

**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 attends a public school located in the District of Columbia. Prior to attending _____ the student attended _____ and _____ School, also located in the District of Columbia. The student resides in the District of Columbia, however, is not identified as disabled and eligible to receive special education services.

On December 9, 2008, Counsel, on behalf of parent and the student, filed a due process complaint alleging that the District of Columbia Public Schools (“DCPS”), denied the student a Free Appropriate Public Education (“FAPE”), by failing to:

- (1) adhere to the 120 day District of Columbia Code of Municipal Regulations (DCMR) deadline to test and determine the student eligible for special education services;
- (2) determine the student eligible for special education services;
- (3) provide the student an appropriate placement for the 2007-08 and 2008-09 school years; and
- (4) provide the student educational, related, and special education services conducive to her disability and needs for the 2007-08 and 2008-09 school years.

The due process hearing convened on March 4, 2009, at 11:00 a.m.; at Van Ness Elementary School, located at 1150 5th Street, S.E., Washington, D.C. 20003, as scheduled.

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. ISSUE(S)

The following issues are identified in the *December 9, 2008* due process complaint:

- (1) Whether D.C. Public Schools denied the student a free appropriate public education; by failing to comply with the 120 day DCMR deadline to test and determine the student's eligibility for special education?
- (2) Whether D.C. Public Schools denied the student a free appropriate public education; by failing to determine the student eligible for special education services?
- (3) Whether D.C. Public Schools denied the student a free appropriate public education; by failing to provide the student an appropriate placement for the 2007-08 and 2008-09 school years?
- (4) Whether D.C. Public Schools denied the student a free appropriate public education; by failing to provide the student educational, related, and special education services conducive to her disability and needs for the 2007-08 and 2008-09 school years?

V. RELIEF REQUESTED

- (1) DCPS to fund the following independent evaluations and assessments, which are a comprehensive psychological, speech and language, occupational therapy, functional behavioral assessment, and Intervention Behavior Plan.
- (2) DCPS to convene an MDT/IEP meeting to develop an appropriate IEP. If DCPS fails to attend, then the team can move forward without DCPS.
- (3) DCPS to fund an appropriate placement of the parent's choice including but not limited to School, Academy, or Academy, with transportation.
- (4) DCPS to provide appropriate educational, related, and special education services, i.e. specialized instruction, and counseling.
- (5) DCPS to fund compensatory education for the past and present denial for the 2007-08 and 2008-09 school years, at and
- (6) DCPS to pay reasonable attorneys' fees.

Note: At the March 4, 2009 due process hearing Issues 1 and 2 were consolidated, and Petitioner withdrew Issues 3 and 4.

VI. DISCLOSURES

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

VII. DOCUMENTS SUBMITTED BY STUDENT

Petitioner's Exhibits 01 through Petitioner's Exhibits 9; and a witness list dated February 4, 2009.

VIII. DOCUMENTS SUBMITTED INTO EVIDENCE BY DCPS

Respondent's Exhibits 01 through Respondent's Exhibits 04; and a witness list dated February 4, 2009.

IX. PRELIMINARY MATTERS

The due process complaint was filed on December 9, 2008. The Hearing Officer issued a pre-hearing notice on December 23, 2008 scheduling the pre-hearing conference for January 8, 2008, at 3:30 p.m.. The pre-hearing conference failed to convene due to the parties' unavailability.

The due process hearing was scheduled by the Student Hearing Officer to convene on February 11, 2009, at 11:00 a.m.. On January 8, 2009, an Interim Order of Continuance was issued by the Hearing Officer, due to the Hearing Officers' unavailability on the date and time identified for the hearing. The due process hearing was rescheduled to February 2, 2009, at 9:00 a.m.. Due to the parties' unavailability the hearing was rescheduled to February 9, 2009. Petitioner filed a Joint Motion For A Continuance, due to parent's unavailability for the February 9, 2009 hearing, and the hearing was rescheduled to March 4, 2009. The due process hearing convened on March 4, 2009, as scheduled.

X. FINDINGS OF FACT

1. The student is _____ years of age, and attends _____ School located in the District of Columbia. Prior to attending _____ the student attended _____ and _____ also located in the District of Columbia. The student resides in the District of Columbia, and is not identified as disabled and eligible to receive special education services.

2. On September 16, 2007, Petitioner's counsel forwarded a letter to the Principal at _____ School, notifying DCPS of its representation of parent; and requesting a copy of the student's educational records, special education, and disciplinary file.

