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

Parent on Behalf of Student, [1] Petitioner, v. Public Charter School ("School A") Local Educational Agency ("LEA"), Respondent. Case # 2019-0174 Date Issued: September 22, 2019	HEARING OFFICER'S DETERMINATION Hearing Date: August 28, 2019 Counsel for Each Party listed in Appendix A Hearing Officer: Coles B. Ruff, Esq.

[1] Personally identifiable information is in the attached Appendices A & B.

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 August 28, 2019, at the District of Columbia Office of the State Superintendent of Education ("OSSE") Office of Dispute Resolution 1050 First Street, N.E., Washington, D.C. 20003, in Hearing Room 112.

BACKGROUND AND PROCEDURAL HISTORY:

The student or ("Student") is age _____and in grade _____.[2] Student resides with Student's parent ("Petitioner') in the District of Columbia. Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of specific learning disability ("SLD"). Student attends a public charter school in the District of Columbia ("School A ") that is Student's local educational agency ("LEA").

Student has attended School A since school year ("SY") 2013-2014. Student was found eligible for special education on June 18, 2019. On July 9, 2019, Petitioner filed her due process complaint and alleged in her complaint that School A ("Respondent") denied Student a free appropriate public education ("FAPE") by failing timely locate and identify Student under its child find obligation back to July 2017, and/or failed to timely evaluate Student by not requesting Petitioner's consent to evaluate Student following Student's teacher referring Student on December 15, 2017, to School A's Student Support Services Team ("SSST").

Relief Being Sought:

Petitioner seeks as relief 250 hours of compensatory education.

LEA Response to the Complaint:

The LEA filed a timely response to the complaint on July 12, 2019. Respondent denied all allegations that Student was denied a FAPE, and, inter alia, denied that it failed to comply with its child find obligation with respect to Student and that it failed to request parental consent to evaluate Student following the referral made by Student's teacher December 15, 2017.

Resolution Meeting and Pre-Hearing Conference:

The parties participated in a resolution meeting on July 23, 2019, and did not resolve the complaint. The parties did not mutually agree to shorten the 30-day resolution period. The 45-day period began on August 9, 2019, and ends [and the Hearing Officer's Determination ("HOD") is due] on September 22, 2019.

[2] The student's current age and grade are in indicated in Appendix B.

The undersigned Hearing Officer ("Hearing Officer") convened a pre-hearing conference ("PHC") on July 31, 2019, and issued a pre-hearing order ("PHO") on August 10, 2018, outlining, inter alia, the issues to be adjudicated.

ISSUES: [3]

The issues adjudicated are:

1. Whether Respondent denied Student a FAPE by failing timely locate and identify Student under its child find obligation as of July 2017.

2. Whether Respondent denied Student a FAPE by failing to timely evaluate Student by not requesting Petitioner's consent to evaluate Student following Student's teacher referring Student on December 15, 2017, to the SSST.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in each party's disclosures (Petitioner's Exhibits 1 through 18 and Respondent's (LEA's) Exhibits 1 through 28 and Hearing Officer Exhibit 1) that were admitted into the record and are listed in Appendix 2.[4] The witnesses testifying on behalf of each party are listed in Appendix B.[5]

SUMMARY OF DECISION:

Although Petitioner sought to prove that School A's violations occurred in July 2017 and/or December 2017, the evidence did not support such a finding. However, the evidence did support a finding that a violation did occur as of June 2018 when Student was slated to be retained and after which School A's SSST interventions were determined to be unsuccessful in improving Student's academic performance. Petitioner sustained the burden of persuasion by a preponderance that School A failed to timely locate, identify and evaluate Student under its child find obligation. There was insufficient evidence to support a finding that School A failed to timely evaluate Student in December 2017 by not requesting consent to evaluate Student when Student's teacher referred Student to School A's SSST.

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[3] The Hearing Officer restated the issues at the hearing and the parties agreed that these were the issues to be adjudicated.

[4] Any item disclosed and not admitted, or admitted for limited purposes, was noted on the record and is noted in Appendix A.

[5] Petitioner presented three witnesses: (1) Student's parent ("Petitioner"), (2) Petitioner's Educational Advocate, and (3) another Educational Consultant. Respondent presented six witnesses: (1) School A's SSST Coordinator, (2) School A's Principal, (3) Student's Teacher, (4) School A's Special Education Coordinator, (5) School A's Director of Clinical Services, (6) School A's Senior Director of Student Support Services.

