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Confidential

<p>Parent on Behalf of Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”) [“LEA”]</p> <p>Respondent.</p> <p>Case # 2015-0128</p> <p>Date Issued: June 2, 2015</p>	<p>HEARING OFFICER’S DETERMINATION ON REMAINING ISSUES ²</p> <p>Hearing Date(s): May 5, 2015, & May 8, 2015</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioner: Anne Cunningham, Esq. Children’s Law Center 616 H Street, NW, Third Floor Washington, DC 20005</p> <p>Counsel for Respondent: Maya Washington, Esq. District of Columbia Office of the General Counsel 1200 First Street, NE Washington, DC 20002</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

² The initial decision on the single issue that required an expedited hearing and decision was issued May 22, 2015. The remaining issues to be adjudicated are addressed in this HOD.

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 May 5, 2015, and concluded on May 8, 2015, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2003. The record was closed with the submission of the parties’ written closing arguments on May 11, 2015.

BACKGROUND AND PROCEDURAL HISTORY:

The student attends a DCPS public middle school (“School A”) where she began attending at the start of school year (“SY”) 2013-2014. Prior to attending School A the student attended another DCPS school (“School B”). The student has not been determined eligible for special education and related services as a child with a disability pursuant to IDEA.

Petitioner asserted DCPS pursuant to its obligations under Child Find should have identified, evaluated and determined that the student eligible for special education and related services while she attended School B. This assertion is based upon the student’s poor academic performance during the first and second advisories of SY 2012-2013. Petitioner asserted that DCPS was on notice that the student was a child with a suspected disability on or about December 10, 2012, and within 120 days thereafter should have found the student eligible and provided her an individualized educational program (“IEP”) and special education services.

Petitioner also alleged that on December 11, 2013, DCPS received her written request to conduct initial evaluations and despite this written request, DCPS failed to complete the student’s initial evaluations until October 30, 2014.

By October 30, 2014, DCPS had conducted a functional behavioral assessment (“FBA”), and comprehensive psychological and occupational therapy (“OT”) evaluations. The student’s eligibility meeting was held on November 24, 2014. During this meeting the team determined that the student was ineligible for services pursuant to IDEA. Petitioner asserted DCPS inappropriately found the student ineligible and that the student’s evaluation results prove that she is a child with a specific learning disability (“SLD”) and/or other health impairment (“OHI”) due to attention deficit hyperactivity disorder (“ADHD”) and/or emotional disturbance (“ED”).

Petitioner seeks as relief that the Hearing Officer either find, or order DCPS to find, the student eligible for special education and related services, convene a meeting to develop an appropriate IEP and provide compensatory education for services missed back to April 9, 2013.

DCPS filed a timely response to Petitioner’s due process complaint on April 13, 2015, in which it denied any alleged violation(s). DCPS asserted the student was evaluated for special education and related services on or about April 1, 2011, and was determined to be ineligible. DCPS asserted that it was unaware of any request for evaluation made after the April 1, 2011,

determination of ineligibility including Petitioner's claim of submission of a written request for evaluation in December 2013.

DCPS asserted the team appropriately determined the student ineligible for services at the November 24, 2014, eligibility meeting and appropriately issued a prior written notice on that date.

A resolution meeting was held on April 23, 2015. The parties did not resolve the issues and did not mutually agree to waive the remainder of the resolution period. The 45-day period began on May 3, 2015, and ends [and the Hearing Officer's Determination ("HOD") is due] on June 17, 2015.

The Hearing Officer convened a pre-hearing conference on April 22, 2015, and issued a pre-hearing order ("PHO") on April 22, 2015, outlining, inter alia, the issues to be adjudicated.

ISSUES:³

1. Whether DCPS denied the student a FAPE by failing to identify, locate and determine the student's eligibility for special education and related services pursuant to Child Find within 120 days of April 3, 2013.⁴
2. Whether DCPS denied the student a FAPE by failing to timely evaluate the student following the parent's written request for evaluation made on December 11, 2013.
3. Whether DCPS denied the student a FAPE by failing to find her eligible for special education and related services at the November 24, 2014, eligibility meeting and by failing to promptly develop and implement an appropriate IEP and provide an appropriate educational placement.

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 27 and Respondent's Exhibits 1 through 13) that were admitted into the record and are listed in Appendix A).⁵ Witnesses are listed in Appendix B.

³ The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated.

⁴ Although Petitioner asserted the 120 days should run from December 10, 2013, the Hearing Officer concluded that because of the two-year period of limitation the 120 days runs at earliest from April 3, 2013.

⁵ DCPS counsel filed a written motion to exclude Petitioner's disclosed documents on the ground that they had not been timely received by DCPS. Petitioner filed a written opposition to the motion and presented proof in the form of a fax confirmation that the documents had been timely sent to and received by Respondent. The Hearing Officer heard arguments on the motion and opposition at the outset of the hearing and denied Respondent's motion orally on the record and admitted some of Petitioner's disclosed documents. Any document(s) disclosed and not admitted or

FINDINGS OF FACT:

1. The student attends School A, a DCPS middle school. Prior to attending School A the student attended School B, another DCPS school. The student has not been determined eligible for special education and related services as a child with a disability pursuant to the IDEA. (Respondent's Exhibits 3-1, 4-2, 4-4, 4-9)
2. The student was initially evaluated for special education in first grade by DCPS. At that time the student's cognitive skills were measured and were average. Her academic scores were also average, consistent with her cognitive ability. During this initial evaluation math was cited as a weakness for the student but the weakness was attributed to the student's poor school attendance of 28 days absent and 64 days tardy. DCPS concluded the student did not meet eligibility criteria. The student was diagnosed with ADHD later that year. (Respondent's Exhibit 12-2, 12-3)
3. In March 2011 while the student was attending School B DCPS conducted a reevaluation to measure the student's then current cognitive/intellectual functioning in order to determine whether she presented with the disability classifications of SLD and/or OHI and/or ED. The student again had attendance problems during the school year that this reevaluation was conducted. (Respondent's Exhibit 12-1, 12-2)
4. The evaluator noted that the student had received six discipline referrals from September 13, 2010, through October 27, 2010, for opposition, defiance and being disrespectful toward her classroom teacher. The student's behaviors were attributed to difficulties the student and other students had with that particular classroom teacher and after the classroom teacher was changed there were no additional disciplinary referrals for the student that school year. (Respondent's Exhibit 12-3)
5. The evaluator conducted a classroom observation of the student, reviewed records and previous evaluations and interviewed the student's teachers and the school social worker who had been providing the student counseling. The evaluator administered the following assessments: Reynolds Intellectual Assessment Scales (RIAS), Comprehensive Test of Nonverbal Intelligence (CTONI), Learning Disabilities Diagnostic Inventory (LDDI), Devereux Behavior Rating Scales for the teacher and unsuccessfully attempted to administer the scale to the student's parent. (Respondent's Exhibit 12-1, 12-2, 12-7)
6. The student's cognitive functioning was assessed as average except in the area of working memory, which was below average. The student's non-verbal intelligence was also measured as being average. (Respondent's Exhibit 12-5, 12-6)

admitted for limited purposes was noted on the record and is noted in Appendix A. Petitioner did not object to the admission of any of Respondent's disclosed documents.

