

**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 for Public Policy, hereinafter referred to as _____ a District of Columbia Public Charter School, located in the District of Columbia. The student is a resident of the District of Columbia, and identified as disabled and eligible to receive special education and related services, pursuant to “The Individuals with Disabilities Education Act (IDEA); reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)”. The student’s disability classification is Specific Learning Disability (SLD).

On March 17, 2009, the student’s guardian (grandmother), through her Attorney, 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) provide the student an appropriate placement; (2) evaluate the student in all areas of suspected disability, as recommended by the Multidisciplinary Development Team (MDT) on December 17, 2008; (3) develop an appropriate Individualized Education Program (IEP), for the 2007/08 and 2008/09 school years; and (4) provide the student appropriate special education and related services during the 2007/08 and 2008/09 school years.

The due process hearing convened on April 22, 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 *March 17, 2009* due process complaint:

- (1) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide the student an appropriate placement, during the 2007/08 and 2008/09 school years?
- (2) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to evaluate the student in all areas of suspected disability, as recommended by the Multidisciplinary Development Team (MDT) on December 17, 2008?
- (3) Whether DCPS denied the student a free appropriate public education; by failing to develop an appropriate Individualized Education Program (IEP), for the 2007/08 and 2008/09 school years?
- (4) Whether DCPS denied the student a free appropriate public education; by failing to provide the student appropriate special education and related services during the 2007/08 and 2008/09 school years?

Relief Requested:

- (1) DCPS to fund a placement of the parent's choice including but not limited to Academy, and Academy, with transportation.
- (2) DCPS to fund independent Adaptive Scale (Vineland), Clinical and Attention Deficit Hyperactivity Disorder (ADHD) screening.
- (3) DCPS to convene an MDT/IEP team meeting to complete an appropriate IEP for the student. If DCPS fails to attend, the MDT/IEP team can move forward with the meeting.
- (4) DCPS to provide the student's educational and related services, and his special education services, i.e. specialized instruction, and counseling.
- (5) DCPS to pay reasonable attorney's fees.

V. PROCEDURAL POSTURE

On March 17, 2009, Counsel, on behalf of parent, filed a due process complaint. On March 23, 2009, the Hearing Officer issued a Pre-hearing Conference Notice scheduling the Pre-hearing Conference for March 31, 2009 at 3:00 p.m.. The pre-hearing conference convened as scheduled and on March 31, 2009, the Hearing Officer issued a Pre-hearing Conference Order.

Note: At the hearing, Petitioner withdrew Issues 2 and 3 of the complaint; and all issues pertaining to the 2007/08 school years.

On March 27, 2009, DCPS submitted "DCPS' Response to Parent's Administrative Due Process Complaint Notice". On April 14, 2009, DCPS submitted disclosures, and on April 17, 2009, Petitioner submitted disclosures, and a supplemental disclosure of witnesses and documents. The due process hearing convened on April 22, 2009 at 9:00 a.m., as scheduled.

VI. 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. Petitioner withdrew from the record the supplemental disclosures and witness list. Receiving no objections to the disclosures submitted, the disclosures identified herein, were admitted into the record as evidence.

DISCLOSURES ADMITTED INTO EVIDENCE ON BEHALF OF PETITIONER

- Petitioner's Exhibits 01 through Petitioner's Exhibit 15; and a witness list dated April 15, 2009.

DISCLOSURES ADMITTED INTO EVIDENCE ON BEHALF OF RESPONDENT

- Respondent's Exhibits 01 through Respondent's Exhibit 4; and a witness list dated April 13, 2009.

VII. PRELIMINARY MATTERS

As a preliminary matter, Petitioner represented that DCPS failed to provide requested educational records for the student for the 2007/08 school years, and withdrew from the complaint all issues pertaining to the 2007/08 school years, without prejudice. Petitioner also withdrew as requested relief the student's placement at _____ School, indicating that on April 17, 2009, DCPS agreed to fund the student's placement and transportation to the _____ School. Petitioner represents that although DCPS agreed to place the student, it requests that the court find that the student was denied a FAPE.

As a preliminary matter Petitioner also advised the court that DCPS agreed to fund an independent Vineland and cognitive assessment. The parties also stipulated that DCPS will convene a MDT meeting within 30 days of receiving the independent evaluations, to review the evaluations, and update the student's IEP, as appropriate. There were no remaining preliminary matters.

IIX. STATEMENT OF CASE

1. The student is _____ years of age, and a _____ grade student at _____ School for Public Policy, a District of Columbia Public Charter School, located in the District of Columbia.

