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Office of the State Superintendent of Education
Office of Review and Compliance
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Confidential

<p>Parent on Behalf of Student ¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools ("DCPS") ["LEA"]</p> <p>Respondent.</p> <p>Case # 2015-0290</p> <p>Date Issued: November 11, 2015</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Hearing Date(s): October 20, 2015</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioner: Carolyn Houck, Esq. P.O. Box 252 St. Michaels, MD 21663</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.

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 October 20, 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 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student is a resident of the District of Columbia who is currently being home schooled by her parent (“Petitioner”). The student has been diagnosed with a psychotic disorder and an anxiety disorder. During school year (“SY”) 2012-2013 and SY 2013-2014 the student attended a District of Columbia public charter school (“School A”) for the ■ and ■ grades. Petitioner contends it was within this period that the student’s mental health problems began to escalate and the student began to hallucinate and developed a school phobia. The student was hospitalized for mental health issues at least once during her ■ grade year at School A.

In March 2014 the student was evaluated and an initial individual education program (“IEP”) was developed for her at School A. The student’s IEP reflects that she meets the criteria for emotional disturbance (“ED”). The evaluations revealed the student has average range cognitive and academic functioning; however, she has significant weakness with cognitive processing speed and long-term memory retrieval. Despite her mental health concerns the student completed the ■ grade at School A.

Petitioner claims that on August 25, 2014, she went to the student’s DCPS neighborhood school (“School B”) and spoke to School B’s special education coordinator (“SEC”) and the registrar and provided them each with the student’s psychological evaluation report and IEP.

Petitioner asserts she registered the student at School B and was advised by the SEC that due to the student’s mental illness she should not be placed at School B and that DCPS would have to locate another placement. Petitioner contends DCPS did not provide the student with a placement for SY 2014-2015. The student’s parent began to home school the student and secured private tutoring for the student for which she incurred, and continues to incur, costs and expenses.

On June 17, 2015, Petitioner emailed the School B principal to request evaluations. Petitioner asserts she received no response to her request. Petitioner asserts that the student’s mental condition deteriorated requiring another hospitalization. Petitioner asserts she forwarded the student’s discharge summary to School B on August 17, 2015, and has received no response.

On August 28, 2015, Petitioner filed this due process complaint. Petitioner alleges DCPS denied the student a free appropriate public education (“FAPE”) by (1) failing to comply with child find requirements; (2) failing to determine eligibility and develop an IEP during SY 2014-2015; (3)

failing to have an IEP in place prior to the beginning of SY 2015-2016; (4) failing to provide an appropriate placement during SY 2014-2015 and 2015-2016, and (5) failing to implement the student's IEP as a transfer student during SY 2014-2015.

Petitioner seeks as relief that the Hearing Officer find DCPS denied the student a FAPE and order DCPS to evaluate the student, develop an IEP and provide her with an appropriate placement. Petitioner also requests that as compensatory education DCPS reimburse her for out-of-pocket tutoring expenses up to such time as DCPS provides the student with an appropriate placement. At the hearing Petitioner's counsel stated Petitioner is seeking reimbursement for tutoring services of approximately \$6,000.00.²

On September 3, 2015, DCPS filed a timely response to Petitioner's complaint in which it denied that it failed to provide the student with a FAPE. DCPS asserted that although Petitioner completed documents for enrollment on August 25, 2014, after the School B program was explained to her Petitioner contacted School B and advised the school that she would be home schooling the student.

DCPS contends that School B's SEC visited Petitioner's home in order to provide her with a registration form and information on the home school program. However, DCPS asserts the Petitioner never contacted DCPS to request enrollment. DCPS also asserts that Petitioner emailed the school principal requesting evaluations on June 17, 2015, and Petitioner filed her complaint well before the 120 days deadline to conduct evaluations had expired.

A resolution meeting was held on September 15, 2015. The case was not resolved and the parties did not mutually agree to waive the remainder of the resolution period. The 45-day period began on September 28, 2015, and ends [and the Hearing Officer's Determination ("HOD") is due] on November 11, 2015.

The Hearing Officer convened a pre-hearing conference on September 22, 2015, and issued a pre-hearing order on September 25, 2015, outlining, inter alia, the issues to be adjudicated.