7. The student's emotional and behavioral functioning was assessed as being average based on the student's teachers' responses to the behavior rating scales questionnaires. (Respondent's Exhibit 12-8)
8. The student's overall academic skills ranged from the Average to the Low range of others at her age level. Although the evaluator determined the student's academic functioning was below average for her age the evaluator noted the student's excessive absences and poor school attendance presented a lack of appropriate instruction. That factor along with the evaluator's observation and assessments regarding the student's emotional and behavioral functioning led the evaluator to conclude the student did not meet the eligibility criteria for SLD, OHI or ED. Thus, in April 2011 DCPS again found the student ineligible for special education services. The student's parent did not agree with the ineligibility determination. (Respondent's Exhibits 9-1, 10-1, 10-3, 11-1, 12-8, 12-9)
9. During SY 2012-2013 while the student was attending School B she earned the following grades: (Petitioner's Exhibit 1-1)

Subjects	Term 1	Term 2	Term 3	Term 4	Final Grade
Language Arts	F	F	F	C	C
Math	F	C	F	F	F
World Geography	D	F	F	C	C
Science	C	D	C	D	D
Computer Applications	C				C
Advisory MS		B			B
Elective MS			B		B
Choral Music				B	B
Health/PE				B	B

10. The student's problems with attendance and class avoidance started at School B. The student also failed math in her final year at School B. The student's parent did not recall that student was evaluated in 2007, but she does know that the student was evaluated in 2011 at School B and was found ineligible. She did not request that the student be evaluated again until the student was at School A. (Parent's testimony)
11. The student's English Language Arts ("ELA") teacher at School B during SY 2012-2013 expressed concerns about the student's constant tardiness and absences. As a result of her absences she did not see the student a lot in her classroom. And when the student was present she did catch up work because of her absences. The student usually came into class quietly and had no behavior problems. However, she would have to occasionally be reminded to stay on task. She had no problems staying in class when she was present for school. The student got along with most of her peers and displayed appropriate behavior with adults. (Witness 5's testimony)
12. The student's School B ELA teacher and other staff including the guidance counselor contacted the student's parent regarding the student's tardiness and absences. However,

during the school's standardized testing the student was usually at school on time. When the student was in school she was able to catch on to the work. However, it was difficult for her teacher to assess the student's abilities because she was absent so much. The ELA teacher did not have a concern that the student was in need of special education services but had significant concern that the student's attendance was affecting her academic progress. (Witness 5's testimony)

13. When the student's parent enrolled the student at School A she took the student's report card and a list of the student's medications and talked to the special education coordinator about the difficulties the student had the previous school year. The coordinator copied the information and said he would monitor the student. (Parent's testimony)
14. The School A special education coordinator remembers first meeting with the student's parent as a part of a student support team ("SST") meeting during fall of 2013 to address the parent's concerns about the student. The SST process was explained to the student's parent and she indicated she wanted to give it a try. The School A special education coordinator and did not have any other contact with the parent after that until SY 2014-2015. (Witness 7's testimony)
15. During SY 2013-2014 the student's first year at School A the student earned Cs and Ds in her courses. Teacher comments indicate the student showed excellent initiative in English and good class participation in her communication, health and physical education, English and math classes. However, several teachers commented that she had excessive absences. Per the report card the student was absent 33 days and tardy 50 times during SY 2013-2014. (Petitioners' Exhibit 3-4, 3-5, 15-4)
16. On December 11, 2013, the student's parent drafted a letter that she faxed to School A from Children's National Medical Center ("CNMC") requesting that the student be evaluated for special education services due to the student's difficulties in school as well as the frequency in which she was being placed in school detention. DCPS did not respond to the letter. The student's parent later sought the assistance of legal counsel who contacted School A on her behalf.⁶ (Parent's testimony, (Petitioner's Exhibit 12-1, 12-2))
17. During her first year attending School A, SY 2013-2014, had 10 behavioral incidents that included skipping detention, a uniform infraction, causing disruption and one incident each of fighting and being out of location. The student received at least two out of school suspensions. On January 13, 2014, the student was given a two-day off-site suspension for causing disruption on school property. On March 28, 2014, the student was given a

⁶ Despite a fax confirmation that Petitioner presented to support her contention that the letter had been faxed to School A, there was no evidence that the Petitioner followed up on the letter to ensure it was received prior to the subsequent letter requesting evaluation from Petitioner's counsel in July 2014. Petitioner testified that she also hand delivered a copy of this letter to School A. This testimony which was stricken from the record with Petitioner's agreement.

three-day suspension for causing disruption on school property. (Petitioner's Exhibit 11-1, 11-2, 15-4)

