

**DISTRICT OF COLUMBIA  
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

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

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Student Hearing Office  
June 3, 2014

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STUDENT, <sup>1</sup>	)	Date Issued: June 3, 2014
through her Parent,	)	
Petitioner,	)	Hearing Officer: Keith L. Seat, Esq.
	)	
v.	)	
	)	
District of Columbia Public Schools	)	
("DCPS"),	)	
Respondent.	)	
	)	

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**HEARING OFFICER DETERMINATION**

**Background**

Petitioner, mother of Student, filed a due process complaint on 4/11/14, alleging that Student had been denied a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Improvement Act ("IDEA"). Specifically, Petitioner alleged that School failed to comply with its affirmative obligation to identify, locate, and evaluate Student over several years to determine her need for special education based on Student's problem behaviors in school and the repeated requests for evaluation by Petitioner and Student's therapist. In addition, Petitioner alleged that DCPS failed to conduct a Manifestation Determination Review ("MDR") and failed to conduct a Functional Behavioral Assessment ("FBA") and develop a Behavioral Intervention Plan ("BIP").

DCPS responded that Student was not denied a FAPE because Student was evaluated in 2008 and found not to have a disability, and because DCPS is now willing to evaluate Student, but Petitioner will not consent. DCPS further asserted that it had no obligation to conduct an MDR or an FBA.

**Subject Matter Jurisdiction**

Subject matter jurisdiction is conferred pursuant to IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; Title V, Chapter E-30,

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<sup>1</sup> Personally identifiable information is provided in Appendix A.

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of the District of Columbia Municipal Regulations (“D.C.M.R.”) and 38 D.C. Code 2561.02.

### Procedural History

Following the filing of the due process complaint on 4/11/14, this Hearing Officer was assigned to the case on 4/15/14. DCPS timely filed an amended response to the complaint on 4/20/14 and made no challenge to jurisdiction.

The complaint contained disciplinary allegations that mandated an expedited hearing pursuant to 34 C.F.R. 300.532(c). Neither Petitioner nor DCPS waived the resolution meeting, which took place on 4/23/14, at which time the parties agreed not to end the resolution period. The 15-day expedited resolution period ended on 4/26/14. Pursuant to 34 C.F.R. 300.532(c)(2), an expedited hearing was required no later than 20 school days following the filing of the complaint. According to the DCPS calendar, the 20<sup>th</sup> school day was 5/20/14. A final decision in this matter must be reached no later than 10 school days following the hearing, *id.*, which based on the hearing date of 5/20/14 requires a Hearing Officer Determination (“HOD”) by 6/4/14.

A prehearing conference was held on 4/30/14 and a Prehearing Order was issued on 5/1/14.

On 5/8/14, Respondent filed a Motion for Summary Adjudication. On 5/13/14, Petitioner filed a Response and Objection to Respondent’s Motion for Summary Adjudication. On 5/14/14, Respondent filed DCPS’s Reply in Support of Motion for Summary Adjudication. On 5/17/14, this Hearing Officer denied the motion in an Order Denying Respondent’s Motion for Summary Adjudication.

The due process hearing was a closed hearing that took place as scheduled on 5/20/14.

Neither party objected to the testimony of witnesses by telephone. Petitioner participated in the hearing in person.

Petitioner’s Disclosure statement, dated 5/13/14, consisted of a witness list of 3 witnesses and documents P-1 through P-12. Petitioner’s documents were admitted into evidence without objection.<sup>2</sup>

Respondent’s Disclosure statement, dated 5/13/14, consisted of a witness list of 3 witnesses and documents R-1 through R-6. Respondent’s documents were admitted into evidence without objection.<sup>3</sup>

The parties discussed settlement very briefly at the beginning of the due process hearing.

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<sup>2</sup> Pursuant to the Prehearing Order issued in this case, failure to note objections to the opposing party’s disclosures results in the disclosures being admitted without objection.

<sup>3</sup> *Id.*

## Hearing Officer Determination

Petitioner presented 2 witnesses in her case in chief: (1) Petitioner, and (2) Educational Advocate/Consultant (“Advocate”). Petitioner was also presented as a rebuttal witness.

Respondent presented 1 witness, the Vice Principal of School B (“Vice Principal”).

Parties stipulated only to the fact that Student has never received an individualized education program (“IEP”).

