

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Office of Dispute Resolution
810 First Street, NE – Second Floor
Washington, DC 20002
Tel: 202-698-3819
Fax: 202-478-2956

Confidential

Parent on Behalf of Student ¹ , Petitioner, v. District of Columbia Public Schools (“DCPS”) [LEA} Respondent. Case # 2016-0199 Hearing Officer: Coles B. Ruff, Esq. Date Issued: October 4, 2016	HEARING OFFICER’S DETERMINATION Hearing Dates: September 20, 2016 September 22, 2016 September 27, 2016 Counsel for Each Party listed in Appendix A
---	---

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 September 20, 2016, September 22, 2016, and September 27, 2016, 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 age _____ and in grade _____.² The student resides with her parent (“Petitioner”) in the District of Columbia, and attended a District of Columbia Public Schools (“DCPS”) [REDACTED] school in her neighborhood (“School A”) until November 2015. When this due process complaint was filed on August 23, 2016, DCPS had not yet determined the student eligible as a child with a disability pursuant to IDEA.³

The student had behavioral difficulties at School A during school year (“SY”) 2014-2015 and SY 2015-2016 and was psychiatrically hospitalized. Petitioner alleges that in November 2015, the School A special education coordinator (“SEC”) instructed Petitioner that the student could not return to School A because of her behavior. Petitioner alleges that as result of this direction, and to avoid truancy proceedings, Petitioner began to home school the student in November 2015 and later obtained an OSSE home school registration.

On February 23, 2016, Petitioner filed a due process complaint that resulted in a Hearing Officer Determination (“HOD”) issued March 25, 2016, that concluded DCPS had denied the student a free appropriate public education (“FAPE”) by, inter alia, failing to comply with “child find” obligations pursuant to 34 C.F.R. §300.111, and failing to evaluate the student based on Petitioner’s requests. That Hearing Officer concluded that DCPS should have evaluated the student and determined her eligible or ineligible for special education on or before May 26, 2014. The HOD directed, inter alia, that DCPS fund independent evaluations and convene a meeting within ten (10) school days of the HOD to review the available evaluation(s) and determine the student’s eligibility. DCPS convened an eligibility meeting on June 28, 2016, but did not find the student eligible at that meeting.

On August 23, 2016,⁴ Petitioner filed the current due process complaint in which she alleged,

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

³ Prior to the hearing, during the second pre-hearing conference, the parties stipulated that the student was eligible with a disability classification of emotional disability (“ED”) as of mid-August 2016.

⁴ Petitioner filed the same complaint on August 3, 2016. The parties conducted a resolution meeting on August 18, 2016, and did not resolve the complaint. Petitioner withdrew the August 3, 2016, complaint without prejudice on August 22, 2016, and re-filed the complaint on August 23, 2016.

inter alia,⁵ that DCPS denied the student FAPE by: (1) failing at the June 28, 2016, meeting to determine the student eligible, develop an individualized educational program (“IEP”) and provide a special education placement, and (2) failing to comply with the disciplinary procedures of 34 C.F.R. §§300.530-536, when the School A SEC allegedly told Petitioner in November 2015 the student could not return to School A.

Petitioner seeks as relief that the Hearing Officer finds DCPS denied the student a FAPE, and grants appropriate compensatory education or allow Petitioner to reserve compensatory education until an IEP is developed and a placement is determined.⁶ Although the student has now been determined eligible for special education and related services pursuant to a stipulation between the parties, Petitioner requests that DCPS be ordered to convene an eligibility meeting to discuss the student’s evaluations and the full extent of her disability. Petitioner also wants DCPS to develop an IEP, and determine placement and location of services.