18. On July 21, 2014 Petitioner's counsel wrote School A to request expedited evaluations and noted that the timeline for responding to the student's parent's December 11, 2013, letter had long since passed. (Petitioner's Exhibit 13)
19. Generally, all fax correspondence to School A is processed by the school secretary who knows to and does immediately pass any request for evaluation onto the School A special education coordinator. The coordinator will then immediately contact the requesting parent to discuss the evaluation process and gain written consent to conduct evaluations. (Witness 7's testimony, Petitioner's Exhibit 13)
20. The School A special education coordinator never received the letter that the student's parent faxed to School A requesting that the student be evaluated nor was he aware of the letter until the summer of 2014 when a DCPS compliance officer sent him Petitioner's counsel's July 21, 2014, letter.⁷ The special education coordinator later spoke to the School A principal who indicated that he never received a letter from the parent requesting evaluation of the student via fax. (Witness 7's testimony, Petitioner's Exhibit 13)
21. On August 22, 2014, an occupational therapy ("OT") evaluation was conducted of the student that was requested by DCPS.⁸ The purpose of the evaluation was to gain information regarding the student's fine and visual motor skills, visual perception, and self-regulation skills as they relate to her academic performance and to determine if the student needs OT services. The student demonstrated strengths in fine motor skills but demonstrated weaknesses in visual motor skills and motor coordination with a slow writing speed and difficulty maintaining appropriate letter size, appropriate casing and alignment on a the writing line. (Petitioner's Exhibits 17-1, 17-11, 18)
22. The student demonstrated significant difficulty with her visual perceptual skills and the evaluator concluded that these difficulties might negatively affect the student's ability to efficiently access the academic curriculum and process visual information. The evaluator recommended the student be provided one 45-minute session of school based OT services once per week to address the areas of concern. A DCPS occupational therapist reviewed the OT evaluation. (Petitioner's Exhibits 17-1, 17-11, 18)
23. On September 29, 2014, a comprehensive psychological evaluation was conducted by a psychologist contracted by DCPS to assess the student's current intellectual, academic and social emotional functioning.⁹ The evaluator conducted a classroom observation,

⁷ The Hearing Officer credits Witness 7's testimony that he never received the letter and although the letter was faxed to School A's fax number any presumption of receipt was effectively countered by Witness 7's testimony.

⁸ The OT evaluation report is dated September 3, 2014.

⁹ The evaluation report is dated September 29, 2014

reviewed records and previous evaluations and interviewed the student's parent and School A's assistant principal and dean of students. The evaluator also administered a battery of assessments.¹⁰ (Petitioner's Exhibit 15-1)

24. The evaluator attempted to interview the student's classroom teachers but none were available at the time the evaluator visited School A. The two school administrators who were interviewed reported the student had minor behavioral difficulties and was occasionally oppositional to staff and occasionally engaged in verbal confrontations with peers. However, the student's primary difficulties according to these administrators were her frequent absences from school and her difficulty getting to school on time. (Respondent's Exhibit 15-3)
25. The evaluator conducted a classroom observation on September 15, 2014, in which the evaluator observed that the student appeared to be on task and did not exhibit any problematic behaviors despite disruptions in the classroom caused by other students. (Petitioner's Exhibit 15-4)
26. The student's cognitive testing indicated the student was low average in verbal comprehension, perceptual reasoning and processing speed. The student had an extremely low working memory that lowered her overall full scale IQ to the borderline range with a composite score of 73. However, the evaluator noted that because of the significant difference in the highest index scores and her lowest score in working memory, the borderline range was not a precise description of the student's cognitive abilities. Overall, the evaluator concluded the student's abilities to sustain attention, concentrate and exert mental control are a weakness relative to her other cognitive abilities. (Petitioner's Exhibit 15-5, 15-6, 15-11)
27. As to the student's academic functioning, the student's overall mathematics ability is comparable to that of the average individual at age 9-11. The evaluator concluded the following: math tasks above the age of 11-6 level will be quite difficult for the student; tasks that measure effective expression in written language above the age 12-2 level will be quite difficult for the student; and reading tasks above the age 11-4 level will be quite difficult for her as well. The student's overall academic testing measured her as generally operating at fourth to fifth grade level despite her low average cognitive abilities. (Petitioner's Exhibit 15-8, 15-9, 15-11, 15-16)
28. The evaluator noted that student sees a D.C. Department of Behavioral Health therapist at school each week and receives monthly outpatient medication management services from First Home Care. (Respondent's Exhibit 15-2)

¹⁰ The evaluator administered the following assessments: Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV), Woodcock-Johnson III (WJ-III), Behavioral Observations, Bender-II, Clinical Interview and Mental Status Examination, Behavior Assessment System for Children, Second Edition, Self Report of Personality Adolescent Form (BASC-2 SRP-A), Children's Depression Inventory, Second Edition (CD-II), Revised Children's Manifest Anxiety Scale, Second Edition (RCMAS-2), Vanderbilt ADHD Diagnostic Parent Rating Scale, Sentence Completion Test, Three Wishes.

29. The evaluator determined based on the assessments of the student's social and emotional functioning that the student was experiencing some degree of depression and anxiety and would benefit from continued counseling services. However, due to the varied reports of the student's at home and at school behaviors, and because the student's at school behaviors were limited to minor rule-breaking such as being out of location, being tardy or not fully complying with the school's uniform policy, the evaluator did not conclude that the student met the criteria for the ED classification. (Petitioner's Exhibit 15-12)
30. The evaluator also did not conclude that the student's diagnosed ADHD adversely impacted her educational performance to substantiate an OHI classification. However, the evaluator recommended that if there were additional facts to support the ED or OHI classifications that were available to the multi-disciplinary team ("MDT") that these classifications might be appropriate. (Petitioner's Exhibit 15-12)
31. The evaluator concluded the student had a learning disorder in the areas of reading, math and written expression. The evaluator concluded the results of the evaluation supported the student's eligibility for special education services and recommended that the student be provided an educational setting with a high level of structure and close adult supervision. The evaluator noted the student's excessive school tardiness has caused the student to miss instructional time putting her at risk of falling further behind academically. (Petitioner's Exhibit 15-2, 15-3, 15-11, 15-12)
32. On October 29, 2014, the School A social worker conducted a functional behavior assessment ("FBA") of the student to assess for behaviors of school attendance, irritability and motivation to complete assignments in class. The FBA included a review of the student's behavior incidents, grades, attendance record, the recent psychological evaluation, an interview with the student, classroom observations and teacher interviews and questionnaires. The social worker developed recommendations to be considered by a MDT to assist in addressing the student's behaviors. (Respondent's Exhibit 6-1, 6-2, 6-3, 6-4, 6-5)
33. On October 30, 2014, DCPS conducted a review of the September 29, 2014, psychological evaluation report. As a part of her evaluation review the DCPS psychologist also conducted classroom observations of the student and interviews with the student's English and math teachers. Both teachers noted that the student did not display inattentive behaviors in the classroom. (Witness 6's testimony, Respondent's Exhibit 5-1, 5-3, 5-7)
34. The DCPS psychologist after a review of the psychological test findings, standardized school test assessments, record review, teacher interview and observations concluded the student did not meet the criteria as a student with a SLD because there was no response to intervention noted and because of the student's attendance concerns. The DCPS psychologist noted her conclusion in written report dated October 30, 2014. (Witness 6's testimony, Respondent's Exhibit 5-1, 5-3, 5-7)