After the hearing concluded on October 20, 2015, and the record closed, Petitioner, on October 25, 2015, filed a motion to admit additional evidence. On, October 29, 2015, Respondent filed an opposition to Petitioner's motion. The Hearing Officer hereby denies Petitioner's motion. The hearing record has closed and Petitioner seeks for the Hearing Officer to consider a document that was not timely disclosed. Petitioner presented no compelling reason why the documents she sought to have admitted after the hearing record closed was not available and disclosed prior to the hearing as required by 34 C.F.R. 300.512 (a)(3).³

² DCPS counsel objected to the late notification of the amount of reimbursement being sought stating that Respondent was prejudiced and was not prepared to defend as to the amount requested. The Hearing Officer noted but overruled the objection and allowed the parent's testimony to be offered to support the claim for this amount of reimbursement.

³ Any party to a hearing conducted pursuant to §§ 300.507 through 300.513 or §§ 300.530 through 300.534, or an appeal conducted pursuant to § 300.514, has the right to (3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing.

ISSUES:⁴

The issues adjudicated are:

1. Whether DCPS denied the student a free appropriate public education (“FAPE”) by failing to comply with child find requirements of 34 C.F.R. §300.111.
2. Whether DCPS denied the student a FAPE by failing to determine eligibility and develop an IEP during SY 2014-2015.
3. Whether DCPS denied the student a FAPE by failing to have an IEP in place prior to the beginning of SY 2015-2016 pursuant to 34 C.F.R. §§300.8, 300.306.
4. Whether DCPS denied the student a FAPE by failing to provide appropriate placement during SY 2014-2015 and 2015-2016 pursuant to 34 C.F.R. §§300.114, 300.115, 300.116, and 300.327.
5. Whether DCPS denied the student a FAPE by failing to implement the IEP for the transfer of the student during SY 2014-2015 pursuant to 34 C.F.R. § 300.323.

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 16 and Respondent’s Exhibits 1 through 4) that were admitted into the record and are listed in Appendix A).⁵ Witnesses are listed in Appendix B.

FINDINGS OF FACT:⁶

1. The student resides with her parent of the District of Columbia and is currently not attending any school. The student is currently being home schooled by her parent. (Parent’s testimony)

⁴ The alleged violation(s) and/or issue(s) listed in the complaint or in the PHO do not directly correspond to the issues outlined here. At the outset of the October 20, 2015, hearing Petitioners’ counsel withdrew one of the issues: Withdrawn at outset of hearing: Whether DCPS denied the student a FAPE by failing to adequately evaluate, including failure to evaluate the student upon parent’s request, and/or to evaluate in all areas of suspected disabilities pursuant to 34 C.F.R. §§300.301, 300.304, and 300.305. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that the issues as listed in this HOD are the issue(s) to be adjudicated.

⁵ Any documents that were objected to by either party, admitted over objection or not admitted and/or withdrawn by either party are noted as such in Appendix A.

⁶ The evidence that is the source of the Finding of Fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party’s exhibit.

