

**INDIVIDUALS WITH DISABILITIES EDUCATION IMPROVEMENT ACT OF 2004
(IDEIA), (Public Law 108-446)
DISTRICT OF COLUMBIA PUBLIC SCHOOLS
IMPARTIAL DUE PROCESS HEARING**

I. INTRODUCTION

The student is _____ years of age, and a _____ grade student at _____ School, a public school located in the District of Columbia. The student is a resident of the District of Columbia, and is not identified as disabled and eligible to receive special education services, pursuant to “The Individuals with Disabilities Education Act (IDEA); reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)”.

On February 4, 2009, Counsel, on behalf of parent, initiated a due process complaint alleging that the District of Columbia Public Schools, hereinafter referred to as “DCPS”, denied the student a Free Appropriate Public Education (“FAPE”), by failing to: (1) evaluate the student in all areas of suspected disability; (2) develop an appropriate individualized education program (IEP); (3) provide the student an appropriate placement; and (4) afford the student’s parent a meaningful opportunity to participate in the placement discussions and determinations for the student.

The due process hearing convened on March 10, 2009, at 9:00 a.m.; at Van Ness Elementary School, located at 1150 5th Street, S.E., Washington, D.C. 20003.

II. JURISDICTION

This proceeding was invoked in accordance with the rights established pursuant to “The Individuals with Disabilities Education Act (“IDEA”)”, Public Law 101-476, reauthorized as “The Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA”)”, Public Law 108-446 and 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; the Rules of the Board of Education of the District of Columbia; the D.C. Appropriations Act, Section 145, effective October 21, 1998; and Title 38 of the District of Columbia Municipal Regulations (“DCMR”), Chapter 30, Subtitle VII, Chapter 25.

III. DUE PROCESS RIGHTS

Petitioners’ Counsel waived a formal reading of parent’s due process rights.

IV. ISSUES

The following issues are identified in the February 4, 2009 due process complaint:

- (1) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to evaluate the student in all areas of suspected disability, in violation of 20 U.S.C. §1414?
- (2) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to develop an appropriate individualized education program (IEP), in accordance with IDEA?
- (3) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide the student an appropriate placement?
- (4) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide parent a meaningful opportunity to participate in decisions regarding the students' placement and the provision of a FAPE?

V. RELIEF REQUESTED

- (1) DCPS must fund independent evaluations to include: comprehensive psychological (cognitive, achievement and clinical testing), social history, functional behavioral assessment, visual/audio screenings and speech and language evaluations.
- (2) Once all evaluations are completed, DCPS must convene an IEP meeting within five days of receiving independent evaluations to update and redevelop the IEP, considering LD, ED and OHI as appropriate disability classifications and considering a full-time placement based on the provisions of the new IEP.
- (3) DCPS should develop and fund a compensatory education plan dating back at least the last two years as warranted per Reid.

VI. PROCEDURAL POSTURE

On February 2, 2009, Counsel, on behalf of parent, filed a due process complaint. On February 9, 2009, the Hearing Officer issued a Pre-hearing Conference Notice scheduling the Pre-hearing Conference for February 18, 2009 at 3:30 p.m.. The parties failed to appear for the pre-hearing conference, and on February 18, 2009 the Hearing Officer issued a Pre-hearing Conference Order, and on March 10, 2008, issued a revised Pre-hearing Conference Order.

On March 3, 2009, DCPS submitted its disclosure statement and response to the complaint. The due process hearing convened on March 10, 2009 at 9:00 a.m., as scheduled.

VII. PRELIMINARY MATTERS

There were no preliminary matters introduced by the parties, or addressed by the court, prior to proceeding with a hearing on the merits.

IX. DISCLOSURES

The Hearing Officer inquired of the parties whether all disclosures were submitted by the parties; and whether there were any objections to the disclosures. Receiving no objections to the disclosures submitted, the following disclosures were admitted into the record as evidence:

DISCLOSURES ADMITTED INTO EVIDENCE ON BEHALF OF PETITIONER

- Petitioner's Exhibits 01 through Petitioner's Exhibit 13; and a witness list dated January 12, 2009.

DISCLOSURES ADMITTED INTO EVIDENCE ON BEHALF OF RESPONDENT

- Respondent's Exhibits 01 through Respondent's Exhibit 04; and a witness list dated March 3, 2009.

IX. STATEMENT OF CASE

1. The student is _____ years of age, and a _____ grade student at _____ School, a public school located in the District of Columbia. The student is a resident of the District of Columbia, and is not identified as disabled and eligible to receive special education services, pursuant to "The Individuals with Disabilities Education Act (IDEA); reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)".

2. On November 15, 2005, an Absence Investigation Request was completed. The Attendance Officer reported that the student's mother advised the staff that the student was absent because of asthma; and on November 10, 2005, the student's sister informed the staff that recent absences were due to the student's allergies. The investigator concluded by indicating that during a discussion with parent, parent promised to visit the student's physician to request a change in medication.

An Attendance Summary from August 18, 2008 to January 26, 2008 reflects that the student had no unexcused absences, and a total of 8 days absent.

3. On March 23, 2006, D.C. Public School completed a "Report of Psychological Evaluation". The evaluator concluded that although current test data show various discrepancies among the processing areas measured by certain tests, the student's overall scores suggest below-average cognitive functioning (a "slow learner"). The evaluator also indicated that it could not be determined whether the student has a learning disability, because of the excessive absences since kindergarten and his need for glasses.

The evaluator also indicates that the testing did reflect that the student's cognitive abilities appear to be subnormal and he has significant visual perception deficits (visual memory, visual form constancy, visual sequential memory) and below average visual motor integration skills (areas that are important components of the kindergarten curriculum). Academically, the evaluator determined that the student is functioning on the readiness level in reading, math, and written language.

The evaluator recommended that school personnel work closely with the student's family to provide for strict adherence to school attendance regulations; and since the student has not had the opportunity to be properly exposed to the kindergarten, first grade, and second grade curricula, it is imperative that his current regular education program provide for such exposure through resource instruction and tutoring.

The evaluator also recommended that the Student Support Team (SST) monitor the student's classroom performance to determine if he is successfully mastering those reading, math, and written language skills that he lacks, or if he continues to have difficulty (despite regular attendance) and would require consideration of special education services in the future.

The evaluator concluded that because of the student's significant visual perception deficits (especially memory and sequential memory) and his apparent receptive/expressive language strengths, he would benefit from a teaching approach that emphasizes auditory stimuli with visual and kinesthetic sensory reinforcement.

4. On March 24, 2006, D.C. Public Schools completed a Speech and Language Evaluation. According to the evaluation, results of the assessments, including records review, observations, and standardized evaluations, revealed low average language skills and below average expressive vocabulary skills.

The evaluation included recommendations for improving the student's expressive vocabulary; and concluded that the scores from the evaluation would be considered in conjunction with other data to determine if a disability exists and the best academic program for the student.

5. On March 31, 2006, a Multidisciplinary Development Team (MDT) eligibility meeting convened on behalf of the student to review the ordered assessments and other data, establish a disability, and determine the student's eligibility for special education services. The MDT meeting notes also indicate that the test results would be shared at the meeting and a written report completed on that date.

