

*District of Columbia*  
*Office of the State Superintendent of Education*

OSSE  
Student Hearing Office  
March 11, 2013

Office of Review and Compliance  
Student Hearing Office  
810 First Street, NE – Second Floor  
Washington, DC 20002  
Tel: 202-698-3819  
Fax: 202-478-2956

**Confidential**

Parent on behalf of the Student <sup>1</sup> ,  Petitioner,  v.  District of Columbia Public Schools (“DCPS”)  Respondent.   Case # 2012-0830	HEARING OFFICER’S DETERMINATION Hearing Date: February 21, 2013  <u>Representatives:</u> Counsel for Petitioner: Joseph Tullman, Esq. Lisa M. Geis, Esq. Student Advocates: Jamie R. Jacobson & Krista Krueger David A. Clark School of Law University of the District of Columbia 4200 Connecticut Avenue, N.W. Washington, D. C. 20008  Counsel for DCPS: William Jaffe, Esq. Assistant Attorney General 1200 First Street, N.W. Washington, D.C. 20002  <u>Hearing Officer:</u> Coles B. Ruff, Esq.
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<sup>1</sup> Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

## **JURISDICTION:**

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on February 21, 2013, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

## **BACKGROUND AND PROCEDURAL HISTORY:**

The student is age s [REDACTED] and resides in the District of Columbia with her parent. During the first semester of the 2011-2012 school year (“SY”) the student attended a DCPS high school (“School A”). Prior to attending School A the student attended a DCPS middle school (“School C”) from grades six through eight. In January 2012, the student’s parent unilaterally placed the student in a private full time special education school (“School B”) where she was enrolled until the end of SY 2011-2012.

When the student attended Schools A, B, and C, up to an including the date this due process complaint was filed (December 18, 2012) the student had not been determined eligible to receive special education services. However, Petitioner alleged in the complaint that the student had been evaluated in April 2011 pursuant to a DCPS authorization for an independent education evaluation (“IEE”) granted in March 2011. Petitioner alleged that the IEE as well as other academic and behavioral data demonstrated the student has a disability and should have been found eligible for special education services as far back as her fifth grade year at a DCPS elementary school (“School D”) during SY 2006-2007.

Petitioner asserted that DCPS denied the student a free and appropriate public education (“FAPE”) by failing to indentify her as a child with a disability under its child-find obligations.<sup>2</sup> Petitioner alleged student’s academic failure and behavioral difficulties put DCPS on notice of her suspected disability and DCPS should have identified, evaluated and found her eligible. Petitioner alleged facts that she claims support a finding that one or more of the exceptions to the 2-year period of limitation under IDEA apply thereby allowing her to assert claims prior to December 18, 2010.

In addition to the claim that the student should have been identified during SY 2006-2007 while attending School D, Petitioner alleged there were several other points at which DCPS should have identified, evaluated and found the student eligible, including during SY 2010-2011 when the student received long term suspensions from School C. Petitioner asserted that although she

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<sup>2</sup> In the complaint Petitioner alleged DCPS denied the student a FAPE for the last seven years in response to her failing grades and her escalating behavioral problems: (1) beginning in SY 2004-2005, the student’s first time in fourth grade, (2) when DCPS allegedly failed to follow through with an evaluation proposed by the principal of School D in 2006, (3) when DCPS allegedly failed to convene an IEP meeting proposed by the student’s teacher at School C in 2009, (4) when DCPS allegedly failed to respond to a written request by Petitioner’s counsel to convene an IEP meeting at School C on September 21, 2011. (Petitioner’s Exhibit 120-9, 120-10)

provided DCPS (School C) the report from the IEE in June 2011 and requested that an eligibility meeting be convened and DCPS never reviewed the IEE and failed to determine the student's eligibility prior to this due process complaint being filed.

Petitioner enrolled the student at School A at the start of SY 2012-2013. Petitioner, through her legal representative, made a number of requests of School A that it convene an eligibility meeting for the student. School A staff allegedly refused. Petitioner alleged the student was suspended from School A repeatedly and eventually told by the School A staff that School A was not the student's neighborhood school. Petitioner attempted to enroll the student in two other DCPS senior high schools but was allegedly refused admission and the student was not attending any school at the time of the due process hearing.

