c)(10); *see also* 20 U.S.C. §1401; *Nguyen v. District of Columbia*, 681 F. Supp. 2d 49, 52 (D.D.C. 2010).

IDEA regulations further provide that an MDT Team "may determine" that a child has a SLD as defined in §300.8(c)(10) if three requirements are met. First, the child "does not achieve adequately for the child's age or to meet State-approved grade-level standards" in one or more basic academic skill areas (e.g. written expression, reading comprehension or mathematics calculation). 34 CFR §300.309(a)(1). Second, the child "does not make sufficient progress to meet age or State-approved" standards "when using a process based in the child's response to scientific, research-based intervention" or the child "exhibits a pattern of strengths and weaknesses in performance, achievement, or both" relative to relevant areas. 34 CFR §300.309(a)(2). Third, the MDT Team determines its findings are not the result of factors such as a visual or hearing disability, cultural or environmental factors. 34 CFR §300.309(c)(3).

Each State must adopt criteria, consistent with 34 CFR §300.309, for determining whether a child has a SLD as defined in §300.8(c)(10). Local educational agencies (LEAs) must use the State criteria in determining whether a child has a SLD. *See* 34 CFR §300.307. The criteria adopted by the State must not require the use of a severe discrepancy between intellectual ability and achievement; must permit the use of a process based on the child's response to scientific, research-based intervention; and may permit the use of other alternative research-based procedures for determining if a child has a SLD. *See* 34 CFR §300.307(a). The District of Columbia Office of the State Superintendent (OSSE) has adopted criteria by implementing the rules in 5 DCMR §E-3006.

These rules provide that the "IEP team shall determine that a child has a SLD if: a disorder is manifested in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to learn, think, speak, read, write, or do mathematical calculations." 5 DCMR

§E-3006.4(a). The rules also provide that LEAs "may use a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation procedure." 5 DCMR §E-3006.4(d). In addition, LEAs must prepare a written evaluation report that includes the basis for making the determination regarding SLD, including a "statement whether there is a severe discrepancy between achievement and ability that is not correctable without special education and related services." 5 DCMR §§E-3006.5(g)(2), (6). Finally, OSSE states that the "IEP team may not determine that a child is a child with a disability if it determines that the determinant factor for the child's eligibility determination is: (a) lack of instruction in reading or mathematics; or limited English proficiency; and (b) the child does not otherwise meet the eligibility criteria." 5 DCMR §E-3006.6; *see also* 34 CFR §300.306(b). The determination of a child's eligibility for special education under the SLD classification is a primarily fact-based inquiry. *See Michael P. v. Dept. of Educ. State of Hawaii*, 656 F.3d 1057 (9th Cir. 2011).

In this case, it is uncontested that the student is significantly below age and grade level expectations in his ability to read and do mathematical calculations. In February 2012, although the student was 17 years old and should have been in the 11th grade, the student was functioning in Broad Reading at the 3.8 grade level and the 9-2 age equivalency; and in Broad Math at the 4.0 grade level and the 9-5 age equivalency. While the student's grades were largely influenced by his failure to attend school, during the 2012-2013 school year, the student failed all academic courses.

DCPS had the option of using a process to determine if the child responded to scientific, research-based intervention to determine if the student was eligible for special education and related services as a student with a SLD. While the school psychologist was mistaken in her understanding that the student needed to qualify under the discrepancy model and the RTI model, the record is clear that DCPS did not implement scientific, research-based interventions to assess the student's ability to meet academic standards or to demonstrate academic improvement. Therefore, the Hearing Officer concludes that DCPS was unable to use a process to determine if the child responded to scientific, research-based intervention as a part of the evaluation procedure and instead was limited to using the discrepancy model in its determination.

LEAs must prepare a written evaluation report that includes the basis for making the determination regarding SLD, including a "statement whether there is a severe discrepancy between achievement and ability that is not correctable without special education and related services." 5 DCMR §§E-3006.5(g)(2), (6). On August 8, 2013, the MDT discussed whether there was a severe discrepancy between the student's achievement and ability. Although there was clear disagreement among the MDT members, DCPS determined that the student was not a student with SLD because there was not a severe discrepancy between the student's achievement and ability. Specifically, on the WAIS-IV, the student's FSIQ was measured at 75. The student scored a 64 in Broad Reading and a 61 in Broad Math. The student's Broad Reading and Broad Math scores were not more than one standard deviation below the student's FSIQ therefore the MDT determined that there was not a severe discrepancy between the student's achievement and ability.