The General Education Teacher reported that the student is functioning below the second grade level in reading and math, has difficulty maintaining his focus in a small or large group setting, is frequently absent, and exhibits extreme behavior problems.

The Speech Pathologist reported that several attempts were made to complete a comprehensive language evaluation, however, the student is frequently absent, and therefore testing could not be completed in a timely manner. The DCPS Psychologist provided the MDT the results of March 23, 2006 Psychological Evaluation.

The MDT determined the student ineligible for special education services at that time due to acute absenteeism since kindergarten, and referred the student back to the Student Support Team (SST), to work with the Attendance Committee, develop and implement a Behavior Intervention Plan, and follows the school Psychologist's recommendations, prior to being re-referred to special education. The MDT meeting notes conclude by indicating that parent agreed with this MDT's decision.

6. On January 12, 2007, D.C. Public Schools completed a "Report of Educational Assessment". According to the assessment the Multidisciplinary Development Team (MDT) at School referred the student for an educational assessment so that his eligibility for special education services could be reevaluated. The report also indicates that a Comprehensive Psychological Evaluation was completed by the Psychologist on March 24, 2005, and considered the Report of Educational Assessment as an addendum to the prior evaluation.

The evaluation test results indicate no strengths were identified for the student in the following categories: Letter and Word Recognition, Nonsense Word Decoding, Spelling, Listening Comprehension, Phonological Awareness, Math Concepts and Applications, Math Computation, Comparison of Letter and Word Recognition, Nonsense Word Decoding and Spelling, Comparison of Math Concepts and Applications and Math Computation.

The following areas of weakness were identified: Single/Double Consonant, Wrong Vowel, Short, Vowel, Initial/Final Sound, Insertion/Omission, Literal Comprehension, Inferential Comprehension, Rhyming, Deleting Sounds, Number Concepts, Addition, Subtraction, Multiplication, Fact or Computation, Regrouping: Subtraction.

According to the Oral and Written Language Scales (OWLS) classification system, the student's written language functioning is in the very low range. Overall the student performed in the very low range for expressive written language.

7. On December 20, 2007, D.C. Public Schools completed a "Social History Evaluation Report", requested by the MDT, as part of a comprehensive evaluation plan to assess the student's overall academic functioning.

The evaluation indicates that the student attended ██████ ES since kindergarten; and has been absent from school between 20-40 days each school year. The evaluation also indicates that most of the absences were excused due to either an illness or medical appointment; the student repeated kindergarten and third grade; and although in the 3rd grade, was functioning at about the second grade level in math and kindergarten level in reading.

According to the evaluation, the school was concerned that the student failed to participate in classroom discussions, lacked enthusiasm toward schoolwork, would run out of the classroom, and engaged in fighting, throwing objects and using aggressive language. The evaluation also indicates that the student failed to complete class work or homework assignments; and his teacher expressed concerns regarding the student's lack of parental involvement over the past few years.

The evaluator recommended that the MDT convene to determine the student's current eligibility for special education services; and discuss whether the social history and other evaluations are necessary to determine a program that meets the student's socio-emotional and academic needs.

8. On February 2, 2008, DCPS completed a "Speech Language Evaluation/Reevaluation" report. The evaluation indicates that the student failed to exhibit articulation deficits; voice and fluency were within the normal range; fluency was within the normal range; language memory was in the low range of functioning.

The student's strengths were formulation of sentences, receptive language index, which consist of skills in concepts following directions and recalling sentences. The student's weaknesses were noted as difficulty with the receptive language index, which consist of skills in concepts in following directions and recalling sentences.

The evaluator concluded that recommendations for the student would be determined in conjunction with other data in collaboration with the team; and based upon observation, review of prior evaluation data, student comments and teacher interview, it appears that the student would benefit from some type of service to address reading.

9. The student's 2007/08 Report Card, Fourth Advisory, reflects that the student shows a basic working knowledge of skills/concepts; produces satisfactory work; and usually applies skills/concepts correctly in language development, social studies, music and art.

The report also reflects that the student produces work that meets the standard, frequently produces work of high quality, and applies skills/concepts correctly in Mathematics; and fails to show basic working knowledge of skills/concepts, seldom produces work of satisfactory quality in Science.

In work habits personal and Social Skills the student rated "rarely" in completing class work on time, using time wisely, completing and returns homework, following classroom rules, following playground rules/school rules, respecting the rights/property of others, and listening while other speak. The student rated "frequent prompting" in practicing self-control, making an effort, working well with others/cooperates, and following directions; and with limited prompting participated with class discussion.

10. On January 26, 2009, the MDT convened to review documentation and determine whether evaluations were warranted. The classroom teacher reported that the student continued to perform below level on all subjects in the classroom; and particularly below level in both reading and math.

According to the teacher, the student's instructional level in the classroom was below 2nd grade in reading, and although he performed better (basic level) in math, he was still below his instructional grade level.

The teacher also reported that socially the student struggled to handle conflict appropriately; he resorted to physical altercations, and verbally lashed out when upset; played excessively in class, including breaking pencils and crayons and throwing them in the classroom.

The team indicated that each time the MDT convened, the student was determined ineligible due to chronic absenteeism and requiring glasses. The MDT decided that it was prepared to proceed with evaluating the student in the following areas: Psychological (cognitive, academic, and clinical), Social History, Functional Behavioral Assessment (FBA), and Speech and Language evaluations.

The MDT meeting notes also indicate that D.C. Public Schools completed a Psychiatric Evaluation on November 13, 2008, and diagnosed the student with Oppositional Defiant Disorder (ODD) and Attention Deficit Hyperactivity Disorder (ADHD). The MDT notes also indicate that a Speech and Language Evaluation was completed on March 24, 2006, the student's abilities were in the low average range; and according to the report the student was determined eligible for speech and language services.

Parent and the advocate requested funding for independent evaluations (Psychological, Social History, Functional Behavior Assessment, Speech and Language Evaluation, and Visual/Audio screening. The MDT meeting notes indicate that parent and advocate were not in agreement with DCPS completing the evaluations; however, parent signed the Consent to Evaluate form, in an effort to expedite the process. The MDT meeting notes also indicate that a Psychological Evaluation was scheduled for January 29, 2009; parent and teacher evaluation scheduled for January 30, 2009; and the Speech and Language Evaluation would be administered on February 4, 2009.

11. On January 29-30, 2009, DCPS completed a Report of Psychological Evaluation. The evaluator determined that as a result of the student's attendance problems finally being resolved and his recently being exposed to appropriate intervention services for a reasonable amount of time (which indicated significant difficulties in his mastering skills despite small group and individual instruction), he now meets the criteria for the disability category of "Multiple Disabilities (MD)", which includes "Specific Learning Disabilities" and "Other Health Impairments (OHI)" to address the student's Attention Deficit Hyperactivity Disorder (ADHD), as defined by IDEA.

The evaluator also indicated that it can now be stated with certainty that the student's learning disability is not primarily the result of visual impairment, hearing impairment, motor problems, mental retardation, emotional disturbance, or environmental, cultural, or economic disadvantage including poor instructional experiences and/or chronic absenteeism.