2. The student is a resident of the District of Columbia, and identified as disabled and eligible to receive special education and related services, pursuant to "The Individuals with Disabilities Education Act (IDEA); reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)". The student's disability classification is Specific Learning Disability (SLD).

3. A teacher survey completed on September 17, 2008, notes that behaviorally, the teacher would like to see the student focusing the entire class, not becoming distracted by peers or interruptions. The teacher also noted that the student tries extremely hard, however, at times becomes aggravated and distracted by his peers, which at times may become hard to redirect.

The teacher also expressed concerns regarding the student's overall reading comprehension and fluency, expressing ideas in written form, and the ability to write complete sentences, especially when responding to a longer text. The student rated below average in reading comprehension, written expression, and math calculation.

4. On November 4, 2008, "Vital Enterprises" completed a "Psycho-educational Reevaluation". The evaluator determined that when compared to others at his age level, the student's academic skills, his ability to apply those skills, and his fluency with academic tasks are all within the low range. The evaluator also determined that when compared to others at his age level, his performance is low in broad reading, written language, and written expression, and very low in mathematics and math calculation skills.

The evaluator indicated that based on the student's extremely low cognitive, academic, and behavioral functioning, the student may qualify as a student with mental retardation; and recommended an Adaptive Behavioral Scale prior to making the diagnosis. The evaluator recommended a Clinical Evaluation to address the student's current level of social-emotional functioning; and a screening for Attention Deficit Hyperactivity Disorder (ADHD) to address concerns regarding inattention and hyperactive behavior.

The evaluator concluded that if a new diagnosis is warranted based on results of the evaluations, an appropriate educational placement that focuses explicitly on the student's cognitive, academic, and social-emotional skills is recommended.

5. On November 18, 2008, DCPS completed a "Speech and Language Reevaluation". The evaluator indicated that it was noted that the student was demonstrating average language skills, and average to below average vocabulary skills; and concluded that based on the student's overall scores, speech and language services were not recommended.

6. A teacher survey completed on December 16, 2008, notes that the student is frequently frustrated and overwhelmed in his classes, as the information that he is expected to synthesize is not something that he has the base skill sets.

7. On December 17, 2008, DCPS convened a Multidisciplinary Development Team (MDT) meeting to discuss the student's academic and social performance, review a psycho-educational and speech evaluation, review and/or revise the student's IEP; and discuss placement.

The MDT developed an IEP for the student recommending 30 hours of specialized instruction, and 1.0 hours of psychological counseling, weekly; and placement in a special education (Resource) Setting. The student's special education hours were increased from 20 to 31 hours per week. According to the MDT meeting notes, parent understood that the student was being exited from speech and language services; and stated concerns regarding the placement and inquired regarding the site DCPS was considering for placement.

The MDT determined that the student remained eligible for special education services with a specific learning disability classification, while noting that the student's disability classification required revisiting after an adaptive behavior scale, clinical and ADHD screening to determine whether his disability classification requires modification.

A Student Evaluation Plan (SEP) was created in which an adaptive behavior scale, clinical, and ADHD screening evaluation was developed, indicating that the SEP and Consent to Evaluate would be forwarded to DCPS once executed by parent.

In discussing placement, the team stated that because the student's level of services on his IEP were increased from 21.75 to 31 hours per week, the student's least restrictive environment is noted as 100% removal from general education setting into full-time special education setting. The team stated that Parkside is unable to implement the student's full-time IEP (Parkside is an inclusion school and not a full-time special education school) and his IEP has been submitted from placement at a DCPS school that can implement his IEP.

8. On March 17, 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) provide the student an appropriate placement; (2) evaluate the student in all areas of suspected disability, as recommended by the Multidisciplinary Development Team (MDT) on December 17, 2008; (3) develop an appropriate Individualized Education Program (IEP), for the 2007/08 and 2008/09 school years; and (4) provide the student appropriate special education and related services during the 2007/08 and 2008/09 school years.

IX. WITNESSES

Witnesses for Petitioner

- Guardian (Grandmother)
- Student

Witnesses for Respondent

No witnesses were presented.

Witness Testimony

Petitioner's Witnesses

Guardian (Grandmother)

The guardian testified that she has cared for the student since birth; and the student is a grade student at School, which he began attending during the 2007/08 school year. The guardian testified that upon inquiry she was repeatedly advised the school that the school was working with the student; never advised her of any difficulties the student was experiencing in school; and that she was only informed this school year of his deficits. Parent also testified that last school year she received no report card, and upon inquiry received the report card near the end of the school year.