The letter also included a request that DCPS evaluate the student in all areas of suspected disability, including a comprehensive psychological (clinical and psychological), speech/language, occupational therapy, Functional Behavioral Assessment, Intervention Behavioral Plan (IBP), and Social History evaluations, to determine the student's eligibility for special education and related services.

3. On October 15, 2007, a Multidisciplinary Development Team (MDT) meeting convened for the purpose of addressing parent's referral of the student for evaluation for special education services. The team discussed the student's lack of focus, inattentiveness, and need for redirection in class, while indicating that since the beginning of the school year, the student progressed behaviorally.

Parent reported to the team that the student repeated the 1st grade at School; and has difficulty with reading. Parent and the Education Advocate requested a Comprehensive Psychological (Clinical), Social History, Speech and Language, Psychiatric evaluations, and a Rule Out for Attention Deficit Hyperactivity Disorder (ADHD). The team recommended assessments to determine whether the student is disabled and entitled to special education services.

The MDT developed a Student Evaluation Plan (SEP) summarizing area(s) of concern, including: "Child does not pay attention and is not focused. Student is being retained in Grade 1 from School. Parent and Advocate want her to be assessed." The MDT determined that the student failed to require assessment at that time, however, would assess the student in that she was in a "homeless" situation and the team wanted to determine whether the student's homelessness may be affecting her academically. The SEP recommended a Psychological, Speech and Language, Social History, and Educational evaluation.

DCPS completed a Teacher Assistance Team (TAT) Alternative Instructional Strategies (AIS) Review. The review indicates that the parent requested referral to MDT without the opportunity for intervention and the 120 day time line began. Parent completed the "Consent for Evaluation", authorizing DCPS to complete initial evaluations.

4. On November 10, 2008, Petitioners' counsel forwarded to the Principal at a written request for a Comprehensive Psychological (clinical and psycho-educational), Psychiatric, Speech and Language, Occupational Therapy, and Social History evaluation to address the student's poor academic performance and negative social emotional behavior.

5. On November 21, 2008, the Special Education Coordinator at forwarded a Letter of Invitation/Notice to parent and parent's Education Advocate, to attend a meeting of the IEP Team to review information (class work) to determine if testing is necessary. The letter of invitation recommended December 11, 2008 at 10:00 a.m. or 11:00 a.m., or December 18, 2008, at 1:30 p.m...

6. On December 9, 2008, Counsel, on behalf of parent and the student, filed a due process complaint alleging that the District of Columbia Public Schools ("DCPS"), denied the student a Free Appropriate Public Education ("FAPE"), by failing to:

- (2) adhere to the 120 day DCMR deadline to test and determine the student eligible for special education services;
- (2) determine the student eligible for special education services;
- (3) provide the student an appropriate placement for the 2007-08 and 2008-09 school years; and
- (4) provide the student educational, related, and special education services conducive to her disability and needs for the 2007-08 and 2008-09 school years.

7. On January 16, 2009, DCPS forwarded a letter to parent's counsel indicating the pursuant to parent's request for independent educational evaluations (IEE); DCPS is authorizing parent to obtain an independent Comprehensive Psychological Evaluation (which includes cognitive, educational, and clinical components as well as a social history), a speech and language evaluation, functional behavior assessment and an occupational therapy evaluation, at DCPS expense.

8. On January 15, 2009, the Education Advocate forwarded a letter to in regard to parent's January 15, 2009 authorization for a Comprehensive Psychological, Speech and Language, and Functional Behavioral Assessment, and Occupational Therapy evaluation.

The letter also indicates that in lieu of this authorization, parent will be exerting her right to the above mentioned independent evaluations; and requesting a decision whether intends to proceed with the January 29, 2009 SEP meeting.

9. On January 22, 2009, the Education Advocate forwarded a letter to the Principal at requesting the opportunity to observe the student in her classroom environment, in preparation for the due process hearing.

WITNESSES

Witnesses for Petitioner

Parent
Education Advocate

Witnesses for Respondent

Special Education Coordinator (SEC) at

WITNESS TESTIMONY

PETITIONER'S WITNESSES

Parent

Parent testified that the student has behavior problems, fail to complete assignments, is disruptive in class, not returning homework, is not focused, and requires constant redirection in class. Parent also testified that she receives daily reports from the school regarding the student's behavior; during testing she is not focused; and although student completes homework at home or the aftercare program, she fail to submit the completed homework to the teacher.