The evaluator recommended an intensive program to address the student's academic needs as well as the behaviors related to his ADHD; specialized instruction in all academic areas (reading, math, written language). Accommodations for the student's ADHD related behaviors, and psychological counseling; behavior modifications; a multi-sensory teaching approach because of the student's significant short-term auditory memory deficits, as well as working memory. The evaluator concluded by recommending clear limits, limited distractions, and a small group setting; and assignments broken up in small components.

12. On February 4, 2009, D.C. Public Schools completed a Speech and Language Evaluation/Reevaluation, to address concerns regarding the student's speech and language needs. According to the evaluation, the student's teacher reports that the student has difficulty finding words to express himself; and demonstrates some non-compliant behavior. The student's strengths were formulation of sentences, receptive and expressive word classes (word relationships/opposites); and weaknesses included difficulty with the receptive language index, which consist of skills in concepts in following directions and recalling sentences.

The evaluator concluded that recommendations would be determined in conjunction with other data, and in collaboration with the team; and based on observation, review of prior evaluation data, student comments and teacher interview, it appears that the student would benefit from some type of service to address reading.

13. On February 4, 2009, Counsel, on behalf of parent, initiated a due process complaint alleging that the District of Columbia Public Schools, hereinafter referred to as "DCPS", denied the student a Free Appropriate Public Education ("FAPE"), by failing to: (1) evaluate the student in all areas of suspected disability; (2) develop an appropriate individualized education program (IEP); (3) provide the student an appropriate placement; and (4) afford the student's parent a meaningful opportunity to participate in the placement discussions and determinations for the student.

X. WITNESSES

Witnesses for Petitioner

Psychologist
Parent

Witnesses for Respondent

Special Education Coordinator, [REDACTED] Elementary School

Witness Testimony

Petitioner's Witnesses

Licensed Clinical Psychologist

At the due process hearing, the Psychologist was qualified as an expert in Child Psychologically, specifically limited to the ██████████ Community. The Psychologist testified that he failed to interview the student, however, interviewed parent, and reviewed the student's educational records and evaluations.

The Psychologist testified that according to the evaluations completed by DCPS, the student is functioning in the very low range, academically; his cognitive functioning is also within the low average range. The Psychologist also testified that at a minimum, at the March 31, 2006 and subsequent MDT meetings, the MDT should have determined the student eligible for special education services, because the student has significant asthma, which qualifies the student under the category of Other Health Impairment (OHI), and test scores are very low, indicating the student has significant academic deficits, and a learning disability (LD), and requires intervention.

The Psychologist testified that the student's attendance is directly related to a health issue, which is the student's asthma, and the MDT should have addressed this issue, and accommodated the student's disability. The Psychologist also testified that DCPS should have addressed the student's behavior difficulties, and although recommended by the MDT on March 31, 2006, there is no evidence that the Student Support Team developed and implemented a Behavior Intervention Plan based on a Functional Behavioral Assessment for the student, which is extremely problematic.

The Psychologist testified that it is unreasonable for DCPS to attribute its findings that the student failed to qualify for special education services because of his absenteeism, because according to the evaluations completed by DCPS, the student demonstrated strength in certain areas. The Psychologist testified further that the MDTs prior determinations of ineligibility is not supported, because according to test results, even with the absenteeism the student's abilities fell within the low average range in math, and his writing was depressed; he also demonstrated relative strengths in other areas, and demonstration of strength in certain areas is evidence that the student received academic instruction.

The Psychologist also testified that in the year 2006, the student had a reading composite of 74, and in the year 2007, the student's reading composite was 60, indicating that the student has regressed academically, particularly in reading. The Psychologist also testified that the student received a score of 68 in the year 2006, and a score of 72 in the year 2007, also indicating minimum to no progression, because there must be at least a 15 point difference between the scores, to be significant.

The Psychologist testified that the March 23, 2006 Psycho-educational Evaluation included findings sufficient for the MDT to determine the student eligible for services. The Psychologist also testified that the student scored 70 on the March 24, 2006 Speech and Language Evaluation, which is within the below average/low range, indicating that the student qualified for speech and language services.

The Psychologist testified that the student's relative strength is in math, and test scores in other areas consistently demonstrate that the student performs below expectations; and test results in the Speech and Language and Psycho-educational evaluations completed in 2006, in addition to teacher reports could have been utilized by the MDT to determine the student eligible for services.

The Psychologist testified that at the January 26, 2009 MDT eligibility meeting the team reviewed evaluations to determine the student's eligibility, and after reviewing the Speech and Language and Psycho-educational evaluations completed in the year 2006, determined additional evaluations were warranted. The Psychologist indicated that if the team determined that additional evaluations were warranted, independent evaluations were appropriate because although the prior two evaluations completed by DCPS indicated the student was disabled and required special education services, the MDT disregarded these findings, and determined the student ineligible for services, therefore, additional evaluations completed by DCPS would likely render similar results and findings of ineligibility.

The Psychologist concluded by testifying that although the MDT agreed that test scores in its evaluations supported a finding that the student was learning disabled, the team was concerned that the student's absenteeism may have skewed the test results, however, the student had strengths in certain areas, therefore, the student's absences were not controlling the results. The Psychologist testified that the student's absences from school were excused, because they were due to illness; therefore, the team should have considered OHI, as a disability category for the student.

During cross-examination, the Psychologist testified that more than evaluations are utilized by the team to determine eligibility for services, including attendance; and that during a discussion with the DCPS Psychologist, he was informed that because of the student's attendance, he could not find the student eligible for services. The Psychologist also testified that according to the DCPS Psychologist, he could not determine the student eligible for special education services because of uncertainty whether the test results were a true representation of a disability, or because of the student's absences and limited access to the academic curriculum. The Psychologist reiterated that strengths in certain areas demonstrate that the student was exposed to academics and there were no indications of poor performance across all areas, therefore, test results were a true reflection of the student's performance. The Psychologist concluded that if the student was not exposed to academics, one must expect performance defeated in all areas.

The Psychologist testified that a year after the initial evaluations were completed, the student was retested to determine eligibility because the student continued to regress academically; and scores demonstrated that the student had regressed further, however, the MDT continued to determine the student ineligible for services.

Parent

Parent testified that the student was retained in kindergarten and the third grade; and that his absences are due to medical reasons, particularly the student's asthma, however, the student currently utilizes a breathing machine which assists with his breathing, and increased his attendance.

Parent testified that the student fail to progress academically, fail to receive assistance in math, is harassed by teachers, and according to the student's teacher, there are too many students in the class to provide the student the attention he requires. Parent testified that the student could benefit from additional services in math, reading, and written language; and during the 2008/09 school year, the student began receiving the services of a tutor at the school, who assists with math and reading three times per week, although not certain who provides the services. Parent testified that although the student receives tutoring services, there is no marked improvement academically.

Parent testified that she requested services prior to the school year; the student's behavior has declined and he is not motivated because "he doesn't know anything". Parent testified that she attended the January 26, 2009 MDT eligibility meeting and expressed concerns regarding the student's academics and behavior, however, the MDT was primarily focused on the student's absences; and the meeting proceeded without addressing her concerns.

Respondent's Witness

Special Education Coordinator (SEC), [REDACTED] Elementary School (ES)

The SEC testified that the student began attending [REDACTED] ES during the 2008/09 school years; receives no special education services, however, receives tutoring in the school's aftercare program. The SEC testified that the student was referred for tutoring by the SST, which he began receiving in November, 2008.

