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DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

Parent,[1] on behalf of,
Student,
Petitioner,

v.

District of Columbia Public Schools,
Respondent.

Date Issued: August 5, 2012

Hearing Officer: Melanie Byrd Chisholm

Case No: 2012-0416

Hearing Dates: July 23, 2012; July 25, 2012

Room: 2003

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

The student is a year old male, who is currently a grade student attending School A. The student is currently a general education student and has not been identified as a student with disabilities eligible for special education and related services.

On June 6, 2012, Petitioner filed a Due Process Complaint against Respondent District of Columbia Public Schools (DCPS), alleging that DCPS denied the student a free appropriate public education (FAPE) by failing to by failing to take any affirmative steps to locate, evaluate or identify the student as eligible for special education and related services, and when presented with an outside evaluation and data that indicate that the student is eligible for services, denied the student's eligibility without including the parent in the final eligibility determination. As relief for this alleged denial of FAPE, Petitioner requested that the student be found eligible for special education and related services as a student with emotional disturbance (ED) or specific learning disability (SLD); an individualized education program (IEP) for the student with includes at least fifteen (15) hours per week of specialized instruction in all academic areas, at least one (1) hour per week of tutoring services, vocational support, and at least one (1) hour per week of behavioral support services; an appropriate placement for the student; and compensatory education including tutoring and counseling services.

On June 8, 2012, Respondent filed its Response to the Complaint. In its Response, Respondent asserted that while the student is a Ward of the District of Columbia, he is under the

[1] Personal identification information is provided in Appendix A.

jurisdiction of another local educational agency (LEA), consequently, DCPS may not alter or amend a determination of eligibility by a different LEA; DCPS does not have a Child Find obligation with respect to the student who is a resident of another State; and the student has been identified and evaluated and was determined ineligible by other State and the proper appeal is with that State.

On June 15, 2012, the parties participated in a Resolution Meeting. The parties concluded the Resolution Meeting process by failing to reach an agreement. At the meeting, the parties also agreed in writing that no agreement is possible. Accordingly, the parties agreed that the 45-day timeline started to run on June 16, 2012.

On June 15, 2012, Respondent filed a Motion to Dismiss alleging that DCPS is not responsible for the education of the student because the student is a resident of the State of Maryland and does not meet the IDEA requirement of "a child residing" in the District of Columbia and the student's "parent" is a resident of the State of Maryland and therefore does not have standing to file a claim in the District of Columbia. Additionally, the Respondent alleged that the Hearing Officer does not have subject matter jurisdiction to hear the claim of a non-resident. The Respondent further argued that while the student is a Ward of the District of Columbia, his status as a Ward of the District of Columbia does not entitle him to special education and related services in the District of Columbia.

On June 20, 2012, Petitioner filed an Opposition to Respondent's Motion to Dismiss, arguing that since the student is a Ward of the District of Columbia, DCPS is the local LEA responsible for providing the student with a FAPE.

On June 21, 2012, Hearing Officer Melanie Chisholm convened a prehearing conference and led the parties through a discussion of the issues, relief sought and related matters. During the June 21, 2012 prehearing conference, the Hearing Officer requested that both parties submit a memorandum or brief outlining DCPS' responsibility to wards of the District of Columbia pursuant to the District of Columbia Municipal Regulations (DCMR). Petitioner and Respondent timely submitted the requested memorandum/brief. The Hearing Officer issued the Prehearing Order on June 26, 2012. The Prehearing Order clearly outlined the issues to be decided in this matter and confirmed July 23-24, 2012 as the dates for the due process hearing. Both parties were given three (3) business days to review the Order to advise the hearing officer if the Order overlooked or misstated any item. On June 28, 2012, the Respondent requested that the Hearing Officer revise the Prehearing Order to remove any reference to DCPS agreeing that the student is a Ward of the District of Columbia. On July 5, 2012, the Hearing Officer issued a Revised Prehearing Order.

On July 3, 2012, Petitioner filed a Motion for Production of Documents alleging that DCPS is in possession of educational records pertaining to the identification, evaluation and eligibility of the student and has not provided these records to Petitioner. On July 6, 2012, Respondent filed a Response to Petitioner's Motion to Produce Documents arguing that DCPS did not identify, evaluate or place the student in his current educational environment and therefore is not obligated to disclose any information the agency has regarding the student.

On July 5, 2012, the Hearing Officer issued an Order Denying Respondent's Motion to Dismiss. On July 9, 2012, the Hearing Office issued an Order Denying Petitioner's Motion for Production of Documents.

On July 5, 2012, Petitioner filed a Motion for a Notice to Appear for Monique Bass. On July 10, 2012, the Hearing Officer asked the Petitioner for more information regarding the Motion for a Notice to Appear. Specifically, the Hearing Officer asked the Petitioner to clarify why the witness was unavailable to testify.

On July 16, 2012, Petitioner filed Disclosures including forty (40) exhibits and nine (9) witnesses.[2] On July 17, 2012, Respondent filed Disclosures including zero (0) exhibits and one (1) witness.

On July 22, 2012, the Hearing Officer issued an Order Denying Petitioner's Motion for a Notice to Appear finding that the Petitioner failed to show that the witness refused to appear voluntarily.

The due process hearing commenced at approximately 9:03 a.m. on July 23, 2012 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2003. The Petitioner elected for the hearing to be closed. At the start of the hearing, Respondent's counsel informed the Hearing Officer that Respondent's only listed witness would be unable to testify on the scheduled hearing days because of a family emergency. Respondent requested that the second day for the hearing be rescheduled for July 25, 2012 and requested a seven (7) day extension of the 45-day timeline. Respondent did not oppose the request for a seven (7) day extension. The Hearing Officer rescheduled the second day of the hearing for July 25, 2012 and granted the seven (7) day extension to the 45-day timeline.

Petitioner's Exhibits 1-40 were admitted without objection. Petitioner amended Exhibit 32 with a copy of the document with other student names redacted. The Hearing Officer also clarified that Order of Dismissal attached to Respondent's June 15, 2012 Motion to Dismiss would be altered to exclude the pages including personally identifiable information of another student.

Prior to Petitioner presenting its first witness, the Respondent renewed its Motion to Dismiss based on the same argument contained within its June 15, 2012 Motion to Dismiss. The Hearing Officer denied Respondent's Motion to Dismiss based on the reasoning it the July 5, 2012 Order Denying Respondent's Motion to Dismiss.