35. The psychologist observed the student in her social studies and ELA classes for approximately 30 minutes each. The DCPS psychologist's noted that during the classroom observations the student sat with her peers, was quiet and compliant with the teachers' instructions and did not have any behavioral concerns. (Witness 6's testimony, Respondent's Exhibit 5-4, 5-5)
36. The DCPS psychologist noted the student is currently on medications that support her ability to be calm and focus within her classroom setting. Consequently, the DCPS psychologist concluded the student did not meet the criteria of OHI due to ADHD. (Respondent's Exhibit 5-7)
37. Based upon her observations of the student, teacher interviews, the fact that student did not display major behavioral difficulties and that she was apparently benefiting from the mental health services being provided, the DCPS psychologist also concluded that the student would not meet the criteria for ED. (Respondent's Exhibit 5-7, 5-8)
38. Subsequent to the evaluation review the DCPS psychologist talked with the student's math teacher who said the student is capable of doing the work but noted her attendance problems. The DCPS psychologist also spoke to the student's arts & technology classroom teacher who said the student is capable, creative and is doing well in the class but does not attend on a regular basis. (Witness 6's testimony, Respondent's Exhibit 5-2)
39. On November 17, 2014, School A convened a SST meeting to address the student's school and class attendance. It was noted during the meeting that the student engaged in work avoidance. School A staff reported that the student would arrive at school in time for class but instead of going to class she would go to tardy hall. When the student did come to class and got frustrated she would leave class and often end up in the in-school suspension classroom. The attendance plan for the student included, inter alia, an attendance contract and the student checking in with a School A staff member daily. (Witness 2's testimony, Petitioner's Exhibit 5)
40. Despite the attendance plan the student continued her practice of skipping class and walking the halls. The student's academic difficulties with class increases with the instruction she missing due to her absenteeism and frequent refusal to attend classes despite the School A staff's desire and efforts to see the student be successful. (Witness 4's testimony)
41. The School A assistant principal has frequently had to walk with the in the hallway to direct her to class and convince her that going to class is the right thing to do. The student often states that she doesn't like her class, her teacher, or that the class work is too difficult. However, which class the student feels this way about changes frequently. On occasion the student is combative and disrespectful to teachers and staff. (Witness 4's testimony)

42. The parent has received telephone calls from School A staff about the student's attendance and difficulties staying in class. The student has told the parent that she gets frustrated the class work and by other students and as result she walks out of class. The student has expressed to her parent that she feels she does not get the help she needs, she doesn't really have friends at School A and is depressed. (Parent's testimony)
43. During SY 2014-2015 the student was in school a total of 111.00 of 147.00 membership days from the start of the school year on August 26, 2014, through April 24, 2015. Thus, the student missed the equivalent of 36 school days during that period. (Respondent's Exhibit 7-1)
44. The student's incident history log maintained by DCPS reflects disciplinary infractions that the student has been given during SY 2014-2015. The log indicates the student had a total of 33 separate disciplinary infractions spanning from October 2, 2014, through March 25, 2015. Of the 33 infractions 19 were for unexcused tardiness to school for which the student was given in-school detention. 11 of these 33 infractions were for the student being absent from class without authorization and she was given in-school disciplinary action for these infractions. The remaining 3 infractions were for behaviors that disrupted or interfered with the classroom teaching and learning for which the student was temporarily removed from class or given in-school disciplinary action. (Respondent's Exhibit 8-2, 8-3)
45. Prior to March 26, 2015, the student was given no out of school suspensions for any conduct infractions for which she was cited. (Respondent's Exhibit 8-2, 8-3)
46. School A has provided the student behavior interventions including wrap-around services, the attendance contract and she is on the school social worker's caseload. School A has attempted to maximize the number of daily adult interactions the student has for check-in to help address her behaviors and ensure she remains in class. The student is able to go to her teachers to get extra help and is encouraged to come to after school assistance but she has not used this opportunity often if at all. (Witness 4's testimony)
47. On November 24, 2014, DCPS convened an eligibility meeting at which the MDT reviewed and considered the student's evaluations. The team included the student's teacher, the DCPS psychologist, a DCPS occupational therapist, the School A social worker and special education coordinator, a DCPS special educator, and the student's parent and her representative(s). (Respondent's Exhibit 2-1)
48. During the November 24, 2014, eligibility meeting the DCPS psychologist's role was to review the findings from the student's recent psychological evaluation and recorded the meeting notes. The MDT meeting notes reflect that the DCPS psychologist presented information from the evaluation on the student's cognitive and academic achievement scores. She also discussed the eligibility standards for SLD, OHI for ADHD, and ED classifications. (Witness 6's testimony, Respondent's Exhibit 2-5)

49. The DCPS occupational therapist reviewed the OT evaluation and mentioned that she performed an informal observation of the student's writing samples and concluded there were no deficits. The therapist spoke with the student's teacher who said the student performed appropriately. As a result, the therapist concluded the student did not need OT services. (Witness 2's testimony, Respondent's Exhibit 2-3)
50. The student's teacher shared that the student is capable and completes task but prefers to work alone. However, the student is defiant and has attendance issues. The student is not in class, but her teacher is not sure why. For the previous five days the student has asked to see the nurse each day and perhaps twice during a class period. (Witness 2's testimony)
51. As a result of the DCPS psychologist's review of the data she concluded and announced to the team that the student was not eligible under any of the disability categories considered. (Witness 2's testimony, Respondent's Exhibits 1, 3, 4)
52. As to the OHI classification the psychologist stated that the student was on medication and passing her classes. Due to these facts the student did not qualify for special education and related services under the OHI classification for ADHD. (Witness 2's testimony)
53. The DCPS psychologist noted that the student's DC CAS scores placed her in the Basic performance category and her attendance played a significant role in her poor academic performance. Therefore, the psychologist concluded the student was ineligible. The other DCPS members of the team were in agreement with the decision. (Witness 2's testimony)
54. The DCPS psychologist gave greater weight to her own observations of the student and the comments she received from the student's teachers than she gave to the statements from the School A assistant principal and the dean of students that were included in the September 29, 2014, psychological evaluation report. (Witness 6's testimony)
55. According to the special education coordinator the decision as to eligibility typically comes from information shared by the psychologist. At the November 24, 2014, meeting the decision as to the student's eligibility came from the psychologist on the team based upon her review of the evaluation data and the input from the student's teachers and the other data on the student including the student's school attendance concerns. The special education coordinator agreed with the decision that the student was not eligible for any of the disability classifications that were considered: SLD, OHI, and ED and he based his agreement upon the data and teachers statements shared at the meeting. (Witness 7's testimony)
56. The student's parent expressed her disagreement with the decision that the student was ineligible. She also asked questions and requested additional evaluations. (Parent's testimony, Witness 2's testimony)

