



**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. The student is a resident of the District of Columbia, and is 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 developmentally delayed (DD).

On March 13, 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) reevaluate the student within a reasonable period of time; and (2) provide the student an appropriate educational placement. Petitioner also requests the court to determine whether the student is entitled to compensatory education services due to DCPS’ failure to reevaluate the student, in a timely manner; and provide an appropriate IEP.

The due process hearing convened on April 17, 2009, at 9:00 a.m.; at Van Ness Elementary School, located at 1150 5<sup>th</sup> 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 13, 2009* due process complaint:

- (1) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to reevaluate the student, within a reasonable period of time?
- (2) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide the student an appropriate educational placement?
- (3) Whether the student is entitled to compensatory education services, due to DCPS' failure to reevaluate the student in a timely manner; and provide and appropriate IEP?

#### V. RELIEF REQUESTED

- (1) The Hearing Officer shall find that DCPS denied the student a FAPE, by failing to conduct reevaluations in a timely manner.
- (2) The Hearing Officer shall find that DCPS denied the student a FAPE, by failing to provide an appropriate educational placement.
- (3) DCPS shall place and fund the student in one of the following programs:  
or the . In the event she is accepted  
in another, unidentified educational program, the parent will seek placement of the student in that program at the due process hearing.
- (4) DCPS shall conduct the following assessments: comprehensive psychological evaluation, speech and language evaluation, educational evaluation, and adaptive physical education evaluation.
- (5) After placement in the program, DCPS shall convene an IEP meeting to review all evaluations, and develop an appropriate IEP;
- (6) All meetings shall be scheduled through counsel for the complainant, Christopher L. West., Esq., in writing, via facsimile, at 202-742-2097 or 202-742-2098.
- (7) Provide the student with a due process hearing within 20 calendar days of a request on any issue arising out of the noncompliance with the DCPS' obligation hereunder, or any disagreement with the assessment, programming or placement the Parents may have.
- (8) DCPS agrees to pay counsel for the parent's reasonable attorney's fees.
- (9) In the event that the DCPS shall fail to comply with the terms herein, then under the Conciliation Agreement, the Parents shall have the authority to use self help without further notice to the DCPS, and initiate an IEP with the DCPS' invited participation, and unilateral placement in an interim school or educational program until such time the DCPS can come into compliance and properly assess, program and/or participate.

*Note: At the due process hearing, Petitioner withdrew Issues 2 and 3 of the due process complaint.*

## **VI. PROCEDURAL POSTURE**

On March 13, 2009, Petitioner's Attorney filed a due process complaint. On March 19, 2009, the Hearing Officer issued a Pre-hearing Conference Notice scheduling the Pre-hearing Conference for March 23, 2009 at 3:00 p.m.. The pre-hearing conference failed to proceed as scheduled, due to the Hearing Officer's unavailability.

On April 9, 2009, DCPS filed "District of Columbia Public School's Response and Motion to Dismiss Parent's Administrative Due Process Complaint". DCPS Motion to Dismiss was based on grounds that there are no genuine issues of material fact for the court to decide; Petitioner's request for reevaluations is for reasons other than that authorized under the IDEA; and that the issues are precluded pursuant to the Doctrine of Res Judicata, and collateral estoppel. On April 9, 2009, the parties filed disclosures; and on April 16, 2009, Petitioner filed "Petitioner's Opposition to District of Columbia Public School's Motion to Dismiss". The due process hearing convened on April 17, 2009 at 9:00 a.m., as scheduled.

## **VII. PRELIMINARY MATTERS**

As a preliminary matter, Petitioner reserved and withdrew Issues "2" and "3", also referred to as Issues "B" and "C", of the complaint. DCPS Motion to Dismiss is based on fact the reevaluations requested for student were for sole purpose indicated by the due process complaint to inquire regarding the teacher's lack of appropriate qualifications affected the student's level of academic functioning. The student's current teacher doesn't meet highly qualified requirement under no child left behind and parent requesting reevaluations to determine if student has not received appropriate academic instruction, as a result of the teacher's qualifications.