Parent testified that the student requires special education because she repeated the 2nd grade because of problematic behavior, and according to the student's teacher, she is at risk of repeating the 2nd grade a second time for similar reasons. Parent also testified that upon enrollment at _____ during the 2008/09 school years, she requested special education services and evaluations.

During cross examination, parent testified that in October, 2008, she spoke with the SEC at _____ regarding concerns, and assistance for the student. Parent also testified that she visited _____ in November, 2008 and January, 2009, to attend a meeting on the student's behalf, however, was advised that the meeting was cancelled because the case was settled by the Advocate. Parent also testified that she was informed that Interdynamics will complete the independent evaluations, authorized by DCPS.

Education Advocate

The Education Advocate testified that in January, 2009, she observed the student in her educational setting, reviewed the student's educational record and drafted the due process complaint. The advocate also testified that during the observation, the student was inattentive and required constant redirection from the teacher; and experienced difficulty completing an assignment. The advocate also testified that the student's completed assignment included doodling, and the student was the last student to complete the assignment, approximately five minutes later.

The advocate testified that she inquired of the teacher regarding the student's inattentiveness and behavior difficulties; and was advised that the student can be noncompliant and attention problems are consistent.

The advocate concluded by testifying that she requested independent educational evaluations, and as a result the MDT meeting failed to convene, as scheduled. The advocate also concluded that DCPS issued an Independent Educational Evaluation (IEE) letter on January 16, 2009; authorizing Petitioner to secure independent evaluations, at DCPS expense.

RESPONDENT'S WITNESS

Special Education Coordinator,

School

The SEC testified that she received a letter requesting a meeting to discuss concerns regarding the student's academics and behavior; and she responded with letters of invitation. The SEC testified that Petitioner failed to respond to the initial Letter of Invitation; however, a meeting was scheduled for January, 2009, after a second Letter of Invitation. The SEC testified that the meeting failed to proceed in January, 2009, because the school received information from DCPS that an IEE was issued to parent, authorizing independent evaluations.

The SEC testified that upon inquiry whether the student's teacher referred the student for evaluation, the teacher advised the SEC that the student has small behavioral problems; however, there was no need for special education services at that time. The SEC also testified that the teacher offered no concerns regarding the student's attention or lack of focus in the classroom.

XI. DISCUSSION AND CONCLUSIONS OF LAW ISSUE 1

Whether DCPS denied the student a free appropriate public education (FAPE); by failing to evaluate and determine the student eligible for special education services pursuant to the "Child Find" provisions of the IDEA?

Petitioner

Petitioner represents that DCPS failed to adhere to the 120 day D.C. Code of Municipal Regulations ("DCMR") deadline; and that on September 16, 2007, parent through counsel, forwarded a letter to DCPS, requesting evaluation of the student to address her poor academic performance by completing a comprehensive psychological, speech and language, occupational therapy, Functional Behavioral Assessment (FBA), and an Intervention Behavioral Plan (IBP), to address the student's problematic behavior.

"In addition, on November 10, 2008, parent through counsel, initiated a second request for the above mentioned evaluations; and as of today, DCPS has failed to complete any testing for xxx. In the interim, xxx has performed poorly academically. Therefore, DCPS has denied her FAPE."

Petitioner also represents that DCPS failed to determine the student eligible for special education services, and the student require the above mentioned evaluations. "xxx has regressed academically and she is performing below average and grade level. Xxx needs evaluations to assess her current level of functioning, behavior, and to address her special needs. Therefore, DCPS has denied her FAPE."

Petitioner represents that failure to complete evaluations is not merely a procedural violation of IDEA, however, is substantive; and to find that such a violation is merely procedural places parent in a position where she never meets her burden of proof, because there is no means of measuring harm to the student until the evaluations are completed. Petitioner further asserts that only DCPS can complete the evaluations, and by failing to complete the evaluations or issue parent an independent education evaluation (IEE) letter, parent is forever harmed and the student is prevented from receiving special education services.

Petitioner also represents that according to Child Find after evaluations are completed then there can be a means of assessing the student's needs and measuring harm to the student. Petitioner concludes that approximately two (2) years lapsed from the time of parent's initial request for evaluations, and a determination regarding eligibility. Petitioner also concludes that although student's report card reflects that the student approaches the standard (basic) in the majority of subjects, the student is repeating the 2nd grade, and is one year behind.