Petitioner seeks as relief an order placing the student, with DCPS/OSSE funding, in a residential program or a full time special education program with intensive wrap-around services<sup>3</sup> and compensatory education. Petitioner is also seeking reimbursement for the student's tuition at School B from January 3, 2012, to the end of SY 2011-2012. The parent did not pay the student's School B tuition but is seeking reimbursement to the school for the student's tuition for this period.

DCPS filed a response to the complaint on December 28, 2012. DCPS denied that it failed to evaluate the student and/or failed to determine her eligibility. DCPS stated its willingness to evaluate the student and determine the student's eligibility once she registered at her neighborhood school. DCPS asserted the parent failed to notify DCPS of the unilateral placement and therefore no reimbursement is warranted. DCPS denied that it withheld information or made representation(s) to the parent and that there are no exceptions to the two-year period of limitation that apply and all claims prior to December 18, 2010, are barred.

A resolution meeting was held January 31, 2013, between Petitioner and DCPS. That meeting was unsuccessful in resolving the issues. No party expressed a desire to proceed directly to hearing. The parties did not waive the resolution meeting and did not agree to an acceleration of the hearing. The 45-day timeline began on January 17, 2012, and ended (and the Hearing Officer's Determination ("HOD") was originally due) on March 3, 2013.

A pre-hearing conference was conducted on January 31, 2012. The Hearing Officer issued a pre-hearing order on February 6, 2013, outlining the issues to be adjudicated and setting the hearing date.

The parties agreed during the pre-hearing conference that DCPS<sup>4</sup> would convene an eligibility meeting prior to the scheduled hearing date at which the student's existing IEE would be reviewed along with other available existing data and an eligibility determination would be

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<sup>3</sup> Petitioner is seeking the student's placement at the Jefferson School that has a day program and an alternative residential program. Petitioner agrees to determine and report to the Hearing Officer and DCPS counsel whether this school holds an OSSE COA and whether any DCPS students are attending.

<sup>4</sup> This agreement to convene an eligibility meeting was also made by DCPS at the resolution meeting.

made. Prior to the hearing an eligibility meeting was convened at which the student was determined eligible. The team, however, did not develop an IEP for the student.

The parties appeared for the hearing on February 21, 2012. At the conclusion of the hearing Petitioner's counsel requested additional time to file a post-hearing brief on the applicability of the exceptions to the 2-year period of limitation and requested a continuance and an extension of the HOD due date. The motion for continuance was granted over DCPS' objection. The parties were given until February 26, 2013, to file the post hearing briefs. The HOD due date was extended to March 8, 2013. On February 26, 2013, Petitioner filed a post hearing brief. DCPS did not file a post hearing brief. The record in this matter was closed on February 26, 2013, with filing of Petitioner's post hearing brief.

### **THE ISSUES ADJUDICATED:**

- 1) Whether DCPS denied the student a FAPE by failing to indentify and evaluate the student as a child with a disability under its child-find obligations and/or in response to a specific request made by the parent.

Petitioner specifically alleges that the student should have been identified and evaluated at the following points:

- DCPS failed to indentify and evaluate the student during SY 2004-2005 based on the student's failing grades and escalating behavior problems when the student was in fourth grade at a DCPS elementary school.
  - DCPS failed to conduct an evaluation in 2006 (during SY 2006-2007) as proposed by the principal at School D.
  - DCPS failed to convene an IEP meeting as proposed by the student's teacher at School C in 2009 (during SY 2009-2010).
  - DCPS failed to convene a MDT meeting in response to the written request to School C on September 21, 2011.
- 2) Whether the violation(s) alleged by Petitioner that precede the two-year period prior to the date the complaint was filed (December 18, 2010) can be adjudicated and whether Petitioner has presented sufficient proof that the one or more of the exceptions listed in 300.511(f) apply.
    - Petitioner alleges the two-year period of limitation tolled in 2006 when DCPS failed to provide the parent written safeguards when the principal at School D recommended to the parent that the student be evaluated after the student failed fifth grade.
    - Petitioner alleges an exception to the two-year period of limitation applies

because the teacher/assistant principal at School C misrepresented to the parent that an evaluation would be or had been conducted and an IEP developed for the student.

### **RELEVANT EVIDENCE CONSIDERED:**

This Hearing Officer considered the testimony of the witnesses and the documents submitted in Petitioner's disclosures (Petitioner's Exhibits 1-128)<sup>5</sup> that were admitted into the record and are listed in Appendix A. The witnesses are listed in Appendix B.