2. During SY 2012-2013 and SY 2013-2014 the student attended School A, a District of Columbia public charter school, for the [REDACTED] and [REDACTED] grades.
3. In April 2013 when the student was in [REDACTED] grade at School A her D.C. CAS scores were in the advanced range for math and proficient range in reading and science. (Petitioner's Exhibits 3-1, 3-2)
4. During her [REDACTED] grade year the student began to display significant mental health concerns. She began to hallucinate and developed school phobia and as a result was hospitalized for 14 days. The student was diagnosed with a psychotic disorder. Following her hospitalization the student was engaged in out of school mental health therapy. Her therapist recommended that the student be considered for an IEP. (Parent's testimony, Petitioner's Exhibits, 4, 5-2, 10-1)
5. The student attempted to return to school in early December 2013 but she had difficulty attending regularly due medication adjustment. She finally resumed school by the winter break. While in school the student often had to have a school staff member sit with her to assist her in coping with her social emotional difficulties. (Parent's testimony)
6. School A referred the student for a psychological evaluation in March 2014. The evaluation assessed the student's cognitive, academic and behavioral/emotional functioning. The assessments revealed the student has average range cognitive and academic functioning; however, she has significant weakness with cognitive processing speed and long-term memory retrieval. The student's overall cognitive abilities were measured as being in the low average to average range. Her overall academic achievement was solidly in the average range. (Petitioner's Exhibit 6-4, 6-5, 6-6, 6-10, 6-11)
7. The evaluator concluded that the student's presents with "deficits in two basic psychological processes involved in understanding and using language that manifests itself in the imperfect ability to listen think and speak in the classroom." In addition, the evaluator concluded that the student demonstrated "an inability to build or maintain satisfactory interpersonal relations with peers and teachers and has a tendency to develop fears associating with personal and school problems." The evaluator concluded the student met the criteria for a specific learning disability ("SLD") and ED. (Petitioner's Exhibit 6-7, 6-1-, 6-11)
8. In March 2014 School A found the student eligible for special education with a disability classification of ED. School A developed an initial IEP for the student dated May 5, 2014. The IEP includes present levels and goals in the area of emotional, social and behavioral development. The IEP included no academic goals. The IEP prescribed the following services: 2.5 hours per week of specialized instruction in general education and 45 minutes of behavioral support per week in general education and 45 minutes of behavioral support per week outside general education. (Petitioner's Exhibits 8-1, 8-5)

9. Despite the student's difficulties she was able to complete ninth grade at School A. The student's parent talked with the head of School A's high school division about the academic demands of tenth grade at School and the parent concluded the school's accelerated curriculum would be too difficult for the student. This coupled with the school's high turnover of teachers led the student's parent to conclude School A could meet the student's needs and she decided not to enroll the student at School A for SY 2014-2015. (Parent's testimony, Petitioner's Exhibit 9)
10. On August 25, 2014, the student's parent went to School B and brought documents prepared to enroll the student. The student went with her parent to the school that day. The parent met the School B principal and then spoke with the School B special SEC. (Parent's testimony)
11. The student's parent informed the SEC that the student had an IEP. The parent told the SEC that the student was psychotic and talked about the student's difficulties at School A and her social emotional needs. The parent expressed to the SEC that the student was afraid of being in a school environment and asked if there would be anyone to sit with the student to assist her when she needed assistance. The SEC advised that School B did not have the advanced academic offerings that the student had access to at School A. At the end of their conversation the SEC agreed with the parent that School B would not be a good fit for the student.⁷ The SEC mentioned to the parent the possibility of home schooling the student. (Parent's testimony)
12. The SEC recalls from her discussion with the student's parent on August 25, 2014, that the student was good academically but was having social emotional challenges. The SEC and parent discussed the School B student population and the special education programs that were available including the self-contained and inclusion programs. The parent completed the enrollment forms and left them with the school registrar. The SEC recalls the parent stating her concern that that due to School B's larger school environment she was not certain it was a good fit for the student. The parent was not sure she wanted to enroll the student at School B. The SEC did not recall ever talking to the parent about finding another placements for the student or getting back to her later with other school options for the student. School B can provide the services prescribed in the student's May 5, 2014, IEP. (Witness 2's testimony, Petitioner's Exhibit 8-5)
13. Later in the afternoon of August 25, 2014, the SEC came to the parent's and brought information to the parent about home schooling. After the parent's meeting with the SEC the parent had the impression DCPS would be in touch with her about where the student

⁷ The parent's and SEC's testimony conflicted in this regard. The SEC testified that she never told the parent that School B would not be a good fit for the student. The Hearing Officer found the parent's testimony in this regard to be more credible. The parent was direct, unhesitant and clear in her recollection of the facts regarding her meeting with the SEC. On the other hand, the SEC was hesitant and guarded in her testimony and made little eye contact during her testimony. On several occasions the SEC stated she could not recall details of the meeting and what occurred thereafter. In addition, based upon the same factors related to the testimony of these two witnesses the Hearing Officer credited the parent's testimony that the SEC brought the home school documents to the parent's home later on the same day of their first meeting, August 25, 2014, rather than days later as the SEC testified.

could attend other than School B but in the mean time she would pursue the home school option. (Parent's testimony)