The guardian also testified that the student had a tutor; and she also assisted with his academics; and the student appeared to demonstrate improvement with the Special Education Coordinator, at the Center. The guardian testified that according to the student's 2007/08 report card, he completed four classes and received "C's" and "B's"; and thus far for the 2008/09 school year, he received the following grades: "C's", "B's", an "A" and three (3) "F's"; and she was not advised that the student was failing in certain subjects.

The guardian testified that she would like for the student to receive good grades and improve himself; and not repeat his grade "again", stating that the student was retained in the 5th grade. The guardian also testified that the school is a good school however, it fail to offer the one on one instruction the student requires, it is not a special education school, and the student sits in the SEC's office daily, completing assignments he should be completing in a classroom. The guardian testified that three (3) of the student's special education teachers left the school, and as a result the SEC provides the student instruction, as needed; and there is no basis for the student's grades because he has no special education teacher.

The guardian testified that she failed to communicate to DCPS concerns regarding the unavailability and inconsistency of a special education teacher for the student, however, expressed concerns to the SEC, who informed her that the student would complete his assignments in his office. The guardian testified that the student is unable to receive the appropriate care at he requires one on one instruction, is unable to focus with a classroom full of children; and his last class consisted of approximately 20 students.

The guardian concluded by testifying that she visited the School, there are only a few students in each class, there are two (2) floors of classrooms in the building, compared to which has more students and three (3) floors of classrooms.

Student

The student testified that each day, he retrieves his classroom assignments from his general education teachers, and takes his assignments to the SEC's office, where he completes the assignments, and when needed receives assistance from the SEC.

The student also testified that he spends no time in a classroom; and is in the SEC's office the entire day; except he attends a reading resource room for .5 hours on Monday and Wednesday, where he participates in reading and communicating sounds; and every Thursday, he visits a counselor for approximately 1 hour. The student testified that he is the only student in the office; and there are times when he is alone in the SEC's office.

X. DISCUSSION AND CONCLUSIONS OF LAW

ISSUE 1

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

Petitioner represents that DCPS failed to provide the student an appropriate placement for the 2008/09 school years, although it was evident that he required a full time special education program, in a therapeutic environment, DCPS maintained him at School, which offers an inclusion program.

Petitioner represents that the student fails to receive a full-time special education program; and only receives .5 hours of resource room time twice per week. Petitioner also represents that the student has no special education teacher, although his IEP recommends 30 hours per week of specialized instruction; which is denial of a FAPE. Petitioner represents that the student spends each day in the SEC's office, and is occasionally alone completing assignments without assistance.

DCPS represents that the student's placement is appropriate and his IEP is implemented at and Petitioner failed to satisfy its burden of proof by presenting evidence that the student is denied a FAPE, because he failed to receive services; and such a finding is necessary before a determination that the student is entitled to compensatory education services.

DCPS also represents that the parent chose to send the student to School; and when the school ultimately determined that it could not implement the student's IEP, DCPS informed parent that it would seek another school for the student. DCPS also represents that it anticipates that such a school will be located in the near future; a placement meeting will be held, and parent will be provided the opportunity to visit the proposed school for the student. Petitioner advised the court that on April 7, 2009, after the due process complaint was filed, DCPS agreed to fund the student's placement at School.

ANALYSIS

IDEA, 34 C.F.R. §300.116

According to 34 C.F.R. §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 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 record reflects that the placement decision was not 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. According to the guardian's testimony, during the 2008/09 school year, [redacted] decided to remove the student from the inclusion classroom setting, require that on a daily basis, the student would retrieve his assignments from the general education teachers, and return to the SEC's office where he completes the assignments, without the support and assistance of a special education teacher.

IDEA also requires that 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.

The record reflects that although DCPS convened annually to discuss and determine that the student's placement; it failed to provide the student a placement where his IEP could be implemented, and he could receive educational benefit; as contemplated by IDEA.

IDEA contemplates that during an annual review of a student's IEP, the IEP team will review the student's IEP, academic, developmental, and functional needs, ability to progress in his current placement, evaluations, academic and behavioral history, input from parent, teachers, and others, and determine whether the recommended level of services are sufficient, and the placement is appropriate to meet the student's academic, developmental, and functional needs. If it is determined that the level of services and/or placement are insufficient or inappropriate, IDEA expects that the team will revise the student's IEP to ensure that it is reasonably calculated to provide the student "some educational benefit"; the student's needs can be met in the placement, his IEP implemented, and he can receive educational benefit.

