District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Parent, on behalf of Student,[1]	)	
Petitioner,	)	
	)	**Hearings: January 24 and 29, 2018**
v.	)	**Hearing Officer: Michael Lazan**
	)	**Case No.: 2017-0309**
District of Columbia Public Schools,	)	**Issue Date: February 10, 2018**
	)	
Respondent.	)	

HEARING OFFICER DETERMINATION

I. Introduction

This case involves a student who is currently eligible for services as a student with Multiple Disabilities (the "Student").

A Due Process Complaint ("Complaint") was received by District of Columbia Public Schools ("DCPS" or "Respondent") pursuant to the Individuals with Disabilities Education Act ("IDEA") on November 13, 2017. Petitioner is the parent of the Student. On November 22, 2017, Respondent filed a response. The resolution period expired on December 13, 2017.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act ("IDEIA"), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of

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

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

III. Procedural History

On December 14, 2017, the Hearing Officer held a prehearing conference. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on December 19, 2017, summarizing the rules to be applied in the hearing and identifying the issue in the case.

There were two hearing dates: January 24, 2018, and January 29, 2018. These were closed proceedings. Petitioner was represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioner moved into evidence Exhibits 1-7 and 9-33. There were no objections. Exhibits 1-7 and 9-33 were admitted. Respondent moved into evidence Exhibits 1-26. There were no objections. Exhibits 1-26 were admitted. At the close of testimony, both sides presented oral closing statements. Supplemental written statements were provided by the parties on February 2, 2018.

Petitioner presented as witnesses: Petitioner; Witness A, a neuropsychologist; and Witness E, from School C. Respondent presented as witnesses: Witness B, a social worker; Witness C, a special education teacher; and Witness D, a psychologist.

IV. Credibility.

Witness A's testimony that the Student's Post-Traumatic Stress Disorder ("PTSD") kept the Student from school and necessitated individualized instruction was corroborated by the report of Dr. A. (P-11-5) Witness D, in her report, did not disagree that the Student's PTSD affected the Student's education.

Witness B's suggestion that the Student could be maintained at School B if the Student received counseling was not consistent with the evidence. There is nothing in the record to suggest that counseling would have such an impact on the Student that it would allow the Student to go back to School B. On the contrary, Petitioner, whose testimony was consistent with the documentation in the record, said that the Student had refused to go to counseling.

V. Issue

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the Free Appropriate Public Education ("FAPE") issue to be determined is as follows:

Did Respondent violate "Child Find" when it failed to identify, locate, and evaluate the Student in or about June, 2017? If so, did Respondent violate 20 U.S.C. Sect. 1412(a) (3)(A), 34 C.F.R. Sect. 300.111(a) and related provisions of the IDEA? If so, did DCPS deny the Student a FAPE?

As relief, Petitioner is seeking tuition reimbursement for School C.

VI. Findings of Fact

1. The Student is an X-year-old who, as of January, 2018, was eligible for services as a student with Multiple Disabilities (Emotional Disturbance and Other Health Impairment). The Student currently attends a non-public school in Washington, D.C. The Student has attended District of Columbia public schools for much of the Student's academic career. The Student has also attended school in Jamaica, where the Student's mother resides. The Student's Full-Scale IQ is well above average, but the Student has difficulties in math. (Testimony of Petitioner; Testimony of Witness A; P-2; P-14)

2. Petitioner felt that the Student was "disorganized" in or about 2011. As a result, the Student was evaluated by a neuropsychologist in August, 2011. The neuropsychologist found that the Student had a Full-Scale IQ of 120 with relative weakness in processing speed and working memory. The Student was functioning well below grade level in math fluency, and testing revealed difficulties with the Student's impulsivity. The Student was diagnosed with Attention Deficit Hyperactivity Disorder, Combined Type. Petitioner did not seek special education services at that time. (Testimony of Petitioner; P-2)

3. The Student attended School A, a DCPS school, during the Student's middle school years. The Student also attended school in Jamaica. For high school, the Student returned to Washington, D.C., and started at School B. (Testimony of Petitioner)

4. At the start of the 2016-2017 school year, at School B, the Student was functioning adequately. However, after a month or two, the Student began associating with other children who influenced the Student to skip classes, smoke marijuana, and "wander." (Testimony of Petitioner)

5. For the first term of the 2016-2017 school year, the Student received F grades in English II, Honors Biology, and Spanish II, with an A in Model UN, an A- in World History, and a B+ in Geometry. For the second term, the Student received F grades in Geometry, World History, Model UN, Honors Biology, and English II. (P-3)