FINDINGS OF FACT: [6]

1. Student resides with Petitioner in the District of Columbia. School A is Student's LEA. Student has attended School A since SY 2013-2014. (Petitioner's testimony, Petitioner's Exhibit 10-1)

2. During SY 2015-2016 Student's mid-year report card indicated Student's skills in English/Language Arts ("ELA"), Math, Science and Social Studies were "Developing", but Student was identified as being at risk for retention. The end of year report card indicated Student's skills in ELA, Math, and Science were still developing, rather than "Secure." However, for special subjects the report card indicated Student was "Secure." Student was promoted to the next grade. (Petitioner's Exhibit 1-1, 1-2)

3. At end of SY 2016-2017 Student earned the grade "C" in ELA, grade "D" in Math, grade "B" in Science and Social Studies and was promoted to the next grade. In special subjects of Student earned the grade "A" in Art, Music and Physical Education ("PE") and "B" in Technology. Student was promoted to the next grade. (Petitioner's Exhibit 1-3, 1-4)

4. During SY 2017-2018 Petitioner had concerns about Student's academic performance and expressed her concerns to Student's teacher in a meeting at which she was told that Student was failing. During the meeting Petitioner asked about the teacher about the possibility that Student was dyslexic. The teacher expressed that she had no experience with identifying dyslexia. (Petitioner's testimony)

5. Student's classroom teacher referred Student to the SSST on December 15, 2017, when the teacher had concerns about Student's academic performance. The SSST determined that additional academic strategies would be implemented to assist the Student beyond the strategies attempted by the classroom teacher. In January 2018, School A began attempts to schedule an SSST meeting with Student's parents. (Witness 3's testimony, Witness 5's testimony, Petitioner's Exhibits 2-2, 11-1)

6. On January 26, 2018, School A convened an SSST meeting with Student's father. Petitioner did not attend the meeting. During the meeting the School A staff shared multiple forms of data with Student's father that indicated Student was performing one to one and half grade levels below Student's grade at that time. Student's father insisted that Student was capable of doing work on grade level and that Student was having difficulty focusing in the classroom. (Petitioner's Exhibit 2-2)

[6] The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within a parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit 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.

7. During the January 26, 2018 meeting the team discussed Student attending summer school, the possibility of retention and the possibility that Student might have a disability. Student's father said the he did not agree that Student had a disability and became hostile and aggressive. The team discussed that there was a disparity between Student's homework and classroom. Student's homework was 100 accurate. However, Student could not do the same work at school, even with the interventions. (Witness 3's testimony)

8. During the March 2018, meeting, Student's father did not specifically reject a request by School A to evaluate Student, but he objected to the possible outcome of Student being determined to have a disability. Because of Student's father's reaction, the SSST coordinator was afraid of again bringing up the possibility of Student being evaluated for a disability and decided to allow the data of Student's performance to speak for itself. She felt uncomfortable with interactions with Student's father. However, she did not inform School A administration of her discomfort. (Witness 3's testimony)

9. School A prepared an SSST action plan outlining the interventions that would be provided Student. The team developed goals memorialized in Student's SSST plan and determined the appropriate interventions/strategies to implement that included: use of visual cues; sentence frames & structures at desk; frequent check-ins with student during class; reteach lessons daily and receive additional 1-1 reading support and math support with math coach as well as small group reading intervention. The team also agreed to meet again in six (6) weeks. (Witness 3's testimony, LEA Exhibit 21)

10. Following the January 26, 2018, meeting School A provided Student interventions. Student's father came to Student's classroom on multiple occasions to assist Student in work in ELA and Math. Periodic SSST meetings were held with Student's parents to update them on Student's progress. (Petitioner's Exhibits 2-2, 3-1)

11. School A convened another SSST meeting on March 13, 2018. Both parents were present. The team discussed that Student had made progress in both reading and math; however, Student was still struggling. The team discussed additional interventions and strategies with regard to writing that would be put into place and provided the parents with academic resources that could be used at home. The parents were advised that Student would need to attend summer school to continue making progress. (Petitioner's Exhibit 2-2)