IDEA also requires that the student's placement is based on his IEP. The record reflects that prior to revision of the student's IEP on December 17, 2008, the student's IEP recommended that the student expend 67% of his time out of the general education setting; and receive 21.7 hours of specialized instruction and related services. However, the student failed to receive the specialized instruction recommended in his IEP. DCPS failed to ensure that the student's placement was determined at least annually, and as contemplated by IDEA, and was based on his IEP. The evidence is insufficient to determine whether the student's placement at [redacted] was as close as possible to his residence.

In addressing *IDEA's LRE requirements* in determining the educational placement of a student with a disability, the Hearing Officer finds that DCPS failed to comply with these requirements. IDEA provides that 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. See, 34 C.F.R. §300.116.

DCPS failed to consider the potential harmful effects on the student, by removing the student from the inclusion setting, and failing to identify an appropriate placement for the student, where his IEP could be implemented; and placing the student in the SEC's office, where he receives no specialized instruction. DCPS was aware that the student's 2008/09 IEP recommended 30.0 hours of specialized instruction in a special education (resource) setting, 1.0

hours of psychological counseling, per week; and that it was unable implement the student's IEP, however, it failed to provide the student an appropriate placement.

DCPS failed to consider the potential harmful effects of denying the student a special education teacher, and specialized instruction for the entire 2008/09 school year, and the fact that the student was once retained in the 5th grade; received failing grades in three (3) of his classes this year, compared to last year; and fail to receive the services recommended in his IEP, placing the student at risk of another retention.

DCPS also failed to consider the potential harmful effects on the quality of services the student requires, by placing the student in an inclusion environment where he was expected to perform at the same level as non-disabled students, however, is unable to fully participate or have access to the general curriculum, because of his learning disability.

In addition, the nature of the student's disability is such that education in a general education or inclusion setting, even with the use of supplementary aids and services, cannot be achieved satisfactory. The student requires a more restrictive environment, where he can access the general curriculum, receive the one on one instruction he requires; and educational benefit. DCPS' decision to maintain the student's placement at _____ although aware that it was unable to provide the student the specialized instruction recommended in his IEP, fails to comply with the ***Least Restrictive Environment (LRE)*** requirements of IDEA.

The Hearing Officer concludes that DCPS failed to comply with the procedural requirements of IDEA, in determining the educational placement of the student.

Standard for Determining Appropriateness of Educational Setting

The standard for determining the appropriateness of a general education setting for a particular student is whether the student can be "educated satisfactorily" in the setting. Oberti v. Board of Education, 995 F.2d 1204 (3rd Cir. 1993).

"In determining whether a child with disabilities can be educated satisfactorily in a regular class with supplementary aids and services...[several factors should be considered], including:

- 1) Whether the school district has made ***reasonable efforts to accommodate*** the child in a regular classroom;
- 2) The ***educational benefits*** available to the child in a regular class, with appropriate supplementary aides and services, as compared to the benefits provided in a special education class; and
- 3) The ***possible negative effects of the inclusion*** of the child on the education of the other students in the class." Id.

In addressing the *first* criteria, the student's disability is specific learning disability, in mathematics, reading, and written expression; and according to the student's December 17, 2008 IEP, a special education (resource) setting is recommended for the student, 30.0 hours of specialized instruction and 1.0 hours of psychological counseling, per week. However, the student testified that each day, he retrieves classroom assignments from his general education teachers, and returns with assignments to the SEC's office, where he completes the assignments independently, and as needed receives assistance from the SEC. The student testified that he is the only student in the office; and there are times when he is alone in the SEC's office.

The student also testified that he spends no time in a classroom; and is in the SEC's office the entire day; however, attends a reading resource room for .5 hours on Monday and Wednesday of each week, where he participates in reading and communicating sounds; and every Thursday, he visits a counselor for approximately 1 hour.

Parent testified that the student began attending _____ school during the 2007/08 school years; and during the 2008/09 school years, the student was placed in the SEC's office, where he completes assignments from his general education teachers. Parent also testified that during the 2008/09 school year the student has not been in a classroom, has no special education teacher, and since he began attending the school, approximately three (3) of his Special Education Teachers departed from the school, resulting in no specialized instruction for the student. Parent also testified that thus far this school year, the student's grades have declined, compared to the 2007/08 school year.