DCPS, the local educational agency (“LEA”) relied on its response to the August 3, 2016, due process complaint that Petitioner subsequently withdrew. That response was filed on August 15, 2016. The LEA denies that it failed to provide the student with a FAPE. The LEA contends that the Petitioner has made no allegation that there was an “effective expulsion” prior to the filing of the August 3, 2016, complaint. The LEA asserts that at the June 28, 2016, eligibility meeting the school personnel responsible for reviewing relevant data and information correctly determined that there is insufficient information to determine the student’s eligibility. The LEA contends that DCPS proposed further evaluation and services be provided to the student at home, to facilitate collection of the missing data, and issued a prior written notice to that effect on July 8, 2016, to which Petitioner did not respond.

The parties convened a resolution meeting on the August 3, 2016, complaint and did not reach a resolution. The parties did not convene a resolution meeting on the current complaint and did not mutually agree to proceed directly to hearing in this matter. A decision on issue #2 below is subject to an expedited hearing⁷ and decision is due within ten (10) school days of the first date of hearing: October 4, 2016. For issue #1 below, the 45-day period began on September 23, 2016, and ends [and the HOD is due] on November 7, 2016. However, both issues are decided in this HOD.

The undersigned Impartial Hearing Officer (“Hearing Officer”) convened a pre-hearing conference (“PHC”) on the complaint on September 7, 2016, and issued a pre-hearing order

⁵ Petitioner also alleged in the complaint that DCPS failed to timely comply with the February 23, 2016, HOD. On September 12, 2016, Petitioner withdrew that issue prior to the hearing. The Hearing Officer allowed withdrawal of the issue without prejudice over DCPS objection.

⁶ Petitioner originally requested that the Hearing Officer determine the student eligible for special education and related services as a student, who is Multiply Disabled (ED and OHI) and requires an IEP and a full time special education placement and order DCPS to develop and IEP and fund the student’s placement at a private school of the parent’s choice. Following a resolution meeting, and during the second pre-hearing conference DCPS agreed the student was eligible. Petitioner thereafter withdrew her request for a finding of eligibility by the Hearing Officer and withdrew her request for private school placement.

⁷ Pursuant to 34 C.F.R. §§300.530-536 to start twenty (20) school days after the complaint was filed which was September 20, 2016.

(“PHO”) on September 9, 2016. On September 15, 2016, the Hearing Officer convened a second pre-hearing conference and issued a second pre-hearing order on September 15, 2016, outlining, inter alia, the issues to be adjudicated.

The issues adjudicated are:

1. Whether the LEA denied the student a FAPE by failing to determine the student eligible, develop an IEP, and provide a special education placement at the June 28, 2016, meeting.
2. Whether the LEA denied the student a FAPE by failing to comply with and provide the student protections pursuant to 34 C.F.R. §§300.530-536, including failing to convene and manifestation review determination (“MDR”).

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 20 and Respondent’s Exhibits 1 through 11) that were admitted into the record and are listed in Appendix A.⁸ Witnesses are listed in Appendix B.⁹ The record was closed with the simultaneous submission of written closing arguments on October 3, 2016.

SUMMARY OF DECISION:

Petitioner sustained the burden of proof on both issues that DCPS had denied the student a FAPE. The Hearing Officer grants Petitioner’s request for compensatory education and directs DCPS to convene a meeting to review the student’s evaluation(s) and updated data and the impact of her disability on her educational performance, develop an IEP and determine her placement and location of services.

FINDINGS OF FACT:¹⁰

1. The student resides with Petitioner in the District of Columbia, and attended School A, a DCPS [REDACTED] school in her neighborhood, until November 2015. (Parent’s testimony)

⁸ Any items disclosed and not admitted or admitted for limited purposes was noted on the record and summarized in Appendix A.

⁹ Petitioner presented four witnesses: Petitioner, the student, and educational advocate and a clinical psychologist. Respondent presented three witnesses: a DCPS resolution specialist, and DCPS psychologist, and a DCPS compliance case manager.