The hearing concluded at approximately 3:33 p.m. on July 25, 2012, following closing statements by both parties.

Jurisdiction

The hearing was conducted and this decision was written pursuant to the Individuals with Disabilities Education Act (IDEA), P.L. 101-476, as amended by P.L. 105-17 and the Individuals

[2] A list of exhibits is attached as Appendix B. A list of witnesses who testified is included in Appendix A.

with Disabilities Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E-30.

ISSUES

The issues to be determined are as follows:

1. Whether DCPS failed to take affirmative steps to locate, identify and evaluate the student pursuant to its Child Find obligations and whether this failure constitutes a denial of a FAPE for the student?
2. Whether DCPS failed to provide the student a FAPE by failing to find the student eligible for special education and related services as a student with an ED or as a student with a SLD?
3. Whether DCPS failed to allow the parent to meaningfully participate in the eligibility determination and whether this failure constitutes a denial of FAPE for the student?

FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. The student is not currently identified as a child with a disability. (Petitioner's Exhibits 4, 11, 14, 15)
2. The student's mother is deceased and the whereabouts of the student's father is unknown. The parental rights of the student's father have not been extinguished. (Petitioner's Exhibits 21, 22 and 32; GAL's Testimony)
3. The student became a Ward of the District of Columbia in 2008. The student continues to be a Ward of the District of Columbia. By virtue of the student's status as a District of Columbia Ward, the District of Columbia Superior Court deems the student to be a resident of the District of Columbia. (Petitioner's Exhibits 32, 33, 34 and 35; GAL's Testimony)
4. The District of Columbia Child and Family Services Agency (CFSA) has authority over the student. Given the lack of foster families in the District of Columbia, CFSA must place Wards of the District of Columbia in foster homes in the State of Maryland and the Commonwealth of Virginia. (Petitioner's Exhibits 34 and 35; GAL's Testimony)
5. CFSA placed the student in School A. (GAL's Testimony)
6. CFSA has no obligation to inform DCPS of a student's placement and does not update DCPS as to the academic or placement status of Wards. DCPS has neither been invited to nor attended any CFSA review hearings regarding the student. (GAL's Testimony; Program Manager's Testimony)
7. The student and the student's guardian currently reside in Prince George's County, Maryland. The student has lived with his current guardian since August 2011. Prior

to his current foster placement, the student was in foster placements with his siblings. (Petitioner's Exhibits 21 and 35; GAL's Testimony; Parent's Testimony)

8. Since 2008, the student has resided in the State of Maryland and has attended schools in Charles County, Maryland and Prince George's County, Maryland. (Petitioner's Exhibits 24, 25, 26, 27, 28, 29, 30, 31 and 35; GAL's Testimony)
9. In 2006, the student was involved in a fatal car accident which claimed the life of his brother and caused significant injuries to him and his mother. In December 2012, the student's mother died suddenly, following her inability to effectively cope with the death of her son. Also during the 2010-2011 school year, the student's aunt died. (Petitioner's Exhibit 21 and 22; GAL's Testimony)
10. During the 2009-2010 school year, as a 8th grade student in Charles County, Maryland, the student received three (3) "A's", one (1) "B" and three (3) "C's" on his third quarter report card. At the end of the 2010-2011 school year, as a 9th grade student, in Charles County, Maryland, the student received one (1) "C", four (4) "D's", and three (3) "F's". During the 2011-2012 school year, the student earned all grade letter "E's" and was not promoted to the next grade level. (Petitioner's Exhibits 24, 25, 26, 28 and 29; GAL's Testimony)
11. In March 2011, Mood Disorder was ruled out as a diagnosis for the student. At this time, the student slept well, had a good appetite, had a good energy level, enjoyed being with friends and denied having anger problems, anxiety or suicidal ideation. He was alert, cooperative, made good eye contact and had an "okay" mood. The student was deemed not in need of medication. (Petitioner's Exhibits 19 and 20)
12. During the 2011-2012 school year, the student received an in-school suspension for disruption/disrespect/insubordination on October 4, 2011; an out-of-school suspension for inciting others to violence on October 6, 2011; and out-of-school suspensions for failure to follow school policies on November 1, 2011, November 18, 2011, December 9, 2011, January 19, 2012 and February 21, 2012. The "failure to follow school policies" was for being in the hallways or not attending class. (Petitioner's Exhibits 21, 23 and 31; GAL's Testimony; Parent's Testimony; Investigator's Testimony)
13. The student's poor grades and truancy from class began after the death of his mother. (Petitioner's Exhibits 21, 24, 25, 26, 28 and 29; GAL's Testimony)
14. Following the student's move to his current foster placement, the student's behavior stabilized. (Petitioner's Exhibit 21; GAL's Testimony; Parent's Testimony)
15. The student has been diagnosed with Dysthymic Disorder. (Petitioner's Exhibit 21; Psychologist's Testimony)
16. On December 12, 2011, the parent, through counsel, requested that School A, located in Prince Georges County, Maryland, determine the student's eligibility for special education. A copy of this request was not provided to DCPS. From December 12, 2011 through May 8, 2012, the Petitioner, through counsel, continued to communicate with School A regarding the student's eligibility for special education services. DCPS was not included in or copied in these communications. (Petitioner's Exhibits 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16; GAL's Testimony; Parent's Testimony; Program Manager's Testimony; Progress Monitor's Testimony)
17. A Multidisciplinary Team (MDT) met at School A on April 25, 2012 and did not find the student eligible for special education and related services. DCPS was not

informed of, invited to or present at this meeting. (Petitioner's Exhibits 11, 12, 14, 15 and 16; GAL's Testimony; Parent's Testimony; Program Manager's Testimony; Progress Monitor's Testimony)