14. The parent later made a couple of more visits to School B to observe the school after her August 25, 2014, meeting with the SEC. The parent was not content with what she saw at School B and was concerned about the student being and feeling safe there. (Parent's testimony)
15. The parent eventually told the SEC she was certain School B was not a good fit for the student and at that point the parent was going forward with homeschooling the student until she found a different school placement for the student. The parent emailed the SEC to ask if there was any other information she could provide regarding the student and a possible placement but got no response. Had the parent heard from DCPS regarding a different school placement she would have taken whatever steps she was directed to take. The student parent did not see or talk with the School B SEC again until the parent went to School B the next school year to enroll her other daughter at the start SY 2015-2016. (Parent's testimony)
16. Had the student actually enrolled and begun attending School B the SEC would have first obtained and reviewed documents from the student's prior school(s) including transcripts and her IEP and assigned the student to a case manager and developed a class schedule. There would have been a 30-day review to determine how the student was progressing and whether her IEP and placement were appropriate. None of that was done because the parent did not actually enroll the student and the student's electronic records never became accessible to School B. The SEC communicated to the School B registrar on or about September 5, 2015, that the student was not going to enroll at School B because the parent called the SEC on or about that date and told her the student was not going to enroll. (Witness 2's testimony, Respondent's Exhibit 4)
17. The SEC does not recall seeing the student's IEP at the August 25, 2014, meeting. However, the SEC normally would have asked for the IEP but does not recall getting the IEP from the parent. The SEC does not recall having the student's IEP at the time she talked to the School B registrar and told her the student would not be attending. Had the SEC been provided the IEP and the student not attended she would have held on the IEP for a while and then destroyed it. However, she does not remember ever receiving the IEP or destroying it. (Witness 2's testimony, Respondent's Exhibit 4)
18. The parent researched home school programs and looked at the OSSE requirements for home schooling. Based upon a recommendation from a friend of the parent on or about September 15, 2014, enrolled the student in an online home school program, Acellus Academy ("Acellus"), at a cost of approximately \$30 per month. (Parent's testimony)
19. The student's parent filed with OSSE a notice of her intent to homeschool her daughter and included a letter to OSSE Home School Coordinator, dated September 4, 2014, in which the parent stated: "I removed my daughter from [School A]. They were not and have not provided services to my daughter based on her IEP. I therefore attempted to

place my daughter in our neighborhood school, which is [School B]. I cannot fathom that she would do well in a school filled with the kind of issues that were apparent to me after a few visits. I would like to know what types of services the District of Columbia provided for students who are home schooled when the their neighborhood school is insufficient and laden with problem students, bullies, students from outside the neighborhood zone that could not attend any other DC school. I have read the FAQ's and Regulations on Homeschool. Does the District provide a computer? Internet? Books and materials? I was informed by K12 DC, that they do not have space for my [REDACTED] grader. I am really confused by this – no space for a public option in a homeschool online environment????” (Respondent’s Exhibit 3-1, 3-2)

20. On November 20, 2015, OSSE’s Home School Coordinator sent a letter to the parent acknowledging receipt of the parent’s notice of intent to home school the student. The letter stated the date by which OSSE is to be notified of a parent’s intent to home school a student and instructions on the a parent’s requirements in implementing a home school program for the availability of DCPS standardized testing free of charge. There was no acknowledgment in OSSE’s letter of the student’s status as a special education student or the concerns about School B the parent mentioned in her letter. (Respondent’s Exhibit 2)
21. The student is currently taking online courses with Acellus. The student’s parent engaged a professional tutor to assist the student throughout the school year The student saw the tutor twice per week for 2 to 3 hour during SY 2014-2015. The student had completed most courses for [REDACTED] grade and has two more to complete: English and Geometry. The student has recently started some of her [REDACTED] grade courses and the tutor will be assisting her completing theses online classes. (Parent’s testimony)
22. The student’s tutor charges the parent \$150 per hour but allows the parent to pay only \$75 of the \$150. They have no written agreement but the tutor sends the parent monthly invoices. The tutor invoices the parent for \$75 per hour but the parent believes she is responsible for the remaining \$75 per hour for all tutoring that has been delivered. The parent pays the invoices by check and can provide copies of the cancelled checks. The tutor saw the student during SY 2014-2015 at 4:30 on Tuesday and Thursday. She now sees her once per week on Thursdays at 1:00 p.m. and the services will increase with the student starting her [REDACTED] grade courses. Ultimately, the parent would like DCPS to provide the student an appropriate placement. (Parent’s testimony, Witness 1’s testimony)
23. The student’s tutor worked with the student at School A and is aware of the student’s mental difficulties. The student’s behaviors at times interfere with her ability to participate in the tutoring. The tutor helps the student develop strategies for note taking and organization, breaking down academic concepts to help her understand and navigate the online courses. Once the student has a strategy she does very well with the academic material for the online courses. The tutor is willing to continue working with the student until DCPS provides her a placement. (Witness 1’s testimony)