12. During the SSST meetings Student's father expressed his belief that Student's academic difficulties were related to classroom management and thought Student would do better in another classroom. As result, School A changed Student's classroom in March 2018. Student was transferred to a classroom that had some students with disabilities, a second teacher and a paraprofessional. (Witness 3's testimony, Witness 4's testimony, Petitioner's Exhibit 3-4)

13. School A scheduled follow up SSST meeting with the parents in April and early May 2018. However, the parents requested the meetings be rescheduled. School A convened another SSST meeting on May 21, 2018. Petitioner was present. The team discussed Student's

progress and areas where Student still struggled. Petitioner felt Student was capable of doing the work, but was distracted and not engaged. The team reminded Petitioner that Student was 1/1/2 to 2 years below in both reading and math. The team agreed to continue strategies that had been previously implemented. The team discussed that Student would probably be retained and Petitioner agreed that the would be a good option for Student. After the May 2018 meeting School A's principal took the lead in communicating with Student's parents about Student's performance. (Witness 3's testimony, Petitioner's Exhibits 2-2, 3-12, 3-13, 3-14)

14. At School A, SSST data is reviewed every 6 weeks and at any interval the team may make the referral for a student to be evaluated for special education. (Witness 3's testimony)

15. At the end of SY 2017-2018 Student earned the grade "F" in ELA and Math and earned the grade "C" in Science and Social Studies. In all special subjects of Student earned the grade "A". However, Student end of year report card indicated Student would be retained in the same grade. (Petitioner's Exhibit 1-5, 1-6).

16. School A's principal initially recommended that Student be retained. However, in a telephone call to Petitioner on June 5, 2018, the principal informed Petitioner that Student would not be retained. Student was not retained but attended summer school. Student was promoted administratively because School A's principal did not believe retention would benefit Student. Student attended summer school during summer 2018 and teachers informed Petitioner that Student did well. (Witness 4's testimony, Petitioner's testimony)

17. During SY 2018-2019 School A continued the SSST inventions with Student. During the first semester of SY 2018-2019 no SSST meetings were convened with Student's parents. During the fall of 2018 the principal had informal conversations with the parents about Student's progress. Most of the time Student's parents approached the principal for these conversations. (Witness 4's testimony)

18. The SSST coordinator still held bi-weekly meetings with School A staff about the Student's interventions. Student was making progress, but was not on grade level. Student remained 1.5 to 2 grade level below and was not progressing at a rapid rate. Student made more growth in math than reading. (Witness 3's testimony)

19. There was no formal communication with regarding Student's progress with Student's parent from May 2018 to April 2019. During SY 2018-2019 School A continued to provide Student pull-out and inclusion support. At some point during the 2018-2019 the principal said he would resume contact with Student's parents. The SSST coordinator attempted to contact the parents in March 2019 because School A's principal instructed her to do so. (Witness 3's testimony)

20. In March 2018, School A's SSST coordinator telephoned and later emailed Petitioner to schedule and meeting to discuss Student's academic progress. On April 8, 2019, the SSST coordinator was able to meet with Petitioner and scheduled an SSST meeting for April 25, 2019. (Petitioner's Exhibit 2-1)

21. At the April 25, 2019, meeting School A reviewed the interventions that were being provided Student and reported that Student had not shown growth in Math or ELA as reflected in Student's MAP scores. However, Student had shown growth of two levels in the Fontis and Pennell assessment as a result of the reading interventions that School A had been providing. The team noted that they suspected Student had a disability and recommended that Student be evaluated. Petitioner noted that this was the same information that was available to the team the year prior and inquired as to why evaluation was not recommended earlier. School A informed Petitioner that when a disability was suspected the year prior, Student's father did not agree to move forward with evaluations. Petitioner soon after the meeting provided School A consent to evaluate Student. (Petitioner's Exhibits 2-2, 3-15)

22. On April 29, 2019, School A's Special Education Coordinator generated a document to indicated that an official request by both Student's parent and School A was being made for Student to be evaluated for special education. On May 2, 2019, School A sent Petitioner a letter acknowledging that on April 29, 2019, School A received the referral for initial evaluation of Student. On May 2, 2019, Petitioner signed the form consenting to the evaluation. (Petitioner's Exhibit 8-1, 8-2, 8-4)

23. On May 23, 2019, School A issued a PWN informing Petitioner that School A would proceed with evaluating Student for special education. (LEA Exhibit 15)