18. DCPS did not become aware of the student until May 16, 2012 when the parent, through counsel, contacted DCPS seeking "intervention" in the student's case because of frustration with "the school's ongoing refusal to communicate" and requested that DCPS set a meeting to "revisit [the student's] eligibility", identify a liaison within School A to respond to counsel's communication, conduct an functional behavioral assessment (FBA) and be in attendance at the next MDT meeting in Prince George's County, Maryland. Prior to May 16, 2012, DCPS was not included on any communication regarding the student; was neither invited to nor attended any meetings regarding the student; and had not received any information regarding the student's academic or behavioral performance. (Petitioner's Exhibits 14, 15 and 16; GAL's Testimony; Parent's Testimony; Program Manager's Testimony; Progress Monitor's Testimony)
19. On May 25, 2012, DCPS communicated with parent, though counsel, regarding its communication with Prince George's County and its understanding of why Prince George's County did not find the student eligible for special education and related services and its request to Prince George's County that the student be provided with a 504 Plan. (Petitioner's Exhibit 16; GAL's Testimony; Progress Monitor's Testimony)
20. DCPS had no intention of evaluating the student after it was notified of the student's academic and behavioral difficulties on May 16, 2012. (Petitioner's Exhibit 16; GAL's Testimony; Program Manager's Testimony; Progress Monitor's Testimony)
21. The student has a full scale IQ of 89, which is in the low average range. The student's academic functioning is in the low average range for Broad Reading, the average range for math, the low range for Broad Written Language and the low average range for Academic Skills. There were not any significant discrepancies between the student's index scores which fell within the low average and average ranges. The student has no significant strengths or weaknesses. (Petitioner's Exhibit 21; Psychologist's Testimony)
22. The student's age-level equivalences are particularly low in passage comprehension (within the reading cluster) and writing samples (within the written language cluster). (Petitioner's Exhibit 21)
23. The cognitive testing scores achieved by the student during his March 2012 testing were relatively consistent with or somewhat higher than his testing scores achieved in 2009. (Petitioner's Exhibit 21)
24. The student goes to school but frequently does not attend class. While in the school building, he is in the hallways during class time. (Petitioner's Exhibits 23, 31; GAL's Testimony; Parent's Testimony)
25. Not putting forth adequate effort, lack of motivation and loss of class time while the student walks the halls are factors which have interfered with the student's development of academic skills. (Petitioner's Exhibit 21)
26. The student's academic difficulties relate, in part, to his external stressors. The student has been internalizing feelings of depression since the death of his brother in 2009. The symptoms of the student's depression are likely closely related to his

reported conduct problems, disrespectful actions and projected indifference. (Petitioner's Exhibit 21)

27. The student maintains good eye contact and is pleasant. The student has friends and is able to build friendships when in a new environment. (Petitioner's Exhibits 21 and 22; GAL's Testimony)
28. The student has a desire to attend college and is interested in culinary arts. (Petitioner's Exhibit 21; GAL's Testimony)
29. The student has relationships with his siblings and other family members. (Petitioner's Exhibits 19, 21 and 22; GAL's Testimony; Parent's Testimony)
30. School B is a private special education day school located in Baltimore, Maryland. (Petitioner's Exhibits 38 and 39; GAL's Testimony; School B Director Testimony)

CONCLUSIONS OF LAW

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

Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. 5 DCMR §E-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). 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. 5 DCMR §E-3030.3. The recognized standard is the preponderance of the evidence. *See N.G. v. District of Columbia,* 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

Issue #1

A State must have in effect policies and procedures to ensure that all children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated; and a practical method is developed and implemented to determine which children are currently receiving needed special education and related services. 34 CFR §300.111(a). The standard for triggering the Child Find duty is suspicion of a disability rather than actual knowledge of a qualifying disability. *See, Regional School District Board of Educ. v. Mr. and Ms. M. ex rel. MM,* 15 IDELR 8 (D. Conn. 2009); *Torrance United School District v. E.M.,* 51 IDELR 11 (M.D. Calif. 2009); *District of Columbia Public Schs,* 111 LRP 25929 (SEA DC March 25, 2011).

Ward of the State

In the present matter, the Respondent argued that it does not have a Child Find duty for this student because the student does not reside in the District of Columbia and is not a Ward of the District of Columbia. The Respondent further argued that the definition of "Ward of the State" at 34 CFR §300.45 excludes this child because the child is a foster child who has a foster

parent who meets the definition of a parent in 34 CFR §300.30. *See* 34 CFR §300.45(b). The Respondent alternatively argued that even if the student is a Ward of the District of Columbia, 5 DCMR §E-3002.1(d) expressly states that DCPS "shall ensure that procedures are implemented to identify, locate, and evaluate all children with disabilities that *reside* in the District who are in need of special education and related services..." (emphasis added).

While this is indeed the language of 5 DCMR §E-3002.1(d), 5 DCMR §E-3002.3(a), states that "the LEA shall ensure that procedures are in place to identify, locate and evaluate children with disabilities residing in the District or children who are wards of the District." 5 DCMR §E-3002.1(d) does seem to limit DCPS' Child Find obligations to children residing in the District of Columbia, yet 5 DCMR §E-3002.3(a) clearly makes DCPS' Child Find obligation inclusive of children residing in the District of Columbia and children who are Wards of the District of Columbia.

The student is a Ward of the District of Columbia. Given the lack of foster families in the District of Columbia, CFSA must place Wards of the District of Columbia in foster homes in the State of Maryland and the Commonwealth of Virginia. By virtue of his Ward status, the District of Columbia Superior Court has deemed this student a "resident" of the District of Columbia. This Hearing Officer has neither the inclination nor the authority to question the position of the District of Columbia Superior Court regarding the student's residency status. Regardless of the fact that the student has been placed by CFSA in a foster home in the State of Maryland, the student remains a resident of the District of Columbia.

The IDEA regulations at 34 CFR §300.30(a) define a Parent as: (1) A biological or adoptive parent of a child; (2) A foster parent, unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as parent; (3) A guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State).... 5 DCMR §E-3001.1 defines Parent as including a foster parent only if the natural parent's authority to make educational decisions on the child's behalf has been extinguished under applicable law and the foster parent has an ongoing, long-term parental relationship with the child, is willing to make educational decisions for the child as required under the Act, and has no interest that conflicts with the interests of the child.

In the present matter, the child's mother is deceased and while the whereabouts of the child's father is unknown, the parental rights of the child's father have not been extinguished. The student became of Ward of the District of Columbia in July 2008 however has only been residing with his current foster parent since August 2011. The GAL clearly stated that CFSA has the authority to remove the student from his current foster placement at any time. Reading the IDEA regulations together with the DCMR, the Hearing Officer finds that the child's current foster parent does not yet have an "ongoing long-term parental relationship with the child" which would meet the exception of the definition of "Ward of the State" pursuant to 34 CFR §300.45(b).