57. In response to concerns raised by Petitioner's counsel during the meeting, the psychologist responded that the student is passing her classes and should perhaps go to Saturday class for more one-to-one attention and smaller classes. After the student was determined ineligible there was a discussion about engaging the SST process to assist with the student's attendance. (Witness 2's testimony)
58. The DCPS psychologist filled out the disability worksheets that reflect the team's considerations and eligibility determination as to each of the three disability classifications considered for the student and indicated the decision was based on the student's September 29, 2014, psychological evaluation. The SLD eligibility worksheet was not filled out correctly as required by DCPS. The three criteria on the worksheet were not filled out and the one that was filled out implied that student met the criteria for SLD eligibility.¹¹ (Witness 6's testimony, Respondent's Exhibit 4-6)
59. The DCPS psychologist was designated as an expert witness testified as to the eligibility standards that were considered at the November 24, 2014, meeting. The psychologist noted that as to SLD best practices of school psychology dictate that a team consider any interventions that have been tried and implemented with a student and whether the student has taken advantage of the interventions and their effect, if any, on the student's academic and behavior performance.¹² (Witness 6's testimony)
60. A team should also consider whether any environmental factors are impacting a student. Poor attendance is a major factor to consider. If the student has a history of poor attendance SLD classification may perhaps be ruled out if the student has not been available for instruction. (Witness 6's testimony)
61. The DCPS psychologist opined that the student's lower scores in her most recent evaluation as compared to her previous evaluations could be attributable to the student's attendance problems because she may not have been exposed to some of the information that is on the later assessments. (Witness 6's testimony, Respondent's Exhibit 12)
62. For a student to meet the OHI classification for ADHD the student must demonstrate in both the home and the school setting consistent inattentiveness and difficulties with focusing and/or hyperactivity. The student's inattentive behaviors were only noted in the home setting and were not substantiated through the DCPS psychologist's observations of the student. In addition, the fact the student is on ADHD medication that seems to be working was another factor as to why the DCPS psychologist concluded the student did not qualify under OHI for ADHD. (Witness 6's testimony)

¹¹ In determining whether the student had SLD Option A was used of the two options available. Of the three criteria for Option A only criterion 3 was checked although all three criteria were to be filled out according to DCPS guidelines stated on the form. (Witness 6's testimony, Respondent's 4-5, 4-6, 4-7)

¹² The DCPS psychologist testified that in considering whether the student qualified for the SLD disability, Option B, the intervention model, should have been used; however, the disability worksheets indicate Option A, the discrepancy model, was used and used incorrectly.

63. For a student to meet the criteria for ED classification the student must exhibit difficulty getting along with peers, and/or teachers and other adults. There must be some symptomatic concerns that the student may be exhibiting such as depression. The student was not found eligible for the ED classification because the student was compliant based upon conversations the DCPS psychologist had with the student's teachers who said the student can be redirected. The teachers did mention that the student sometimes seemed unhappy which the DCPS psychologist concluded would warrant continued counseling but not indicate the student is ED. (Witness 6's testimony, Respondent's Exhibit 5-7)
64. On April 10, 2015, Petitioner's educational consultant conducted an independent FBA that has not yet been reviewed by DCPS. The consultant reviewed the student's evaluations and conducted an observation of the student on April 7, 2015, to determine the student's in-class behaviors that were interfering with her academics. These behaviors included singing, shouting, using profanity, skipping class and leaving class. The consultant concluded that the reason for the student's inappropriate classroom behaviors is to gain attention from her teacher, get additional help and/or to be removed from class to escape the work. (Witness 1's testimony, Petitioner's Exhibit 20-1, 20-3, 20-8)
65. The consultant recommended based upon her review of the student's records and observations of the student that the student be provided a small class size so that she is able to receive individualized academic instruction at her independent work level. She recommended that the student's class be highly predictable with no students with significant behavioral issues. She also recommended that the student be provided individualized instruction to allow her to catch up to her grade level and that she be provided counseling, behavior support and OT. (Witness 1's testimony, Petitioner's Exhibit 20-1, 20-3, 20-8)
66. Petitioner's consultant was designated as an expert witness and testified during the hearing. Petitioner's expert witness opined that DCPS should have been put on notice the student was a child with a disability when she failed classes and exhibited behavior difficulties during SY 2012-2013 and SY 2013-2014. Petitioner's expert witness also opined that the student's behaviors as noted in the student's disciplinary log and those noted after the November 24, 2014, eligibility meeting of work avoidance should have put DCPS on notice that she is student with a disability. (Witness 1's testimony, Petitioner's Exhibit 10-1)
67. In this expert witness' opinion, based upon her review of the student's most recent psychological evaluation and other school records, the student should have been found eligible for special education at the November 24, 2014, eligibility meeting as a student with multiple disabilities including SLD and ED and OHI, with her primary disability classification being SLD. The expert witness opined that the student needs an IEP with specialized instruction in reading, math and written expression and a behavior intervention plan ("BIP") and behavioral support services. (Witness 1's testimony, Petitioner's Exhibit 20-8, 20-9, 20-10)

68. Petitioner's expert witness opined that the student should be provided the following services as compensatory education independent tutoring of three 1 hour sessions per week for 9 months to a year to teach her skills she missing from her current instructional level as well as counseling services for 9 months to 1 year once per week outside of school for 45 min to an hour from a licensed social worker or psychologist to learn to integrate her disability. (Witness 1's testimony)

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").

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)

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 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief.¹³ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

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. See DCMR 5-3030.34. 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) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

¹³ The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.

ISSUE 1: Whether DCPS denied the student a FAPE by failing to identify, locate and determine the student's eligibility for special education and related services pursuant to Child Find, within 120 days of April 3, 2013.