According to Criterion 2 on DCPS' SLD Disability Worksheet for the Discrepancy Model, that in addition to a discrepancy of two standard deviations between a student's achievement (as measured by the academic evaluation) and measured ability (as measured by the intellectual evaluation), DCPS should also determine if the student has a discrepancy of two years below a student's chronological age in relation to the student's achievement (as measured by the academic evaluation) and measured ability (as measured by the intellectual evaluation). In the present matter, the student clearly scored more than two years below his chronological age in relation to his achievement. The school psychologist and the special education coordinator believed that the student needed to show both a discrepancy between achievement and ability and a discrepancy between age and chronological age however DCPS' worksheet provides that the analysis is an "and/or" analysis rather than an "and" analysis. Therefore, DCPS should have found a discrepancy for the student.

An IEP Team may not determine that a child is a child with a disability if it determines that the determinant factor for the child's eligibility determination is a lack of instruction in reading or mathematics. *See* 34 CFR §300.306(b). DCPS argued that the student's absences from school were significant and therefore prohibited the student from benefitting from instruction. Beginning in the 1st grade, the student did not consistently attend school. In the 5th grade, the student missed 40 days of school. By the 2011-2012 school year, the student was absent as many as 99 days in one class. Therefore, the Hearing Officer concludes that it is possible that the determinant factor for the student's eligibility determination may have be a lack of instruction in reading or mathematics.

Additionally, the student's February 14, 2012 psychoeducational evaluation outlined five criminal charges against the student, a history of physical abuse, a history of substance abuse and a history of homicidal and suicidal ideation. CFSA has been involved with the student's family since 2007. While the record indicates that the August 8, 2013 MDT did not discuss whether cultural factors or environmental or economic disadvantage could have impacted the student's academic performance, it is possible that cultural factors or environmental or economic disadvantage have impacted the student's academic performance. Therefore, the Hearing Officer concludes that the Petitioner has not met its burden in proving that the determinant factor for the child's eligibility determination was not cultural factors, economic or environmental disadvantage on August 8, 2013.

Emotional Disturbance

Emotional disturbance means "a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors. (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers. (C) Inappropriate types of behavior or feelings under normal circumstances. (D) A general pervasive mood of unhappiness or depression. (E) A tendency to develop physical symptoms or fears associated with personal or school problems." An emotional disturbance "includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section." 34 CFR §300.8(c)(4).

In this case, it is not clear if the student has displayed an inability to learn over a long period of time and to a marked degree. The record is clear that over a long period of time the student has had failing grades, however the record is also clear that the student's failing grades were largely attributed to his failure to attend class rather than his inability to learn while in class. Additionally, the student's borderline IQ could explain his inability to adequately perform on grade level.

While the student reported to the evaluator that he does not have friends, the student did not appear to be truthful during the entirety of his interview with the evaluator. Additionally, the student clarified that his family members are his friends and reported positive relationships with family members. On the MACI, the student appeared to be socially isolated and reported that he felt lonely, like peers did not like him and that he did not have friends. There is no evidence regarding the period of time the student has felt this way. The student testified that in middle school he had "too many friends" and described being "caught up" with peers. There is conflicting evidence regarding the student's ability to build or maintain personal relationships, however where there is "conflicting evidence regarding whether [a student] could maintain satisfactory relationships" a student is not eligible for IDEA under this prong. *R.B. ex rel. F.B. v. Napa Valley Unified Sch. Dist.,* 496 F.3d 932, 944-945 (9th Cir. 2007).

It is possible that the student has displayed inappropriate types of behaviors under normal circumstances over a long period of time and to a marked degree which adversely affects the student's educational performance. Specifically, it is inappropriate to miss up to 99 days of class within one school year. The record is clear that the student's chronic truancy has adversely affected his educational performance. However, the student's truancy began when he was in the 1st grade. At that time, truancy would be attributed to the guardian responsible for ensuring that the student attended school rather than the behavior of the student. If, for his formative years, for a long period of time the student was taught that truancy was acceptable, this behavior could not be interpreted as an inappropriate behavior under normal circumstances. Truancy itself would be a "normal circumstance."