The issues to be determined in this Hearing Officer Determination are:

**Issue 1** – Whether DCPS denied Student a FAPE by failing to comply with its affirmative Child Find obligations to locate, identify and evaluate Student to determine initial eligibility for special education services:

(A) during 2011/12<sup>4</sup> at School A when (1) Student incurred behavioral infractions and was repeatedly suspended, (2) Student was placed in School A’s “Path Program,” a class of full-time special education students with serious behavioral problems, (3) staff at the school knew Student was being treated for ADHD, and (4) Parent asked many times that Student be evaluated;

(B) during 2012/13 at School A when (1) Student incurred behavioral infractions and was repeatedly suspended, (2) Student remained in the Path Program, where the other students were much lower functioning than Student and Student made little or no academic progress, (3) staff at the school acknowledged that Student’s behavior appeared to be due to her ADHD, and (4) Parent continued to request that Student be evaluated; and

(C) during 2013/14 at School B when (1) Student incurred behavioral infractions and was repeatedly suspended for more than 25 days, (2) staff at the school know Student is being treated for ADHD, (3) Parent continued to request that Student be evaluated, and (4) an outside mental health counselor, who comes to the school once a week to provide services to Student, has several times requested the school to evaluate Student due to severe emotional issues.

**Issue 2** – Whether DCPS denied Student a FAPE by failing to conduct a Manifestation Determination Review for Student, who was suspected of having a disability during 2013/14, when Student was suspended from school for more than 10 school days.

**Issue 3** – Whether DCPS denied Student a FAPE by failing to conduct a Functional Behavioral Assessment and develop a Behavioral Intervention Plan during 2013/14, when Student was suspected of having a disability that had an adverse impact

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<sup>4</sup> All dates in the format “2011/12” refer to school years.

Petitioner alleges that district staff misrepresented that the Path Program was an appropriate alternative to evaluation of Student, such that the two-year statute of limitations does not apply because of the exception in 34 C.F.R. § 300.511(f)(1).

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on education during the time that Student was removed from her educational placement following her 10<sup>th</sup> day of suspension.

Petitioner requested the following relief:

- (1) DCPS to fund an independent comprehensive psychological assessment (including clinical, cognitive, educational/achievement, and social history components) and to fund any other assessments recommended by the psychologist.
- (2) DCPS to convene a multidisciplinary team (“MDT”) meeting within 10 business days of receiving the evaluation to determine eligibility, develop an IEP, if eligible, and determine placement.
- (3) DCPS to fund a compensatory education<sup>5</sup> plan developed by Parent if Student is found eligible for special education.

### **Findings of Fact**

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact<sup>6</sup> are as follows:

1. Student is a resident of the District of Columbia. Petitioner is Student’s mother.<sup>7</sup>
2. Student was a DCPS student at School A
3. Student has behavioral and emotional problems and has been diagnosed with ADHD (attention deficit hyperactivity disorder) and impulsive disorder.<sup>9</sup>

Student talks to herself and is unpredictable; she has become more aggressive and is talking to herself more frequently as she has gotten older.<sup>11</sup> Frequent suspensions<sup>12</sup> have made it even more difficult for Student to get along

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<sup>5</sup> Petitioner’s request for compensatory education is reserved pending the completion of Student’s evaluation and a determination of eligibility for special education services.

<sup>6</sup> Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness’s testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer’s determinations of the credibility and/or lack of credibility of the witness(es) involved.

<sup>7</sup> Petitioner.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>11</sup> Advocate.

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at school.<sup>13</sup> To date, she has never been found eligible for special education services or received an IEP.<sup>14</sup>

5.

Student has met with Therapist at school both at School A and then at School B.<sup>18</sup> Therapist told Petitioner that Student needed a full evaluation.<sup>19</sup>

6. Student was placed in the Program at School A, which was supposed to deal with behavioral issues like hers, but the program was not successful, and Student continued to be suspended.<sup>20</sup>

School A said that Path was what Student needed, but didn't test Student, and continued to suspend her and require Petitioner to come and sit with her.