The SEC also testified that at the January 26, 2009 MDT referral meeting the team recommended assessments (Psychological, Educational, Speech and Language, Social History, and Functional Behavioral Assessment). The SEC stated that the Psychological, Educational, and Speech and Language evaluations are complete, and the Social History and Functional Behavioral Assessment, are being completed. The SEC testified that once the evaluations are completed, an eligibility meeting will be held to review the evaluations.

XI. DISCUSSION AND CONCLUSIONS OF LAW

ISSUE 1

Whether DCPS denied the student a free appropriate public education (FAPE); by failing to evaluate the student in all areas of suspected disability, in violation of 20 U.S.C. Section 1414?

Petitioner represents that the student is ■ years old, and a ■ grade student at ■ ES; has been labeled a nonreader for his entire academic career; and although the student was retained in kindergarten and the 3rd grade, DCPS failed or refused to appropriately evaluate the student.

Petitioner also represents that in January, 2008, the student began attending one on one tutoring sessions with a special education teacher. The special education teacher reported that the student presents notable learning disabilities including visual deficits, visual motor deficit, memory deficits, and auditory deficits.

Petitioner represents that the student's teacher also reported that the student's learning difficulties manifest into problematic behavior patterns that the student utilizes to cope with low self esteem and negative consequences of being labeled a non reader in a typical classroom setting. According to Petitioner, the student's teacher also noted that the student's visual motor deficit makes writing so laborious for the student that he requires a word processing device to achieve academic progress.

Petitioner also represents that the student's teacher recommended a full battery of academic and psychological testing, and development of an appropriate educational plan with one on one instruction to begin the 2008/09 school year. Petitioner represents that in May, 2008, a reading interventionist documented the student's inability to function and be productive in a classroom setting without someone to accompany him, keeping him on task and focused.

Petitioner represents that the student has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder (ODD), however, DCPS failed or refused to appropriately evaluate the student or devise an educational program that appropriately classifies the student's disabilities, prescribe an appropriate amount of specialized instruction and related services, and designate an appropriate educational placement. Petitioner also represents that on January 26, 2009, parent requested independent evaluations, however, as of the date of hearing, DCPS failed to authorize independent evaluations.

Petitioner represents that the student was absent from school due to medical reasons, and although the absences are excused, DCPS failed to ensure a continuum of the student's educational program, by forwarding homework and classroom assignments to the student's residence.

Petitioner also represents that evaluation reports indicate learning deficits, visual perception deficits, and below average functioning in math and reading; which is information the MDT had in its possession at the time it determined the student ineligible for services.

DCPS represents that evaluations were previously completed for the student, and the student was determined ineligible for special education services, however, participates in the Student Support Team (SST) process.

DCPS represents that parent agreed to allow DCPS to consider strategies through the SST process, prior to retesting the student for special education services. DCPS also represents that it has never determined the student requires special education services from a special education teacher; however, the student receives tutoring services in reading from a special education teacher, in the after school program.

DCPS also represents that in January, 2009, it agreed to complete certain evaluations, the Psychological and Speech and Language evaluations are complete, and the school awaits results of the Social History evaluation and Functional Behavior Assessment. DCPS also represents that independent evaluations were not warranted because Petitioner relied on scores to from the Speech and Language and Psycho-educational 2006 evaluations to find the student eligible for services.

DCPS represents that the student's chronic absenteeism since kindergarten may have attributed to the student's academic performance, and the MDT's determination that the student was ineligible for services; however, at the January 26, 2009 MDT meeting, the team agreed that the student's attendance improved, therefore, the school can evaluate the student and reconsider the student's eligibility. DCPS also indicated that it is in the process of retesting the student for special education services, and upon completion, DCPS will convene a meeting to discuss eligibility. DCPS also represents that any challenges by Petitioner regarding the 2006 ineligibility determination exceeds the two year statute of limitations, established by IDEA.

ANALYSIS

According to IDEA, each disabled student is entitled to a "free appropriate public education," or a "FAPE," which requires that appropriate special education services be "provided at public expense, under public supervision and direction, and without charge." 20 U.S.C. §1401(9)(A).

IDEA, *34 C.F.R. §Section 300.301(a) (b)* provides in pertinent part:

(a) **General.** Each public agency must conduct a full and individual *initial* evaluation, in accordance with §§300.305 and 300.306, before the initial provision of special education and related services to a child with a disability under this part.

A full evaluation of a child is an integral part of developing an IEP for a student, which is the reason IDEA requires public education providers to conduct a full and individual initial evaluation of a child. *See, T.X. ex rel. Skrine v. District of Columbia, 2007 WL 915227 (D.D.C.)*

IDEA, §300.301(c)(1)(i) provides that the initial evaluation must be conducted *within sixty (60) days of receiving parental consent* for the evaluation; *or* if the State establishes a timeframe within which the evaluation must be conducted. The 60 day timeframe established by IDEA in completing initial evaluations, only applies if the State fails to establish a timeframe within which an initial evaluation must be conducted.

In the District of Columbia, the District of Columbia Code, Chapter 25, §38-2501, entitled "Special Education and Assessment", established a 120 day timeframe within which initial evaluations and assessments must be completed for students who may have a disability and may require special education services; applicable to student in public or non-public schools. However, §38-2501 was recently repealed, and not replaced.

District of Columbia Code, Chapter 25B, §38-2561.02, entitled "Placement of Students with Disabilities in *Nonpublic* Schools", includes the same language that was included in §38-2501 requiring completion of initial evaluations and assessments within 120 days after the date the student is referred for evaluation or assessment, however, this Chapter and provision only applies to students in non-public schools. The student in this matter is not in a non-public school, therefore, the 120 day time frame is inapplicable, to the student in this matter.

In summary, the District of Columbia repealed D.C. Code, §38-2501, and failed to replace the section with another section establishing a timeframe for completing initial evaluations/assessments for students in public schools. Therefore, absent the District of Columbia establishing a timeframe within which initial evaluations must be conducted for students in public schools; the court applies the sixty (60) day timeframe established by IDEA, at §34. C.F.R. §300.301(c)(1)(i).

In requesting initial evaluations, IDEA, *34 C.F.R. §Section 300.301, subparagraph (b)* provides that consistent with the consent requirements in §300.300, *either a parent of a child or a public agency may initiate a request for an initial evaluation* (emphasis supplied) to determine if the child is a child with a disability.

The record reflects that during the 2006 school year, DCPS initiated a request for initial evaluations to determine whether the student has a disability. On March 23, 2006 DCPS completed an initial Psychological Evaluation, and on March 24, 2006 completed an initial Speech and Language Evaluation. However, there is no evidence of the date DCPS received parental consent for the initial evaluations, therefore, the court is unable to determine whether DCPS completed the evaluations within sixty (60) days of receiving parental consent for the evaluations, as required by IDEA, 34 C.F.R. §300.301(c)(1)(i).

The Hearing Officer proceeds with an inquiry of whether DCPS evaluated the student in all areas of suspected disability; consistent with the requirements of 34 C.F.R. §300.304 (c)(4) and (6), and 20 U.S.C. §1414.