The respondent also argued that DCPS is not the LEA for the student since an LEA has "administrative control or direction" over the delivery of instruction of the child. The Hearing

Officer is not persuaded by this argument. At no point has Petitioner alleged that the student was enrolled in another LEA within the District of Columbia at the time when he became a Ward of the District of Columbia. As a factual matter, DCPS is the only geographical LEA in the District of Columbia. In 5 DCMR §E-3002.1(a) and 5 DCMR §E-3002.3(a), District of Columbia regulations provide that DCPS has the responsibility to identify, locate and evaluate children residing in the District *or* who are wards of the District and must provide a FAPE to children residing in the District *or* who are wards of the District. The LEA's responsibilities extend beyond students for whom DCPS has administrative control or direction of the delivery of their instruction. DCPS is the District of Columbia LEA for the student and has a Child Find obligation for the student as a resident of the District of Columbia and as a Ward of the District of Columbia. The fact that the LEA in Prince George's County, Maryland also has Child Find responsibilities for the child is irrelevant in this matter.

Child Find

During the 2009-2010 school year, as a 8th grade student in Charles County, Maryland, the student received three (3) "A's", one (1) "B" and three (3) "C's" on his third quarter report card. By the end of the 2010-2011 school year, as a 9th grade student, in Charles County, Maryland, the student's grades had declined to one (1) "C", four (4) "D's", and three (3) "F's." The student's June 20, 2012 report card, from his 10th grade year in Prince George's County, Maryland, indicates that the student earned all grade letter "E's" and is not to be promoted to the next grade level.

On December 12, 2011, the student's parent, through counsel, requested that Prince George's County review evaluation results, when they became available, to determine whether the student qualified for special education services. Prince George's County informed counsel that an Intervention meeting for the student was held on October 6, 2011 and no additional meetings had been scheduled. On January 5, 2012 and January 25, 2012, the parent, through counsel, requested that Prince George's County provide disciplinary information and again asserted that the student is a student with a disability. On February 24, 2012, parent, through counsel, mirrored the requests from the January 2012 letters and informed Prince George's County, Maryland that a psycho-educational evaluation for the student was in the process of being conducted. On March 15, 2012, parent, through counsel, provided Prince George's County, Maryland with a copy of the student's psycho-educational evaluation and requested an eligibility meeting. DCPS was not copied on any of the communication between the parent, through parent's counsel, and Prince George's County, Maryland regarding the student's suspected disability.

Prince George's County, Maryland scheduled an MDT meeting for April 25, 2012 to review the student's psycho-educational evaluation. At this meeting, the MDT declined to find the student eligible for special education and related services. The record contains varying reasons why the student was not found eligible at this meeting. The Petitioner alleged that the student was not found eligible because the MDT needed additional information and the Respondent alleges that the student was not found eligible because the MDT determined that the student's poor academic performance was due to laziness and the student's desire to ensure that he would be in a foster home with his siblings. DCPS was not informed of or invited to the April 25, 2012 MDT meeting in Prince George's County, Maryland.

On May 16, 2012, parent, though counsel, contacted DCPS seeking "intervention" in the student's case because of frustration with "the school's ongoing refusal to communicate" and requested that DCPS set a meeting to "revisit [the student's] eligibility", identify a liaison within School A to respond to counsel's communication, conduct an FBA and be in attendance at the next MDT meeting in Prince George's County, Maryland. On May 23, 2012, DCPS communicated with parent, though counsel, regarding the student's case. The parent, through counsel, discussed its objection to Prince George's County's decline to find the student eligible for special education services. On May 25, 2012, DCPS communicated with parent, though counsel, regarding its communication with Prince George's County and its understanding of why Prince George's County did not find the student eligible for special education and related services and its request to Prince George's County that the student be provided with a 504 Plan. On June 7, 2012, the Progress Monitor visited School A to observe the student. Prior to May 16, 2012, DCPS was not included on any communication regarding the student; was neither invited to nor attended any meetings regarding the student; was neither invited to nor attended any CFSA review hearing regarding the student; and had not received any information regarding the student's academic or behavioral performance.

The Petitioner argued that DCPS' Child Find obligation was triggered at the time the student began receiving failing grades in Charles County, Maryland and that DCPS should have been reviewing report cards of student in order to be aware of the student's failing grades. Although the Petitioner stated that the student had "several years of academic and behavioral" difficulties, the record indicates that the student's poor grades did not occur until the 2010-2011 school year and the student's behavioral difficulties did not begin until October 2011, during the 2011-2012 school year.

The standard for triggering the Child Find duty is suspicion of a disability rather than actual knowledge of a qualifying disability. *See Regional School District Board of Educ. v. Mr. and Ms. M. ex rel. MM,* 15 IDELR 8 (D. Conn. 2009); *Torrance United School District v. E.M.,* 51 IDELR 11 (M.D. Calif. 2009); *District of Columbia Public Schs,* 111 LRP 25929 (SEA DC March 25, 2011). However, the LEA must have a reason to suspect that a student has a disability. *See E.J. by Tom J. and Ruth J. v. San Carlos Elementary Sch. Dist.* 803 F. Supp. 2d 1024 (N.D.Cal. 2011) (allegations that a California district knew about a student's anxiety disorder for years before it referred her for an evaluation were not enough to show that the district violated its child find obligation because the student's teachers had no reason to believe she needed special education services); *J.G. v. Douglas County Sch. Dist.* 552 F.3d 786, 803 (9th Cir. 2008) (although the parents requested initial evaluations in May 2003 and attended the district's child find day in June 2003, the district had no reason to suspect that the students had autism until it was contacted by the twins' private service provider); *Long v. District of Columbia*, 780 F. Supp. 2d 49 (D.D.C. 2011) (the district's child find duty was triggered when a private psychologist diagnosed the student with a learning disability). To establish a procedural violation of "child find," a parent must show school officials overlooked clear signs of disability. *Board of Educ. of Fayette County, Kentucky v. L.M.*, 47 IDELR 122 (6th Cir. 2007).

In the present case, the last time the student was in DCPS was in 2008, and until May 16, 2012, DCPS had no information and no way of obtaining information regarding the student.