Petitioner also concludes that 2 years has passed since parent requested initial evaluations, and DCPS failed to evaluate the student. Petitioner also represents that passing the student from grade to grade, does not obviate the need for testing; and that parent satisfied its burden of proof. Petitioner concludes that on October 15, 2007, the MDT determined that the student did not require evaluations; and in August, 2008, parent initiated a second request for evaluations, which were not completed.

Respondent

DCPS represents that a SEP was developed during the 2007/08 school years, and the MDT determined that the student failed to require testing for special education services. DCPS also represents that failure to evaluate a student within 120 days is not equivalent to denial of a FAPE; the student has not been retained; the 2008/09 report card reflects that the student approaches the standard (basic) in the majority of subjects; and although authorized Petitioner failed to proceed with securing the independent evaluations.

DCPS also represents that harm to the student is merely speculative without the evaluations. DCPS also represents that any argument regarding parent's participation in a meeting to discuss the student's educational program is premature, until the student is determined eligible for services.

DCPS represents that the student's prior school closed, a letter of invitation was sent to parent, and several attempts were made to convene a meeting to discuss evaluations, and Petitioner failed to respond. DCPS concludes that the student could have been tested prior to filing of the complaint, had Petitioner responded to the Letter of Invitation.

DCPS concludes that although the student's teacher expressed concerns regarding the student's behavior and focus, this is not an indication that the student requires special education services. DCPS also concludes that the student has behavior concerns which are reflected in her report cards, however, the student's grades fail to reflect that she is at risk of being retained in grade.

DISPOSITION

“Child Find”

IDEA, at **34 C.F.R. Section 300.111**, ***“Child Find”***, requires that the LEA must have in effect policies and procedures to ensure that all children with disabilities residing in the State, and who are in need of special education and related services, are ***identified, located, and evaluated***. In addition, subparagraph (c) of the ***“Child Find”*** provisions provide that ***“Child find”*** must also include children who are ***suspected*** of being a child with a disability under Section 300.8, (***“Other Health Impairment”***), and in need of special education, even though they are advancing from grade to grade.

According to **34 C.F.R. §300.304(c)(4) and (6)** DCPS 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.”

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.

(b) Request for ***initial*** evaluation. 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.

IDEA, §300.301(c)(1)(i) provides that the initial evaluation must be conducted ***within 60 days of receiving parental consent*** for the evaluation; ***or*** if the State establishes a timeframe within which the evaluation must be conducted. 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; and this provision was ***applicable to students 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 §38-2561.02, requiring completion of initial evaluations and assessments within 120 days after the date the student is referred for evaluation or assessment; however this provision only applies to students in non-public schools. The student in this matter is in a public school; therefore, this provision does not apply to the student, and Petitioner’s reference to the 120 timeframe is-

misplaced. The 60 day timeframe established by IDEA in completing initial evaluations applies because the District of Columbia failed to establish a timeframe within which initial evaluations must be completed for students in public schools.

The record reflects that on *September 16, 2007*, parent through counsel, initiated a written request that DCPS evaluate the student in all areas of suspected disability, including a comprehensive psychological (clinical and psychological), speech/language, occupational therapy, Functional Behavioral Assessment, Intervention Behavioral Plan (IBP), and Social History evaluations, to determine the student's eligibility for special education and related services.

On *October 15, 2007*, while attending _____ School, a Multidisciplinary Development Team (MDT) meeting convened for the purpose of addressing parent's referral of the student for evaluation for special education services. The team discussed the student's lack of focus, inattentiveness, and need for redirection in class, while indicating that the student has made progress with her behavior since the beginning of the school year.

Parent noted attention deficit and retention difficulties, that the student is easily distracted by her surroundings, and must require the student to focus on her when providing directions. According to parent, the student repeated the 1st grade, while attending _____ Parent also advised the team that the student was tested while attending _____ and failed all tests; the student becomes frustrated when confronted with complex situations; and during class loses focus and veers off task. Parent also expressed concerns regarding the number of telephone calls received from the school regarding the student's problematic behavior. Parent also stated that the student writes backwards, and +dyslexia is suspected.

The general education teacher indicated that the first week of school the student was not focusing at all, is focusing better, and knows the work the 1st grade level. The teacher reported that the student has made progress with her behavior since the beginning of the school year; and it is necessary to repeat directions at least 5 times; redirect the student several times during the day; the student is hyperactive; and is not as focused as she should be at times, however, improvements have been made. The teacher also reported that the student is doing well in both reading and math; has been tardy quite often; and at times appears to day dream in class.