On *March 23, 2006*, DCPS completed an *initial* "Report of Psychological Evaluation". The Student Support Team (SST) at █████ ES referred the student for a Comprehensive Psychological Evaluation because of academic concerns; and the student had difficulties staying on task. The evaluation indicates that at the time of the evaluation the student was in the second grade; was a non-reader, had no functional writing skills, and was only capable of basic addition and subtraction computations. The student's attendance was also of notable concern; and the evaluation indicated that the student required glasses for some time; and the school obtained glasses for him, which he began utilizing on March 22, 2006.

The evaluator concluded that although current test data show various discrepancies among the processing areas measured by certain tests, the student's overall scores suggest below-average cognitive functioning (a "slow learner"). The evaluator also indicated that although it could not be determined whether the student has a learning disability, because of the excessive absences since kindergarten and his need for glasses (which has not been addressed until very recently), testing reflected that the student's cognitive abilities appear to be subnormal and that he has significant visual perception deficits (visual memory, visual form constancy, visual sequential memory) and below average visual motor integration skills (areas that are important components of the kindergarten curriculum).

Academically, the evaluator determined that the student is functioning on the readiness level in reading, math, and written language. The evaluator concluded that because of the student's significant visual perception deficits (especially memory and sequential memory) and his apparent receptive/expressive language strengths, he would benefit from a teaching approach that emphasizes auditory stimuli with visual and kinesthetic sensory reinforcement.

On *March 24, 2006*, D.C. Public Schools completed an *initial* Speech and Language Evaluation. The Speech and Language Evaluation was requested as part of a multidisciplinary reevaluation to determine whether the student presented an oral communication disorder. The team had concerns regarding the student's attendance, academic difficulties, and below grade level performance in all areas.

According to the evaluation, results of the assessments, including records review, observations, and standardized evaluations, revealed low average language skills and below average expressive vocabulary skills. The student's overall language abilities fell within the low average range when compared to his same age peers. The student's listening comprehension test results reveal that the student earned a low average score; the student displayed difficulty naming common objects. The evaluation included recommendations for improving the student's expressive vocabulary; and concluded that the scores from the evaluation would be considered in conjunction with other data to determine if a disability exists and the best academic program for the student.

On *March 31, 2006*, a MDT eligibility meeting convened on behalf of the student; to review the ordered assessments and other data; establish a disability; and determine eligibility for special education services. According to the MDT notes the team reviewed the Psycho-educational (Psychological and Educational) Evaluation and Speech and Language Evaluation.

The General Education Teacher reported that the student was functioning below the second grade level in reading and math; has difficulty maintaining his focus in a small or large group setting; is frequently absent; and exhibits extreme behavior problems.

The Speech Pathologist reviewed results of the Speech and Language Evaluation completed on March 24, 2006; and the school Psychologist reviewed results of the March 23, 2006 Report of Psychological Evaluation, completed by DCPS.

The MDT determined the student ineligible for special education services at that time due to acute absenteeism since kindergarten, and referred the student back to the Student Support Team (SST), to work with the Attendance Committee, develop and implement a Behavior Intervention Plan based on a Functional Behavior Assessment, prior to being re-referred for special education; and follow the school Psychologist's recommendations prior to the student being re-referred to special education. The MDT meeting notes conclude by indicating that parent agreed with this MDT decision; and team failed to recommend additional evaluations.

The Hearing Officer finds that although the Report of Psychological Evaluation includes a finding that it cannot be determined if the student has a learning disability because of his excessive absences since kindergarten and his need for glasses, the report includes findings sufficient for a determination that the student has a learning disability based on his below average cognitive functioning; visual, auditory, sensory and motor integration skill deficits; and requires special education and related services. In addition, the evaluator notes the student's significant absenteeism, due to a medical condition, qualifying the student as disabled under the category of OHI.

The Hearing Officer also finds that the Speech and Language Evaluation include findings that the student presents with low average language skills, low average listening comprehension, low average oral expression, and below average expressive vocabulary, support a finding that the student requires speech and language services, which is supported by the January 26, 2009 MDT meeting notes wherein the MDT acknowledged the student's abilities being in the low average range, and that the evaluator determined the student eligible for speech and language services.

IDEIA, 34 C.F.R. §300.304(c) (4) and (6) also provides that the public agency shall ensure that a child is assessed in *all* areas related to the *suspected* disability; and in evaluating each child with a disability that the evaluation is *sufficiently comprehensive* to identify *all* of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified."

According to findings in the Report of Psychological Evaluation, further evaluations were warranted to address areas of weakness identified in the Report of Psychological Evaluation, such as a visual and auditory screening and/or testing to address deficits in these areas; and occupational and/or physical therapy evaluations, to address the students sensory and motor integration skill deficits.

According to the March 24, 2006 Speech and Language Evaluation, findings suggest that an auditory and visual screening and/or testing were also warranted. In addition, at the March 31, 2006 MDT meeting the Speech Pathologist advised the MDT that she was unable to complete a "comprehensive language evaluation", because of the student's absenteeism, also indicating that additional testing was necessary to complete a comprehensive Speech and Language Evaluation.

In addition, at the March 31, 2006 MDT eligibility meeting the student's teacher expressed concern regarding the student's academic deficits; inability to maintain focus, in either a small or large group setting; and extreme behavior problems, indicating that additional evaluations were warranted to "rule out" Attention Deficit Hyperactivity Disorder, and Oppositional Defiant Disorder; and a Functional Behavioral Assessment was appropriate, to address the student's extreme behavior.

Finally, the record reflects that the student has suffered academically and behaviorally since kindergarten; and was retained in kindergarten and the third grade. The student's academic record, dating to kindergarten, is replete with documentation indicating that the student exhibited academic and behavioral deficits in various areas, a medically diagnosed condition impacting his education and learning, grade retentions, and concerns from his parent and teachers regarding his academics and behavior. This information was available to the MDT prior to its determination regarding the recommended evaluations, and its March 31, 2006 ineligibility determination; however, the MDT disregarded this information and only recommended two (2) initial evaluations.

The Hearing Officer finds that although the two (2) initial evaluations completed by DCPS were sufficient to find that the student is disabled and requires special education and related services; subsequent evaluations reveal and confirm that when DCPS initially conducted the two (2) initial evaluations, it failed to evaluate the student in all areas of suspected disability; and the evaluations were not sufficiently comprehensive to identify *all* of the child's special education and related service needs.

Based on the aforementioned, it is the Hearing Officer decision that Petitioner satisfied its burden of proof by presenting evidence sufficient for a finding that DCPS failed to evaluate the student in all areas of suspected disability, in violation of 34 C.F.R. §300.304 (c)(4)(6).

ISSUE 2

Whether DCPS denied the student a free appropriate public education (FAPE); by failing to develop an appropriate individualized education program (IEP), in accordance with IDEIA?

Petitioner represents that DCPS failed to evaluate, develop an appropriate IEP, or provide an appropriate placement for the student. Petitioner represents that DCPS completed evaluations which indicate that the student has a learning disability and requires special education services, and parent's Psychologist testified that the evaluations support a finding that the student is disabled and eligible to receive special education and related services.