Conclusion: DCPS had identified the student while she was attending School B and found her ineligible. Until the parental request was received it was reasonable for DCPS to not yet reevaluate the student and reassess her eligibility for special education. Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue.

The "Child Find" requirements of IDEA at 20 U.S.C. 1412 (a); 34 C.F.R. Section 300.111 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 cases 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 or her educational needs, including the content of his or her IEP. 20 USC 1414(a)(1)(C); 20 USC 1414(b)(2)(A).

DCPS must conduct initial evaluations to determine a 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 § 38-2561.02(a).

Because an evaluation and eligibility determination is a prerequisite to preparing an IEP, ordinarily DCPS' failure to evaluate the student and determine his eligibility strictly within the deadline would be considered a denial of a FAPE. See G.G. ex rel. *Gersten v. District of Columbia*, 924 F.Supp.2d 273, 280 (D.D.C. Feb. 20, 2013) and cases cited therein; *Latynski-Rossiter v. District of Columbia*, 928 F.Supp.2d 57, 60 (D.D.C.2013) (An IDEA violation occurs at the moment that the District fails to provide an appropriate placement for the child.)

A parent may initiate a request for an initial eligibility for special education benefits and services. 34 C.F.R. §300.301 (b). In the District of Columbia, such a request, termed a "referral," is to be made in writing. DCMR Title 5E, §3004(a).

Petitioner asserted that the student should have been identified under Child Find and that the student should have been identified by mid-term of SY 2012-2013 and evaluated and determined eligible by April 2013. Petitioner asserts that from April 2013 up until DCPS took action to evaluate the student at the start of SY 2014-2105 it should have been on notice that the student was a child with a disability and should have been evaluated. The Hearing Officer is not convinced by this argument. As stated in the conclusion above, DCPS had identified the student during SY 2010-2011 and found the student ineligible.

Although the student appeared to be struggling academically she had previously been evaluated and determined not to have a disability. Her evaluation scores were near average and the plausible explanation for any deficits was her persistent absenteeism as noted in the evaluation that DCPS had on record for the student.¹⁴ It was also noted that despite the student's chronic absenteeism she was able to pass all her classes during SY 2012-2013 except math.¹⁵

The student's School B ELA teacher testified that the only concern she had at the time was the student's excessive absences and tardiness.¹⁶ She also testified that the student was capable of doing the classwork when she attended school and did not have any behavioral issues except occasionally requiring redirection. The ELA teacher testified that the student's parent was contacted numerous times throughout the school year to discuss the student's attendance.

Despite her attendance concerns, the student earned B's and C's in all courses with the exception of science and math.¹⁷ The student's poor grades in these two classes were not sufficient to put DCPS on notice that she required reevaluation to determine her eligibility under the IDEA, especially considering her attendance.

There was no glaring information prior to and absent of the subsequent request for evaluation from the student's parent that would have put DCPS on notice that the student should be evaluated again and her eligibility reassessed. Although the student was struggling academically even at School A, until DCPS received the new request for evaluation it was reasonable for DCPS to presume the student's lack of academic performance was solely due to her excessive absenteeism.

Although a prior finding of ineligibility does not forever preclude a student from being identified pursuant to Child Find or forever relieve DCPS of its Child Find obligations, absent a specific

¹⁴ FOF #s 3, 8

¹⁵ FOF #9

¹⁶ FOF #s 11, 12

¹⁷ FOF #9

request for reevaluation, the prior finding of ineligibility had significance, particularly when the student was evaluated and determined ineligible less than two years prior to when Petitioner claims the student should have been identified.¹⁸

Although there was testimony and documentary evidence that the student had significant behavioral and academic difficulties during SY 2013-2014 at School A, the Hearing Officer concludes that the student had already been identified to DCPS based on the previous evaluation and ineligibility determination. The testimony and evidence demonstrates there was insufficient evidence that the student might have been eligible as a student with a disability between April 3, 2013, and the time DCPS received the parental request for evaluation.

Thus, the Hearing Officer concludes Petitioner did not meet the burden by preponderance of the evidence that DCPS failed to identify, locate, evaluate, and determine the student's eligibility for special education services pursuant to Child Find.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to timely evaluate the student following the parent's written request for evaluation made on December 11, 2013.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence that DCPS received Petitioner's December 11, 2013, letter and that the student was denied a FAPE because it did not evaluate and determine the student's eligibility within 120 days of when the letter was allegedly faxed by the student's parent. Once Petitioner's counsel sent the letter requesting evaluations DCPS evaluated the student and held an eligibility meeting. Consequently, the Hearing Officer concludes that Petitioner has not met the burden of proving that the DCPS failed to timely evaluate and determine the student's eligibility or ineligibility for special education services and denied the student a FAPE.

DCPS is required to complete evaluations of children in 120 days of a referral pursuant to IDEA and DC law. 34 CFR § 300.301(c)(ii); D.C. Code § 38-26561.02. Evaluation under the IDEA includes assessment procedures as well as the eligibility determination. *See* 34 CFR §§ 300.15 (definition of evaluation) and § 300.306 (procedures for eligibility meeting and decision).

Petitioner presented a fax confirmation from December 11, 2013, as evidence that the parent's request that the student be evaluated was sent to School A. The student's parent testified that she faxed the letter to School A from CNMC. However, there is no evidence that Petitioner followed up with DCPS to confirm its receipt of the letter requesting evaluation prior to her counsel's letter seven months later in July 2014.

¹⁸ "Nothing in the federal or local regulations limits the District's obligation to conduct an "initial evaluation" to a single occurrence that forever fulfills its "child find" obligations as to that child, and, indeed, such an interpretation would be at odds with the child find provision of the Act, as well as the District's implementing regulations. The provisions of the Act requiring reevaluations of children with disabilities at least every three years -- with other events triggering reevaluation sooner -- clearly recognize that a child's disability status is subject to change. ... Where the absence of an initial evaluation by a child study team is caused by the failure of the parents to initiate that process, there is no basis for holding the absence of such evaluations against the DCPS." *J. Kenneth Kruvant, et al., Plaintiffs, v. District of Columbia*, 44 IDELR 242

DCPS presented testimony from School A's special education coordinator that the school never received Petitioner's faxed letter. The School A special education coordinator testified credibly that he was never provided the letter by any school staff and there was never any follow up by the parent to ensure the letter was received.¹⁹ The School A special education coordinator testified that requests for evaluations faxed to the school typically are provided directly to him. He also testified that he spoke to the School A principal who indicated that he never received a letter from the parent requesting evaluation of the student via fax.²⁰

Although generally a fax confirmation indicates that a fax sent was received, fax confirmations are not conclusive proof of receipt.²¹ Absent evidence there was any follow up by the student's parent, a fax confirmation to the school without any additional evidence of receipt is insufficient to show that School A was on notice of the parent's evaluation request.