### **FINDINGS OF FACT:<sup>6</sup>**

1. The student is age [REDACTED] and resides in the District of Columbia with her parent. During the first semester of SY 2011-2012 the student attended School A, a DCPS high school. Prior to attending School A the student attended School C, a DCPS middle school from grades six through eight. (Parent's testimony, Petitioner's Exhibit 1-2, 1-3)
2. In January 2012, the student's parent unilaterally placed the student in School B, a private full time special education school where she was enrolled until the end of SY 2011-2012. (Parent's testimony, Petitioner's Exhibit 2-1)
3. When the student attended Schools A, B, and C, up to and including the date this due process complaint was filed (December 18, 2012) the student had not been determined eligible to receive special education services. (Parent's testimony, Ms. Ennis' testimony)
4. During SY 2004-2005 the student was enrolled in a DCPS elementary school in fourth grade. The student made little progress in fourth and was retained. After the student completed in fourth grade for the second time during SY 2005-2006 the student moved to fifth grade at another DCPS elementary school, School D for SY 2006-2007. (Parent's testimony, Petitioner's Exhibit 10)
5. The student ended up being retained in fifth grade at the end of SY 2006-2007, and she repeated fifth grade during SY 2007-2008 at School D. (Parent's testimony, Petitioner's Exhibit 9)
6. Starting in fourth grade the student began display behavior problems and began to be suspended from school. The student's behavior and academic problems continued at School D. (Student's testimony)

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<sup>5</sup> Respondent submitted a disclosed list of witness (and no documents) one day later than the 5-day disclosure deadline. Petitioner objected to the admission of the list and the disclosed witnesses testifying due to the late filing of the list. The Hearing Officer did not admit the disclosed list of witnesses and did not allow the DCPS witnesses to testify.

<sup>6</sup> The evidence that is the source of the Finding of Fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted.

7. The principal of School D, in the fall of 2006, on a day the student was suspended asked the student's parent if she would mind the student having an IEP. The parent expressed that she would not mind. However, the no evaluations were ever conducted at School D and no IEP was developed as a result of the parent's conversation with the School D principal. The parent did not know there was something she could do to initiate the IEP process and did and took no action after the conversation with the principal to pursue an IEP for the student. (Parent's testimony)
8. After leaving School D the student went on to attend School C for grades six, seventh and eighth. At School C the student's behavioral difficulties escalated and she was sent home from school and/or suspended from school frequently. At School C the student continued to have academic difficulties. (Student's testimony, Petitioner's Exhibits 20, 21-1, 21-2)
9. During SY 2009-2010 when the student was in seventh grade at School C, she earned failing final grades in all classes except English 7 in which she earned that grade of "C." During SY 2009-2010 the student behaviors resulted in suspensions for bullying and disruptive behaviors in September 2009 and again in January 2010. (Petitioner's Exhibits 7, 20, 21-1, 21-2, 22)
10. During the both SY 2009-2010 the student was suspended from School C and spent a period in DCPS' alternative school [REDACTED]. During her time at [REDACTED] the student also received several suspensions from [REDACTED] (Petitioner's Exhibit 15, 19)
11. In March 2010 the student was given a long-term off-site suspension from School C. School C's assistant principal completed a suspension/expulsion form dated March 22, 2010, prosing suspension for 45 days. The form had boxes checked on the form stating that the student had an IEP and a manifestation determination review ("MDR") would be held for the student. No MDR was held. (Parent's testimony, Petitioner's Exhibits 17-1, 18)
12. The student's parent remembers receiving the March 22, 2010, suspension notice. Even though the form indicated the student had an IEP the parent was aware at the time that the student did not have an IEP. The parent was given the student's suspension papers in March 2010 but was not given any procedure safeguard notice or her rights to request that the student be evaluated for special education services. The parent was not aware of the special education process and her rights to request that the student be evaluated. Thus, the parent made no such request. (Parent's testimony, Petitioner's Exhibit 17)
13. The student received a long-term suspension from School C for disruptive behaviors during the first semester of SY 2010-2011 and returned to [REDACTED]. During much of SY 2010-2011 the student was at [REDACTED] because of suspensions and disruptive behaviors at School C. (Petitioner's Exhibits 6, 14, 29, 32)