7. Petitioner has been trying to get DCPS to evaluate Student to see if she has a disability. Student has not been evaluated since 1<sup>st</sup> Grade in 2008, when she was found not to have a disability.<sup>22</sup>

8. At School A, Petitioner asked a number of people for an evaluation of Student, including the Principal; Petitioner primarily made her requests to Administrator, asking four or five times per year in 2011/12 and 2012/13.<sup>23</sup> Petitioner and Therapist met with Administrator in 2012/13 to ask for testing; Petitioner wrote a letter requesting evaluation

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<sup>12</sup> Unless otherwise indicated, all suspensions mentioned in this HOD refer to out-of-school suspensions.

<sup>13</sup> Petitioner.

<sup>14</sup> Stipulation; Petitioner.

<sup>15</sup> Petitioner.

<sup>16</sup> *Id.*

<sup>17</sup> Petitioner; Advocate.

<sup>18</sup> Petitioner.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Advocate.

<sup>22</sup> Petitioner.

<sup>23</sup> Petitioner; Administrator was the person who called Petitioner whenever Student was suspended from School A.

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during that meeting and gave it to Administrator.<sup>24</sup> Therapist sought an evaluation of Student from school personnel at School A in 2011/12 and 2012/13 and at School B in 2013/14.<sup>25</sup>

9. In 2013/14, Petitioner asked Vice Principal to evaluate Student 4 or 5 times, sometimes with Therapist.<sup>26</sup> Petitioner wrote a letter to Vice Principal asking for the necessary consent form to have Student evaluated, but never received the form from anyone.<sup>27</sup> Therapist also asked Vice Principal for an evaluation of Student separately from Petitioner and specifically asked for the consent form.<sup>28</sup> At one point, Vice Principal said that she thought Student already had an IEP; Vice Principal said she would have to check when Therapist said that was not correct.<sup>29</sup>

10. Petitioner understood from Vice Principal that a Student Support Team (“SST”) process was a preliminary step prior to evaluation of Student. Petitioner was willing to take that step, if necessary, and asked for SST, but could not even get Student into SST. Petitioner never sought SST in place of an evaluation.<sup>30</sup>

11. Student was suspended frequently in 2013/14, but Petitioner only received documentation relating to one of the suspensions. Petitioner kept notes of the suspensions and, with corroboration from Therapist’s records, prepared a calendar showing Student’s periods of suspension in 2013/14.<sup>31</sup>

12. In 2013/14, Student has been suspended for 26 days through March 2014: 7 days on 11/19/13, 3 days on 12/5/13, 3 days on 12/18/13, 6 days on 1/31/14, and 7 days on 3/20/14.<sup>32</sup> Other behavioral issues occurred that did not result in suspensions, including Student being transferred early in 2013/14 from one English teacher’s class to another after throwing a chair.<sup>33</sup> Early in 2013/14, Student was in a fight in her classroom and ran to the school office and called the police without the knowledge of school staff, who were surprised when the police responded.<sup>34</sup>

13. Petitioner was usually called about the suspensions during 2013/14 by Vice Principal, but did not have meetings to discuss Student or the suspensions, and did not receive packets of work for Student while she was out of school.<sup>35</sup> While School B’s

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<sup>24</sup> Advocate. Petitioner testified that she and Therapist met with Administrator to seek an evaluation, but the request fell on “deaf ears.”

<sup>25</sup> Petitioner.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Petitioner; Advocate.

<sup>29</sup> Advocate.

<sup>30</sup> Petitioner.

<sup>31</sup> *Id.*

<sup>32</sup> Petitioner; P-12; Vice Principal confirmed that Student has been suspended a number of times in 2013/14.

<sup>33</sup> Advocate.

<sup>34</sup> Petitioner; Advocate.

<sup>35</sup> Petitioner.

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practice is to provide documentation for every suspension, the documents may be given to the suspended student to take home.<sup>36</sup>

14. Petitioner stated that suspensions in 2011/12 and 2012/13 were at about the same level as 2013/14. In addition, Petitioner was often called by School A in 2011/12 and 2012/13 and required to come and sit with Student in the classroom or else someone would have had to pick up Student.<sup>37</sup>

15. The school psychologist at School B met with Petitioner and Therapist after the February 2014 suspension; the psychologist told them that she could not provide services to Student as they might be at cross-purposes with Therapist's counseling of Student.<sup>38</sup> Therapist emphasized the need for testing, to no effect.<sup>39</sup>

16. DCPS never conducted an MDR or FBA for Student.<sup>40</sup> Once the complaint in this case was filed, DCPS was willing to conduct an evaluation.<sup>41</sup> Petitioner had asked for a DCPS evaluation for years, but no longer trusted DCPS and refused to consent to a DCPS evaluation once litigation commenced.<sup>42</sup>

## Conclusions of Law

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

The overall purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1. To that end, DCPS must have procedures in place to ensure that all children with disabilities, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located and evaluated. This obligation extends to children who are suspected of being a child with a disability and in need of special education, even though they are advancing from grade to grade. 34 C.F.R. 300.111, 5 D.C.M.R. E-3002.1(d).