6. During the 2016-2017 school year, the Student was acquainted with Student A. Student A and the Student had a disagreement in late November, 2016. Student A then began to bully the Student and encouraged others in the school to "turn against" the Student. This led to an altercation prior to Christmas, 2016, resulting in a

one-day suspension for Student A. Notwithstanding the suspension, the bullying and taunting continued. On February 6, 2017, the Student had another fight with Student A and other students, which caused Petitioner to bring the conflict to the attention of the school staff. When Student A learned of this, Student A took a baseball bat, went to Petitioner's and the Student's house, and tried to break the windows of the house. Because the house had storm windows, Student A was unable to break the windows of the house. Instead, Student A smashed the windshield of Petitioner's car. Student A was arrested and then served a six-day suspension from school. (Testimony of Petitioner)

7. On March 16, 2017, when the Student stepped out of biology class, the Student was attacked by Student A and others ("the Incident"). The group of students struck the Student multiple times in the head, including with a hard object to the back of the head. The Student lost consciousness and was eventually taken to X Medical Center. The students who struck the Student were arrested. As a result of this attack, the Student's head was deformed, the Student's skull was fractured, the Student had an orbital bone fracture, and there were bruises all over the Student's body. The Student was also diagnosed with a concussion. A video of the attack was posted online, and Petitioner viewed this video. (Testimony of Petitioner; P-4-3; P-9)

8. As a result of the Incident, the Student developed amnesia and anxiety about going back to school. The Student was diagnosed with PTSD and also met the criteria for mild Traumatic Brain Injury. (Testimony of Witness A)

9. The principal of School B then authorized an involuntary transfer of the student. However, Petitioner felt this was unjust because he felt that the Student's attackers should be the ones to leave the school. Petitioner then contacted the Deputy

Chief, Mr. A, who agreed with him and sent the Student back to School B with a safety plan. (Testimony of Petitioner)

10. However, the students who attacked the Student were still enrolled at School B. The Student briefly returned to the school in May, but the same students who attacked the Student threatened the Student again. The Student managed to "escape" and then left the school, resolving never to go back to School B. (Testimony of Petitioner)

11. Petitioner then sought home instruction for the Student. Petitioner submitted support documentation from three different doctors, but Respondent rejected the request for home instruction because the Student was not in active counseling. Respondent also denied the request for home instruction because it felt that the report of one of the Student's doctors, Doctor A, supported a denial of the request. In particular, Respondent interpreted Doctor A's report as stating that the Student could attend school if the Student attended another campus. The support documentation from Doctor A that is in the record, however, does not make any such statement. (Testimony of Petitioner; P-11a-4; P-11-5-9; P-13)

12. The Student was tested by Witness A on July 10, 2017. The Student was then diagnosed with PTSD, Attention Deficit Hyperactivity Disorder-Combined Type, a Specific Learning Disability in Mathematics, a Mild Neurocognitive Disorder secondary to Traumatic Brain Injury, Cannabis Use Disorder-Moderate, and Unspecified Depressive Disorder. Testing on the Multidimensional Anxiety Scale for Children-Second Edition showed that the Student was suffering from clinically significant physical symptoms as a result of the Incident. Witness A recommended, among other things, a small, self-contained classroom environment for the Student to address executive functioning

deficits, anxiety, and learning disabilities, with special education services to address math. (P-14; R-2-2)

13. The Student was to return to School B for the 2017-2018 school year, but the Student did not return because of the Student's PTSD and for safety reasons. (Testimony of Petitioner)

14. Petitioner submitted the report of Witness A to School B on September 11, 2017. As a result, Respondent expressed an interest in evaluating the Student. Initially, Respondent requested an evaluation at School B, to which Petitioner and the Student objected. Then, on October 27, 2017, Respondent contacted Petitioner and told him that the Student could be evaluated the next day at Respondent's central offices. However, the Student had already scheduled a flight to Jamaica the next day. Eventually, the Student met Witness D at Respondent's central offices on or about November, 21, 2017. (P-22)

15. Witness D then conducted an "IEE review" and assessed whether Witness A's report provided enough persuasive information to deem the Student eligible for services. Witness D recommended that the Student be determined eligible as a Student with Multiple Disabilities (Emotional Disturbance and Other Health Impairment). Witness D noted that the Student was suffering from clinically significant physical symptoms as a result of the Incident. This report was provided to Petitioner on December 8, 2017. (Testimony of Witness B; R-2-2; P-14-12; R-20)

16. On December 14, 2017, Petitioner provided Respondent with notice that he was placing the Student at School C, a non-public school. (P-27)