DCPS also represents that the Motion to dismiss is based on fact that the purpose of reevaluations is to decide programming for a student, not to determine whether the student's level of academic functioning has changed because the teacher is not qualified to teach the student. In addition, DCPS represents that this issue was addressed in the August 19, 2008 and September 17, 2008 due process complaints. DCPS further represents that in the prior complaint, Parent requested reevaluations because she believed the teacher was not qualified under the highly qualified provision of the "No Child Left Behind (NCLB)".

DCPS represents that the Hearing Officer in the prior complaint determined that highly qualified provision of the NCLB fail to create a cause of action for the parent in regard to a teacher not being qualified and in fact that if a parent has issue whether teacher meets those requirements they can contact the Principal at the school, or file a complaint with the State Education Agency, which failed to occur in this matter. DCPS argues that to file a complaint for that reason is contrary to IDEA's intent with regard to the purpose of reevaluations.

DCPS represents that secondly, at the October, 2008 hearing it was indicated that parent was authorized independent evaluations (comprehensive psychological and speech and language), which they failed to obtain. DCPS admit and concede that there was an MDT meeting in February, 2009, and parent requested reevaluation and DCPS agreed to perform a Psychological, Educational, Speech and Language, Occupational Therapy, and Adaptive Physical Therapy Evaluation. DCPS represents that the Speech and Language Evaluation was completed at Children's Hospital; and the "Confidential Psychological Reevaluation" is complete. DCPS also represents that its ability to complete the additional evaluations is hindered due to the student's absence, because of illness.

Petitioner represents that prior HOD dismissed the complaint, however, page 3 of the complaint provides that the decision would not include allegations regarding the 2008-09 school years. Issues regarding this complaint pertain to issues occurring after issuance of the prior HOD.

Petitioner also represents that 34 C.F.R. §300.303 provides that reevaluations must be conducted when requested by parent, and that under the Cartwright v. Lambert decision, there is no condition precedent to completing reevaluations; and parent does not have to justify a request for reevaluations. Petitioner indicates that its request for reevaluations is in response to a letter received from DCPS indicating that the student's teacher is not highly qualified, and it's a standard that DCPS has established.

Parent also represents that DCPS issued an IEE letter prior to the prior complaint and the services providers fail to evaluate the student, with the condition that the letter is performed within 45 days. Parent represents that the complaint is not based on the prior IEE letter, however, is based on the January 6, 2009 request for reevaluations, and DCPS' agreement at the February 4, 2009 MDT meeting to reevaluate the student within 45 days, and its failure to complete the evaluations within that time period.

DCPS represents that Petitioner requested two of the evaluations in February 4, 2009 which he was already authorized to obtain independently, and failed to obtain; and the team represented in good faith that they would complete the evaluations within 45 days and when DCPS failed to complete the evaluations within that time period, Petitioner filed a complaint, which is disingenuous; especially because the student is absent for extended periods of time due to illness. DCPS represents that the school has worked in cooperation with parent to meet the student's educational needs.

DCPS represents that there is no denial of FAPE, the student receives all services, evaluations are current, and parent was at IEP meeting and involved in all decisions in revising the IEP, and parent signed the IEP in agreement.

Petitioner represented that it is not intending to relitigate issues in the prior complaint, or the IEE letter; and that it is unable to demonstrate educational harm to the student as a result of the delay because the evaluations were not completed. Petitioner represents that it is prepared to demonstrate that the parent's decision making with regard to the student's educational-

program has been impeded as a result of DCPS' failure to complete the evaluations; and under 34 C.F.R. §300.506, must show educational harm or parent's decision making significantly impeded.

DCPS responds that §300.506 provides that there must be a showing that parent has not had meaningful participation in the decision making for the student, which is not the case here because parent signed the IEP in agreement; and parent has not participated in decisions regarding the development of an educational program based on evaluations because the evaluations have not been completed. Petitioner is unable to show harm regarding a meeting which has not occurred, therefore, there can be no showing of harm.

