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Office of the State Superintendent of Education
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Confidential

Parent on Behalf of Student, Petitioner, v. District of Columbia Public Schools ("LEA") Respondent. Case # 2017-0267 Date Issued: December 13, 2017	CORRECTED HEARING OFFICER'S DETERMINATION ¹ Hearing Date: November 20, 2017 Counsel for Each Party listed in Appendix A <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
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¹ This "Corrected" HOD is issued to only make typographical and/or grammatical changes and/or to remove personally identifiable information; no substantive changes have been made. The HOD issuance date, December 13, 2017, remains unchanged, as does the applicable appeal date. Personally identifiable information is in the attached Appendices A & B which must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on November 20, 2017, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, N.E., Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age _____ and in grade _____.² The student resides in the District of Columbia and is a child with a disability pursuant to IDEA with disability classification of specific learning disability (“SLD”).

The student or “Student” currently attends a public charter school located in the District of Columbia (“School A”). School A is its own local education agency (“LEA”). Prior to attending School A, Student attended a District of Columbia Public Schools (“DCPS”) elementary school (“School B”) for school year (“SY”) SY 2015-2016 and SY 2016-2017. Student attended a different DCPS elementary School (“School C”) during SY 2014-2015.

After Student began attending School A in SY 2017-2018, School A found Student eligible for special education under the SLD disability classification on September 1, 2017.

On September 29, 2017, the student’s mother (“Petitioner”) filed her due process complaint alleging that during the period when DCPS was Student’s LEA, it failed to locate, identify, and evaluate the student pursuant to Child Find.

Relief Sought:

Petitioner seeks as relief that the Hearing Officer find that DCPS denied the student a FAPE and that the Hearing Officer order DCPS to provide the student compensatory education.

LEA Response to the Complaint:

DCPS filed a response to the complaint on October 12, 2017. DCPS asserts that Student has not been denied a FAPE. In its response DCPS asserts that it determined Student ineligible under IDEA in April 2015. Petitioner disagreed with the determination. However, Petitioner did not dispute the determination or allege an IDEA violation until September 2017. DCPS contends the Hearing Officer should consider and apply the equitable doctrine of laches to Petitioner’s claim. Petitioner, through counsel, sought DCPS review of an independent evaluation funded by DCPS in May 2016. Petitioner did not forward this report to DCPS until May 2017. Less than two months later, Petitioner’s counsel cancelled the meeting and sought to review the evaluation

² The student’s current age and grade are indicated in Appendix B.

because the student began attending a charter school. DCPS contends it did not fail to evaluate Student, did not fail to find Student eligible, and did not fail to develop an IEP. DCPS requests that Petitioner's request for relief be denied. In addition, DCPS asserts it had concerns about Student's attendance and Student failed vision tests but was not provided glasses.

Resolution Meeting and Pre-Hearing Conference:

The parties participated in a resolution meeting on November 9, 2017, and did not resolve the complaint. The parties did not mutually agree to proceed directly to hearing in this matter. The 45-day period began on October 29, 2017, and ends [and the Hearing Officer's Determination ("HOD") is due] on December 13, 2017.

The undersigned Impartial Hearing Officer ("Hearing Officer") convened a pre-hearing conference ("PHC") on October 31, 2017, and issued a pre-hearing order ("PHO") on October 31 20, 2017, outlining, inter alia, the issue to be adjudicated.

ISSUE: ³

The issue adjudicated is:

Whether DCPS denied Student a FAPE by failing to identify, locate and evaluate Student pursuant to Child Find during SY 2015-2016, so that Student had an IEP in place at the start of SY 2016-2017.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 40 and Respondent's Exhibits 1 through 31) that were admitted into the record and are listed in Appendix A.⁴ Witnesses' identifying information is listed in Appendix B.⁵

SUMMARY OF DECISION:

Petitioner held the burden of persuasion on the issue to be adjudicated. Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that DCPS denied Student a FAPE

³ The Hearing Officer restated the issue at the outset of the hearing and the parties agreed that this was the issue to be adjudicated.

⁴ Any items disclosed and not admitted, or admitted for limited purposes, was noted on the record and summarized in Appendix A.