24. In June 2015, the student's parent contacted School B to request that the student be evaluated. School B's principal told the School B SEC that the parent had requested evaluations for the student through a June 17, 2015, email. The SEC contacted the OSSE Home School Coordinator to determine whether DCPS is responsible for evaluating a student who is home schooled and got no response. However, the SEC is now aware that DCPS will conduct the evaluations despite the student being home schooled. The evaluation(s) requested by the parent have not yet been initiated because the parent has not yet signed an evaluation consent form. (Witness 2's testimony)
25. The student was readmitted to the hospital for 7 days in July 2015 when asked her parent to take her back to the hospital. The student's parent forwarded the student's discharge summary to School B on August 17, 2015. (Parent's testimony, Petitioner's Exhibit 10)

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.⁸ *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.

⁸ 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.

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).

ISSUE 1: Whether DCPS denied the student a free appropriate public education (“FAPE”) by failing to comply with child find requirements of 34 C.F.R. §300.111.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence that DCPS violated its child find requirements under 34 C.F.R. §300.111.

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."

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 educational needs, including the content of his IEP. 20 USC 1414(a)(1)(C); 20 USC 1414(b)(2)(A).

The evidence in this case demonstrates that the student had been identified and found eligible as a child with a disability in March 2014 and had been provided an IEP in May 2014.⁹ The evidence demonstrates that the parent informed DCPS that the student had an IEP when the parent came to School B on August 25, 2014, and began the enrollment process and spoke with the School B SEC.¹⁰ There was no question at that time that student was a child with a disability and that pursuant to a then current IEP she was in need of special education.

⁹ FOF # 8

¹⁰ FOF #s 10, 11

Accordingly, because the student had already been located, identified and evaluated and found eligible and been provided an IEP that was current at the time of the alleged violation(s), the Hearing Officer concludes that the facts of this case do not support a child find violation and Petitioner did not sustain the burden of proof on this issue by a preponderance of the evidence.¹¹

ISSUE 2: Whether DCPS denied the student a FAPE by failing to determine eligibility and develop an IEP during SY 2014-2015.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence that DCPS failed to determine eligibility and develop an IEP for the student for SY 2014-2015.

As noted in the issue above, the evidence demonstrates that the student had been identified and found eligible as a child with a disability in March 2014 and had been provided an IEP in May 2014. The evidence demonstrates that the parent informed DCPS that the student had an IEP when the parent came to School B on August 25, 2014, and began the enrollment process and spoke with the School B SEC. There was no question at that time that student was a child with a disability and that pursuant to a then current IEP she was in need of special education. Although Petitioner's counsel stated in her closing that Petitioner does not agree the student's IEP is appropriate, there was no specific challenge to the student's May 2014 IEP in the due process complaint.

Accordingly because the student at the start of SY 2014-2015 when the parent came to School B on August 25, 2015, and submitted enrollment documents to the School B was eligible and had a current IEP, DCPS was not at that point obligated to determine the student's eligibility or develop an IEP.

ISSUE 3: Whether DCPS denied the student a FAPE by failing to have an IEP in place prior to the beginning of SY 2015-2016 pursuant to 34 C.F.R. §§300.8, 300.306.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence that DCPS denied the student a FAPE by failing to have an IEP in place for the student at the beginning of SY 2015-2016.