It is also possible that the criminal activity of the student, one charge in 2008, one charge in 2009, one charge in 2010, one charge in 2012 and one charge in 2013, could be labeled as inappropriate behavior under normal circumstances however the record does not provide the circumstances surrounding the student's criminal behavior.

The discipline referrals contained in the record are largely a result of the student's disruptive and truant behavior. The record indicates that in the past the student may have been diagnosed with ADHD. The record does not contain adequate evidence that the student's disruptive behavior was not a result of his ADHD. As discussed above, the Hearing Officer cannot conclude that the student's truant behavior was inappropriate behavior under normal circumstances.

The Hearing Officer concludes that the record does not prove, by a preponderance of the evidence, that the student has displayed inappropriate types of behaviors under normal circumstances over a long period of time and to a marked degree which adversely affects the student's educational performance. It is possible that on August 8, 2013 the student had

exhibited this characteristic over a long period of time and to a marked degree however the record is evenly balanced. The record is not clear as to whether the student was consistently in a "normal circumstance," the inappropriate behaviors revealed in the February 2012 evaluation are not described in length of time and with the exception of truancy, the record does not indicate the effect of these behaviors on the student's educational performance.

The record does not prove, by a preponderance of the evidence, that the student has a general pervasive mood of unhappiness or depression over a long period of time and to a marked degree which adversely affects the student's educational performance. In February 2012, the student was diagnosed with Mood Disorder NOS. However, the IDEA requires more than a diagnosis of a disability or of a disorder. It requires that the child exhibit symptoms of a qualifying disability and exhibit them to such a degree that they interfere with the child's ability to benefit from the general education setting. *See* 34 CFR §300.8(a); *see also Alvin Indep. Sch. Dist. v. A.D.*, 503 F.3d 378, 383 (5th Cir. 2007). The student testified that he is comfortable in his current school, is able to focus in school, likes his trade classes, is attending school and previously did not attend school because he felt that the school "wasn't playing fair" in terms of his suspensions for "dumb stuff." The School C Director of Academics testified that the student is attending school, is cooperative, willing to learn, completes homework, does not interrupt in class and comes to class prepared. Likewise, the record indicates that prior to the 2013-2014 school year when the student put forth effort into his classwork, he was capable and performed well.

There was no evidence presented which suggests the student develops physical symptoms or fears associated with personal or school problems. During the student's February 2012 evaluation, the student did not score in the clinically significant range in Somatic Preoccupations, Pain or Eating Dysfunctions.

The Hearing Officer concludes that the record does not contain adequate evidence to dispute the possibility that the student's behaviors may be a result of social maladjustment rather than ED. *See Hansen v. Republic R-III Sch. Dist.*, 632 F.3d 1024, 56 IDELR 2, (8th Cir. 2011) (the team determined that [the student] exhibited behaviors more akin to social maladjustment than emotional disturbance because "[the student] controls his behavior. He turns it on and turns it off.").

Here, the student has a history and diagnosis of cannabis abuse. Further, while the CBI Worker and Community Support Worker testified that the student is depressed, the record does not contain evidence of how the student's depression is manifested either at home or in the school environment. In *W.G. and MG. v. New York City Dep't of Educ.*, 801 F. Supp. 2d 142 (S.D.N.Y. 2011), the Court concluded that a teenager's academic difficulties stemmed from social maladjustment rather than a depressive disorder, and the student was not eligible for IDEA services as a child with ED. The court rejected the parents' claim that the student's behaviors, which included truancy, defiance, and refusal to learn, were the result of his depression. The court determined that the student's poor grades and strained relationships with certain teachers were the result of social maladjustment and substance abuse. Evidence that the student had positive relationships with teachers he liked and performed well in their classes further undercut

the parents' claim that the student was unable to maintain interpersonal relationships because of an emotional condition.

The fact that a student exhibits some inappropriate behaviors or has difficulties interacting with certain people does not mean that he has an emotional disturbance. Rather, the IEP team must look at the source of the student's difficulties and determine whether they result from an emotional condition. *Id.* It is possible that the student is ED however the evidence is not necessarily more probable than its nonexistence.