14. After the parent obtained legal counsel during second semester SY 2010-2011, the School C special education coordinator in March 2011 authorized an IEE for the student. The IEE was conducted in April 2011 when the student was age fifteen by [REDACTED], Ph.D. The student’s cognitive assessments revealed that the student’s IQ score of 78 placed her in the borderline range of functioning. [REDACTED] diagnosed the student with ADHD, Bipolar Disorder, Oppositional Defiant Disorder (“ODD”), Dysthymic Disorder, and a Learning Disorder. [REDACTED] found the student met the criteria for emotional disturbance and recommended that the student be provided a full-time school placement that focused on both emotional disturbance and learning disabilities with a low student–teacher ratio and individualized instruction. ([REDACTED] testimony, Petitioner’s Exhibit 1-5, 1-11, 1-12)

15. The student’s had the follow academic achievement from the IEE:

	Standard Score	Grade Equiv.	Age Equiv.
Broad Reading	84	6.0	11-5
Broad Mathematics	78	5.4	11-0
Broad Written Language	85	5.9	11-5

[REDACTED] testimony, Petitioner’s Exhibit 1-7)

16. [REDACTED] offered his opinion as to what services would be needed by the student to catch up to the level she needs to be and the level she would have been has she been found eligible and been provided timely and appropriate special education services. Dr. [REDACTED] opined that the student should receive a prospective placement in an appropriate full time special education program with appropriate therapeutic supports and be provided additional after school tutoring for 2 to 3 days per week for 1.5 to 2 hours a day. ([REDACTED] testimony)<sup>7</sup>

17. On June 23, and June 27, 2011, Petitioner’s legal representative sent DCPS a copy of IEE and requested a meeting to review the evaluation, determine the student’s eligibility. DCPS never reviewed the IEE and DCPS failed to determine the student’s eligibility. (Petitioner’s Exhibits 118-1, 119-2)

18. In September 2011 the student was hospitalized at [REDACTED] [REDACTED] for psychiatric reasons. The student’s discharge summary from [REDACTED] confirmed the diagnosis that were contained the student’s earlier IEE and recommended the student be provided an IEP. (Petitioner’s Exhibit 109-1, 109-4, 109-5)

19. The parent unilaterally placed the student at School B in January 2012 and the student continued to attend School B, although sporadically, until the end or near the end of SY 2011-2012. (Petitioner’s Exhibit 110, 111)

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<sup>7</sup> The witness was designated as a expert in administer educational-psychological evaluations.

20. When the parent enrolled the student at School B did not contact anyone at DCPS about enrolling the student at School B and did not know she had to. The student was placed in at School B in January 2012 principally with the advice and assistance of her legal representatives. The parent did not inform DCPS and she not discuss payment of the student tuition at School B with the School be staff. The parent suspected that when the student stop attending School B is was because the school was not getting any tuition for the student. (Parent's testimony)
21. The student attended School B starting January 2012 and for the remainder of SY 2011-2012. The student struggled to attend school regularly and when she did attend she was resistant and was aggressive toward staff and refused to do work but tended to be more engaged when class work involved hands-on activities. Based on the student's behaviors and performance during her time at School B the school staff believed that she needed a more restrictive educational placement and in a therapeutic milieu. (██████████, testimony)
22. The cost of the School B is between \$200 to \$250 per day. The parent did not pay the tuition during the time the student attended School B. The student did not come to School B with an IEP and was not found eligible while she attended. School B created a mock IEP for the student. The student's last day of school at School B was June 10, 2012. No one at School B told the parent or student that the student could not return to School B. The parent's legal representative that the student was enrolling in another school notified the school. The student brought the IEE to High Road and, P-111 recommended the student in a more restrictive. (██████████ testimony, Petitioner's Exhibits 2, 3, 111)
23. Petitioner enrolled the student at School A at the start of SY 2012-2013. Petitioner, through her legal representative, made a number of requests of School A that it convene an eligibility meeting for the student. School A staff refused. The student was suspended from School A repeatedly and Petitioner was eventually told by the School A staff that School A was not the student's neighborhood school. (Parent's testimony, Petitioner's Exhibits 112, 113)
24. Petitioner attempted to enroll the student in two other DCPS senior high schools but was refused admission and the student was not attending any school at the time of the due process hearing. (Parent's testimony)
25. After the due process complaint was filed DCPS convened an eligibility meeting for the student. The School B representative participated in the student's eligibility meeting along with DCPS personnel. At that meeting the student was found eligible as a student with multiple disabilities. (██████████ testimony)
26. The student has visited and desires to be placed and the ██████████ ("██████████") located in ██████████, ██████████, ██████████ mission is to provide special education and mental health services to adolescents who are suffering from emotional and behavior disorders. ██████████ opened in 1996 and operates both a special education

day program and a residential treatment center. The school provides related services including individual and family therapy, recreational therapy, occupational therapy and speech and language therapy. [REDACTED] also has an equestrian therapy program that allows students to integrate the work with the animals into a student's IEP goals. The classrooms have 8 to 10 students in a classroom and average age for students is 15. There is a teacher and aide in each classroom. The teachers at [REDACTED] are certified in special education or in the process of being certified. ([REDACTED] testimony)