Child with a disability means a child who is evaluated as having one of the defined disabilities under the IDEA, and who, by reason thereof, needs special education and related services. 34 C.F.R. 300(a). Disability includes, but is not limited to Emotional Disturbance, Hearing Impairment, Specific Learning Disability, and Other

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<sup>36</sup> Vice Principal.

<sup>37</sup> Petitioner.

<sup>38</sup> Petitioner; Advocate.

<sup>39</sup> Advocate.

<sup>40</sup> Petitioner; Vice Principal testified that an MDR has not been conducted because Student has no disability.

<sup>41</sup> Vice Principal.

<sup>42</sup> Petitioner.

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Health Impairment. Regardless of the existence of a disability, it is only a qualifying disability under the IDEA if the disability adversely affects a child's educational performance. 34 C.F.R. 300.8.

In addition, DCPS must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR 300.114.

However, a child who meets one of the disability classifications under the IDEA who solely is in need of behavioral intervention or a related service and does not require special education services, does not qualify as a child with a disability under the IDEA. 34 C.F.R. 300.8(a)(2)(i).

“Based solely upon 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 that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5 D.C.M.R. E-3030.3. The burden of proof is on the party seeking relief. *Schaffer v. West*, 44 IDELR 150 (U.S. 2005).

A Hearing Officer's determination of whether a child received a FAPE must be based on substantive grounds. 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. 34 C.F.R. 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child's *substantive* rights.

*Issue 1 – Whether DCPS denied Student a FAPE by failing to comply with its affirmative Child Find obligations to locate, identify and evaluate Student to determine initial eligibility for special education services:*

*(A) during 2011/12 at School A when (1) Student incurred behavioral infractions and was repeatedly suspended, (2) Student was placed in School A's "Path Program," a class of full-time special education students with serious behavioral problems, (3) staff at the school knew Student was being treated for ADHD, and (4) Parent asked many times that Student be evaluated;*

*(B) during 2012/13 at School A when (1) Student incurred behavioral infractions and was repeatedly suspended, (2) Student remained in the Path Program, where the other students were much lower functioning than Student and Student made little or no academic progress, (3) staff at the school acknowledged that Student's behavior appeared to be due to her ADHD, and (4) Parent continued to request that Student be evaluated; and*

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*(C) during 2013/14 at School B when (1) Student incurred behavioral infractions and was repeatedly suspended for more than 25 days, (2) staff at the school know Student is being treated for ADHD, (3) Parent continued to request that Student be evaluated, and (4) an outside mental health counselor, who comes to the school once a week to provide services to Student, has several times requested the school to evaluate Student due to severe emotional issues.*

Petitioner met her burden of proof by a preponderance of the evidence that DCPS failed in its affirmative Child Find obligations to identify, locate and evaluate Student during 2012/13 and 2013/14. DCPS's Child Find obligations are triggered as soon as a child is identified as a potential candidate for services. *Long v. District of Columbia*, 56 IDELR 122 (D.C.D.C. 2011). Here, there is credible testimony that both Petitioner and Therapist repeatedly sought an evaluation of Student by DCPS, but were ignored or disregarded. Petitioner's requests were both oral and in writing at School A in 2012/13 and School B in 2013/14. In addition, there were numerous objective indicators that Student might be a child with a disability who, as a result, required special education services in order to access the curriculum. Petitioner's un rebutted testimony is that Student was suspended some 26 days in 2013/14 and at similar levels in previous years, in addition to other indications of apparent problems, including aggression, fighting, throwing furniture, leaving class without permission, and talking to herself.