According to the MDT meeting notes, parent and the Education Advocate requested a Comprehensive Psychological (Clinical), Social History, Speech and Language, Psychiatric evaluations, and a Rule Out for Attention Deficit Hyperactivity Disorder (ADHD); and although the team determined that the student failed to require assessment at that time, it recommended evaluations to determine whether the student is disabled.

The MDT developed a Student Evaluation Plan (SEP) summarizing area(s) of concern, including: "Child does not pay attention and is not focused. Student is being retained in Grade 1 from _____ School. Parent and Advocate want her to be assessed."

The MDT determined that the student failed to require assessment at that time, however, would assess the student in that she was in a "homeless" situation and the team wanted to determine whether the student's homelessness may be affecting her academically. The SEP recommended a Psychological, Speech and Language, Social History, and Educational evaluation.

At the **October 15, 2007** MDT meeting, parent completed "Consent for Evaluation", authorizing DCPS to complete initial evaluations.

The record also reflects that on **November 10, 2008**, Petitioners' counsel initiated a second request for initial evaluations, to address the student's poor academic performance and negative social emotional behavior. Petitioner requested that DCPS complete a Comprehensive Psychological (clinical and psycho-educational), Psychiatric, Speech and Language, Occupational Therapy, and Social History evaluation.

As indicated supra, according to IDEA, §300.301(c)(1)(i) initial evaluations must be conducted ***within 60 days of receiving parental consent*** for the evaluation. Parental consent was received by DCPS on October 15, 2007; therefore, IDEA required DCPS to complete initial evaluations no later than December 15, 2007. DCPS failed to complete initial evaluation of the student by December 15, 2007, within 60 days of receiving parental consent for evaluation.

The record reflects that on November 21, 2008, the Special Education Coordinator at forwarded a Letter of Invitation/Notice to parent and parent's Education Advocate, to attend a meeting of the IEP Team *to review information (class work) to determine if testing is necessary*. The letter of invitation recommended December 11, 2008 at 10:00 a.m. or 11:00 a.m., or December 18, 2008, at 1:30 p.m... On December 9, 2008, Petitioner filed a due process complaint.

The Hearing Officer finds that DCPS' argument that a Letter of Invitation was forwarded, several attempts were made to discuss evaluations, and Petitioner failed to respond, is without merit. Although DCPS issued a letter of invitation to parent, the letter indicated the purpose of the meeting was to review information (class work) to determine if testing was necessary; although the record reflects that on October 15, 2007, the MDT recommended and parent consented to completion of initial evaluations, and a SEP was developed recommending evaluations. In addition, parent had submitted two (2) requests for initial evaluations, and consented to initial evaluations.

The Hearing Officer finds that issuance of a Letter of Invitation by DCPS more than a year later, for a MDT meeting *to review class work to determine if testing was necessary*, is inappropriate, and represents further delay of the evaluation and eligibility determination process. Petitioner's decision to proceed with filing a due process complaint was more than justified.

On January 15, 2009, DCPS issued parent an Independent Educational Evaluation (IEE) letter, authorizing parent to obtain an independent comprehensive psychological evaluation (which includes cognitive, educational, and clinical components as well as a social history), a speech/language evaluation, a functional behavioral assessment and an occupational therapy evaluation at the expense of DCPS.

Approximately one (1) year and five (5) months has lapsed since the MDT recommended evaluations; and parent initially requested and provided written consent for DCPS to complete initial evaluations; which is a significant period of time and deviation from the 60 day time limit established by IDEA. Although DCPS issued parent an IEE letter on January 15, 2009, after the due process complaint was filed, it fails to remedy the violation which had already occurred.

It is the Hearing Officers' decision that Petitioner satisfied its burden of proof by presenting evidence sufficient for finding that DCPS failed to evaluate, and determine the students' eligibility for special education services, pursuant to the "Child Find" provisions of the IDEA. Absent evaluations any determination that the student is disabled and eligible to receive special education services pursuant to the provisions of the IDEA, would be premature.

Free Appropriate Public Education

Having determined that DCPS failed to comply with the procedural requirements of IDEA; the court must inquire whether the procedural violations result in denial of a FAPE, causing substantive harm to the student, or his parents.

According to IDEA, 34 C.F.R. §300.17 a free appropriate public education (FAPE) means special education and related services that—

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

A free appropriate public education must be available to all children residing in the State between the ages of 3 and 21, inclusive, ...in section 300.530(d). In addition, according to 20 U.S.C. 1412(a)(1)(A), a State participating in IDIEA 2004 is required "...to ensure...[that]...a free appropriate public education is available to all children- with disabilities residing in the State..." DCPS must make FAPE available to every student eligible to attend DCPS on a tuition free basis. See, 5 DCMR 2000.2(a).