27. There is currently one DCPS student attending [REDACTED] in the RTC. The cost of the school is \$ 300.50 per day, which totals approximately \$65,000 per year. The daily costs includes all related services. The average stay for students at [REDACTED] RTC is eight months. A student can transition to the RTC when necessary and transition out when necessary. The RTC students are not all special education students and all students in the day program have IEPs. The school does not have a certificate of approval ("COA") from OSSE but in the process of obtaining the certification. The [REDACTED] staff is not certain that the student's placement at [REDACTED] is appropriate because [REDACTED] has not reviewed all of the student's educational records or evaluated the student. To admit the student [REDACTED] would need current psychological testing, a current IEP and her transcript and any information from her last educational placement. [REDACTED] can develop an IEP once the student arrives. The travel time to [REDACTED] from the District of Columbia is approximately one-hour and 15 minutes from the each way. ([REDACTED] testimony)
28. The student has visited the [REDACTED] School. She liked the small class sizes and especially liked the therapeutic program available at the school where students work with animals. She believes that such a program would be helpful to her in being able to manage her emotions and in-school behaviors. The student also believes that if she attends a school far away from her home as [REDACTED] is, she will be far less likely to leave school without authorization during the school day. The student is determined to attend school regularly and graduate and she hopes to attend college and go on to veterinary school. (Student's testimony)

## CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--  
(a) Are provided at public expense, under public supervision and direction, and without charge;  
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved;  
and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. <sup>8</sup> *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.34. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

**ISSUE 1:** Whether DCPS denied the student a FAPE by failing to identify and evaluate the student as a child with a disability under its child find obligations and/or in response to a specific request made by the parent.

**Conclusion:** Petitioner sustained the burden of proof by a preponderance of the evidence that the student should have been located identified, evaluated and determined eligible at least by the time the student was evaluated independently and Petitioner provided DCPS the IEE report in June 2011. Thus, the student should have been determined eligible at the latest by July 2011 - 120 days after DCPS authorized the IEE in March 2011.

In addition, the Hearing Officer concludes that there was sufficient evidence that DCPS was on notice of the student's possible disability during the first semester of SY 2010-2011, when the student was given a long-term suspension from School C and attended Choice. Thus, the Hearing Officer concludes that the evidence clearly supports a finding of a denial of a FAPE to the student back to December 18, 2010.

"DCPS' 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").

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<sup>8</sup> The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.

The facts of this case clearly indicate through the student's testimony and through the documentation of her suspensions at School C that and her suspensions once she was sent to Choice, that the student had severe behavioral difficulties as of September 2010 when she was first sent from School C to Choice. In addition, following the student's suspension from School C and her attendance at Choice, DCPS granted Petitioner an independent evaluation and in response to repeated requests that DCPS review the evaluation and determine the student's eligibility DCPS did nothing. The facts reveal that only after this current due process complaint was filed was an eligibility meeting held at which the student was found eligible with a multiple disability classification.

Presumably had the IEE been reviewed when it was first provided to School C the student would have been found eligible. The Hearing Officer concludes that the DCPS' failure to determine the student's eligibility after it was provided the IEE in June 2011 was a denial of a FAPE to the student.

The evidence clearly indicates that the student had behavioral difficulties when she started School C during the 6th grade and these behaviors continued and even escalated during the student's second year at School C during SY 2010-2011. By the time the student received the long-term suspension and was sent to Choice the student was displaying severe disruptive behavior and even at the alternative placement, [REDACTED], she was suspended for her behavior.

The Hearing Office concludes that this level of behavioral difficulties in subsequent school setting coupled with the student poor academic performance was sufficient for DCPS to have been on notice the student should have been evaluated and her eligibility for special education determined. DCPS' failure to evaluate the student during the first semester of SY 2010-2011 when she was suspended from School C was a failure by DCPS to identify the student under its child-find obligations and was a denial of a FAPE to the student.