¹⁰ The evidence (documentary and/or testimony) that is the source of the Finding of Fact (“FOF”) is noted within a parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit 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. At the time this due process complaint was filed on August 23, 2016, the student had not yet been determined eligible by DCPS as a child with a disability pursuant to IDEA. (Witness 1's testimony)
3. The student had behavioral difficulties at School A during SY 2014-2015 and SY 2015-2016 and was psychiatrically hospitalized. (Parent's testimony)
4. Due to the student's mental health concerns during the first semester of SY 2015-2016, the student was to come to school daily and meet with her community support worker from First Home Care, then the student returned home with an early medical release. The days the student did not come to school, were marked as "unexcused" absences. The goal in developing this short-term schedule was to gradually increase the student's mental stability so she could remain in school for a full day. (Parent's testimony, Petitioner's Exhibit 3)
5. The student followed this schedule for a few weeks but was again hospitalized. Upon her release from the hospital in November 2015 Petitioner returned to School A with the student's hospital discharge instructions. At that point the School A SEC instructed Petitioner that the student could not return to School A because of her behavior and absences. There was no re-entry meeting at School A after the student's hospitalization and School A never contacted Petitioner about trying to get the student in another school. As a result of this directive from the School A SEC, and to avoid truancy proceedings, Petitioner began to home school the student in November 2015 and on December 16, 2015, obtained an OSSE home school registration. (Parent's testimony, Petitioner's Exhibits 4)
6. During the time the student was being home school she received some tutoring from an educational consultant and completed work the parent and the consultant suggested and that they found online. The parent did not use an official home school curriculum and as a result the student did not receive significant academic instruction. (Parent's testimony)
7. On February 9, 2016, while student was being home schooled, an independent clinical psychologist conducted a comprehensive psychological evaluation of the student. The psychologist noted the student's previous diagnoses of Attention Deficit Hyperactivity Disorder ("ADHD"), Mood Disorder and Anxiety. The psychologist also referenced the student's behavior difficulties at school, her anxiety, her eventual refusal to attend School A and that she had "not attended school since November 2015, as her anxiety and depression have reached a peak." (Petitioner's Exhibit 5-2, 5-8)
8. Based upon her assessments, the psychologist concluded that the student's cognitive functioning was low average with a Brief Intellectual Ability ("BIA") score of 89. The student's reading, math and written expression functioning was average at about fifth grade level. (Petitioner's Exhibit 5-3, 5-4, 5-5)
9. The psychologist administered the Behavior Assessment Scale for Children – Second Edition ("BASC-2"). The psychologist had the rating scales on this assessment from the

student and her parent. The evaluator noted that she requested teacher rating scales from School A on February 17, 2016, and February 25, 2016, but the forms had not been returned prior to the evaluation report being completed on March 7, 2016. The evaluator concluded the student met the criteria of Persistent Depressive Disorder and Social Anxiety Disorder (Social Phobia) and ADHD by history. The psychologist recommended that the student be classified as a student with an Emotional Disturbance (“ED”) and a student who is Other Health Impaired (“OHI”) and that she received full time special education services in a stand-alone private school. (Petitioner’s Exhibit 5-1, 5-8, 5-9)