The 2004 amendments to IDEA, at Section 615(f)(ii) limits the jurisdiction of administrative hearing officers to make findings that a child did not receive FAPE due to procedural violations, unless there is a finding that the procedural inadequacies:

- (I) impeded the child's right to a free and appropriate public education;
- (II) significantly impeded the parent's opportunity to participate in the decision making process regarding the provisions of a FAPE to the parent's child; or
- (III) caused a deprivation of educational benefit."

First, the student was a 1st grade student at _____ School during the 2006-07 school years. The student's 2006/07, 1st grade, Fourth Advisory Report Card, reflects that the student received an overall grade of 1+ in Reading/English Language Arts, which indicates that the students' overall academic progress skills within the subject area was at the below basic level. The student received an overall score of 2 in Mathematics, Science, Social Studies, Music, Art, Health and Physical Education; which indicates that the students' overall academic progress skills within the subject areas was at the basic level.

In summary, during the 2006/07 school years, 1st grade, Fourth Advisory, the students' overall academic progress skills in the majority of his classes were at the basic level of performance which indicates that the student showed a basic working knowledge of skills/concepts; produced satisfactory work; and usually applied skills/concepts correctly. The student was retained in the 1st grade; and because the school closed was transferred to _____ School.

Second, the student repeated the 1st grade student at _____ School during the 2007/08 school years. On October 15, 2007, while attending _____ School, a Multidisciplinary Development Team (MDT) meeting convened for the purpose of addressing parent's referral of the student for evaluation for special education services. The team discussed the student's lack of focus, inattentiveness, and need for redirection in class, while indicating that the student has made progress with her behavior since the beginning of the school year.

Parent noted attention deficit and retention difficulties, that the student is easily distracted by her surroundings, and must require the student to focus on her when providing directions. According to parent, the student repeated the 1st grade, while attending _____ Parent also advised the team that the student was tested while attending _____ and failed all tests; the student becomes frustrated when confronted with complex situations; and during class loses focus and veers off task. Parent also expressed concerns regarding the number of telephone calls received from the school regarding the student's problematic behavior. Parent also stated that the student writes backwards, and +dyslexia is suspected.

The general education teacher indicated that the first week of school the student was not focusing at all, is focusing better, and knows the work from a 1st grade level. The teacher reported that the student has made progress with her behavior since the beginning of the school year, and is doing very well, pays better attention and follow directions; however, and it is necessary to repeat directions at least 5 times; redirect the student several times during the day;-

the student is hyperactive; and is not as focused as she should be at times. The teacher also reported that the student is doing well in both reading and math; has been tardy quite often; and at times appears to day dream in class.

According to the MDT meeting notes, parent and the Education Advocate requested a Comprehensive Psychological (Clinical), Social History, Speech and Language, Psychiatric evaluations, and a Rule Out for Attention Deficit Hyperactivity Disorder (ADHD); and although the team determined that the student failed to require assessment at that time, it recommended evaluations to determine whether the student is disabled.

The MDT developed a Student Evaluation Plan (SEP) summarizing area(s) of concern, including: "Child does not pay attention and is not focused. Student is being retained in Grade 1 from Leckie School. Parent and Advocate want her to be assessed."

Third, student was a 2nd grade student at _____ School, during the 2008-09 school years. The student's 2008/09 school years Report Card reflect that during the 1st Advisory, the student received an overall score of 2 in Reading/English language Arts, Mathematics, Science, Social Studies, Music; which indicates that the student approaches the standard (Basic), shows a basic working knowledge of skills/concepts; produces satisfactory work; usually applies skills/concepts correctly. The student also received an overall score of 3 in Art, Health and Physical Education; which indicates that the student produces work that meets the standard (Proficient), frequently produces work of high quality; applies skills/concepts correctly.

The students' *work habits, personal and social skills* reflect: rarely follows directions, completes class work on time, uses time wisely, completes and returns homework, follows classroom rules, respects the rights/property of others, listens while others speak, practices self control. With frequent prompting the student works well with others/cooperates, and makes an effort; and independently participates in class discussion. With limited prompting the student follows playground rules/school rules.