The preponderance of evidence standard simply requires the trier of fact to find that the existence of a fact is more probable than its nonexistence. *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted). Unlike other standards of proof, the preponderance of evidence standard allows both parties to share the risk of error in roughly equal fashion, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted). Except that when the evidence is evenly balanced, the party with the burden of persuasion must lose. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion.

In this proceeding, the Petitioner carries the burden of persuasion. The Hearing Officer is not persuaded that the August 8, 2013 MDT had adequate data to find the student eligible for special education and related services as a student with a SLD or as a student with an ED on August 8, 2013. While it is possible that the student is a student with disabilities, the student's chronic truancy has caused a lack of appropriate instruction in all academic areas thus potentially excluding the student from a SLD classification. Likewise, it is possible that cultural factors or environmental or economic disadvantage have impacted the student's academic performance. The student may have a condition exhibiting one or more of the ED characteristics over a long period of time and to a marked degree that adversely affects the student's educational performance however the Petitioner's burden was not met in this area. The Hearing Officer agrees with DCPS that more data is needed to determine whether the student is a student with SLD or ED.

The Petitioner failed to meet is burden with respect to Issue #4.

Requested Relief

In this matter, the parents seek an award of reimbursement for tuition for School C from August 26, 2013 through present and funding for School C until such time that DCPS makes an eligibility determination for the student. A board of education *may* be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parent, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parent were appropriate, and equitable considerations support the parents' claim. (emphasis added). *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993); *Cerra v. Pawling Cent. Sch. Dist*., 427 F.3d 186, 192 (2d Cir. 2005).

The first step in the *Burlington/Carter* analysis is to determine if the services offered by the board of education were inadequate or inappropriate. The Hearing Officer has determined that DCPS failed to identify, locate and evaluate the student for special education and related services from November 2011 through present and failed to timely conduct an initial evaluation of the student. While the Hearing Officer concluded that the record did not contain adequate evidence to find the student eligible for special education and related services, DCPS had the obligation to gather the necessary evidence to make this determination. Therefore, the services offered by DCPS were inadequate.

School C is a private, special education year-round program with a vocational focus. All teachers at School C are content certified in their respective areas and teachers without a special education certification are assisted by a teacher with a special education certification. School C is a school with a COA from OSSE and provides all IEP services. At School C, the student is enrolled in English, Algebra, Physics, Government, Carpentry and Mechanics. The student is attending school, is cooperative, willing to learn, completes homework, does not interrupt in class and comes to class prepared. The student is far behind grade level and requires additional assistance and time however is responding well to coaching and coaxing.

The IDEA regulations at 34 CFR §300.148(d) state that the cost of reimbursement described in paragraph (c) of this section 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 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 (d)(1)(i) of this section. In this case, DCPS was informed of the student's intent to remove himself from the public school and enroll in School C in order to obtain a FAPE.

IDEA remedies are equitable remedies requiring flexibility based on the facts in the specific case rather than a formulaic approach. Under *Reid* ". . .the inquiry must be fact-specific and . . . the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid v. District of Columbia*, 401 F. 3d 516 at 524, 365 U.S. App. D.C. 234 (D.C. Cir 2005) citing *G.ex. RG v Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4 h Cir. 2003).

In the present matter, DCPS failed to identify, locate and evaluate the student for special education and related services from November 2011 through present and failed to timely conduct an initial evaluation of the student. Because of the length of time that elapsed between the Child Find trigger and the date of the hearing, as well DCPS' failure to gather all relevant data needed to complete the evaluation for the student within the 120-day timeline, the Hearing Officer concludes that it is equitable for DCPS to fund the student's tuition, fees for counseling services and transportation for School C from the date of this Order until such time that DCPS makes an eligibility determination for the student based on adequate data.

The question of reimbursement for School C from August 26, 2013 through the date of this Order requires a different analysis. It is well settled that parents pursuing an administrative challenge "may, at their own financial risk, enroll the child in a private school and seek retroactive reimbursement for the cost of the private school from the state." *Gagliardo v. Arlington Cent. Sch. Dist*., 489 F.3d 105, 111 (2d Cir. 2007) (internal quotation marks omitted) (citing Burlington, 471 U.S. at 370). However, in the present matter, the parent did not take a financial risk in enrolling the student at School C. School C has enrolled and educated the student without charge to the student or parent.