10. On February 23, 2016, Petitioner filed a due process complaint that resulted in a HOD issued March 25, 2016, that concluded DCPS had denied the student a free appropriate public education (“FAPE”) by, inter alia, by failing comply with the child find obligations pursuant to 34 C.F.R. §300.111, and failing to evaluate the student based on Petitioner’s requests. (Petitioner’s Exhibit 6)
11. The Hearing Officer concluded that DCPS should have evaluated the student and determined her eligible or ineligible for special education on or before May 26, 2014. The HOD directed, inter alia, that DCPS fund independent evaluations and convene a meeting within ten (10) school days of the HOD to review the available evaluation(s) and determine the student’s eligibility. The HOD also ordered DCPS to fund the actual cost of the independent comprehensive psychological evaluation, not to exceed \$2,000; to fund an independent functional behavioral assessment (“FBA”). DCPS convened an eligibility meeting on June 28, 2016, but did not find the student eligible at that meeting. (Petitioner’s Exhibit 6)
12. Based on the Hearing Officer’s conclusion that the student's should have been evaluated and an eligibility determination made by May 26, 2014, the student was due protections pursuant to 34 C.F.R. 300.530 et seq. as of that date. (Petitioner’s Exhibit 6)
13. In the March 25, 2016 HOD, the Hearing Officer adjudicated the issue of whether DCPS had failed to determine the student eligible, develop and IEP and provide a special education placement from February 22, 2014, the date of that first hearing. In that HOD, the Hearing Officer noted the following in her conclusions: “Despite her best efforts, Psychologist (Parent) was not able to obtain the input she requested from District School prior to preparing her evaluation. Without input from District School, the Hearing Officer does not have sufficient information in this instance to make a determination regarding whether Student is in fact eligible, as Student’s educational performance across her recent educational settings (home and District School) would be a relevant consideration.” (Petitioner’s Exhibit 6-2, 6-6)
14. On April 14, 2016, a DCPS psychologist conducted a review of the independent evaluation and conducted her own interview of the student’s School A teachers. The DCPS psychologist noted that that no teachers or school personnel questionnaires were completed and the evaluator did not include any information about the student’s behavior at any of the student’s schools. The DCPS psychologist concluded the evaluation did not

provide enough information to determine how the student functions in an educational environment and concluded the independent evaluation was incomplete. The DCPS psychologist recommended, among other things, an updated classroom observation and the behavioral rating scales from the student's teachers. (Witness 4's testimony, Petitioner's Exhibit 7-1, 7-4, 7-6)

15. On May 24, 2016, DCPS convened an eligibility meeting at School A. The parent could not attend. The DCPS team discussed the student's independent evaluation and concluded the evaluation was insufficient to determine the student's eligibility. The DCPS psychologist who conducted the review of the independent psychological evaluation attended that meeting. DCPS determined the student was ineligible but the meeting and its outcome was later voided because the parent had not participated. (Witness 4's testimony, Petitioner's Exhibit 8)
16. On June 28, 2016, DCPS convened an eligibility meeting that the parent and her advocate participated in by telephone. The meeting was convened at School A. The DCPS psychologist who reviewed the independent psychological evaluation did not attend. Another DCPS psychologist participated in the meeting and followed the recommendation of the first DCPS psychologist that the independent psychological evaluation was incomplete and there was thus insufficient data from which to determine the student's eligibility for special education and related services. (Witness 5's testimony, Respondent's Exhibit 1-63, 1-64, 1-67, 1-68)
17. At the June 28, 2016, meeting DCPS offered to conduct a comprehensive psychological evaluation and a FBA and developed a positive behavior plan to re-engage the student and transition her back to a regular school so that additional information could be gathered to make a final eligibility determination. DCPS also offered in home tutoring and counseling to Petitioner to allow for the evaluation data to be gathered that DCPS believed was necessary to find the student eligible. DCPS issue a prior written notice to this effect. (Witness 3's testimony, Respondent's Exhibit 1-63, 1-64, 1-67, 1-68)
18. The student receives outside counseling and Petitioner did not think the student needed the additional counseling DCPS offered at the June 28, 2016, meeting. She was unsure about the tutoring DCPS offered because she feared if she accepted it she would be limited to that as a remedy from DCPS. Therefore, the parent did not agree to the services that DCPS offered at the meeting. (Parent's testimony, Petitioner's Exhibits 3, 4, Respondent's Exhibit 1-68)
19. The DCPS psychologist asked her supervisor whether she should request the teacher rating scales from the student's School A teachers who she had interviewed and to gather the information she felt was missing from the independent evaluation. She was instructed by her supervisor not to do so. Consequently, DCPS did not have the data it believed it needed regarding the student's behavior and emotional functioning at School A or in any other school setting to make a reasonable eligibility determination. Had the DCPS psychologist been able to obtain the information that DCPS was requesting, either the teacher rating scales or the information that DCPS sought to obtain after the June 18,

2016, eligibility meeting, the DCPS psychologist could have made an eligibility determination recommendation. (Witness 4's testimony, Petitioner's Exhibit 7-1, 7-4, 7-6)