24. OSSE guidelines for referral and initial evaluation for special education indicate that LEAs are required to make reasonable efforts to obtain parental consent for initial evaluation of a student within 30 calendar days of child being referred for special education and document the attempts to obtain parental consent. The LEA must complete an eligibility determination within 60 calendar days of obtaining parental consent. (Petitioner's Exhibit 12, 13, 14, 15)

25. In June 2019, School A conducted evaluations of Student and at a June 18, 2019, eligibility meeting with Petitioner reviewed the evaluations and determined Student eligible for special education and related services with a SLD disability classification. (Witness 6's testimony, Witness 2's testimony, Petitioner's Exhibits 6, 7, 8-7, 8-8, 8-9, 8-10,10-1)

26. On July 11, 2019, School A developed an Individualized Educational Program ("IEP") for Student that prescribed the following services: 25 hours per week of specialized instruction, 45 minutes per week of occupational therapy and 60 minutes per month of behavioral support services ("BSS"), all outside the general education setting. The IEP also prescribed 60 minutes per month of BSS consultative services. School A had prepared a draft IEP for the July 11, 2019, IEP meeting. The draft IEP had fewer hours of specialized instruction. The school believed Student would benefit from inclusion instruction, but Petitioner's educational advocate believed Student should be in resource setting. School A agreed to the 25 hours of specialized instruction to avoid conflict with Petitioner's advocate. (Witness 6's testimony, Witness 2's testimony, Petitioner's Exhibits, 10)

27. The psychoeducational evaluation School A conducted included assessments of Student's cognitive functioning and academic achievement. Student cognitive functioning was assessed as being in the Very Low range with a Full-Scale IQ score of 74. However, the evaluator noted that this score should be interpreted with caution as there was variability within and between Student's subtests index scores. The testing indicated multiple strengths in Student's Fluid Reasoning, Working Memory and Processing Speed. Student's academic achievement was in the Low to Very Low Range. Student's Broad Reading, Broad Mathematics and Broad Written Language were assessed at approximately 1.5 grade levels below Student's current grade. (Witness 7's testimony, LEA Exhibit 13-5, 13-8, 13-9).

28. School A administers MAP testing three times during each school year to assess growth in their students reading and math abilities. Student demonstrated modest growth in both reading and math from Fall 2017 to Spring 2019, but maintained below grade level scores throughout on the MAPP testing. (LEA Exhibit 3-1)

29. At the end of SY 2018-2019 Student earned the grade "D" in ELA, Math and Science. Student earned the grade "C" in Social Studies. In special subjects: Art, Music, PE and Technology, Student earned higher grades and was promoted to next grade, but was required to attend summer school. (Petitioner's testimony, LEA Exhibit 1-1, Petitioner's Exhibit 1-8)

30. Petitioner's Educational Advocate proposed a compensatory education plan to compensate Student for the alleged failure by School A to evaluate Student, determine eligibility and provide Student special education services for two years since July 2017. She requested 250 hours of independent academic tutoring to compensate Student for having been without, during that two-year period, the level of services that are prescribed in Student's IEP. The advocate based the request on the severity of Student's lack of progress in the past and her anticipation that Student's rate of progress could and would increase with the tutoring. (Witness 1's testimony, Witness 2's testimony, Petitioner's Exhibit 16)

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. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). Petitioner held the burden of persuasion on both issued adjudicated.[7] The normal standard is for the burden of persuasion is a preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 F. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether Respondent denied Student a FAPE by failing timely locate and identify Student under its child find obligation as of July 2017.

Conclusion: Petitioner sustained the burden of persuasion by a preponderance that School A failed to timely locate, identify and evaluate Student under its child find obligation. Although Petitioner sought to prove that School A's violations occurred in July 2017 and/or December 2017, the evidence did not support such a finding. However, the evidence did support a finding that a violation did occur as of June 2018 when Student was slated to be retained and after which School A's SSST interventions were determined to be unsuccessful in improving Student's academic performance.

The overall purpose of the IDEA is to ensure that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). *See Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA "aims to ensure that every child has a meaningful opportunity to benefit from public education").

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[7] DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

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

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

In *Board of Education v. Rowley,* the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Petitioner alleged that Respondent did not comply with IDEA by timely evaluating Student for special education following her requests and/or pursuant to its child find obligations.