**ISSUE 2:** Whether the violation(s) alleged by Petitioner that precede the two-year period prior to the date the complaint was filed (December 18, 2010) can be adjudicated and whether Petitioner has presented sufficient proof that the one or more of the exceptions listed in 300.511(f) apply.

**Conclusion:** Petitioner sustained the burden of proof that the 2-year period of limitation was tolled as of the date that the parent was not provided procedural safeguards when the assistant principal at School C told the parent that student would be evaluated for special education. Thus, Petitioner is allowed to assert claims beyond December 18, 2010. The Hearing Officer concludes that there is sufficient evidence and Petitioner sustained the burden of proof that DCPS should have, under its child-find obligations, found, identified and evaluated the student for special education eligibility by the time the student was first given a long term suspension from School C and sent to Choice.

Where there has been a denial of FAPE, "a parent or agency must request an impartial hearing on their due process complaint within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint." 34 C.F.R. § 300.511(e).

The two-year timeline described in paragraph (e) of 34 C.F.R. § 300.511 – the statute-of-limitations provision – does not apply to a parent if the parent was prevented from filing a due process complaint due to: “(1) Specific misrepresentations by the Local Education Agency (LEA) that it had resolved the problem forming the basis of the due process complaint; or (2) The LEA's withholding of information from the parent that was required under this part to be provided to the parent.” 34 C.F.R. §300.511(f) (1)-(2).

The question of whether Petitioner is entitled to assert denials of FAPE prior to December 18, 2010, depends upon whether Petitioner has presented sufficient proof that the 2-year period of limitation was tolled at some point prior to December 18, 2010, due to application of one or more of the exceptions outlined in 34 C.F.R. §300.311(f).

Petitioner maintains that both exceptions apply and pointed to several instances at which DCPS either withheld information from Petitioner in the form of procedural safeguards, and one instance in which DCPS misrepresented to the Petitioner on March 22, 2010, that the student had been evaluated and found eligible and had an IEP.

Petitioner asserts that she should have been provided procedural safeguards (1) as early the end of SY 2006-2007 when the student had failed fifth grade at School D, (2) when the assistant principal asked for and Petitioner allegedly granted verbal consent to evaluate the student during SY 2010-2011. Petitioner alleges the misrepresentation came with DCPS provided the expulsion for in March 2011 that indicated the student had an IEP and a manifestation review meeting would be held.

The evidence does not suggest that there was a misrepresentation by DCPS in March 2010 that the student had been evaluated or had an IEP that Petitioner relied upon to her detriment. Petitioner testified that at the time she was given the form she knew the student did not have an IEP. Thus, the Hearing Officer concludes that this was not an instance of misrepresentation that would have given rise to the 2-year exception of 34 C.F.R. 311(f).

Thus, the remaining issue is whether DCPS withheld information, specifically the procedural safeguards to the parent at some point such that Petitioner is able to assert and have the opportunity to prove that DCPS should have identified, evaluated and found the student eligible under child-find or pursuant to a request after the date the procedural safeguards were withheld.

The evidence demonstrates from the parent's own testimony that during SY 2006-2007, when the student had been suspended the School D principal teacher asked the parent whether she had a problem with the student having an IEP. The Hearing Officer does not conclude that based upon this inquiry to the parent alone DCPS was obligated to provide the parent the procedural safeguards. The question as posed was whether she had a problem with the IEP, not a clear statement that the student should have an IEP, that the school intended to move forward with providing her an IEP, or anything that definitive. Therefore, the Hearing Officer concludes Petitioner did not sustain the burden of proof that she should have been provided the procedural safeguard by DCPS during SY 2006-2007.

However, Petitioner credibly testified that when she was provided the March 22, 2010, suspension/expulsion notice for the student at that point she was not provided any procedural safeguards. Although, there was not misrepresentation that the student had an IEP at the time, the Hearing Officer concludes that the form noting that an IEP existed, was a legitimate point at which the parent should have been provided procedural safeguards and the point at which thereafter any notice to DCPS that the student was perhaps a child with a disability would have created a child-find obligation that is actionable under the exceptions of 34 C.F.R. 311 (f).