20. Prior to the June 28, 2016, meeting Petitioner did not raise with DCPS the allegation that the School A SEC had told the parent in November 2015 that the student could not return to School A. (Witness 3's testimony, Witness 5's testimony)
21. After Petitioner filed the August 3, 2016, due process complaint DCPS and Petitioner participated in a resolution meeting on August 17, 2016, at School A. A School A staff member facilitated return of the teacher questionnaires to the independent psychologist, who was then able to complete an addendum to her evaluation report in September 2016. The independent psychologist's conclusions and recommendations regarding the student's eligibility for special education remained the same in the addendum. She concluded the student should be found eligible. (Witness 2's testimony, Respondent's Exhibit 1-69, 1-70, 1-71, (Petitioner's Exhibit 11-1,11-3)
22. The student is eligible for special education with an ED classification as of mid-August 2016. (Stipulation)
23. The student acknowledges that she has mood swings and benefits from counseling and desires academic assistance. She is now attending a different DCPS [REDACTED] school for SY 2016-2017 and seems to like it far better than School A. (Student's testimony)
24. Petitioner's educational consultant recommended the student be provided 200 hours of tutoring and 50 hours of counseling for the failure to provide the student services for approximately two school years.¹¹ (Witness 1's testimony, Petitioner's Exhibit 20)

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)

¹¹ There was conflicting evidence with regard to the recommendation for independent counseling. The consultant testified that 50 hours was her recommendation. However, the document submitted was blurred and could have been read to state 50 hours or 150 hours of counseling. The Hearing Officer concluded that the amount recommended, despite the document, was 50 hours of counseling.

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

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

ISSUE 1: Whether the LEA denied the student a FAPE by failing to determine the student eligible, develop an IEP, and provide a special education placement at the June 28, 2016, meeting.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that DPCS denied the student a FAPE by failing to determine the student eligible at the June 28, 2016, meeting and not developing and IEP and determining a placement for the student on that date.

Pursuant to 34 C.F.R. § 300.306¹² upon completion of assessments and other evaluation measures a group of qualified professionals and the parent of the child shall determine whether the child is a child with a disability as defined in 34 C.F.R. § 300.8¹³ and the educational needs

¹² 34 C.F.R. § 300.306 (a) Upon completion of the administration of assessments and other evaluation measures—
(1) A group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in § 300.8, in accordance with paragraph (b) of this section and the educational needs of the child; and (2) The public agency provides a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent. (c) Procedures for determining eligibility and educational need. (1) In interpreting evaluation data for the purpose of determining if a child is a child with a disability under § 300.8, and the educational needs of the child, each public agency must— (i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child’s physical condition, social or cultural background, and adaptive behavior; and (ii) Ensure that information obtained from all of these sources is documented and carefully considered. (2) If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child in accordance with §§ 300.320 through 300.324.

¹³ 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.

of the child and if a determination is made that a child has a disability and needs special education and related services must develop and IEP and determine placement pursuant to § 34 C.F.R. 300.327.

The evidence in the case demonstrates that pursuant to the March 25, 2016, HOD, DCPS should have evaluated the student and determined her eligibility or ineligibility for special education services on or before by May 26, 2014. The HOD ordered DCPS to convene a meeting to review evaluation data for the student and make an eligibility determination within ten (10) school days of the issuance of the HOD.

DCPS, with Petitioner present, convened that meeting on June 28, 2016. DCPS determined, based upon the DCPS psychologist's opinion, that the independent evaluation that recommended the student be determined eligible was incomplete because the evaluation did not include sufficient educational data on the student. The evidence demonstrates that the data DCPS claimed the independent evaluation lacked principally consisted of the missing teacher rating scales that the independent evaluator had provided to the student's School A teachers in February 2016 that School A had failed to return to the evaluator prior to the completion of her report and the date of the eligibility determination.