Petitioner's argument that since an attorney from the District of Columbia Office of Attorney General is present in the student's CFSA review hearings then DCPS should have knowledge of the student is unconvincing. While it is a laudable concept that all District of Columbia agencies would collaborate regarding students involved in all levels and divisions of the District of Columbia court system, this archetype is impractical and likely a violation of varying privacy laws. Likewise, it is not reasonable to expect DCPS review the report cards of all students in foster care, especially when CFSA has no obligation to notify DCPS of children in foster care and does not include DCPS in reviews of students in foster care.

Just as the student's parent requested Prince George's County, Maryland to determine the eligibility of the student on December 21, 2011, the parent could have requested this from DCPS at the same time. In fact, the parent, though counsel, knew to seek "intervention" and request an eligibility review from DCPS but did not do so until May 16, 2012 and only after Prince George's County, Maryland declined to find the student eligible for special education and related services.

The Hearing Officer finds that DCPS' Child Find duty for the child was triggered on May 16, 2012, the date that the parent, through counsel, notified DCPS that the student had "several years of academic problems and behavioral failure," thus making DCPS aware of the student and giving DCPS suspicion of a disability for the child.

When a child is identified as potentially requiring special education services, the LEA has a duty to complete the evaluation process and failure to complete the process constitutes a denial of a FAPE. 20 U.S.C. § 1414(b)(2)(A)(i); *see also N.G. v. Dist. of Columbia,* 556 F. Supp. 2d 11 (D. D.C. 2008). An initial evaluation must be conducted within 60 days of receiving parental consent for the evaluation; or if the State establishes a timeframe within which the evaluation must be conducted, within that timeframe. The timeframe does not apply if the parent of a child repeatedly fails or refuses to produce the child for the evaluation. 34 CFR §§300.301(c), (d). The District of Columbia has established a 120-day timeline. *See* D.C. Code §38-2561.02.

In its closing argument, DCPS argued that if the Hearing Officer were to find that DCPS has a Child Find duty as it relates to this student, that since DCPS' timeline to evaluate the child would not have begun until May 16, 2012, DCPS is still within its 120-day timeline and therefore has not denied the student a FAPE. This position is supported by the Court's decision in *Jones ex rel. A.J. v. District of Columbia*, 646 F. Supp. 2d 62 (D.D.C. 2009) (noting that the District of Columbia had 120 days to evaluate the student, the District Court held that the parent's due process complaint, filed 25 days after her evaluation request, was premature). However, in the present matter, DCPS clearly stated that it had no intention of evaluating the student when the parent, through counsel, notified DCPS of the student's academic and behavioral difficulties on May 16, 2012. On July 25, 2012, the second day of the due process hearing, 70 days after DCPS was notified of the child's academic and behavioral challenges, DCPS again indicated that it had no intention of evaluating or providing services to the student, holding firm to its position that it has no obligation or authority to evaluate or provide services to the student.

In *Board of Education v. Rowley,* 458 U.S. 176 (1982), the Supreme Court of the United States held that the term "free appropriate public education" means "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped." The United States Supreme Court has established a two-part test for determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the IDEA, 20 U.S.C. §§1400 et seg., and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. *Id.*; *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

The Hearing Officer concludes that DCPS failed to take affirmative steps to locate, identify and evaluate the student pursuant to its Child Find obligation, which was triggered on May 16, 2012, and that this failure constitutes a denial of a FAPE for the student.

Issue #2

The IDEA and its implementing regulations define "child with a disability" to mean "a child evaluated in accordance with §§300.304 through 300.311 as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services." 34 CFR §300.8(a). The fact that a child may have a qualifying disability does not necessarily make him "a child with a disability" eligible for special education services under the IDEA. *See Alvin Indep. Sch. Dist. v. A.D.*, 503 F.3d 378, 383 (5th Cir. 2007). The child must also need special education and related services. *Id.* The Petitioner alleges that DCPS should have found the student eligible for special education and related services as a student with ED or SLD.

Emotional disturbance means "a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors. (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers. (C) Inappropriate types of behavior or feelings under normal circumstances. (D) A general pervasive mood of unhappiness or depression. (E) A tendency to develop physical symptoms or fears associated with personal or school problems." An emotional disturbance "includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section." 34 CFR §300.8(c)(4).

Specific learning disability means "a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia." 34 CFR §300.8(c)(10); *see also* 20 U.S.C. §1401; *Nguyen v. District of Columbia*, 681 F. Supp. 2d 49, 52 (D.D.C. 2010).

IDEA regulations further provide that an MDT Team "may determine" that a child has a SLD as defined in §300.8(c)(10) if three requirements are met. First, the child "does not achieve adequately for the child's age or to meet State-approved grade-level standards" in one or more basic academic skill areas (e.g. written expression, reading comprehension or mathematics calculation). 34 CFR §300.309(a)(1). Second, the child "does not make sufficient progress to meet age or State-approved" standards "when using a process based in the child's response to scientific, research-based intervention" or the child "exhibits a pattern of strengths and weaknesses in performance, achievement, or both" relative to relevant areas. 34 CFR §300.309(a)(2). Third, the MDT Team determines its findings are not the result of factors such as a visual or hearing disability, cultural or environmental factors. 34 CFR §300.309(c)(3).

Each State must adopt criteria, consistent with 34 CFR §300.309, for determining whether a child has a SLD as defined in §300.8(c)(10). Local educational agencies (LEAs) must use the State criteria in determining whether a child has a SLD. *See* 34 CFR §300.307. The criteria adopted by the State must not require the use of a severe discrepancy between intellectual ability and achievement; must permit the use of a process based on the child's response to scientific, research-based intervention; and may permit the use of other alternative research-based procedures for determining if a child has a SLD. *See* 34 CFR §300.307(a). The District of Columbia Office of the State Superintendent (OSSE) has adopted criteria by implementing the rules in 5 DCMR §E-3006.

These rules provide that the "IEP team shall determine that a child has a SLD if: a disorder is manifested in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to learn, think, speak, read, write, or do mathematical calculations." 5 DCMR §E-3006.4(a). The rules also provide that LEAs "may use a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation procedure." 5 DCMR §E-3006.4(d). In addition, LEAs must prepare a written evaluation report that includes the basis for making the determination regarding SLD, including a "statement whether there is a severe discrepancy between achievement and ability that is not correctable without special education and related services." 5 DCMR §§E-3006.5(g)(2), (6). Finally, OSSE states that the "IEP team may not determine that a child is a child with a disability if it determines that the determinant factor for the child's eligibility determination is: (a) lack of instruction in reading or mathematics; or limited English proficiency; and (b) the child does not otherwise meet the eligibility criteria." 5 DCMR §E-3006.6; *see also* 34 CFR §300.306(b). The determination of a child's eligibility for special education under the SLD classification is a primarily fact-based inquiry. *See Michael P. v. Dept. of Educ. State of Hawaii*, 656 F.3d 1057 (9th Cir. 2011).