In addition, prior to development of the December 17, 2008 IEP, according to the guardian and student, DCPS failed to ensure that the student receive the specialized instruction recommended in his IEP, in a classroom where his disability was accommodate; and special education services were provided by a special education teacher. According to parent, three of the student's special education teachers have departed the school since the student began attending during the 2007/08 school year.

During the 2008/09 school year, DCPS determined that education of the student in regular classes with the use of supplementary aids and services could not be achieved satisfactorily; and that the student could not be accommodated in the inclusion classroom. DCPS failed to exercise reasonable efforts to accommodate the child in the regular classroom, and instead attempted to accommodate the student disability "outside" of the regular classroom. DCPS removed the student from the general education/inclusion setting and placed the student in the SEC's office, however, DCPS failed to provide the student the 21.75 hours of specialized instruction, as recommended in his IEP.

On December 17, 2008, the level of special education services was increased from 21.75 to 31.0 hours of specialized instruction, and agreed that the student's IEP could not be implemented at _____ and the student required and would receive an alternate placement. However, as of the date of hearing, although DCPS agreed on April 17, 2009 to fund the student's placement at the _____ School, the student is not in an appropriate placement,-

and fail to receive the special education and related services he requires, and as recommended in his IEP. According to the student's guardian, the student remains at home, pending the provision of transportation by DCPS. DCPS is unable to accommodate the student's disability in a regular classroom.

In addressing the *second* criteria, the student's December 17, 2008 IEP includes general and DC-CAS accommodations ; however, fail to include appropriate supplementary aides or services for the student, although the student has a specific learning disability in mathematics, reading, and written expressing; and can benefit from the use of appropriate supplementary aides and services. Assuming arguendo, the student's IEP includes such services, a special education teacher is not available to implement the services, included in the student's IEP.

In addition, any educational benefits the student may receive in a regular lass, with appropriate supplementary aides and services, is far outweighed by the benefits he would receive in a full-time special education class of his peers, where he can receive the one on one instruction he requires, and appropriate supplementary aides and services.

If the student received any value from the education afforded by DCPS, even with the use of appropriate accommodations/modifications, supplementary aides and services, it was de minimis; and fails to satisfy *Rowley's* "some educational benefit" standard. This is evidenced by the unavailability of a special education teacher to implement the student's IEP, and a decline in the student's grades this year, compared to the 2007/08 school years.

The student requires a less integrated academic setting, with learning disabled peers, accommodations/modifications, supplementary interventions and supports, remedial and related services; and an inclusion setting with non-disabled peers, without a special education teacher to implement the IEP, or accommodations/modifications, interventions and supports, fail to serve the student's needs, or provide educational benefit.

The *third* criteria, requires an inquiry into the possible negative effects of the inclusion on the student's education and other students in the class."

According to the student's IEP, his disability impacts his learning. Therefore, placement of a student with a specific learning disability in reading, mathematics, and written expression, in an inclusion setting, without the support of a special education teacher; where he is expected to perform at the same level as non-disabled students, is likely to continue to produce regression and not progression.

In addition, receiving specialized instruction in an inclusion classroom and/or the SEC's office, isolates and ostracizes the student, where he is noticeably different than the other students, which presents opportunity for ridicule and harassment from non-disabled students; and negatively impacts the student's self esteem and confidence, furthering hindering his ability to progress academically.

Furthermore, removing the student from the inclusion setting, requiring that he retrieve his assignments from general education teachers, on a daily basis, and returns to the SEC's office where he remains during the day, isolates the student from other students, denies him access to the general education curriculum, and has negative implications on the student, his learning, self esteem, and confidence.

The student's self esteem, frustration level, desire to succeed, and continued interest in school, is likely to be compromised and/or diminished, should he remain in an inclusion setting; and not receive placement in a therapeutic environment, as recommended in his IEP. The student is denied access to the general curriculum; and fails to receive educational benefit because of the unavailability of specialized instruction, an inappropriate placement, and the lack of supplementary aids and services.

DCPS failed to exercise *reasonable efforts to accommodate* the child in a regular classroom; the *educational benefits* available to the child in a regular class, with appropriate supplementary aides and services, is far outweighed by the benefits the student can receive in a special education class with his peers; and the *possible negative effects of the inclusion* of the child on the education of the other students in the class, are significant. is not an appropriate educational placement for the student.

The Hearing Officer concludes that DCPS failed to satisfy the standard set forth in *Oberti v. Board of Education*, in determining the appropriateness of as a general education setting for the student; and comply with the procedural requirements of IDEA, in determining the student's educational placement.