⁵ Petitioner presented four witnesses: Petitioner, and three witnesses designated as expert witnesses: an educational consultant and two employees of the law firm representing Petitioner (one is a clinical psychologist and the other is an educational advocate). Respondent presented two witnesses: a DCPS school psychologist and a resolution specialist.

by failing to locate, identify and evaluate Student pursuant to the Child Find provisions of IDEA. The Hearing Officer dismissed the complaint with prejudice and denied Petitioner's requested relief.

FINDINGS OF FACT:⁶

1. Student resides in the District of Columbia and is a child with a disability pursuant to IDEA with disability classification of SLD. (Petitioner's Exhibit 33-1)
2. Student currently attends School A, a public charter school located in the District of Columbia that is its own LEA. Student began attending School A at the start of SY 2017-2018. Prior to attending School A, Student was enrolled in DCPS at School B for SY 2015-2016 and SY 2016-2017. Prior to attending School B, Student attended School C, another DCPS school, during SY 2014-2015. (Petitioner's testimony)
3. In March 2015, while Student was attending School C, DCPS Early Stages ("ES") evaluated Student for special education eligibility. ES conducted a comprehensive psychological evaluation. The evaluation noted Student had been exposed to lead as a toddler and a family history of dyslexia. Student was assessed as having average cognitive functioning and average achievement in reading and spoken language. Student was assessed as having below average achievement in math and writing. (Respondent's Exhibits 6, 10, 14)
4. The DCPS psychologist did not conclude the student met any disability criteria, but suggested that due to Student's academic struggles and lack of progress, the Student Support Team ("SST") should determine targeted interventions, implement the interventions, and frequently monitor the effectiveness of the interventions. The psychologist noted Student passed a hearing screening but failed the vision screening and recommended Student have a complete eye examination. ES also conducted an occupational therapy ("OT") evaluation and a physical therapy evaluation and there were no concerns noted that warranted related services. (Respondent's Exhibits 6, 11, 12)
5. In April 2015, DCPS prepared an evaluation summary report and on April 8, 2015, convened an eligibility meeting at which Student's evaluations were considered. Petitioner participated in the meeting and was represented by an educational advocate employed by Petitioner's current law firm. DCPS found the student ineligible for special education for the classification of developmental delay. Petitioner disagreed with the determination of ineligibility but did not file a due process complaint challenging the determination. (Respondent's Exhibits 2, 3, 4, 13)

⁶ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within a parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit (or the page number of the entire disclosure document) from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party's exhibit.

6. Student began attending School B at the start of SY 2015-2016. During Student's first year at School B, Petitioner expressed her concerns about Student's academic difficulties to School B staff. Student was still unable to recognize alphabets and numbers. Student could not write Student's name. Student was still displaying behavioral difficulties and Petitioner frequently received calls from School B regarding Student's behavior. (Petitioner's testimony)
7. School B monitored Student through its SST process. School B suggested academic interventions and had someone come into Student's classroom to work one on one with Student. Petitioner found some School B staff more helpful than others, but acknowledged that the School B special education coordinator ("SEC") was helpful in addressing Petitioner's concerns about Student. (Petitioner's testimony)
8. During SY 2015-2016 Student was operating below basic in reading, written language and math. Student was operating at Proficient or Advanced level in the other areas measured on the SY 2015-2016 report card. Student's reading assessment indicated Student was making minor progress and Student was promoted to the next grade at the end of SY 2015-2016. (Petitioner's Exhibits 5, 8)
9. DCPS provided Petitioner, upon request, an authorization for an independent comprehensive psychological evaluation and an occupational therapy evaluation on May 27, 2016. The authorization letter directed that the independent evaluations should be provided to the School B SEC. (Respondent's Exhibits 21, 23)
10. An independent psychological evaluation ("IEE") was conducted in July 2016 and the evaluation report was completed on October 12, 2016. The psychologist assessed Student as having Borderline intellectual functioning, and profound academic deficits in all areas. Although the psychologist noted Student needed, and did not have reading glasses, the psychologist concluded Student's academic deficits were "more significant than needing glasses." The psychologist also noted Student was experiencing significant emotional distress, felt teased, and had no friends at school. The psychologist concluded Student met the criteria for developmental delay and should be provided specialized instruction. (Respondent's Exhibit 22)
11. As part of the IEE, an educational consultant conducted an observation of Student at School B in September 2016. The consultant spoke with Student's classroom teacher for SY 2015-2016. The teacher acknowledged Student was operating below grade level and noted Student needed, but did not have, reading classes. Student's classroom teacher for SY 2016-2017 was concerned that Student was operating below grade level, unable to identify letters, unable to work independently, and occasionally had altercations with classmates. During the observation, Student was periodically off task, displayed work avoidance behaviors, and did not appear to be able to read independently during a class reading assignment. However, Student was able to effectively answer questions about what was read to Student. The consultant also spoke with the School B SEC, who is also the school psychologist. The SEC noted that Student had been identified as needing