Emotional Disturbance

In order for the student to be labeled as a student with ED, the student must, over a long period of time and to a marked degree that adversely affects a child's educational performance, (1) display an inability to learn; (2) display an inability to build or maintain interpersonal relationships; (3) display inappropriate types of behaviors under normal circumstances; (4) display a general pervasive mood of unhappiness or depression; or (4) display a tendency to develop physical symptoms or fears associated with personal or school problems. The term does not apply to child who is socially maladjusted.

In this case, the student has not displayed an inability to learn over a long period of time and to a marked degree. During the 2009-2010 school year, the student's grades were average to above average. During the 2010-2011 school year, while not earning stellar grades, the student passed all but one subject. In December of the 2010-2011 school year, the student's mother passed away suddenly. The student did not pass any classes during the 2011-2012 school year however it is clear from the record that the student rarely attended class during the 2011-2012 school year. The record does not contain any information from the student's teachers regarding his performance in class on the days that he did attend nor does it contain any information as to why the student was not attending class. During his February 23, 2012 evaluation, the student reported to the evaluator that he understands his work and is able to complete his work and that his academic problems are due to "laziness."

There was no evidence presented to prove that the student's failure to learn during his 10th grade year is an "inability to learn." The record contains ample evidence that the student does not regularly attend class, but does not contain any evidence that his failure to attend class is due to an inability to learn. The student's March 6, 2012 evaluation notes that the factors which have likely interfered with his development of academic skills and academic functioning are not putting forth adequate effort, lack of motivation and loss of class time while the student walks the halls.

The student has not displayed an inability to build or maintain interpersonal relationships. In the Psychologist's March 6, 2012 evaluation, he noted that rapport was gradually earned from the student and that the student maintained good eye contact. The psychiatrist who conducted the student's March 29, 2012 Psychiatric Evaluation noted that the student was "pleasant and verbal." The GAL testified that although the student is "guarded," he is "sweet" when a rapport is established. The student had friends in his previous foster placement and was able to build a "peer network" shortly after moving to his current foster placement. The student also has relationships with his siblings and other family members.

The student has not displayed inappropriate types of behaviors under normal circumstances. Tragically, the student has faced numerous abnormal circumstances throughout his life. The student was involved in a fatal car accident which claimed the life of his brother and caused significant injuries to him and his mother; was removed from his mother's care and entered into the foster system; experienced the sudden death of his mother, following her inability to effectively cope with the death of her son; experienced the death of an aunt the same year as the death of his mother; and has changed foster placements which, most recently, separated him from his siblings. The Petitioner argued that the student displayed inappropriate behaviors as evidenced by "numerous suspensions." However, the vast majority of the student's suspensions were due to the student being in the hallway during class time and all within approximately one year after the death of his mother. Additionally, while the student was removed from his prior foster home because of disrespectful behavior toward his foster parents, the record suggests that these behaviors began after the death of the student's mother and that following placement in the uncle's home, the student's behavior stabilized.

There is evidence that the student has a general pervasive mood of unhappiness or depression over a long period of time and to a marked degree which adversely affects the student's educational performance. The student has been diagnosed with Dysthymic Disorder. However, the IDEA requires more than a diagnosis of a disability or of a disorder. It requires that the child exhibit symptoms of a qualifying disability and exhibit them to such a degree that they interfere with the child's ability to benefit from the general education setting. *See* 34 CFR §300.8(a); *see also Alvin Indep. Sch. Dist. v. A.D.*, 503 F.3d 378, 383 (5th Cir. 2007). While the Psychologist noted that the factors which have likely interfered with the student's development of academic skills and academic functioning are not putting forth adequate effort, lack of motivation and loss of class time while the student walks the halls, the Psychologist also noted that the student's academic difficulties relate, in part, to his external stressors. The Psychologist concluded that the student has been internalizing feelings of depression since the death of his brother in 2009. The student's March 6, 2012 evaluation notes that the symptoms of the student's depression are likely closely related to his reported conduct problems, disrespectful actions and projected indifference. To the extent that the student's depression is the cause of his nonattendance in class, this would adversely affect his educational performance. While the record contains no evidence of why the student does not attend class, the record does contain evidence that the student's poor grades and truancy from class began after the death of his mother. While the Petitioner's evidence was not overwhelming that the student has a general pervasive mood of unhappiness or depression over a long period of time and to a marked degree that adversely affects the student's educational performance, the Petitioner met its burden of a preponderance of the evidence for this component of the ED definition.

There is conflicting evidence regarding whether the student develops physical symptoms or fears associated with personal or school problems. The Psychologist testified that the student presents with some physical problems and that the reports of these problems are clinically significant. In his March 6, 2012 report, the Psychologist noted that the student reported somatic complaints such as having difficulty sleeping, feeling fatigued and getting stomach aches. There was no evidence as to the cause of these somatic complaints or whether they are associated with personal or school problems. Likewise, during the student's March 23, 2012 psychiatric evaluation, the student reported that he has "had sleeping problems for as long as he can remember." Again, there was no evidence as to the cause of the sleeping problems or whether the problem is associated with personal or school problems. However, in this evaluation, one month after the psychological evaluation, there is no evidence that the student reported feeling fatigued or getting stomach aches. In the student's March 2011 Psychiatric History, the student stated that he slept well, his appetite was good and his energy was good. There is no evidence as to when the student's physical symptoms began after March 2011 therefore the Hearing Officer cannot conclude that the student develops physical symptoms or fears associated with personal or school problems over a long period of time and to a marked degree.

Specific Learning Disability

As it relates to a SLD, the record indicates that the student does not have a SLD. The student has a full scale IQ within the upper end of the low average range. There were not any significant discrepancies between his index scores which fell within the low average and average ranges. The cognitive testing scores achieved by the student during his March 2012 testing were relatively consistent with or somewhat higher than his testing scores achieved in 2009. In his

academic testing, the student earned a lower end average score on the Broad Math Cluster, a lower end low average score on the Broad Reading Cluster, and a low score on the Broad Written Language Cluster. The student's scores revealed no significant strengths or weaknesses. Further, the Psychologist specifically stated in his March 6, 2012 report that the student's scores "do not appear to reflect a specific learning disability." This conclusion was consistent with the student's 2009 testing which did not reveal any particular disabilities.