"Child-find obligations [to evaluate the student] are triggered 'as soon as a child is identified as a potential candidate for services,'" *Long*, 780 F. Supp. 2d at 57 (citing *N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 16 (D.D.C. 2011)). *Integrated Design and Elec. Acad. Pub. Charter Sch. v. McKinley*, 570 F. Supp. 2d 28, 34 (D.D.C. 2008) (a school is obligated to evaluate a student once that student is "suspected of having a disability").

An LEA 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 for an evaluation or assessment." D.C. Code § 38-2561.02(a).

Because an evaluation and eligibility determination are a prerequisite to preparing an IEP, ordinarily an LEA's failure to evaluate the student and determine [redacted] 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.)

The evidence demonstrates that in December 2017 Student's teacher took the initiative to refer Student's to School A's SSST. School A promptly initiated a SSST meeting with Student's parents and met with Student's father on January 26, 2018. During that meeting the SSST coordinator mentioned the possibility that Student might have a disability. Student's father flatly rejected that possibility. The evidence did not indicate that at that initial meeting the coordinator or anyone else from School A specifically requested the father's consent to evaluate Student.

The evidence demonstrates that the SSST coordinator was thereafter afraid to interact with Student's father. Although the coordinator testified that she did not convey that fear to the School A administrators, the School A principal became the point person for communicating with Student's parents about Student's academic performance.

Over the next few months pursuant to an SSST plan that School A developed, School A provided Student interventions to address Student's low academic performance. By May 2018 when the SSST met, it was clear to School A that the interventions were not sufficiently successful, although Student had made some progress. At the end of SY 2017-2018 Student was slated to be retained. Student was, however, administratively promoted to the next grade and attended summer school.

The evidence demonstrates that even though School A continued to provide Student SSST interventions during the following year, SY 2018-2019, there were only informal meetings with Student's parents about Student's academic progress and those were mostly initiated by the parents.

There were no other formal SSST meetings with Student's parent until April 2019 after the School A principal directed the SSST administrator to contact the parents to participate in a meeting. It was in that April 2019, meeting that School initiated evaluation of Student and eventually obtained consent from Petitioner to move forward with evaluation.

The evidence demonstrates that based on Student's poor academic performance and failure to make sufficient progress as a result of the SSST interventions that School A implemented, School A was on notice at least by the end of SY 2017-2018 when Student was slated to be retained, that Student's not only needed to be identified, but warranted evaluation at that time for special education eligibility. It appears that School A's reluctance to do so was in reaction to Student's father's initial and perhaps anticipated continued opposition to Student being identified as having a disability.

Although Petitioner asserts that School A should have evaluated Student in December 2017 when Student's teacher first referred Student to the SSST, there was no credible testimony, or evidence that supported such a finding. It was reasonable at that time for School A to attempt interventions before moving to evaluating the Student. However, once it became clear at the end of SY 2017-2018 that the interventions were unsuccessful, School A should have then moved to evaluate Student rather than simply continuing the SSST interventions into SY 2018-2019 without evaluating Student. In addition, the evidence demonstrates that after during SY 2018-2019 there was no formal communication with Student' parents about the SSST interventions until April 2019 when formal evaluations were then initiated.

Although Respondent's counsel asserted that there is no time frame that a student needs to remain in the SSST before being evaluated, the facts in this case reveal that too much time passed with too little progress, and evaluation was clearly warranted.

Despite Respondent's witness indicating that School A team did not suspect Student had a disability during SY 2017-2018, the SSST meeting notes belie that assertion. The School A notes clearly indicate that in response to Petitioner's question at the April 2019, meeting as to why evaluation was not conducted the year prior, the coordinator responded that the when the team believed Student perhaps had a disability the year before, because Student's father disagreed, they did not press forward with evaluation. Despite the father's apparent opposition, School A had an obligation to pursue evaluating Student in June 2018 when the data clearly demonstrated that School A's interventions were not working sufficiently.

Consequently, the Hearing Officer concludes that School A's failure to initiate evaluations of Student for special education by June 2018 significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE and caused Student a deprivation of educational benefits.

The evidence demonstrates that Student, once found eligible, was provided an IEP that prescribed specialized instruction and related services. Had School A timely evaluated Student, Student would have presumably been found eligible a year prior to the date that Student was found actually

found eligible, and would have had the benefit of special education services throughout SY 2018-2019.