The Petitioner argued that *Mr. and Mrs. A. ex rel. D.A. v. New York City Dep't of Educ*., 769 F. Supp. 2d 403 (S.D.N.Y. 2011) provided that a direct payment to the private school is an appropriate remedy. The Hearing Officer agrees that *Mr. and Mrs. A. ex rel. D.A. v. New York City Dep't of Educ*., provides that a court may, under § 1415(i)(2)(C)(iii), require a school district to pay a private school directly and prospectively for special education, may require the district to retroactively reimburse parents for private school tuition previously paid and may order a school district to pay the private school directly and retroactively for expenses already incurred by the parent however does not agree that the case, on its face, supports a claim for the private school to be reimbursed when the parent or student has not incurred an expense.

In *Mr. and Mrs. A. ex rel. D.A. v. New York City Dep't of Educ*, the U.S. District Court, Southern District of New York ordered a district to pay $83,800 in private tuition expenses already incurred, but not paid, by the parents of a child with autism. The case analysis focused on the retroactive payment where a parent enrolled the student but was unable to *pay upfront.* The case presented the following question: (1) When a child with disabilities has been denied a free and appropriate public education; and (2) the child's parents have enrolled the child in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so; does the Court's authority under Section 1415(i)(2)(C)(iii) of the IDEA, 20 U.S.C. §§ 1415(i)(2)(C)(iii), "to grant such relief as the court determines is appropriate," include the power to order a school district to make a retroactive tuition payment directly to the private school? *Id.*

Mr. and Mrs. A. ex rel. D.A. v. New York City Dep't of Educ. is distinguished from the present matter in several respects. First, in *Mr. and Mrs. A. ex rel. D.A. v. New York City Dep't of Educ*., there was no question as to the student's eligibility for special education and related services. The student was classified as a student with autism and suffered from bipolar disorder and ADHD. Next, State education agency recommended that the student be educated in a 12-month program at a non-public school. Finally, and most importantly, the parents agreed to pay the entire $84,900 yearly tuition if the district did not, were paying the tuition debt in monthly installments and were legally obligated to make the tuition payments.

In the present matter, the student has not been identified as a student with disabilities. The denial of FAPE is that DCPS has been untimely in its determination. The Hearing Officer was unable to conclude that the student is a student with disabilities as defined by 34 CFR §300.8. Next, there is no evidence that a nonpublic school is an appropriate placement for the

student. While the Hearing Officer has concluded that School C is appropriate under the *Burlington/Carter* analysis, this analysis, in the present matter, does not include an analysis of the student's least restrictive environment or the appropriate amount of specialized instruction for the student. The record does not contain evidence that such a highly restrictive setting would be appropriate for the student as in *Mr. and Mrs. A. ex rel. D.A. v. New York City Dep't of Educ*. Finally, the parent and student have not incurred any cost for School C and are not legally obligated to pay tuition for the time that the student has attended School C. The record contains no evidence of the parent's or student's financial means, only that School C is "not charging" the student and that School C is requesting reimbursement.

The IDEA at § 1401(29) requires that special education services are to be provided "at no cost to parents." Additionally, other provisions of IDEA reflect Congress's determination that the guarantee of a FAPE should extend to all children with disabilities, regardless of their financial means. *See, e.g.*, § 1437(b)(7). Where parents lack the financial resources to "front" the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs -- or will take years to do so -- parents who satisfy the *Burlington* factors have a right to retroactive direct tuition payment relief. *Mr. and Mrs. A. ex rel. D.A. v. New York City Dep't of Educ*., 769 F. Supp. 2d at 412. However, in the present matter, there has been no cost to the parent or student. The Hearing Officer is swayed by the School C Director of Academics' testimony that "we would request reimbursement for tuition, services and transportation." The reimbursement right is a parent right not a private school right. School C made the decision not to charge tuition cost to the parents. Whether this act was a scholarship, genuine altruism or merely a gamble on the change of reimbursement following this proceeding is not clear. Either way, the Hearing Officer concludes that the right to reimbursement is a parent right, when a parent has incurred a cost. In this matter, it is not appropriate to reimburse School C for tuition, services and transportation expenses prior to the date of this Order.