Petitioner also represents that the Psychologist testified that the MDTs should have at a minimum, determined the student eligible for services, as a student with a learning disability and under the category of Other Health Impaired (OHI), which the evaluations support.

Petitioner represents that the student was diagnosed with ADHD and ODD, however, DCPS failed or refused to appropriately evaluate the student or devise an educational program that appropriately classifies the student's disabilities, prescribes an appropriate program that appropriately classifies the student's disabilities, prescribes an appropriate amount of specialized instruction and related services, and designate an appropriate educational placement.

Petitioner further represents that parent testified that the student is not performing well academically, and that the student's absences from school were due to medical reasons, and were excused. Petitioner also represents that the student's general education teacher indicates that the student struggles in small and large group settings, and the class is too large to accommodate the student's individual needs.

DCPS represents that the student was evaluated in the past and determined ineligible; the student has been involved in the SST process; and DCPS never determined that the student needed the service of a special education teacher.

DCPS also represents that DCPS is in the process of retesting the student for special education services, and once testing is completed, DCPS will reconvene a MDT to discuss eligibility.

ANALYSIS

According to IDEIA, 34 C.F.R. §300.15 evaluations are procedures used in accordance with §§300.304 through 30.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.

In addition, a free appropriate program or FAPE means special education and related services that are provided at public expense, under public supervision, and without charge; meet the standards of the SEA, include an appropriate school; and are provide in conformity with an individualized education program (IEP) that meets the requirements of §§300.320 through 300.324. To ensure that each eligible student receives a FAPE, the IDEA requires that an individualized education program ("IEP") be developed to provide each disabled student with a plan for educational services tailored to that student's unique needs. 20 U.S.C. §1414(d); 34 C.F.R. §300.300(a)(3)(ii).

IDEA, §300.306(a) also provides that upon completion of the administration of assessments and other evaluation measures a group of qualified professionals and the parent of the child meet to determine whether the child is a child with a disability, as defined in §300.8, in accordance with paragraph (b) of this section and the educational needs of the child; and...

The Hearing Officer finds that although a group of qualified professionals and the parent of the student convened upon completion of the administration of assessments and other evaluations, to determine whether the child is a child with a disability, the teams failed to consider the educational needs of the child. Since 2006 DCPS continued to evaluate the student, although not comprehensively; and determined the student ineligible for special education and related services, while the student continued to regress academically and behaviorally.

The record reflects that on March 23, 2006, DCPS completed an *initial* Psychological Evaluation; and on March 24, 2006, DCPS completed a Speech and Language evaluation. On March 31, 2006, DCPS convened an MDT eligibility determination meeting, to review the ordered assessments and other data, establish a disability, and determine eligibility for special education services.

The team reviewed the evaluations, accepted input from parent, the Education Advocate, student's teacher, and the DCPS Psychologist and Speech Therapist. During its review of the March 23, 2006 Psychological Evaluation, the team focused on a finding in the evaluation that provides "it cannot be determined, however, if he has a learning disability because of his excessive absences since kindergarten and his need for glasses"; and disregarded other findings in the evaluation.

The record reflects that at each MDT eligibility meeting thereafter, regardless of finding and recommendations in the existing and subsequent evaluations, and teacher comments that the student continued to regress academically and behaviorally, the MDT determined the student ineligible for special education services, due to the student's absenteeism since kindergarten. The MDTs discussed a medically diagnosed medical condition, for which IDEA recognizes as a disability under the category of OHI.

The Hearing Officer finds that although a student's attendance is a consideration in determining a student's eligibility for services, it is not in and of itself conclusive, according to IDEA, a MDT/IEP team must consider information from various sources; which failed to occur in this matter.

Additionally, at the January 26, 2009 MDT eligibility determination meeting, the MDT acknowledged that prior evaluations completed by DCPS determined the student disabled, and eligible for special education and related services, however, the teams disregarded these findings; and relied solely upon the DCPS Psychologist's finding that a definitive determination regarding a learning disability could not be made at that time because of the student's absenteeism since kindergarten, disregarding all other findings in evaluations completed by DCPS.

For instance, according to the January 26, 2009 MDT meeting notes, DCPS completed a Psychiatric Evaluation on November 13, 2008, which diagnosed the student with Oppositional Defiant Disorder (ODD) and Attention Deficit Hyperactivity Disorder (ADHD), acknowledging that the student is disabled and requires special education services.

The MDT meeting notes also reflect that DCPS completed a Speech and Language Evaluation on March 24, 2006, which indicated that the student's abilities were in the low average range, and the student was found eligible for speech and language services according to the report.

The student's teacher also reported to the team that academically, the student continues to perform below level in both reading and math, on the DCBAS; is performing below level on all subjects in the classroom; his instructional level in the classroom is below 2nd grade in reading; and socially, the student struggles to handle conflict appropriately.

IDEIA, §300.306 (c)(1)(i)(ii) provides that in interpreting evaluation data for the purpose of determining if a child is a child with a disability under §300.8, and the educational needs of the child, each public agency must—

- (i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and
- (ii) Ensure that information obtained from all of these sources is documented and carefully considered.

The Hearing Officer finds that in interpreting the evaluation data for the purpose of determining whether the student has a disability under IDEIA, §300.98, including the data in the March 23, 2006 Psychological Evaluation, the MDT failed to draw upon information from a variety of sources, including the student's academic and behavioral history, grade retentions, aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior. DCPS failed to carefully consider the information obtained from the various sources, in violation of IDEIA, §300.306 (c)(1)(i)(ii).

The Hearing Officer also finds that as a result of DCPS' failure to draw upon information from a variety of sources, carefully consider the information from the various sources; and to rely solely upon one aspect of the March 23, 2006 Psychological Evaluation, the team consistently erred in its decisions to find the student ineligible for special education services; and not to develop an appropriate individualized education program (IEP) for the student.

According to IDEA, 34 C.F.R. §300.323, each public agency must ensure that—

- (1) A meeting to develop an IEP for a child is conducted within **30 days** of a determination that the child needs special education and related services; and
- (2) As soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

The record reflects that on March 31, 2006 the MDT determined that information was sufficient for a finding that the student required special education and related services, however, for reasons indicated herein, determined the student ineligible for services.

The Hearing Officer finds that according to IDEA, 34 C.F.R. §300.323, DCPS was required to convene a meeting to develop an IEP for the student within 30 days of its March 31, 2006 determination that the student required special education and related services; which failed to occur in this matter.

The record also reflects that on January 29-30, 2009, DCPS completed a Report of Psychological Evaluation. The evaluator determined that as a result of the student's attendance problems finally being resolved and his recently being exposed to appropriate intervention services for a reasonable amount of time (which indicated significant difficulties in his mastering skills despite small group and individual instruction), he now meets the criteria for the disability category of "Multiple Disabilities (MD)", which includes "Specific Learning Disabilities" and "Other Health Impairments (OHI)" to address the student's Attention Deficit Hyperactivity Disorder (ADHD), as defined by IDEA.

The evaluator also indicated that it can now be stated with certainty that the student's learning disability is not primarily the result of visual impairment, hearing impairment, motor problems, mental retardation, emotional disturbance, or environmental, cultural, or economic disadvantage including poor instructional experiences and/or chronic absenteeism.