eyeglasses the previous school year as a part of the pre-response to intervention (“RTI”) process. (Witness 1’s testimony, Petitioner’s Exhibit 34-2, 34-3, 34-5, 34-6)

12. The School B SEC reached out to the educational consultant a few months after the observation to inquire when DCPS would be provided the IEE. The consultant provided the IEE to Petitioner’s law firm but could not provide it to DCPS pursuant to her protocol. (Witness 1’s testimony)
13. During SY 2015-2016, School B initiated interventions to address Student’s academic deficits and augmented those interventions at the start of SY 2016-2017 by providing Student interventions with a reading specialist outside Student’s classroom for 45 minutes per day in the mornings. However, Student often missed the targeted reading instruction due to tardiness to School. School B convened RTI meetings during SY 2016-2017 to assess Student’s progress relative to the interventions. Petitioner attended at least one of the RTI meetings. (Witness 3’s testimony)
14. During SY 2016-2017 Student continued to have behavior difficulties. At home Student was behaving worse than at school and refusing to participate in homework. During SY 2016-2017, in November 2016, Student received a one-day in school suspension, and during the second semester of SY 2016-2017, Student had some behavioral referrals for aggression and fighting. (Petitioner’s testimony, Petitioner’s Exhibit 12, 13, 14, 15, 16, 17)
15. School B remained concerned that one of the primary factors for Student’s poor academic achievement was Student’s need for, and lack of, reading glasses. From January 2016 to December 2016, School B urged Petitioner to have Student’s eyes examined. Finally the School B SEC took Student for an eye examination and paid for two sets of eyeglasses out of her own pocket. Student had and used the eyeglasses at School B, but both sets were broken before the end of SY 2016-2017 and not replaced. (Witness 3’s testimony)
16. Although the IEE was completed in October 2016, Petitioner or her attorney did not provide DCPS the IEE until May 16, 2017, when Petitioner’s attorney requested a meeting to review the IEE. (Respondent’s Exhibit 17)
17. DCPS acknowledged the IEE and the request for a meeting as a referral for initial evaluation for special education and on May 25, 2017, issued Petitioner a letter of invitation to attend a meeting to review the evaluation that was scheduled for July 10, 2017. (Respondent’s Exhibits 19, 20)
18. School B had an extended school year for SY 2016-2017. However, in early June 2017, Petitioner enrolled Student in a summer camp where she was employed and withdrew Student from School B. Petitioner enrolled Student in School A for SY 2017-2018. Consequently, the meeting at School B scheduled to review Student’s IEE was cancelled. (Respondent’s Exhibits 25, 26)

19. After Student began attending School A in SY 2017-2018, School A found Student eligible for special education under the SLD disability classification on September 1, 2017. Student's individualized educational program ("IEP") at School A prescribes 8 hours per week of specialized instruction inside general education and 6 hours per week outside general education, 30 minutes per week of behavioral support, 120 minutes per month of speech language pathology, and 60 minutes per month of occupational therapy. (Petitioner's Exhibits 28-1, 33-13)
20. Petitioner proposed a compensatory education plan to remedy the alleged denial of FAPE contained in Petitioner's complaint. The plan sought to remedy the alleged failure by DCPS to locate, identify, and evaluate Student when Student attended School B. Petitioner requested the following services as compensatory education: 300 hours of tutoring, 200 hours of speech language therapy and 150 hours of occupational therapy. (Petitioner's Exhibit 37)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. *Schaffer v. West*, 546 U.S. 49, 126 S.Ct. 528 (2005). The normal standard is preponderance of the evidence. See, e.g. *N.G. v. District of Columbia* 556 F. Supp. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

In this case, as noted in the PHO and at the hearing, Petitioner had the burden of production and the burden of persuasion on the single issue adjudicated. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE: Whether DCPS denied Student a FAPE by failing to identify, locate and evaluate Student pursuant to Child Find during SY 2015-2016, so that Student had an IEP in place at the start of SY 2016-2017.