For the denials of FAPE, the Petitioner also requested independent comprehensive psychological, vocational, speech-language, psychiatric, neurological and functional behavioral assessments; within 30 calendar days of the receipt of the final independent assessment, for DCPS to convene a meeting to review the evaluations and create and appropriate IEP and a BIP for the student; and compensatory education.

IDEA regulations at 34 CFR §300.304(c)(4) require a student to be "assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities." A comprehensive psychoeducation assessment was conducted for the student in February 2012. With the exception of the Special Education Coordinator's question of the accuracy of the student's FSIQ, neither party disputed the information contained within the February 14, 2012 report. Therefore, the Hearing Officer concludes that an independent comprehensive psychological assessment is not necessary. Since DCPS questioned the accuracy of the student's FSIQ, DCPS should conduct the appropriate ability assessment for the student.

A functional behavioral assessment is an educational evaluation. *See Harris v. District of Columbia*, 561 F. Supp. 2d 63 (D.D.C. 2008). An FBA is needed to address the areas related to

the student's suspected disability of ED. Since DCPS should have conducted an FBA of the student prior to the August 8, 2013 MDT meeting, it is equitable for DCPS to fund an independent FBA for the student.

The Petitioner requested independent psychiatric and neurological assessments since the assessments were recommended in the February 14, 2012 Psychoeducation Evaluation. The psychiatric evaluation was recommended because of the student's history of homicidal and suicidal ideation. DCPS was in possession of the February 14, 2012 report on May 23, 2013, during the 120-day timeline to complete the student's evaluation process, and therefore should have conducted the psychiatric evaluation during that time period. Therefore it is equitable for DCPS to fund an independent psychiatric assessment. Conversely, the neurological assessment was recommended based on the student's report of a head injury in his early years and reported "blacking out." The student was not truthful during the February 2012 interview and these conditions were not supported in any other part of the record. Therefore, the Hearing Officer concludes that, at this time, a neurological assessment is not necessary.

While the record does not include evidence that a speech-language assessment relates to the student's suspected disabilities, in the August 8, 2013 MDT meeting, DCPS suggested that a speech-language assessment be completed. The Hearing Officer concludes that it is equitable to allow DCPS to conduct the assessment that the LEA suggested. The Petitioner also requested an independent vocational assessment however the student has not yet been identified as a student with disabilities. Therefore, while a vocational assessment would be prudent, a vocational assessment is not necessary.

At this point, the student has not been found eligible as a student with disabilities as defined by 34 CFR §300.8, therefore, the Hearing Officer does not believe that the record contains the evidence necessary to order compensatory education. However, should the student be found eligible for special education and related services, the student's IEP Team should discuss the student's needs in relation to the time period he was without services.

ORDER

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

1. Issues #3 and #4 are **dismissed** with prejudice.
2. Within thirty (30) calendar days of the date of this Order, for DCPS to complete an appropriate ability assessment, a speech-language assessment and classroom observations of the student. Additionally, DCPS is to gather input from all of the student's current teachers regarding the results of interventions used with the student and the student's academic gains since attending school.
3. Within five business days of the date of this Order, DCPS provide an authorization letter for an independent FBA and an independent psychiatric assessment of the student.
4. Within ten (10) school days of the completed assessments, or on a date mutually agreed upon by the parties, DCPS convene a MDT meeting to review the results of

the assessments and complete the initial evaluation process to determine whether the student is eligible for special education and related services. The MDT meeting must include at least two of the student's current teachers.

5. If the student is found to be eligible for special education and related services, within the meeting described in #4, develop an IEP for the student, and if appropriate, a BIP for the student.
6. If the student is found to be eligible for special education and related services, within 30 calendar days of the meeting described in #4, DCPS complete a vocational assessment and draft a postsecondary transition plan for the student.
7. During the meeting in described #4, if the MDT determines that the student is eligible for special education and related services, DCPS specifically address the needs of the student given DCPS' failure to provide services to the student beginning April 18, 2012.[4]
8. DCPS to fund tuition, fees and transportation for the student to attend School C from the date of this Order until the date of the meeting described in #4.
9. All other relief sought by Petitioner herein is **denied**.

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 USC §1415(i).

Date: December 2, 2013

Melanie Byrd Chisholm
Hearing Officer

[4] Approximately 150 days from the date that DCPS' Child Find obligation was triggered.