On November 7, 2008, at the end of the 1st Advisory, the student's teacher indicated in the "*Teacher Comments*" section of the report card that the student "seems eager to improve. She has shown an encouraging desire to better herself in classroom behavior and participation. The student is interested in books and reading. She comprehends what she reads, she does not work up to her ability. She is capable of much better work. She understands the plus, minus, and equal signs, and uses them to make number models. With more effort and concentration, she will show rapid improvement."

During the 2nd Advisory, the student received an overall score of 3 in Reading/English language Arts, Science, Social Studies, Art, Music, Health and Physical Education; which indicates that the student produces work that meets the standard (Proficient), frequently produces work of high quality; applies skills/concepts correctly. The student also received an overall score of 2 in Mathematics, which indicates that the student approaches the standard (Basic), shows a basic working knowledge of skills/concepts; produces satisfactory work; usually applies skills/concepts correctly.

The students' overall academic progress skills in all of her classes, except Mathematics, reflect that the student meets the standard (Proficient): produces work that meets the standard; frequently produces work of a high quality; and applies skills/concepts correctly. In Mathematics the students' overall academic progress skills remained constant during the 1st and 2nd advisories, however, reflect that the student approaches the standard (Basic): student shows a basic working knowledge of skills/concepts; produces satisfactory work; usually applies skills/concepts correctly.

The students' *work habits, personal and social skills* reflect: with frequent prompting the student followed directions, complete class work on time, works well with others/cooperative, makes an effort, follows classroom rules, and practices self-control. The student rarely uses time wisely, completes and returns homework. The student independently participates in class discussion, and follows playground rules/school rules. In the area of work habits, personal, and social skills, the record reflects that during the 1st Advisory the student required frequent prompting in 2 out of 12 areas, however, during the 2nd advisory the student regressed, requiring frequent prompting in 6 out of 12 areas.

On January 30, 2009, at the end of the 2nd Advisory, the student's teacher indicated in the "*Teacher Comments*" section of the report card that the student is very friendly, and when she applies herself to her school work, her overall work is improved. However, she needs to focus more on getting work done in the allotted time; she has difficulty listening during class; and is often easily distracted. The teacher also reports that the student disturbs others by talking; and she would benefit from learning better work ethics, home study and homework.

In summary, during the 2008/09 school years, 2nd grade, the students' overall performance improved from the 1st to 2nd Advisory in Reading/English Language Arts, Science, Social Studies, and Music; and remained constant in mathematics, art, health and physical education.

Fourth, the Education Advocate testified that during the January, 2009 classroom observation, the student was inattentive and required constant redirection from the teacher; and experienced difficulty completing an assignment. The advocate also testified that the students' completed assignment included doodling, and the student was the last to complete the assignment, which was approximately five minutes after the other student completed the assignment.

The advocate testified that she inquired of the teacher regarding the student's inattentiveness and behavior difficulties; and was advised that the student can be noncompliant and attention problems are consistent; which DCPS failed to refute.

The Hearing Officer finds that the student failed the 1st and 2nd grades of school, and although there is no evidence of academic regression during the 2008/09 school years, according to the student's "Teachers Comments" during the 1st and 2nd Advisory of the 2008/09 school years, and classroom observation; the student exhibits the same behaviors as the 1st grade impacting her learning and that of others. The student has difficulty with concentration, focusing, listening, is easily distracted, and is disruptive in the class and disturbs others.

In the area of work habits, personal and social skills, during the 2nd Advisory, compared the 1st Advisory, the report card reflects that the student requires frequent and limited prompting in 8 out of 12 areas, compared to the 1st Advisory where she required frequent prompting in 2 areas and limited prompting in 1 area.

Although the students' behavior and grades reflect improvement during the 2008/09 school years, the teacher reported that the student is capable of much better and fail to work up to her ability, and with more effort and concentration, she will show rapid improvement. The teacher also comments that when the student applies herself to her schoolwork her overall work is improved, however, she needs to focus more on getting work done in the allotted time; she has difficulty listening during class; is often easily distracted; and disturbs others by talking.

During the October 15, 2007, Multidisciplinary Development Team (MDT) meeting the team discussed the student's lack of focus, inattentiveness, and need for redirection in class. The Parent advised the team that the student has the ability to learn, however, she has an attention deficit, is very distractible, it is necessary to require the student to look at you when providing directions; and at times she is distracted by her surroundings.

The general education teacher reported that the student "has made progress with her behavior since the beginning of the school year. She is not as focused as she should be at times, however, improvements have been made. She is doing well in both reading and math. At times she appears to be day dreaming in class."