17. The Student was determined to be eligible for services on January 9, 2018. The eligibility team agreed with Witness D and found that the Student should be deemed eligible for services as a student with Multiple Disabilities. (Testimony of Witness C; Testimony of Witness B; P-29; R-3)

18. School C is part of a national chain of schools. There are schools nationwide, and these school operate on a "coaching model." There are students in the District of Columbia location, which is open from 7:30 a.m. to 7:30 p.m. The school customizes schedules for its students, who range from grades six through twelve. Every class consists of one teacher and only one student. After class, the student goes to a "Homework Café." Each student at School C has his/her own "FEP," and daily reports are sent to the parents after every class. School C is designed for children for whom the traditional school model does not work. (Testimony of Witness D; P-32-2-6)

19. As of the date of the last hearing, the Student had attended School C for only two-and-a-half weeks. The Student had manifested some attentional issues at School C, but was benefitting from the instruction and felt safe at the school. The Student was taking five classes in total, which meet twice a week for fifty minutes per class. The Student had also received a mentor or advocate. The Student's classes included Art, Geometry, English, Chemistry, and World History. (Testimony of Witness D; Testimony of Petitioner)

20. As of the date of the last hearing, Respondent had not offered the Student any school option other than School B. The Student had not yet received an IEP, though

Petitioner had agreed that Respondent could take more than a month to develop the IEP. (Testimony of Petitioner; Stipulation between parties on the record)

VII. Conclusions of Law

Based upon the above Findings of Fact, the arguments of counsel, and this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following:

> Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

D.C. Code Sect. 38-2571.03(6)(A)(i)

The sole FAPE issue in this case relates to "Child Find" and does not directly challenge the Student's existing or proposed IEP or placement. Accordingly, the burden of persuasion is with Petitioner, the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005). Since this is a case involving a request for tuition reimbursement, the burden is also on Petitioner to establish the right to tuition reimbursement.

1. Did DCPS violate "Child Find" when it failed to identify, locate, and evaluate the Student in or about June, 2017? If so, did DCPS violate 20 U.S.C. Sect. 1412(a) (3) (A), 34 C.F.R. Sect. 300.111(a) and related provisions of the IDEA? If so, did DCPS deny the Student a FAPE?

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conformance with a written IEP. 20 U.S.C. Sects. 1400(d)(1(A), 1401(9)(D), 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320.

The "Child Find" provisions of the IDEA require each State to have policies and procedures in effect to ensure that "(a)l1 children with disabilities residing in the State... who are in need of special education and related services, are identified, located, and evaluated." 20 U.S.C. Sect. 1412(a) (3) (A); 34 C.F.R. Sect. 300.111(a). "Child Find" must include any child "suspected of being a child with a disability under Section 300.8 and in need of special education, even though they are advancing from grade to grade." 34 C.F.R. Sect. 300.111(c)(1).

These provisions impose a duty to identify, locate, and evaluate all such children. Reid v. District of Columbia, 401 F.3d 516, 518-19 (D.C. Cir. 2005); Hawkins v. District of Columbia, 539 F. Supp. 2d 108 (D.D.C. 2008). Consistent with the statutory language, the "Child Find" obligation "extends to all children suspected of having a disability, not merely to those students who are ultimately determined to have a disability." N G. v. District of Columbia, 556 F. Supp. 2d 11 (D.D.C. 2008). In the District of Columbia, the Local Educational Agency ("LEA") must conduct an initial evaluation to determine the child's eligibility for special education services "within 120 days from the date that the student was referred [to DCPS] for an evaluation or assessment." D.C. Code Sect. 38–2561.02(a).[2] Once the eligibility determination has been made, the LEA must conduct a

[2] Though local legislation was passed shortening the time period for evaluation to sixty days, this legislation does not take effect until it is funded. D.C. Official Code Sect, 38-2561.02(2)(a)("(b)eginning July 1, 2017, or upon funding, whichever occurs later, an LEA shall assess or evaluate a student who may

meeting to develop an IEP within 30 days. 34 CFR Sect. 300.323(c)(1); G.G. ex rel. Gersten v. District of Columbia, 924 F.Supp.2d 273, 279 (D.D.C. 2013).

The United States Department of Education's Office of Special Education and Rehabilitative Services ("OSERS") has expressed concern about the bullying of students with disabilities. Dear Colleague Letter, OSERS, 61 IDELR 263 (August 20, 2013). In this letter, OSERS stated that:

> (b)ullying of any student by another student, for any reason, cannot be tolerated in our schools. Bullying is no longer dismissed as an ordinary part of growing up, and every effort should be made to structure environments and provide supports to students and staff so that bullying does not occur. Teachers and adults should respond quickly and consistently to bullying behavior and send a message that bullying is not acceptable. Intervening immediately to stop bullying on the spot can help ensure a safer school environment. Bullying is characterized by aggression used within a relationship where the aggressor(s) has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated, over time.