Petitioner's claims for 2011/12, however, are barred by the 2-year statute of limitations, 34 C.F.R. 300.511(e), as the exception in 300.511(f)(1) for misrepresentation does not apply. While the staff at School A may have asserted that the Path Program was an appropriate alternative to evaluation of Student, Petitioner was not misled as she testified that she made multiple requests for evaluation during 2011/12.

*Issue 2 – Whether DCPS denied Student a FAPE by failing to conduct a Manifestation Determination Review for Student, who was suspected of having a disability during 2013/14, when Student was suspended from school for more than 10 school days.*

Within 10 school days of any decision to change the placement of a child *with a disability* for a violation of a code of student conduct, an MDR must be conducted. 34 C.F.R. 300.530(e)(1). To conduct the MDR, DCPS, the parent, and relevant members of the child's IEP team must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parent to determine (i) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (ii) if the conduct in question was the direct result of DCPS's failure to implement the IEP. 34 C.F.R. 300.530(e)(1).

For Student to be entitled to the disciplinary protections of the IDEA, including the requirements that DCPS conduct an MDR within 10 days of a change in placement for disciplinary reasons and conduct an FBA (Issue 3, below) after Student has been suspended for 10 days, Petitioner must prove that DCPS knew that Student was a child with a suspected disability before the behavior that precipitated her suspension occurred. 34 C.F.R. 300.534(a). Here, Petitioner credibly testified that she had repeatedly

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requested evaluation of Student and had expressed her concerns in writing, so DCPS is deemed to have knowledge of Student's suspected disability under 34 C.F.R. 300.354(b), and Petitioner may rely on the protections of 34 C.F.R. 300.530.

Student reached her 10<sup>th</sup> day of suspension in 2013/14 on 12/9/13, and was subsequently suspended three more times for a total of some 16 additional days, without DCPS conducting an MDR. Since Petitioner demonstrated that Student was entitled to the disciplinary protections of the IDEA that apply to students with disabilities, an MDR was required.

*Issue 3 – Whether DCPS denied Student a FAPE by failing to conduct a Functional Behavioral Assessment and develop a Behavioral Intervention Plan during 2013/14, when Student was suspected of having a disability that had an adverse impact on education during the time that Student was removed from her educational placement following her 10<sup>th</sup> day of suspension.*

DCPS also denied Student a FAPE by failing to conduct an FBA and develop a BIP. An FBA is essential to addressing a child's behavioral difficulties. *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 68 (D.D.C. 2008). In the case of a child whose behavior impedes the child's learning or that of others, the IEP team must consider the use of positive behavioral interventions and supports, and other strategies to address that behavior. 34 C.F.R. 300.324. Here, it is clear that Student was having behavioral difficulties, but they were not being addressed by DCPS apart from repeated suspensions.

After a child with a disability<sup>43</sup> has been removed from her current placement for 10 school days in the same school year, DCPS must conduct an FBA and develop behavioral intervention services and modifications that are designed to address the behavioral violation so that it does not recur. 34 C.F.R. 300.530(d)(1)(ii). Student reached her 10<sup>th</sup> day of suspension in 2013/14 on 12/9/13, and was suspended three times after that for 16 additional days, without DCPS conducting an FBA or developing a BIP.

In addition, an FBA and development of a BIP are also triggered by an MDR which concludes that a student's behaviors were a manifestation of her suspected disabilities. 34 C.F.R. 300.530(f). As set forth above, an MDR should have been conducted, so an FBA may have been required on that basis as well.

## **ORDER**

Petitioner has met her burden of proof as set forth above. Accordingly, it is hereby ordered that:

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<sup>43</sup> As noted above, while Student has not been found to be a child with a disability, she nonetheless comes within the protections of this section because Petitioner satisfied the requirements of 34 C.F.R. 300.534.

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(1) DCPS shall fund an independent comprehensive psychological assessment of Student (including clinical, cognitive, educational/achievement, and social history components), a Functional Behavioral Assessment, and other assessments reasonably recommended by the psychologist.

(2) DCPS shall convene a multidisciplinary team meeting within 10 business days of receiving the evaluation to determine eligibility of Student, develop an IEP, if eligible, and determine placement.

**IT IS SO ORDERED.**

### 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 U.S.C. § 1415(i).

Dated: June 3, 2014

/s/ *Keith Seat*

Keith L. Seat, Esq.  
Hearing Officer

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