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that DCPS denied the student a FAPE by failing to locate, identify and evaluate Student pursuant to the Child Find provisions of IDEA.

The "Child Find" requirements of IDEA at 20 U.S.C. 1412 (a); 34 C.F.R. Section 300.11 require every state to effectuate policies and procedures to ensure that all children with disabilities residing in the state, including wards of the state, who are in need of special education and related services are "identified, located and evaluated." This Circuit in *Reid v. District of Columbia*, 401 F. 3d 516, 519 (D.C. Cir. 2005) held: "School districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction. Instead, school systems must ensure that "all children with disabilities residing in the State...regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated." See also *Branham v. District of Columbia*, 427 F. 3d 7, 8 (D.C. Cir. 2005)

In *Scott v. District of Columbia*, 2006 U.S. Dist. LEXIS 14900, the Court, citing the above case held: "The Circuit's holdings require DCPS to identify and evaluate students in need of special education and related services, whether or not parents have made any request, written or oral." The "Child Find" requirement is an affirmative obligation on the school system. A parent is not required to request that a school district identify and evaluate a child. In *N.G., et al. v. District of Columbia*, 556 F. Supp. 2d 11, (U.S.D.C. 2008) the Court stated: "This Court has held on numerous occasions that as soon as a student is identified as a potential candidate for special education services, DCPS has a duty to locate that student and complete the evaluation process."

The evaluation component of "Child Find" requires a district to conduct an initial evaluation of a child to determine whether he qualifies as a child with a disability within 60 days or within the time frame specified by the state (120 days as mandated by the District of Columbia) and to determine his educational needs, including the content of his IEP. 20 USC 1414(a)(1)(C); 20 USC 1414(b)(2)(A).

34 C.F.R. § 300.131 provides that each LEA must locate, identify, and evaluate all children with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district served by the LEA, in accordance with paragraphs (b) through (e) of this section, and Sec. Sec. 300.111 and 300.201. (b) Child find design. The child find process must be designed to ensure-- (1) The equitable participation of parentally-placed private school children; and (2) An accurate count of those children. (c) Activities. In carrying out the requirements of this section, the LEA, or, if applicable, the SEA, must undertake activities similar to the activities undertaken for the agency's public school children. (d) Cost. The cost of carrying out the child find requirements in this section, including individual evaluations, may not be considered in determining if an LEA has met its obligation under Sec. 300.133. (e) Completion period. The child find process must be completed in a time period comparable to that for students attending public schools in the LEA consistent with Sec.

300.301. (f) Out-of-State children. Each LEA in which private, including religious, elementary schools and secondary schools are located must, in carrying out the child find requirements in this section, include parentally-placed private school children who reside in a State other than the State in which the private schools that they attend are located.

The District's Child Find obligation extends to D.C. resident students in private school and to those attending school out of state. See *Dist. of Columbia v. Abramson*, 493 F. Supp. 2d 80, 85 (D.D.C. 2007); *N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 27 -28 (D.D.C. 2008).

A school district must "evaluate a student who may have a disability and who may require special education services." D.C. Code § 38-2561.02(a)(2) (emphases omitted). This duty applies to any " child suspected of having a disability who may need special education." 5-E D.C. Mun. Regs. § 3004.1(a) (emphases omitted); see 34 C.F.R. § 300.111(c)(1) (extending duty to "[c]hildren who are suspected of being a child with a disability ... and in need of special education, even though they are advancing from grade to grade"). Courts in this Circuit have thus repeatedly held that school districts are required to complete an evaluation process "as soon as a student is identified as a potential candidate for special education services." N.G., 556 F. Supp. 2d at 25; see *Horne v. Potomac Preparatory P.C.S.*, No. 15-115, 2016 WL 3962788 (D.D.C. July 20, 2016); *Hawkins*, 539 F. Supp. 2d at 114.