The evidence demonstrates that the prior to the start of SY 2015-2016, the student's parent requested the student be evaluated.¹² However, there no specific request by Petitioner at that time or prior to the filing of the due process complaint that DCPS to provide the student an educational placement. There was no evidence other than a request for evaluation that Petitioner had provided DCPS the required proof residency documents that entitled her to an offer of a

¹¹ Petitioner has alleged in the other issues detailed below that DCPS denied the student a FAPE by, inter alia, not providing the student an appropriate placement and implementing her IEP. These allegations more accurately reflect the facts of this case and the violations Petitioner seeks to prove. The Hearing Officer concludes based upon an inquiry made at the outset of the hearing regarding the alleged child find violation that Petitioner asserted this child find violation generally and as a "catch all" in case the more specific violations that were alleged were not proved.

¹² FOF # 25

FAPE for SY 2015-2016 and unless and until that documentation is provided the request for evaluation alone was insufficient to put DCPS on notice that the parent was requesting a seeking an offer of a FAPE and an educational placement for the student to attend for SY 2015-2016. Accordingly, as of the date the due process complaint was filed, DCPS did not yet have an obligation to develop an IEP for the student for SY 2015-2016.

ISSUE 4: Whether DCPS denied the student a FAPE by failing to provide appropriate placement during SY 2014-2015 and 2015-2016 pursuant to 34 C.F.R. §§300.114, 300.115, 300.116, and 300.327.¹³

Conclusion: Petitioner sustained the burden of proof that DCPS failed to offer the student an educational placement for SY 2014-2015. However as noted above Petitioner did not sustain the burden of proof by a preponderance of the evidence that she requested an educational placement for the student for SY 20165-2016 prior to the filing of the due process complaint.

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and is made in conformity with the Least Restrictive Environment provisions of the IDEA; and the public agency must ensure that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.

The evidence demonstrate that at the start of SY 2014-2015 the School B SEC rather than direct that the parent complete enrollment of the student and convene a meeting to review the student's

¹³ § 300.114 LRE requirements. (a) General. (1) Except as provided in § 300.324(d)(2) (regarding children with disabilities in adult prisons), the State must have in effect policies and procedures to ensure that public agencies in the State meet the LRE requirements of this section and §§ 300.115 through 300.120. (2) Each public agency must ensure that— (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

§ 300.115 Continuum of alternative placements. (a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. (b) The continuum required in paragraph (a) of this section must— (1) Include the alternative placements listed in the definition of special education under § 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and (2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

§ 300.116 Placements. In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that— (a) The placement decision— (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and (2) Is made in conformity with the LRE provisions of this subpart, including §§ 300.114 through 300.118; (b) The child's placement— (1) Is determined at least annually; (2) Is based on the child's IEP; and (3) Is as close as possible to the child's home; (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled; (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and (e) A child with a disability is not removed from education in age appropriate regular classrooms solely because of needed modifications in the general education curriculum.

§ 300.327 Educational placements. Consistent with § 300.501(c), each public agency must ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.

IEP the SEC actually encouraged the parent to home school the student.¹⁴ The SEC did not at that juncture as would have been prudent provide the parent her procedural safeguards and inform her that if she wanted the student to be provided a school other than School B she had could consult the safeguards. DCPS did not provide the student a prior notice or document in writing that it had offered the student a placement at which the student's IEP could be implemented.

Consequently, the Hearing Officer concludes that DCPS denied the student a FAPE by encouraging the parent to home school the student and assisting her in doing so rather than completing the required actions of offering, and documenting that it did so, an offer of a FAPE even if the parent did not at the juncture seem inclined to enroll the student at School B. Enrollment in school is not a prerequisite to an offer of FAPE to a student. The fact that DCPS is aware that the student has an IEP and that the parent is seeking an educational placement creates the affirmative obligation for DCPS to offer a FAPE that the parent is free to decline. The facts of this case support a finding that although School B was available to Petitioner she was directed away from the offer and provided no meaningful alternative offer of FAPE for the student.

However, Petitioner did not prove by a preponderance of the evidence that the School B could not meet the student's needs and was an inappropriate placement for the student. As Petitioner's counsel noted in her closing statement: Petitioner was not at the hearing to challenge whether School B is appropriate, rather Petitioner was at the hearing to prove that the parent home schooled the student as a result of what the parent was told about School B by its SEC.

Consequently, the Hearing Officer concludes DCPS denied the student a FAPE and in the order below directs that DCPS make an offer of FAPE to the student for SY 2015-2016 once residency has been established, and that DCPS reimburse the parent for the tutorial expenses she has incurred.