The Psychologist summarized in his March 6, 2012 report that the student's achievement scores fell from two to seven years below his same-age norm group within the 8th grade equivalent level. However, the data used for same-aged comparison were not included in the record. Based on the student's March 2012 scores, it is possible that the student does have a learning disability, most distinctly in written language, however it is improper to make that determination based on one assessment. *See* 34 CFR §300.304(b)(1). There was no evidence presented from, or on behalf of, the student, the student's parent or any of the student's teachers regarding the student's written language within the school setting.

It is possible to use the student's report card as additional data in making this determination however the student's report card reveals very little information. Although the student received all "E's," the record suggests that the student's failing grades are based on a lack of attendance in class. An IEP Team may not determine that a child is a child with a disability if it determines that the determinant factor for the child's eligibility determination is a lack of instruction in reading or mathematics. *See* 34 CFR §300.306(b). It appears as if the student has not attended class for enough time to have received basic instruction in reading and mathematics. It is possible that the student's grades and academic achievement scores are a direct result of a lack of instruction.

While the student "does not achieve adequately for the child's age or to meet State-approved grade-level standards," there is no evidence that scientific, research-based intervention was implemented to address the student's failure or that the student "exhibits a pattern of strengths and weaknesses in performance, achievement, or both" relative to the areas in which he is failing. School A reported to the parent's attorney that an Intervention meeting was held and described the interventions that it outlined however there is no evidence that the interventions were implemented with fidelity. In this case, the record does not contain adequate data regarding the basis of the student's grades for the Hearing Officer to find that the student has a SLD.

The Petitioner met its burden in proving that DCPS failed to identify the student as a child with a disability, specifically a child with ED. The Petitioner did not meet its burden in proving that DCPS failed to identify the student as a child with a SLD.

Issues #3

The IDEA imposes strict procedural requirements on educators to ensure that a student's substantive right to a "free appropriate public education" is met. 20 U.S.C. §1415. The IDEA regulations at 34 CFR §300.513(a)(2) state that in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to

participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit.

The IDEA's procedural safeguards help ensure that parents are able to participate fully in decisions affecting their child's education. *See Rowley,* 458 U.S. at 183 n.6; *see also Holland v. District of Columbia,* 71 F.3d 417, 421 (D.C. Cir. 1995). The IDEA "guarantees parents of disabled children the opportunity to participate in the evaluation and placement process." *LeSesne ex rel. B.F. v. District of Columbia,* Civil Action No. 04-0620 (CKK), 2005 WL 3276205 (D.D.C. July 26, 2005); *see also* 20 U.S.C. §§1414(f), 1415(b)(1). The applicable regulations further emphasize the importance of parental participation in IEP meetings, mandating that each public agency take steps to ensure that one or both of the parents of a child with a disability are present at each IEP meeting or are afforded the opportunity to participate, including: (1) notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and (2) scheduling the meeting at a mutually agreed upon time and place. 34 CFR §300.322(a).

In the present matter, the Petitioner alleges that DCPS failed to allow the parent to meaningfully participate in the eligibility determination of the student. On April 25, 2012, the LEA in Prince George's County, Maryland scheduled an MDT meeting to review the student's psycho-educational evaluation. At this meeting, the MDT declined to find the student eligible for special education and related services. DCPS was not informed of or invited to the April 25, 2012 MDT meeting in Prince George's County, Maryland.

On May 16, 2012, parent, though counsel, contacted DCPS seeking "intervention" in the student's case because of frustration with "the school's ongoing refusal to communicate" and requested that DCPS set a meeting to "revisit [the student's] eligibility", identify a liaison within School A to respond to counsel's communication, conduct an FBA and be in attendance at the next MDT meeting in Prince George's County, Maryland. On May 23, 2012, DCPS communicated with parent, though counsel, regarding the student's case. The parent, through counsel, discussed its objection to Prince George's County's decline to find the student eligible for special education services. On May 25, 2012, DCPS communicated with parent, though counsel, regarding its communication with Prince George's County and its understanding of why Prince George's County did not find the student eligible for special education and related services and its request to Prince George's County that the student be provided with a 504 Plan.

DCPS argued that the Petitioner's claim regarding parental participation is directed at the wrong LEA because DCPS is not the LEA which made the eligibility determination regarding the student. The Hearing Officer agrees with this position. On April 25, 2012, the LEA in Prince George's County, Maryland made an eligibility decision regarding the student. DCPS was neither invited to nor participated in this meeting. The Hearing Officer concluded in Issue #1 that DCPS' Child Find duty for the student was triggered on May 16, 2012. Had DCPS begun the eligibility process on that date, the 120-day timeline for evaluation and an eligibility determination would expire on September 13, 2012. During this 120-day timeline, the parent has chosen to file a due process complaint seeking *inter alia* an eligibility determination from a District of Columbia Hearing Officer.

In its closing argument, Petitioner clearly stated its position that this issue was based on the lack on inclusion of the parent in the April 25, 2012 meeting in Prince George's County, Maryland and the fact that Prince George's County, Maryland never held a follow-up meeting to the April 25, 2012 eligibility meeting. DCPS simply cannot be held responsible for another LEA's failure to "include" the parent in a meeting or another LEA's failure to convene a meeting especially when DCPS was unaware of the meeting. The Petitioner has not met its burden with regard to this issue.

Proposed Remedy

In the present matter, the Petitioner requested that the student be found eligible for special education and related services as a student with ED or SLD; an IEP for the student with includes at least fifteen (15) hours per week of specialized instruction in all academic areas, at least one (1) hour per week of tutoring services, vocational support, and at least one (1) hour per week of behavioral support services; an appropriate placement for the student; and compensatory education including tutoring and counseling services. During the hearing, the Petitioner specifically requested that the student be placed in School B, a private special education day school.

IDEA remedies are equitable remedies requiring flexibility based on the facts in the specific case rather than a formulaic approach. Under *Reid* ". . .the inquiry must be fact-specific and . . . 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 v. District of Columbia*, 401 F. 3d 516 at 524, 365 U.S. App. D.C. 234 (D.C. Cir 2005) citing *G.ex. RG v Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4th Cir. 2003).