This "affirmative obligation" does not necessarily hinge on parents' flagging issues -- though parental concerns are still relevant. *D.L. v. District of Columbia*, 109 F. Supp. 3d 12, 35 (D.D.C. 2015); see Reid, 401 F.3d at 518 ("School districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction."); *Horne*, 2016 WL 3962788 (describing "affirmative duty"); see also *Kruvant v. District of Columbia*, No. 03-1402, 2005 WL 3276300 (D.D.C. Aug. 10, 2005) ("A child may be suspected of having a disability based on written parental concern."). The process instead begins once the district is "on notice of substantial evidence that [the student] may have qualified for special education ... such that she should have been evaluated." N.G., 556 F. Supp. 2d at 26.

Once on notice, so begins the "evaluation" -- "a process during which assessments occur." *T.P. ex rel. T.P. v. Bryan Cty. Sch. Dist.*, 792 F.3d 1284, 1291 n.13 (11th Cir. 2016) (emphasis omitted). The process consists of "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 ... [w]hether the child is a child with a disability." 34 C.F.R. § 300.304(b)(1)(i); see 20 U.S.C. § 1414(b)(2); 5-E D.C. Mun. Regs. § 3005.4(a). Those tools and strategies must be "tailored to assess specific areas of educational need," target "all areas related to the suspected disability," be "sufficiently comprehensive to identify all of the child's special education and related services needs," and "provide relevant information that directly assists persons in determining the educational needs of the child." 34 C.F.R. § 300.304(c); see 20 U.S.C. § 1414(b)(3). That is, an evaluation both confirms the student's potential disabilities, and examines whether she needs services. *Davis v. District of Columbia* 69 IDELR 218 U.S. District Court, District of Columbia.

The law does not impose per se liability on a school district for failing to identify every child who might be suspected of having a disability. See *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230,

245, 129 S. Ct. 2484, 2495, 174 L. Ed. 2d 168 (2009) (parents must have a remedy if school district "unreasonably" fails to identify a child with disabilities); *Bd. of Educ. of Fayette County, Ky. v. L.M.*, 478 F.3d 307, 313 (6th Cir. 2007) (claimant "must show that school officials overlooked clear signs of disability and were negligent in failing to order testing").

Petitioner asserts School B should have referred Student for evaluation at the latest by the end of the SY 2015-2016 so the Student had an IEP in place by the start of SY 2016-2017. Although Petitioner presented witnesses who were qualified as experts and testified that Student's lack of academic achievement and behaviors should have put DCPS on notice during SY 2015-2016 to evaluate Student, the Hearing Officer did not find these witnesses' testimony convincing. Neither witness had personally spoken with any of Student's teachers at School B, nor did they have any personal knowledge of Student while Student was actually attending School B and of the interventions and instruction School B provided Student.

The evidence demonstrates the Student had been evaluated in 2015 and found ineligible, and Student was being provided interventions through School B's SST and subsequently, the RTI process. During SY 2015-2016 and SY 2016-2017, the same law firm that currently represents Petitioner was representing her. Petitioner did not challenge the 2015 ineligibility determination through a due process hearing. Petitioner, through counsel, requested DCPS fund independent evaluations of Student, which DCPS agreed to fund in May 2016, before the end of SY 2015-2016. Funding of independent evaluations was an affirmation action by DCPS to evaluate Student.

The evidence demonstrates that the independent evaluation was conducted and included an observation of the Student at School B in September 2016. School B staff participated in the interviews that the evaluator(s) conducted. DCPS' authorization for the independent evaluations instructed that the IEE report should be provided to the School B SEC. Although the IEE report was completed in October 2016, it was not provided to School B by Petitioner's attorney until May 2017. Petitioner is asserting that in addition to providing the IEE, DCPS should have conducted its own evaluation of Student. The Hearing Officer finds this argument absurd.

DCPS had evaluated Student and determined Student ineligible. Consistent with the evaluation recommendations, School B provided Student interventions to address Student's academic deficits during SY 2015-2016 and then granted Petitioner an IEE for Student to be evaluated. Based upon this evidence, the Hearing Officer concludes that DCPS fulfilled the obligation it had regarding Student to identify, locate and evaluate the student pursuant to Child Find. The Hearing Officer concludes that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence in this instance, and in the Order below dismisses Petitioner's claim with prejudice.

ORDER:

1. The due process complaint is hereby dismissed with prejudice.
2. All relief requested by Petitioner is denied.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have ninety (90) days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ Coles B. Ruff

Coles B. Ruff, Esq.

Hearing Officer

Date: December 13, 2017

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