Respondent presented sufficient evidence in the form of testimony to make it questionable whether the fax was ever received. The Hearing Officer finds it unreasonable that Petitioner took no other action to ensure that the faxed letter was received and simply relied upon the fax machine confirmation she obtained from CNMC. There was nothing in the record as to her inquiry to the school and the school staff thereafter to ensure they received the letter and that they were aware of her request.

The Hearing Officer concludes based on the evidence that Petitioner has not met the burden of proving that DCPS received a request to evaluate the student in December 2013 or failed to timely evaluate and determine the student's eligibility or ineligibility for special education services and thus did not deny the student a FAPE in this regard.

ISSUE 3: Whether DCPS denied the student a FAPE by failing to find her eligible for special education and related services at the November 24, 2014, eligibility meeting and by failing to promptly develop and implement an appropriate IEP and provide an appropriate educational placement.

Conclusion:

The weight of the evidence supports a conclusion that the student is a student with a disability primarily due to a learning disability and she should therefore have been determined eligible for

¹⁹ The Hearing Officer judged the witness credible based on the emphaticness and unhesitancy of his testimony.

²⁰ FOF #s 19, 20

²¹ “[P]roof of message exit from a transmitting machine cannot serve as a proxy for proof of actual receipt of the sent message by a remote receiving terminal.” *Riley & Ephriam Constr. Co. v. United States*, 408 F.3d 1369, 1372-73 (Fed.Cir.2005). [C]onfirmation from the sender's fax machine was not evidence that the fax was received. See *Wandrey v. Etchison*, 363 Ark. 36, 210 S.W.3d 892, 894, 896 (2005). This decision, however, does not explore the significance of a fax confirmation; instead, it rests entirely on the court's position that counsel submitting court filings by fax have a duty to follow up with the court clerk to ensure that a fax was received. *Id.* at 894-95.

special education services and DCPS' failure to do so was denial of a FAPE. DCPS is directed in the order below to develop an IEP for the student and determine an educational placement.

To be eligible for special education services a child must be evaluated as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious 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 (emphasis supplied.) See *Parker v. Friendship Edison Public Charter School*, 577 F.Supp.2d 68, 74 (D.D.C.2008).²²

Under the DCMR, an 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.”²³

IDEA regulations further provide that a MDT may also determine that a child has a SLD if three other requirements are met. First, if 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).²⁴

Second, if the child “exhibits a pattern of strengths and weaknesses in performance, achievement, or both” relative to age, grade level or intellectual development in one or more areas that the team determines to be relevant.²⁵ Third, if the MDT determines its findings are not the result of factors such as a visual or hearing disability, cultural or environmental factors.²⁶

²² 34 C.F.R. §300.8 provides:

Child with a disability.

(a) General.

(1) Child with a disability means a child evaluated in accordance with Sec. Sec. 300.304 through 300.311 as having ... [listed disabilities] and who, by reason thereof, needs special education and related services.

(2) (i) Subject to paragraph (a)(2)(ii) of this section, if it is determined, through an appropriate evaluation under Sec. Sec. 300.304 through 300.311, that a child has one of the disabilities identified in paragraph (a)(1) of this section, but only needs a related service and not special education, the child is not a child with a disability under this part.

(ii) If, consistent with Sec. 300.39(a)(2), the related service required by the child is considered special education rather than a related service under State standards, the child would be determined to be a child with a disability under paragraph (a)(1) of this section.

²³ 5 DCMR §E-3006.4(a)

²⁴ 34 CFR §300.309(a)(1)

²⁵ This second prong can alternatively be satisfied if 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.” 34 CFR §300.309(a) (2)

The student's September 29, 2014, psychological evaluation diagnosed the student with specific learning disabilities in math, reading, and writing, recommended the student's eligibility for special education.²⁷ The student's low academic achievement that is nearly four years behind grade level in reading, writing, and math, despite the student's low average cognitive abilities, apparently led the evaluator who conducted the psychological evaluation to conclude the student has a disability and requires special education.²⁸

IDEA requires that a team that includes the parent make eligibility decisions.²⁹ The evidence demonstrates that the DCPS psychologist was the principal decision maker regarding the student's eligibility. The School A special education coordinator testified to that effect. The DCPS' psychologist's review of the psychological evaluation she finalized weeks prior to the eligibility meeting indicated the student would not qualify for special education for any of the disability classifications contemplated.³⁰

Principally, the DCPS team members, lead by the DCPS psychologist, concluded the student did not qualify as an SLD student primarily because of her attendance. IDEA regulations indicate that SLD does not include learning problems that are primarily a result of environmental, cultural or economic disadvantage. 34 C.F.R. §300.8(a)(10)(ii). DCPS asserted the student's academic deficits are the result of the student's chronic absenteeism, which DCPS implied is an environmental factor.

Although the DCPS psychologist who reviewed the evaluation testified that the student's academic deficits are likely attributable to her lack of basic foundational skills as opposed to a SLD the Hearing Officer did not find this part of her testimony convincing as she apparently ignored the criteria that were to be considered for the SLD classification and failed to properly fill out the disability worksheet as DCPS own procedures require.³¹

Rather than consider and document all the eligibility criteria for SLD, evidenced by the incomplete eligibility worksheets and the DCPS psychologist's testimony that the worksheets were not correctly completed, the psychologist gave the greatest weight to the student's attendance record and concluded based on that record that the student was not eligible.

Although she testified that the student would not qualify for the SLD disability because of missed instruction due to excessive absenteeism over multiple school years, the disability work

²⁶ 34 CFR §300.309(c)(3)

²⁷ FOF # 31

²⁸ FOF #s 27, 31

²⁹ See, 34 CFR §300.306(a)(1)

³⁰ FOF #s 34, 36, 37

³¹ FOF #58

sheet belies this conclusion and actually states that the student's academic performance was not the result of missed instruction implying the student is eligible under the SLD classification.