School districts must ensure that all children with disabilities residing in the State who are in need of special education and related services are identified. *See Branham v. Gov't of the District of Columbia,* 427 F.3d 7, 8 (D.C. Cir. 2005) (quoting 20 U.S.C. § 1412(a)(3)(A)). Once such children are identified, a team develops an IEP for the child. *Branham,* 427 F.3d at 8. The IEP must, at a minimum, "provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id. (citing Bd. of Educ. Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S. 176, 203, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982)).

In the present matter, the Petitioner did not present adequate evidence that the student requires at least fifteen (15) hours of specialized instruction in all academic areas on his IEP. While the student earned all "E's" on his final 2011-2012 report card, the record suggests that the student's failure is due mostly to his lack of classroom attendance. In his academic testing, the student earned a lower end average score on the Broad Math Cluster, a lower end low average score on the Broad Reading Cluster, and a low score on the Broad Written Language Cluster. Given his IQ, his math scores are higher than expected, his reading scores are as expected and his written language scores are slightly below expectation. His age-level equivalences are particularly low in passage comprehension (within the reading cluster) and writing samples (within the written language cluster). This indicates a need for specialized instruction in English/Language Arts with IEP goals geared toward reading comprehension and written language.

There was no evidence presented which suggests that tutoring is warranted at this time. While the record indicates that the student has a desire to attend college and is interested in culinary arts, there was no evidence presented which suggests that the student is in need of vocational services at this time. However, the student is years old and is entitled to a transition plan based on age appropriate transition assessments. *See* 34 CFR §300.320(b).

It is clear from the record that while the student is present in school, he frequently does not attend classes. In order for the student to benefit from instruction, he needs to avail himself of the instruction. The record is clear that the student does not attend class but is deplete of any evidence to why the student does not attend class. The record is also clear that the student's decline in grades began after the death of his mother and contains no evidence that behavior problems were apparent before the death of his mother. Therefore, the Hearing Officer concludes that the student is in need of behavioral support services to address his classroom attendance and the impact his depression has on his behavior and ability to make him available for instruction. In order to facilitate this process, an FBA is necessary to identify the "why" of the student's behavior. While the Petitioner did not request an FBA as a remedy in the due process complaint, the Petitioner did request that DCPS conduct an FBA in its May 16, 2012 letter to DCPS.

The Hearing Officer has the obligation to determine an equitable remedy, based on the facts in this specific case, given that there has been a denial of FAPE. Although the Hearing Officer finds that there has been a denial of FAPE, the Hearing Officer notes that the harm to the student is limited. Had DCPS begun the eligibility process on May 16, 2012, the date that its Child Find duty was triggered, the 120-day timeline for DCPS to complete the eligibility process would be September 13, 2012. Therefore, the compensatory education requested by Petitioner is not warranted.

The Court in *Rowley* stated that the Act does not require that the special education services 'be sufficient to maximize each child's potential 'commensurate with the opportunity provided other children.'" Instead, the Act requires no more than a "basic floor of opportunity" which is met with the provision of "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Board of Education v. Rowley,* 458 U.S. 176, 200-203 (1982). The IDEA also requires school districts to place disabled children in the least restrictive environment possible. *Roark ex rel. Roark v. District of Columbia*, 460 Supp. 2d 32, 43 (D.D.C. 2006) (citing 20 U.S.C. §1412(a)(5)); 5 DCMR §3011 (2006). The IDEA creates a strong preference in favor of "mainstreaming" or insuring that handicapped children are educated with non-handicapped children to the extent possible. *Bd. of Educ. of LaGrange Sch. Dist. No. 105 v. Ill. State Bd. of Educ.,* 184 F.3d 912, 915 (7th Cir. 1999). Mainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with nonhandicapped children is not only a laudable goal but is also a requirement of the Act." *DeVries by DeBlaay v. Fairfax County Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989). Furthermore, children with disabilities are only to be removed from regular education classes "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." 34 CFR § 300.550(b)(2).

The Petitioner has requested that the student be placed in School B, a private special education day school. The Petitioner argued that since DCPS has not made a placement offer, placement in School B is an appropriate remedy and an appropriate placement for the student. If an IDEA violation results in denial of a FAPE, a district court has discretion to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii). Such relief could include reimbursement for a private placement. See 20 U.S.C. § 1412(a)(10)(C)(ii); *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 370 (1985). The parent or guardian, however, must also establish that the particular private placement is itself appropriate. *See, e.g., Ashland Sch. Dist. v. Parents of Student E.H.*, 587 F.3d 1175, 1183 (9th Cir. 2009).

The Hearing Officer finds that placement in a private special education day school is not an equitable remedy based in the limited harm caused by DCPS' denial of FAPE to the student, that placement in a private special education day is in not appropriate for the student and that a private special education day school is not the least restrictive environment for the student. The harm to the student was merely the delay in the beginning of the evaluation process for the student. There is no evidence that the nature or severity of the student's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily; that the student is unable to appropriate socialize with nondisabled peers; or that the student is unable to appropriately interact with nondisabled peers throughout the school day in academic and nonacademic activities. Furthermore, in the Psychologist's March 6, 2012 report recommendations, the Psychologist noted that the student's interventions should be "delivered in a manner that minimizes the degree of intrusiveness, including maintaining a mainstream setting." The student has been placed in School A by CFSA. There is no evidence which suggests that School A, working in coordination with DCPS, is unable to implement the specialized instruction and related services ordered by this Hearing Officer.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

1. That within 10 business days of the date of this Order, DCPS convene an IEP Team meeting to develop an IEP for the student which includes five (5) hours per week of specialized instruction outside of the general education environment in English/Language Arts, with goals and objectives geared toward reading comprehension and written language, and one (1) hour per week of behavioral support services outside of the general education environment;
2. That within 60 calendar days of the date of this Order, DCPS conduct an FBA and age appropriate transition assessments for the student;
3. That within 10 business days of the completion of the FBA and the transition assessments, DCPS convene an IEP Team meeting to review the results of the FBA and the transition assessments and develop a transition plan based on the transition assessments and, if recommended by the FBA, develop a BIP;
4. All other relief sought by Petitioner herein is **denied**.

NOTICE OF RIGHT TO APPEAL

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

Date: August 5, 2012

Melanie Byrd Chisholm
Hearing Officer