ISSUE 5: Whether DCPS denied the student a FAPE by failing to implement the IEP for the transfer of the student during SY 2014-2015 pursuant to 34 C.F.R. § 300.323.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence that DCPS failed to comply with the requirements of 300.323(f) and provide the student comparable services and either adopt her IEP or develop a new IEP as is required.

34 C.F.R. § 300.323(f)¹⁵ requires that when a child with a disability transfers from another state with an IEP from the previous state and **enrolls** in a new school within the same school year the

¹⁴ FOF #s 11, 13, 15

¹⁵ 34 C.F.R. § 300.323 (f) IEPs for children who transfer from another State. If a child with a disability (who had an IEP that was in effect in a previous public agency in another State) transfers to a public agency in a new State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency--

(1) Conducts an evaluation pursuant to Sec. Sec. 300.304 through 300.306 (if determined to be necessary

new LEA must provide the student with a FAPE with services comparable to those described in the child's IEP. [Emphasis added]

34 C.F.R. § 300.323 (f) requires that when a child with a disability transfers from another state with an IEP the new LEA must implement the student's existing IEP until it conducts an evaluation (if determined to be necessary by the new LEA) and develops, adopts and implements a new IEP.

As already stated the facts demonstrate that the School B SEC rather than direct that the parent complete enrollment of the student and convene a meeting to review the student's IEP the SEC actually encouraged the parent to home school the student. Based upon the parent's testimony she went to School B to attempt to enroll the student on August 25, 2014, but did not complete enrollment and did have the student attend School B, School B was then under no obligation under the provision cited in the issue to implement and adopt the student's IEP. Consequently, the Hearing Officer concludes Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue.

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 has requested reimbursement for the tutoring costs she incurred as compensatory education although she submitted a compensatory that differed from the request made during the hearing. Based upon the credible testimony of the parent and tutor that the student has benefitted from the tutoring provided in absence of any special education services she would have received had there been no denial of a FAPE, the Hearing Officer in the order below grants Petitioner the requested compensatory education.

by the new public agency); and

(2) Develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in Sec. Sec. 300.320 through 300.324.

(g) Transmittal of records. To facilitate the transition for a child described in paragraphs (e) and (f) of this section--

(1) The new public agency in which the child enrolls must take reasonable steps to promptly obtain the child's records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous public agency in which the child was enrolled, pursuant to 34 CFR 99.31(a)(2); and

(2) The previous public agency in which the child was enrolled must take reasonable steps to promptly respond to the request from the new public agency.

ORDER:¹⁶

1. Petitioner is hereby directed, if she has not already done so for SY 2015-2016, to provide DCPS, within ten (10) calendar days of the issuance of this order, the required proof of residency pursuant to D.C. Code §38-308.
2. Within ten (10) school days of this issuance of this order DCPS shall, if has not already done so, convene, and Petitioner shall attend, a MDT meeting to review the student's available educational and behavioral data and update the student's IEP and determine what if any additional evaluations or areas of assessment are appropriate.
3. At the MDT meeting directed to be convened pursuant to the provision above and following an update of the student's IEP the MDT shall determine an educational placement and a location of services for the student where the student's IEP will be implemented for SY 2015-2016.
4. DCPS shall issue a prior written notice ("PWN") and/or a location of service ("LOS") letter within five (5) calendar days of the MDT meeting described above indicating the student's educational placement and location of services where the student's IEP will be implemented for SY 2015-2016.
5. DCPS shall reimburse Petitioner the cost of the tutoring incurred by Petitioner for SY 2014-2015 and for 2015-2016¹⁷ up until the date DCPS issues the PWN and/or LOS letter described in the provision above, in an amount not to exceed \$6,000, upon Petitioner providing DCPS appropriate proof of payment such as invoices and cancelled checks for the tutoring services that have been provided the student.
6. All other requested relief is denied.

¹⁶ 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.

¹⁷ The Hearing Officer granted Petitioner the full relief requested including reimbursement for expenses incurred in SY 2015-2016 as equitable relief for the denial of FAPE found.

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: November 11, 2015

Copies to: Carolyn Houck, Esq. Petitioner's Counsel
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