ISSUE 2: Whether Respondent denied Student a FAPE by failing to timely evaluate Student by not requesting Petitioner's consent to evaluate Student following Student's teacher referring Student on December 15, 2017, to the SSST team.

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue. There was insufficient evidence to support a finding that School A failed to timely evaluate Student in December 2017 by not requesting from Petitioner consent to evaluate Student when Student's teacher referred Student to School A's SSST.

Pursuant to 34 C.F.R. §300.300 when an LEA proposes to conduct evaluations of a student the LEA, after providing prior notice pursuant to § 300.503 to the parents, must obtain informed consent before conducting the evaluations.[8]

Petitioner asserts that School A should have initiated evaluation of Student in December 2017 and should have initiated a formal consent to conduct the evaluation from Petitioner at that time. As the discussion of the issue above points out, it was reasonable at the time School A initiated the SSST process in December 2017 for School A to attempt interventions prior to evaluating Student. Therefore, the Hearing Officer concludes based on the evidence adduced that there was no violation as of December 2017 in School A not obtaining formal consent from Petitioner or Student's father to conduct the evaluations.

Notwithstanding the conclusion made by the Hearing Officer in the issue above that School A failed to timely identify and evaluate Student pursuant to its child find obligations, there was no evidence that prior to April 2019, School A sought to evaluate Student for which any attempt to gain written consent from the parent would have been required. The child find violation sufficiently identifies the denial of FAPE that the evidence in this case demonstrates.

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[8] 34 C.F.R. §300.300 (a)*Parental consent for initial evaluation*. (1)(i) The public agency proposing to conduct an initial evaluation to determine if a child qualifies as a child with a disability under § 300.8 must, after providing notice consistent with §§ 300.503 and 300.504, obtain informed consent, consistent with § 300.9, from the parent of the child before conducting the evaluation. (ii) Parental consent for initial evaluation must not be construed as consent for initial provision of special education and related services. (iii) The public agency must make reasonable efforts to obtain the informed consent from the parent for an initial evaluation to determine whether the child is a child with a disability.

34 C.F.R. § 300.503 (a) *Notice*. Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency— (1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or (2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. (b) *Content of notice*. The notice required under paragraph (a) of this section must include— (1) A description of the action proposed or refused by the agency; (2) An explanation of why the agency proposes or refuses to take the action; (3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; (4) A statement that the parents of a child with a disability have protection under the

Consequently, the Hearing Officer concludes that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue. The issue is dismissed with prejudice.

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 that Student was denied a FAPE by the LEA failing to evaluate Student pursuant to its child find obligation by June 2018 and that Student was without special education services for a single school year. The Hearing Officer has directed the LEA, in the order below, to remedy that denial.

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's educational advocate requested 250 hours of independent tutoring services. The evidence demonstrates that this request was based upon an assumption there were violations for two years prior to the date Petitioner's due process complaint was filed. Although there was reasonably credible testimony provided that Student would benefit from the tutoring and that such tutoring would assist Student in remediation of skills toward bringing Student closer to grade level, the period that the Hearing Officer has concluded that Student was denied a FAPE and without special education services was half the time that educational advocate testified that Student was without services. The request by the advocate was far beyond the violation this Hearing Officer determined was proved by the evidence.

Based upon the evidence of Student's deficits, Student's educational performance and potential and the services missed, the Hearing Officer has determined that Student will benefit from tutoring to compensate for and ameliorate Student's lack of appropriate services during SY 2018-2019. Accordingly, the Hearing Officer in the order below grants Petitioner the amount of compensatory education services that the Hearing Officer considers appropriate.

ORDER: [9]

1. School A shall, within twenty (20) business days of the issuance of this order, authorize Petitioner to obtain, 125 hours of independent tutoring at the OSSE approved rate.

[9] Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioner, Petitioner's Counsel or Educational Advocate shall extend the timelines on a day for day basis.

2. Issue #2 above is dismissed with prejudice and all other relief requested by Petitioner is denied.

APPEAL PROCESS:

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

/S/ *Coles B. Ruff*

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Coles B. Ruff, Esq.
Hearing Officer
Date: September 22, 2019

Copies to: Counsel for Petitioner
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