The evidence demonstrates that the DCPS psychologist who reviewed the independent evaluation and concluded that evaluation was incomplete actually interviewed the student's School A teachers and was aware based on the evaluator's report that he teacher rating scales had not been returned to the evaluator by School A. The DCPS psychologist even asked her supervisor whether she should obtain the missing data from the School A teachers herself but was instructed not to do so. Consequently, and because of DCPS' failure to provide the requested data to the evaluator, DCPS determined at the June 28, 2016, meeting the student was not eligible.

To its credit, however, DCPS offered to conduct its own evaluation(s) of the student and even offered to Petitioner to provide the student tutoring and counseling services so that the data DCPS considered was missing could be obtained. Petitioner, however, as well as the independent evaluator, believed that there was already sufficient data from which DCPS could determine that the student was eligible. As result, there was no agreement by Petitioner to the evaluation and services DCPS offered at the June 28, 2016, meeting. Petitioner then filed a due process complaint challenging DCPS' ineligibility determination.

The evidence demonstrates that after the complaint was filed School A returned the teacher rating scales to the independent evaluator. Those rating scales in the opinion of the evaluator were consistent with the data she had already analyzed on the student that supported her conclusion that the student should be determined eligible. The independent psychologist then prepared an addendum to the evaluation again recommending the student be determined eligible.

The parties have now stipulated that the student is eligible with a disability classification of emotional disability. However, the parties disagree as to whether there was sufficient data at the June 28, 2016, meeting for DCPS to determine the student eligible.

Based upon review of the evidence, the Hearing Officer determines that DCPS possessed the data it needed at the time of the June 28, 2016, meeting to determine the student eligible. It was DCPS who failed to provide the independent evaluator the needed data – the teacher rating scales and the type of data DCPS claimed it was missing. The DCPS psychologist spoke with the student’s School A teachers and could have, and even inquired about, obtaining the data that was missing at the time of her evaluation review. She was instructed by DCPS not to do so.

Although the student had not attended School A since November 2015, the student had attended School A during SY 2014-2015 and part of 2015-2016. It would have perhaps been ideal to have more current data for the student, however, the facts of this case indicate that without data more recent than November 2015 for the student the independent evaluator was able to conclude and credibly testified that the student meets the criteria as a child with a disability with the ED classification.

Because DCPS did not provide the data that the evaluator had requested in February 2016, prior to completing the independent evaluation or take action to provide that data itself prior to the June 28, 2016, eligibility meeting, and thus did not find the student’s eligible at the June 28, 2016, meeting, the Hearing Officer concludes that DCPS, in effect, impeded the child’s right to FAPE, significantly impeded the parent’s opportunity to participate in the decision-making process regarding provision of FAPE, and caused the child a deprivation of educational benefits. Accordingly, the Hearing Officer concludes Petitioner sustained the burden of proof by a preponderance of the evidence on this issue.

ISSUE 2. Whether the LEA denied the student a FAPE by failing to comply with and provide the student protections pursuant to 34 C.F.R. §§300.530-536, including failing to convene a MDR.

Conclusion: Petitioner sustained the burden of proof that DCPS removed the student from School A in November 2015 without providing her protections she was due pursuant to 34 C.F.R. § 300.530 et seq. and thus denied the student a FAPE.

Pursuant to the requirements 34 C.F.R. § 300.530 et seq. once a student is removed from school for a violation of a code of conduct for more than ten (10) school days in a school year a MDR must be convened with the parent, and relevant members of the student’s IEP team to review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine if the student’s conduct in question was caused by, or had a direct and substantial relationship to, the child's disability. A student should not be removed from school if his or her behavior is determined to be a manifestation of his or her disability.

The evidence in this case demonstrates that during the fall of 2015, because of the student’s emotional and behavioral difficulties, the student was placed on a short term modified scheduled where she came to school for counseling from her First Home Care provider and then was released from school for the remainder of the day. This scheduled was designed to gradually allow the student be able to remain in school all day. However, during this interim period the student was hospitalized and when the parent attempted to have the student return to school after

the hospitalization the School A SEC told the parent the student could not return to School A because of her behavior, emotional difficulties and poor attendance.