The teacher also reported that during the first week of school the student was not focusing at all, it was necessary to repeat directions at least five times; and has a tendency to fall on the floor.

The Hearing Officer finds that the student's educational records are replete with information sufficient for a finding that since the 1st grade the student has exhibited and continue to exhibit behaviors impacting her learning and that of others, specifically: inability to pay close attention to details, difficulty paying attention, trouble organizing tasks, fail to listen when spoken to directly, fail to follow through on instructions, fails to complete schoolwork (but not because of an inability to understand the instruction), avoids or dislikes tasks that require continuous mental effort (such as homework), and is easily distracted.

Academic performance and advancement from grade to grade does not stand as a basis for assuming that a student does not require special education services; and receipt of anything other than an education that is fully aligned with the State's academic standards does not eliminate the duty to provide a student a FAPE. The student's retention in the 1st and 2nd grades; and teachers reports and comments have consistently reported the student's lack of focus, need for repetition, redirection, disruptiveness, and hyperactivity, suggesting that the student is a student suspected of having a disability.

In addition, Congress did not envision that the inquiry would end if a showing is made that the child is receiving passing marks and is advancing from grade to grade. Instead, it intends to permit a full and searching inquiry into any aspect of the child's education; and areas of suspected disability. In this matter, the student was retained in the 1st and 2nd grades, which should have placed DCPS on notice that the student may have a disability.

The courts have held that procedural violations that deprive an eligible student of an individualized education program or ***result in the loss of educational opportunity will also constitute denial of a FAPE under the IDEA.*** See, *Babb v. Knox County Sch. Sys.*, 965 F.2d 104, 109 (6th Cir. 1992); *W.G.*, 960 F.2d at 1484. According to parent and the student's teachers, with more effort and concentration the student will show rapid improvement; when she applies herself to her schoolwork, her overall work is improved; she requires repetition of directions and frequent redirection; which adversely impacts the student's learning and that of others. As a result of DCPS' failure to evaluate the student in a timely manner the student continue to exhibit the same behaviors the previously resulted in her grade retention; and experienced a loss in educational opportunity.

The Hearing Officer finds that DCPS' failure to complete initial evaluations and determine the student's eligibility for special education services for approximately one (1) year and five (5) months is significant; and detrimentally impacts the student's learning and academic progress. In addition, such inaction for such a lengthy period of time jeopardizes Congress' intent and objectives in enacting the IDEA; resulting in not only a procedural violation but substantive harm to the student, and his parents. The DCPS' failure to respond promptly to parent's request, and the MDT's recommendation for initial evaluations, has certainly compromised the effectiveness of the IDEA as applied to the student.

The Hearing Officer concludes that the ***procedural*** violation in this matter is to such an extent, that the violation impedes the student's right to a FAPE; significantly impedes the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the student; and deprives the student educational benefit, resulting in denial of a FAPE.

XII. ORDER

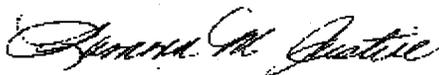
Based on the aforementioned, it is hereby:

1. **ORDERED**, that DCPS shall fund the following independent evaluations: Comprehensive Psychological (clinical), Rule Out for Attention Deficit Disorder (ADD)/Attention Deficit Hyperactivity Disorder (ADHD), Occupational Therapy, Speech and Language, Educational Evaluation, and Social History evaluations, to determine the student's eligibility for special education and related services; and it is further
2. **ORDERED**, that within ten (10) calendar days of receiving the results of the final evaluation, DCPS shall convene an MDT/IEP team meeting to: review all evaluations, and determine the student's eligibility for special education and related services; implement evaluation recommendations; develop an IEP, as appropriate; discuss; discuss and determine placement; discuss compensatory education services; and it is further
3. **ORDERED**, that DCPS will send all notices and schedule all meetings through parent's counsel in writing, via facsimile, with copies to the parent in writing by first class mail.

4. **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 River Terrace 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
5. **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
6. **ORDERED**, that DCPS shall schedule all meetings through counsel for the student and parent, Fatmata Barrie, Esquire, in writing, via facsimile at (202) 626-0048; and it is further
7. **ORDERED**, that this decision and order are effective immediately

XIII. APPEAL PROCESS

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.



Attorney Ramona M. Justice
Hearing Officer

Date Filed: 3-11-09

cc: Attorney Tiffany Puckett, Office of Assistant Attorney General
Attorney Fatmata Barrie: Fax: 202-626-0048