The evaluator recommended an intensive program to address the student's academic needs as well as the behaviors related to his ADHD; specialized instruction in all academic areas (reading, math, written language). Accommodations for the student's ADHD related behaviors, and psychological counseling; behavior modifications; a multi-sensory teaching approach because of the student's significant short-term auditory memory deficits, as well as working memory.

The evaluator concluded by recommending clear limits, limited distractions, and a small group setting; and assignments broken up in small components. As of the date of hearing, DCPS failed to convene a MDT meeting to review the results of the evaluation, and develop an appropriate IEP for the student.

It is the Hearing Officers decision that Petitioner satisfied its burden of proof by presenting evidence sufficient for a finding that DCPS failed to develop an appropriate IEP for the student, in violation of The Individuals with Disabilities Education Act, reauthorized as the Individuals with Disabilities Education Improvement Act of 2004.

ISSUE 3

Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide the student an appropriate placement?

According to 34 C.F.R. Section 300.116, in determining the *educational placement* of a child with a disability, including preschool child with a disability, each public agency must ensure that—

- (a) The placement decision—
 - (1) Is made by a group of persons, *including the parents*, and other persons *knowledgeable about* the child, the meaning of the evaluation data, and the *placement options*; and
 - (2) Is made in conformity with the *Least Restrictive Environment (LRE)* provisions of this subpart, including Sections 300.14 through 300.118;
- (b) The child's placement—
 - (1) Is determined at least annually;
 - (2) Is *based on the child's IEP*; and
 - (3) Is as close as possible to the child's home;
- (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if non-disabled;
- (d) In selecting the LRE, consideration is given to any *potential harmful effect on the child* or on the *quality of services that he or she needs*;... *Individuals with Disabilities Education Improvement Act of 2004, 34 C.F.R. Section 300.116.*

The Hearing Officer finds that DCPS failed to consider the potential harmful effects on the student, or on the quality of services he requires, by failing to carefully consider evaluation data and information from various sources; failing to determine the student eligible for special education services; develop an appropriate IEP, and determine the student's placement, for such a significant period of time, although the evidence supported a finding of eligibility.

The LRE requirement also reflects the IDEA's preference that "[to] the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled", and special classes, separate

schooling, or other removal of children with disabilities from the regular educational environment occurs only when *the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.* See also, 34 C.F.R. Section 300.114(a)(2); 34 C.F.R. Section 300.116(a)(2); and D.C. Municipal Regulations Title 5, Section 3011.

However, IDEA's preference for "mainstreaming" disabled students is not absolute; Section 1412(a)(5) *permits the delivery of educational services to disabled students in less integrated settings as necessitated by the student's disability.* A. B. ex rel. D.B. v. Lawson, 354 F.3rd 315, 330 (4th Cir. 2004).

The Hearing Officer finds that the evidence supports a finding that the nature and severity of the student's disabilities, are such that education in a general education classroom even with the use of supplementary aids and services cannot be achieved satisfactorily; and that the student requires placement in a less integrated, small, structured, therapeutic environment, where he can have access to the general curriculum, receive one-on-one instruction; and educational benefit.

In addition, maintaining the student's placement in the general educational classroom setting at ES, where he continue to struggle academically and behaviorally, is likely to result in continued regression academically, psychologically, behaviorally, and emotionally; and not progression.

The Hearing Officer finds that based on the evidence presented, the student's placement at [REDACTED] is inappropriate. However, as indicated supra, according to IDEA, the student's placement is based in part, upon the student's IEP; and the Hearing Officer determined that DCPS failed to develop an appropriate IEP for the student. Therefore, the Hearing Officer finds that absent an appropriate IEP, any determination regarding the appropriateness of an alternative placement for the student would be premature.

It is the Hearing Officers' decision that Petitioner satisfied its burden by presenting evidence sufficient for a finding that DCPS failed to provide the student an appropriate placement during the 2008/09 school years; in violation of IDEA, 34 C.F.R. §300.116.

ISSUE 4

Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide parent a meaningful opportunity to participate in decisions regarding the students' placement and the provision of a FAPE?

According to 34 C.F.R. Section 300.116, in determining the *educational placement* of a child with a disability, including preschool child with a disability, each public agency must ensure that the placement decision is made by a group of persons, *including the parents*, and other persons *knowledgeable about* the child, the meaning of the evaluation data, and the *placement options*; and..."

It is clear that IDEA left it to state and local educational agencies, *in cooperation with the parents or guardian of the child*, “the primary responsibility for *formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child’s needs*. Springer v. Fairfax County Sch. Bd., 134 F.3d 659, -663 (4th Cir. 1998). However, it is equally clear that procedurally, the IDEA “guarantee[s] parents both an opportunity for “*meaningful*” input into *all* decisions *affecting their child’s education* and the right to seek review of any decisions they think inappropriate.” This includes the “opportunity to present complaints with respect to any matter relating to the *identification, evaluation, or educational placement of the child.*” 20 U.S.C. Section 1415(b)(6)(2000).

IDEA also provides that if a parent objects to the results of an evaluation, parent is entitled to obtain an “independent educational evaluation” of the student at public expense. 20 U.S.C. §1415(b)(1); 34 C.F.R. §300.502. IDEA, 34 C.F.R. §300.502(b)(2) provides that if a parent requests an independent educational evaluation at public expense, the public agency must, *without unnecessary delay*, either—

- (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or
- (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§300.507 through 300.513 that the evaluation obtained by the parent failed to meet agency criteria.

Additionally, if the parent requests an independent educational evaluation, the public agency may ask for the parent’s reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.

The record reflects that at the hearing, parent testified that at the January 26, 2009 MDT meeting the team focused on the student’s absences, and after expressing concern regarding the student’s academics, the team proceeded with the meeting. The record also reflects that the parent and Education Advocate actively participated in the meeting, however, the team denied parent’s request for independent evaluations, and recommended DCPS to complete additional evaluations.

The record reflects that on January 26, 2009, a referral MDT meeting convened to review documentation and determine whether evaluations were warranted. The MDT meeting notes indicates that DCPS recommended reevaluating the student, agreeing to complete a Psychological (cognitive, academic, and clinical), Social History, and Speech and Language Evaluation; and a Functional Behavioral Assessment.

The record also reflects that Parent and the Education Advocate disagreed with the prior evaluations completed by DCPS, and DCPS completing additional evaluations; and requested funding of the following independent evaluations: Psychological (cognitive, achievement, and clinical testing), Social History (Updated), Functional Behavioral Assessment, Speech and

Language, and Visual/Audio screening. DCPS either denied or disregarded Petitioner's request for independent evaluations and recommended that DCPS complete additional evaluations.

At the hearing, Petitioners' counsel argued that although DCPS failed to evaluate the student in all areas of suspected disability; and failed to comprehensively evaluate the student to identify all of the student's special education and related service needs; the two (2) initial evaluations completed by DCPS supported a finding that the student is disabled and requires special education and related services, therefore, there was no need for the recommended evaluations.

Petitioner further represents that DCPS relied upon the findings in its prior evaluations to determine the student ineligible for services, and that additional evaluation completed by DCPS may result in another determination of ineligibility, based upon the evaluations.