Additionally, OSERS stated that "(a)ddressing and reporting bullying is critical." OSERS also stated that "in circumstances involving a student who has not previously been identified as a child with a disability under the IDEA, bullying may also trigger a school's child find obligations under the IDEA."

A central issue in this case is when Respondent had to affirmatively locate, identify, and evaluate the Student. The Incident on March 16, 2017, involved a shocking, violent attack, which caused the Student to suffer a skull fracture, an orbital bone fracture, unconsciousness, a concussion, and bruises all over the Student's body. This

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have a disability and who may require special education services within 60 days from the date that the student's parent or guardian provides consent for the evaluation or assessment. The LEA shall make reasonable efforts to obtain parental consent within 30 days from the date the student is referred for an assessment or evaluation").

Incident led the Student to refuse to go to school, and Witness A credibly testified that the cause of this refusal to go to school was PTSD. The Student ended up going back to school after a safety plan was put in place, though no safety plan was in the record. However, the children who attacked the Student were still in school. When these children saw the Student was back, they cornered and threatened the Student, who ended up "escaping" from school and vowing never to go back.

Then, Petitioner presented Respondent with three different medical reports substantiating the need for home instruction. A letter from Doctor B dated May 5, 2017, indicated that the Student had a brain injury, and that the renewed threats from the students who attacked the Student caused the Student physical, cognitive, and emotional symptoms. (P-11) A form filled out by the Student's pediatrician, Doctor C, stated that the Student was experiencing PTSD, severe physical and emotional trauma, and was unable to function in a school setting. Finally, a form filled out by Doctor A stated that the Student was suffering from intense distress, was not available for learning, and needed home and hospital instruction.

The receipt of these three medical correspondences triggered Respondent's "Child Find" duty. After the violent bullying of the Student, and upon receipt of the reports, one of which discussed the Student's PTSD, Respondent should have suspected that the Student had a disability and initiated an evaluation of the Student.

Respondent indicated that it instead sought to transfer the Student to another school, and that Petitioner resisted because he felt that the bullies should be dismissed from the school instead of the Student. However, a school transfer cannot take the place of an evaluation and an IEP. Moreover, Administrator A at Respondent agreed with

Petitioner and reversed the decision on the transfer. Additionally, Witness A testified that at another, similarly large high school, the Student's PTSD would still have affected the Student's education, because the same structure and environment would still have existed.

Respondent suggested that the transmission date of Witness A's report should be the trigger date for Child Find, but this suggestion is not consistent with the OSEP memo or the caselaw. It is the school district that has the "affirmative duty" to initiate the process of identifying, locating, and evaluating students, not the parent. Reid, 401 F.3d at 518-19; see also T.K. v. New York City Dep't of Educ., 779 F.Supp.2d 289 (E.D.N.Y. 2011)(extensive analysis of bullying in schools). It is noted that, if Respondent's evaluation had started in June, 2017, the Student would have received an IEP and a school placement by the date of the Student's enrollment at School C.

As a result, Respondent denied the Student's "Child Find" rights when it failed to identify, locate, or evaluate the Student by June, 2017.

RELIEF

Parents who unilaterally place their child at a private school without the consent of school officials do so at their own financial risk. Florence Cnty. Sch. Dist. 4 v. Carter, 510 U.S. 7, 15 (1993). Parents in such situations may be reimbursed only if "the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate." 34 C.F.R. Sect. 300.148(c) (2012); see also Florence Cnty., 510 U.S. at 15 (parent may only receive tuition reimbursement "if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act"); Holland

v. District of Columbia, 71 F.3d 417, 420 n. 3 (D.C.Cir.1995) (noting that the circuit has ordered reimbursement "where the public agency violated [the IDEA] and the parents made an appropriate placement").

The record established that placement at School C was proper for the Student. As indicated by Witness A, the Student needs an environment where the Student can have less anxiety and feel protected. With such a small student-to-teacher ratio, School C's instruction excluded bullies from the classroom and therefore reduced the Student's anxiety in the classroom. There is nothing in the record to suggest that the Student felt at risk in any of the other environments at the school, including in the "Homework Café." The school also provided the Student with a mentor and a wide variety of instruction, including classes in History, Geometry, Chemistry, Math, and English.