The first point at which the Hearing Officer concludes there was sufficient basis for DCPS to have been put on notice that the student should have been evaluated for special education services at School C when soon after the start of SY 2010-2011, the student was suspended from School C and sent to Choice. Thus, the Hearing Officer concludes that the denial of FAPE to the student that can and should be remedied prior to December 18, 2010, began upon the student first suspension from School C during SY 2010-2011.

### **Appropriate Relief:**

IDEA authorized District Courts and Hearing Officers to fashion “appropriate” relief, e.g., 20 U.S.C. § 1415(i)(2)(C)(iii), and such authority entails “broad discretion” and implicates “equitable considerations.” *Florence County Sch. Dist. For v. Carter*, 510 U.S. 7, 15-16; *Reid v. District of Columbia*, 401 F.3d 516, 521-23 (D.C. Cir. 2005).

Petitioner seeks as relief that DCPS be ordered to place and fund the student at the Jefferson School and fund appropriate compensatory education. The student was determined eligible by DCPS days prior to the due process hearing and at the meeting no IEP was developed. Petitioner has requested that that student be placed in the Jefferson School and provided testimony as to the services that can be provided.

The witness Petitioner offered as to the Jefferson School could not state that the school was appropriate for the student without the student first having an up to date evaluation and meeting other requirement. The Hearing Officer takes note that the school does not have a current COA from OSSE and would require an approximate 1 hour and 15 minute bus ride drive for the student each way.

Although there was testimony by the School B director that they believed the student was in need of a more restrictive setting, the student attended School B more than a year ago, no IEP has yet been yet developed for the student and there was insufficient testimony presented the student should be placed in a residential program at least at this juncture.

For the foregoing reasons the Hearing Officer concludes that Petitioner’s request that the student be placed at the Jefferson school will not be granted. Instead, the Hearing Officer directs in the Order below that DCPS promptly convene an IEP team meeting for the student and develop the student’s IEP and determine an appropriate placement for her.

Petitioner has also requested as relief reimbursement for the student’s tuition during the time she

attended School B. However, Petitioner did not present proof that she notified DCPS of the unilateral placement and Petitioner specifically testified that she did not pay School B and there is no evidence she obligated herself to pay School B. The student's placement at School B may have been a risk School B took upon itself wagering that it would eventually be compensated. However, School B was not a party to this litigation and Petitioner presented insufficient proof that she is due any reimbursement for the student's tuition for School B. Consequently, the Hearing Officer denies the requested relief of reimbursement.

### **Compensatory Education**

Under the theory of compensatory education, "courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program." "the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

As to compensatory education, Petitioner offered the testimony of [REDACTED] who stated that in order for the student to be placed in a position she would have had she been found eligible the student should be placed in an appropriate full time special education setting and provided addition tutoring in the amount of 2 to 3 hours per week. However, [REDACTED] did not state the length of time the tutoring needed to be provided or a total number of hours of tutoring that in his opinion would be appropriate for the student.

Consequently, the Hearing Officer surmises from [REDACTED] testimony, which was based on his evaluation of the student nearly two years ago, that it is appropriate as compensation for denial of a FAPE to the student to determine her level of functioning through an updated evaluation and to provide the student the recommended tutoring through the end of the current school year. Consequently, based on [REDACTED] testimony the Hearing Officer concludes that the compensatory education DCPS is directed to provide in the Order below is equitable and what is required along with the student's prospective placement in an appropriate educational placement to compensate the student for the denials of FAPE determined in this decision.

### **ORDER:**

1. DCPS shall, within ten (10) school days of the issuance of this Order, convene an IEP meeting for the student at which an IEP shall be developed and an educational placement and location of services for the remainder of SY 2012-2013 determined.

2. As compensation for the denials of FAPE to the student DCPS shall provide the following:
  - (a) Within ten (10) calendar days of the issuance of this Order, fund an independent comprehensive psychological evaluation at the DCPS/OSSE prescribed rate and within thirty (30) calendar days of its receipt of the independent evaluation DCPS shall convene an IEP meeting to review the evaluation and review and revise the student's IEP as appropriate.
  - (b) Fund independent tutoring at the DCPS/OSSE prescribed rate, in the amount of three hours per week for every calendar week during the remainder of the SY 2012-2013, starting the first week following the issuance of this Order, until the start of the SY 2013-2014, for a total of 24 calendar weeks for a total of 72 hours of tutoring. Petitioner shall use the total number hours of tutoring awarded in this Order by September 1, 2013.
3. 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 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: March 8, 2013**