In addition, her testimony was contradictory as to which of the criteria for SLD should have been used. Although the DCPS psychologist testified that Option B, the intervention model, should be used, the disability worksheets indicate Option A, the discrepancy model, was used and it was used incorrectly.³²

The DCPS psychologist's decision about the student's eligibility contradicts the psychological evaluation. Yet the evaluation was considered by the DCPS psychologist to be valid as she relied on that evaluation in making the ineligibility determination evidenced by her notation on the disability worksheets.³³

Despite the DCPS psychologist being identified as a expert witness the Hearing Officer did not find convincing her testimony that because of the student's attendance the student did not qualify for the SLD disability. The evaluating psychologist diagnosed the student with learning disabilities and concluded she is in need of special education. Because of this evaluator's recommendation and the fact that DCPS team's actions and decision to find the student ineligible was not sufficiently supported by an analysis of the criteria for SLD mandated by the DCPS, the Hearing Officer concludes that DCPS inappropriately found the student ineligible for the SLD classification and denied the student FAPE.

As stated above, the weight of the evidence supports a conclusion that the student is a student with a disability primarily due to her learning disability. Accordingly, the Hearing Officer in the order below directs that the student is eligible under the SLD disability classification.

Petitioner also asserted that the student could and should be found eligible under the OHI and ED classifications. Although, Petitioner's expert witness testified that the student might also be classified with OHI and ED, she clearly stated that the student's primary disability classification is SLD.

To be classified as OHI a student must be diagnosed with a chronic or acute health problem and the student's educational performance must be adversely affected by the problem. 34 C.F.R. §300.8(a)(9).

To be eligible as an ED student they must exhibit one or more of the following characteristics over a long period of time and to a marked degree that adversely affects the child's educational performance:

1. Inability to learn that cannot be explained by intellectual, sensory, or health factors
2. Inability to build or maintain satisfactory interpersonal relationships with peers and teachers
3. Inappropriate types of behavior or feelings under normal circumstances
4. General pervasive mood of unhappiness or depression

³² FOF #s 58, 59

³³ FOF #58

5. Tendency to develop physical symptoms or fears associated with personal or school problems. 34 C.F.R. 300.8(c)(4)(i).

The DCPS psychologist testified that she conducted two observations of the student and consulted with her teachers regarding her educational needs. During both observations the student appeared to be attentive and followed the teachers' directions. The student did not exhibit any symptoms of ADHD including being off task, hyperactive, or a lack of focus.

There was also insufficient evidence that the student has experienced any of the five characteristics of ED above for a long period of time and that she is impacted educationally. There is no indication that the student has an inability maintaining interpersonal relationships with peers and teachers.

The student's psychological evaluation did not specifically recommend the student be found eligible with OHI or ED classification. Rather, the evaluator left it to the MDT whether the student was eligible under these other two classifications if additional data was available to the MDT.

A team has not yet determined whether or to what extent the student should have a multiple disability classification to also include OHI for ADHD, and the evaluation data was inconclusive in that regard. In addition, a MDT has not yet reviewed the student's recent FBA conducted by Petitioner's consultant. Thus, the Hearing Officer concludes the this additional determination regarding additional disability classification(s) is premature and should be made by a team that has reviewed the FBA and other data that may be available to the team when it meets pursuant to the order below.

Compensatory Education

Under the theory of compensatory education, "courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, 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, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." Id. at 526.

Petitioner did not present a compensatory education plan in writing or sufficiently explain why the proposed services are appropriate. Petitioner's expert witness simply opined that the student should be provided the following services as compensatory education: independent tutoring of 1 hour for three sessions per week for 9 months to year to teach her skills she missing from her current instructional level as well as counseling services to learn to integrate her disability for 9 months to 1 year once per week outside of school for 45 min to an hour from a licensed social worker or psychologist.

Because the proposal was based on violations and missed services that were not proved the Hearing Officer concludes the compensatory education Petitioner proposed was exorbitant and not based upon the actual services missed or needed to put the student where she would have been had she been found eligible at the November 24, 2014, meeting.

In addition, because the student's IEP has not yet been developed it is virtually impossible to determine at this juncture what services the student would have been provided and therefore missed. However, to award no compensatory education when a denial of a FAPE has been established would be inequitable.³⁴

Consequently, the Hearing Officer grants Petitioner what he considers a reasonable amount of independent tutoring and counseling as compensatory education to assist the student in gaining some academic progress in light of the denial of FAPE that has been found or Petitioner may forego the compensatory education awarded below and seek through a subsequent due process complaint an award of compensatory education for the denial of FAPE determined in this HOD after the student's IEP has been developed.

ORDER:³⁵

1. The student is hereby eligible as a child with a disability pursuant to IDEA with the disability of classification of specific learning disability ("LSD").
2. DCPS shall within ten (10) school days of this issuance of this order convene a MDT meeting to review the student's evaluations and current educational and behavioral data available and determine whether the student should have a multiple disability classification to also include OHI for ADHD and/or ED.
3. The team at this meeting shall develop an IEP for the student with goals and specialized instruction in the areas of reading, math, and written language, in the setting and duration that the MDT deems appropriate.
4. In addition, the student's IEP is to include behavioral support and OT services as recommended in the student's recent psychological and OT evaluations at the hours and setting the team deems appropriate given the student's current functioning.³⁶

³⁴ A party need not have a perfect case to be entitled to compensatory education. *Stanton v. D.C.* 680 F Supp. 201 (D.D.C. 2011). If a student is denied a FAPE a hearing officer may not "simply refuse" to grant a compensatory education award. *Henry v. D.C.* 55 IDELR (D.D.C. 2010)

³⁵ Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

³⁶ Petitioner made specific requests of the Hearing Officer regarding the contents of student's IEP. However, the data available at the hearing was developed at the beginning of the school year and consideration of more recent data on the student's performance is needed. Thus, the Hearing Officer concluded that a team with members familiar with the student, after a review of current data, should determine the setting and actual number of hours of specialized instruction and related services that best meets the student's individual needs.

5. The MDT shall also determine if the student requires extended school year (“ESY”) services.
6. Following development of the student’s IEP DCPS shall determine an educational placement and location of services for the student.
7. DCPS shall provide the student as compensatory education fifty (50) hours of independent tutoring and ten (10) hours of independent counseling both at the DCPS/OSSE prescribed rates to be used by Petitioner by December 31, 2015.
8. All other requested relief 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 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: June 2, 2015

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