Respondent suggested that School C failed to provide the Student with education in the least restrictive environment. However, School C is not a particularly restrictive environment, because it contains "general education" students as well as special education students. The Student had an opportunity to associate with general education students in the "Homework Café." Moreover, a parental placement need not be in the least restrictive environment for a Student. N.T. v. District of Columbia, 839 F. Supp.2d 29 n.3 (D.D.C. 2012). Maintaining a less restrictive placement at the expense of educational benefit or safety is not appropriate or required. Hartmann by Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996 (4th Cir. 1997); see also Clyde K. v. Puyallup Sch. Dist., 35 F.3d 1396 (9th Cir. 1994); MR v. Lincolnwood Bd. of Educ., 843 F. Supp. 1236 (N.D. Ill 1994).

Respondent also pointed out that School C does not provide the Student with specialized instruction, but that is the same argument that was raised in M.G. v. District of Columbia, 246 F. Supp. 3d 1, 11 (D.D.C. 2017), where the Hearing Officer agreed with DCPS and held that the parents were not entitled to reimbursement. The Hearing Officer held that accommodations such as small class sizes and a quiet environment, though beneficial, were not specially designed to meet the unique needs of a child with a disability. But the federal court reversed, finding that small class size was in fact a valid accommodation to provide for a special education student entitled to a FAPE.[3] See also District of Columbia v. Bryant–James, 675 F.Supp.2d 115, 120 (D.D.C. 2009).

Pursuant to Florence Cnty., an equities analysis is required to order reimbursement. The IDEA states that tuition reimbursement may be reduced or denied where a parent fails to challenge the school district in a timely manner, fails to make the child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parent. 20 U.S.C. Sect. 1412(a)(10)(C)(iii). The Supreme Court has suggested that the statutory factors are a non-exhaustive list. Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 241 (2009)("(t)he clauses of Sect. 1412(a)(10)(C) are…best read as elucidative rather than exhaustive"). In addition, courts have broad discretion to consider the range of all relevant facts in determining whether and to what extent awarding relief is equitable. See Florence County, 510 U.S. at 16.

Respondent argued that Petitioner did not cooperate in the scheduling of evaluations, but the record does not support this contention. In fact, Petitioner urged that the Student be evaluated during September and October, 2017. It is true that the Student

[3] The Hearing Officer in M.G. was the undersigned.

declined to be evaluated when notified on October 23, 2017, that the Student was to be interviewed on October 25, 2017. However, that appointment was scheduled at School B, where the Student had been attacked. On October 26, 2017, at 6:45 p.m, the Student was invited to an evaluation at the central office for early the next morning, on October 27, 2017, at 8:30 a.m. However, this invitation did not give the Student enough lead time, nor did it take into account that the Student was traveling to Jamaica on an early flight on October 27, 2017. Petitioner had told Respondent about this travel. Petitioner and the Student acted reasonably in requesting the evaluation on another date.

In fact, it was the school district that acted unreasonably in this matter. In addition to failing to adequately react to the bullying that threatened the Student, Respondent turned down Petitioner's request for home instruction, despite statements from three physicians that the Student was under medical care for illness or injury that was acute, catastrophic, or chronic. Respondent explained that the Student was not in counseling at the time, but did not clearly explain why counseling had to be a prerequisite to the receipt of home instruction. The Student ended up at home without schooling (except for a few dates in May, 2017) from April, 2017, to June, 2016, and from September, 2017, to the time the Student was placed at School C in January, 2018.

Finally, Respondent argued that tuition reimbursement should not be a remedy for a "Child Find" violation. However, this is the same argument that the United States Supreme Court rejected in 2009. In Forest Grove, 557 U.S. at 245–46, Justice Stevens held that "a reading of the Act that left parents without an adequate remedy when a school district unreasonably failed to identify a child with disabilities would not comport with Congress' acknowledgment of the paramount importance of properly identifying

each child eligible for services." Justice Stevens continued by stating that, "by immunizing a school district's refusal to find a child eligible for special-education services no matter how compelling the child's need," the school district's approach would "produce a rule bordering on the irrational."

Petitioner also provided Respondent with notice of the Student's unilateral placement at School C, and actively participated in all meetings involving the Student.

As a result, Petitioner should be awarded tuition reimbursement for the Student's education at School C through the end of the 2017-2018 school year.

IX. Order

As a result of the foregoing:

1. Respondent shall pay for and/or reimburse Petitioner for tuition and related expenses, including transportation expenses, for the 2017-2018 school year.

Dated: February 10, 2018

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
OSSE Division of Specialized Education
Contact.resolution@dc.gov

X. Notice of Appeal Rights

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

Date: February 10, 2018

Michael Lazan
Impartial Hearing Officer