At the time the student was not a special education student so it is understandable that School A would not have considered the student to have been entitled to the protections of 34 C.F.R. §§300.530-536, or to have conducted a MDR. However, based upon the conclusion of the March 25, 2016, HOD, the student was actually entitled to those protections because, as that Hearing Officer determined, DCPS had failed meet its “child find” obligations relative to the student back to May 2014.

Although the student was not formally cited for any specific violation of a school code of conduct, when Petitioner was told by School A the student could not return, School A, nonetheless, by its actions caused the student to be removed from School A which had the effect of a constructive expulsion of the student.¹⁴ Petitioner credibly testified about the action by School A in removing the student and not allowing her to attend School A in November 2015. Her testimony was clear, cogent and un-refuted by any evidence from Respondent.

The parent also credibly testified that after School A informed her the student could not return to School A she was forced to home school the student to avoid truancy proceedings. Petitioner fulfilled the required registration for the student to be home schooled. The evidence, however, demonstrates that while being homeschooled the student actually received minimal instruction, as there was no clear curriculum that the parent was using. As result of the student not being allowed to return to School A, and Petitioner’s vain attempts to home school the student, the student missed instruction that she should have been provided. Based upon the evidence and conclusions made in this HOD and the March 25, 2016, HOD, she should have been found eligible as far back as May 25, 2014, and should have had the benefit of an IEP from that date. Consequently, the Hearing Officer concludes that the student was denied a FAPE as a result of DCPS not providing the student the protections she was due pursuant to 34 C.F.R. § 300.530 et seq.

¹⁴ See *Cumberland School District, Wisconsin State Educational Agency*, 114 LRP 25301, August 28, 2002 where a student was not permitted to return to school and was not provided services an additional day following the last day of formal suspension. “On February 21, 2002, the student had been removed from school without services for 9.5 cumulative school days in the school year. District administration, in consultation with the student's special education teacher, determined that he should not return to the high school setting following the period of removal in the belief that it could endanger the student's safety for him to return. This action resulted in a "de facto" or "constructive" suspension of the child from school. This day must be considered when determining whether a series of removals results in a change of educational placement or whether the child had been removed from school for more than 10 cumulative days in a school year.”

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.) The Hearing Officer has concluded the student was denied a FAPE with regard to both issues that were adjudicated in the case. The Hearing Officer in the order below grants Petitioner's request for compensatory education and directs DCPS to convene a meeting to review the student's evaluations, updated data and the impact of her disability on her educational performance, develop an IEP and determine her placement and location of services.

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 presented a credible witness who testified that the student would benefit from 200 hours of independent tutoring and additional hours of counseling. Although there was conflicting evidence as to whether the consultant recommended 50 or 150 hour of independent tutoring for the student, Petitioner testified that because the student is already receiving significant outside counseling. The Hearing Officer thus opted to award the lower amount independent counseling. The Hearing Officer concludes that the student should be awarded the amount of services Petitioner requested as compensation for the missed services that the student should have received had she been timely evaluated and determined eligible as of May 26, 2014, and for the violations and denials of FAPE that were determined herein.

ORDER:¹⁵

1. DCPS shall, within fifteen (15) school days of the issuance of this order, convene a multidisciplinary team meeting to review the student's evaluation(s), her current educational data and the impact of her disability on her educational performance, develop an IEP and determine her placement and location of services.
2. DCPS shall, within thirty (30) calendar days of the issuance of this order, provide

¹⁵ Any delay in Respondent DCPS in meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

Petitioner authorization for the 200 hours of independent tutoring and 50 hours of independent counseling at the OSSE prescribed rate for the missed services that the student should have received had she been timely evaluated and determined eligible as May 26, 2014, and for the violations and denials of FAPE determined herein.

3. 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: October 4, 2016

Copies to: Counsel for Petitioner
 Counsel for DCPS
 ODR, OSSE & CHO