DISPOSITION

Based on the aforementioned, it is the Hearing Officer's decision that Petitioner satisfied its burden of proof 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, representing a procedural and substantive violation of IDEA, and denial of a FAPE to the student.

ISSUE 2

Whether DCPS denied the student a free appropriate public education; by failing to provide the student appropriate special education and related services during the 2008/09 school years?

Petitioner represents that DCPS failed to provide appropriate educational, related, and special education services for the 2008/09 school years; although the student has been in special education for years, and has not made academic or emotional progress. Petitioner also represents that the student is not receiving the services that would produce progression, although his current IEP recommends 30 hours of special education services; therefore, DCPS denied the student a FAPE.

DCPS represents that Petitioner failed to satisfy its burden of proof that the student was denied a FAPE, because he failed to receive services; and there must be a finding of denial of FAPE, before the student can be entitled to compensatory education services.

ANALYSIS

In regard to the provision of special education and related services, IDEA, 34 C.F.R. §300.323 (c) provides that each public agency must ensure that—

- (4) 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
- (5) 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 December 17, 2008, DCPS convened a Multidisciplinary Development Team (MDT) meeting to discuss the student's academic and social performance, review a psycho-educational and speech evaluation, review and/or revise the student's IEP; and placement.

After review and discussion of the evaluations, the MDT determined that the student required an increase in special education and related services from 20 to 31 hours; a full-time special education program; and placement in a therapeutic environment. The MDT developed an IEP for the student recommending 30 hours of specialized instruction, and 1.0 hours of psychological counseling, weekly; and placement in a special education (Resource) Setting. The MDT also determined that cannot implement the student's IEP.

At the hearing, Petitioner represented that on April 17, 2009, DCPS agreed to place the student at School, however, transportation had not yet been provided. Petitioner also represented that will not permit the student to remain at its school, pending the provision of transportation services at High Road, as a result, the student is without an appropriate placement, where his IEP can be implemented and he can receive the specialized instruction and related services recommended in his IEP.

Approximately four (4) months lapsed from December 17, 2008, the date the IEP team increased the level of services the student requires, and determined that is unable to implement his IEP, and the student requires an alternate placement, where he can receive the services recommended in his IEP.

In addition, the student testified that each day during the 2008/09 school year, he retrieves his classroom assignments from his general education teachers, and returns with the assignments to the SEC's office, where he completes the assignments independently, and when needed receives assistance from the SEC. The student also testified that he spends no time in a-

classroom; and is in the SEC's office the entire day; however, attends a reading resource room for .5 hours on Monday and Wednesday, where he participates in reading and communicating sounds; and every Thursday, he visits a counselor for approximately 1 hour. The student testified that he is the only student in the office; and there are times when he is alone in the SEC's office.

Parent testified that the student began attending _____ school during the 2007/08 school years; and that during the 2008/09 school years, the student is placed in the SEC's office daily, where he completes assignments from his general education teachers. Parent also testified that during the school year the student has not been in a classroom, has no special education teacher, and since he began attending the school, approximately three (3) of his Special Education Teachers left the school. As of the date of hearing, the student has no placement; and therefore, receives no special education or related services.

Finally, DCPS failed to present evidence refuting allegations that it failed to provide the student appropriate special education and related services during the 2008/09 school years; as recommended in his IEP.

DISPOSITION

It is the Hearing Officer's decision that Petitioner satisfied its burden, by presenting evidence that DCPS failed to provide the student special education and related services during the 2008/09 school years, representing a procedural and substantive violation of IDEA, and denial of FAPE.

XI. ORDER

Based on the aforementioned, it is hereby:

- (1) **ORDERED**, that DCPS shall fund the student's placement and transportation for the school; and it is further
- (2) **ORDERED**, that within thirty (30) days of the student's placement at the school, the MDT shall convene to conduct a periodic review of the student's IEP and placement, review evaluations, and revise the student's IEP, as appropriate; and develop a compensatory education plan; and it is further
- (3) **ORDERED**, that DCPS shall schedule all meetings through the parent's counsel, Fatmata Barrie, Esquire, in writing, via facsimile at (202) 626-0048.
- (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 School, 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 this decision and order are effective immediately.

XII. 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

4-28-09

Date Filed: _____

Attorney Ramona M. Justice
Hearing Officer

cc: Attorney Laura George, Office of the Attorney General
Attorney Fatmata Barrie: Fax: 202-626-0048