Petitioners' counsel also argued that the evaluations previously conducted by DCPS and recommended by the MDT at the January 26, 2009 MDT meeting failed to evaluate the student in all areas of suspected disability, and were not sufficiently comprehensive, therefore, because DCPS insisted on completing additional evaluations, Petitioner requested independent evaluations.

The Hearing Officer finds that on January 26, 2009, Parent and the Education Advocate disagreed with the prior evaluations completed by DCPS, and DCPS completing additional evaluations; and requested funding of the following independent evaluations. Therefore, to comply with IDEA, 34 C.F.R. §300.502(b)(2), DCPS was required *without unnecessary delay*, to either—

- (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or
- (ii) Ensure that an independent educational evaluation (IEE) is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§300.507 through 300.513 that the evaluation obtained by the parent failed to meet agency criteria.

The record reflects that as of the date of the hearing, DCPS failed to file a due process complaint to request a hearing regarding the appropriateness of its evaluations; or ensure that an independent educational evaluation was provided to parent, at public expense, without unnecessary delay.

The Hearing Officer finds that Petitioner presented no evidence of discussions, meetings, or decisions regarding the student's placement, however, presented evidence that at the January 26, 2009 MDT meeting, although parent and the Education Advocate participated in the meeting, the team failed to carefully consider available data, evaluations, parent and teacher input regarding the student's eligibility for services; and denied and/or disregarded parent's request for independent evaluations.

Based on the aforementioned, it is the Hearing Officers' decision that Petitioner satisfied its burden of proof by presenting evidence sufficient for a finding that DCPS failed to afford parent the opportunity to provide "meaningful" input in all decisions regarding the student's education and the provision of a FAPE, in violation of IDEA.

Free Appropriate Public Education (FAPE)

In rendering eligibility determinations, IDEA requires public agencies to consider information from various sources when rendering eligibility determinations, which failed to occur in this matter.

In this matter, the record reflects that since kindergarten, the student struggled academically and behaviorally; was retained in kindergarten and the third grade; and continued to regress academically, psychologically, emotionally, and behaviorally. According to the testimony of parent and the student's teachers; and recent evaluations, DCPS' delay in comprehensively evaluating the student, and rendering a determination of eligibility for special education and related services, has had a significant adverse impact upon the student's academic development and progress.

The determination of whether the student is disabled and eligible for special education and related services should not have been based solely upon one evaluation; or upon the DCPS Psychologist suggestion that results of the March 23, 2006 Psychological Evaluation may be skewed due to the student's absenteeism, and limited access to academics. The MDTs should have considered the potential impact that such an indefinite delay and decision, would have upon the student, which also failed to occur in this matter. DCPS delayed the eligibility determination, although every evaluation completed by DCPS in 2006 and thereafter; the student's academic and behavioral history; grade retention; absenteeism due to medical reasons; parent input; teacher comments, and recommendations; all supported a finding that the student was disabled and required special education and related services.

The Hearing Officer finds it disconcerting that the student's eligibility determination was held in abeyance since March, 2006, pending completion of the January 29-30, 2009 Psychological Evaluation, by the same Psychologist who completed the initial Psychological Evaluation on March 23, 2006. In fact, the January 29-30, 2009 Psychological Evaluation merely confirms the Psychologist's prior findings in the March 23, 2006 Report of Psychological Evaluation, and input from the student's teacher, which is that the student has a specific learning disability, and ADHD, under the category of OHI, rendering the student eligible for special education services under the category of "Other Health Impairments (OHI)".

IDEA, 34 C.F.R. §300.8(c) (9) defines Other Health Impaired (OHI) as having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—

- (i) Is due to chronic or acute health problems such as *asthma*, attention deficit disorder or attention deficit hyperactivity disorder, ...; and
- (ii) *Adversely affects a child's educational performance.*

Although the January 29-30, 2009 Psychological Evaluation failed to identify the student's asthma, as a disability under the category of OHI, IDEA recognizes asthma as a disability under the category of OHI, and the record reflects that the disability adversely affected the student's educational performance. Therefore, according to IDEA, the student is a child with a disability, under the category of OHI.

A final consideration is the impact the student's absenteeism due to medical illness had upon his education and learning. Petitioner alleged and DCPS failed to refute that DCPS failed to ensure a continuum of educational services, during the student's absence from school. Failure to ensure that the student received a continuum of services during his absence from school, due to a medically diagnosed illness or disability, denies the student a FAPE; and must be considered in determining educational harm to the student.

The Hearing Officer finds that DCPS failed in its obligation to make FAPE available to the student, during the 2007-08, and 2008-09 school years, representing a substantive violation of IDEA, and entitling the student to compensatory education services.

XII. ORDER

Based on the aforementioned, it is hereby:

- (1) **ORDERED**, that DCPS shall fund the following independent evaluations: comprehensive psychological (clinical, educational, and social history), as appropriate; a functional behavioral assessment; visual/audio screenings and testing; and speech and language evaluation, as appropriate; and any other independent evaluations, requested by Petitioner; and it is further
- (2) **ORDERED**, that within fifteen (15) school days of receipt of this decision and order, DCPS shall convene an IEP team meeting to review all existing evaluations, develop an appropriate IEP to include the disability classifications of learning disabled, and other health impaired, to include ADHD and asthma; identify an appropriate full-time placement, and issue a Notice of Placement shall issue a Prior Notice of Placement to the parent, within five (5) school days, if the placement is a public school, and thirty (30) calendar days, if the placement is a non-public or private school; and it is further;
- (3) **ORDERED**, upon receipt of the final independent evaluation, DCPS shall reconvene the MDT within ten (10) school days of receipt of the final independent evaluation, to review the evaluations, and update the student's IEP, as appropriate; and it is further
- (4) **ORDERED**, that DCPS shall discuss, develop, and fund a compensatory education plan for the student; and it is further

- (5) **ORDERED**, that DCPS shall schedule all meetings through the parent's counsel, Will Purcell, Esquire, in writing, via facsimile at (202) 528-2800.
- (6) **ORDERED**, that in the event of DCPS' failure to comply with the terms of this Order, Petitioner's Counsel will contact the Special Education Coordinator at J.C. Nalle ES, and the DCPS Office of Mediation & Compliance to attempt to obtain compliance prior to filing a complaint, alleging DCPS' failure to comply with this decision and order; and it is further
- (7) **ORDERED**, that any delay in meeting any of the deadlines in this Order because of Petitioner's absence or failure to respond promptly to scheduling requests, or that of Petitioner's representatives, will extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives. DCPS shall document with affidavits and proofs of service for any delays caused by Petitioner or Petitioner's representatives; and it is further
- (8) **ORDERED**, that this decision and order are effective immediately.

XIII. APPEAL RIGHTS

This is the **FINAL ADMINISTRATIVE DECISION**. Appeals may be made to a court of competent jurisdiction within ninety (90) days from the date this decision was issued.

Ramona M. Justice /s/

3-20-09

Date Filed: _____

Attorney Ramona M. Justice
Hearing Officer

cc: Attorney Tiffany Puckett, Office of the Attorney General
Attorney Will Purcell: Fax: 202-528-2800
Mrs. Judy McIver: 4633 Benning Road, S.E., Apt. A, Washington, D.C. 20019

* Party/Witness participated by telephone.