DCPS clarified that according to 34 C.F.R. 300.513(2) provides that a Hearing Officer may find denial of a FAPE, due to procedural violations if the procedural inadequacies impeded a child's right to a FAPE, or significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child.

### **Motion to Dismiss**

In addition to representations made at the hearing, in summary DCPS' Motion to Dismiss includes representations that the complaint should be dismissed on grounds that there are no genuine issues of material fact for the court to decide; Petitioner's request for reevaluations is for reasons other than that authorized under the IDEA; and that the issues are precluded pursuant to the Doctrine of Res Judicata, and collateral estoppel.

In addition to representations made at the hearing, in summary, Petitioner's Opposition to the Motion to Dismiss includes representations that there is no condition precedent warranted to determine the need for reevaluations; and the IDEA does not establish a condition precedent as a requirement for a student to be reevaluated by the school system. Petitioner also responds that the issue of request for reevaluations for the 2008/09 school years as not litigated in the prior matter, therefore, res judicata and collateral estoppels are not applicable in this matter. In conclusion, Petitioner represents that the complaint reflects issues from the 208/09 school year, and not the prior school year.

### **Standard Operating Procedures (SOP), Section 1002.2 provides:**

"The Hearing Officer shall dismiss the case if he/she determines that a hearing has been initiated for reasons other than those under the Hearing Officer's jurisdiction or authority to resolve under IDEA. The Hearing Officer will have a maximum of 10 days from the date of the hearing to issue an Order of Dismissal, noting the reason for dismissal of the hearing."

A "*motion to dismiss*" requests that the court decide that a claim, even if true as stated, is not one for which the law offers a legal remedy.

The possible bases of the motion are laid out in Rule 12(b) of the Federal Rules of Civil Procedure. As of 2004, Rule 12(b) lists seven possibilities:

1. **Lack of subject matter jurisdiction.**
2. **Lack of jurisdiction over the person.**
3. **Improper venue.**
4. **Insufficiency of process.**
5. **Insufficiency of service of process.**
6. **Failure to join a party**
7. **Failure to state a claim upon which relief can be granted.**

*First*, the court finds that although DCPS' arguments are compelling, it is not convinced that Petitioner initiated the due process complaint for reasons other than those under the Hearing Officer's jurisdiction, or authority to resolve under IDEA, which would serve as grounds for granting the Motion to Dismiss the complaint, under SOP, Section 1002.2.

*Second*, the court is not convinced that there exist sufficient grounds for dismissal of the complaint pursuant to Rule 12(b) of the F.R.C.P., as there are genuine issues of material fact for the court to decide; and according to the evidence the issues in this matter are not identical or similar to the issues in the prior complaint, therefore, they are not barred under the Doctrine of Res Judicata, or collateral estoppel. Based on the aforementioned, Respondent's Motion to Dismiss the complaint is denied.

## **IX. DISCLOSURES**

The Hearing Officer inquired whether disclosures were submitted by the parties and whether there were any objections to the disclosures submitted. DCPS objected to the introduction into evidence, Petitioner's Exhibits 14-23, representing that that exhibits were included in the prior complaint, and are not relevant to the issues in the instant matter.

The Hearing Officer determined that DCPS was not prejudiced by admitting into evidence Petitioner's Exhibits 14-23, for the limited purpose of providing the court background information. Receiving no further 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 23; and a witness list dated April 9, 2009.

### **DISCLOSURES ADMITTED INTO EVIDENCE ON BEHALF OF RESPONDENT**

- Respondent's Exhibits 01 through Respondent's Exhibit 11; and a witness list dated April 9, 2009.

## IX. STATEMENT OF CASE

1. The student is \_\_\_\_\_ years of age, and attends \_\_\_\_\_ a public school located in the District of Columbia. The student began attending the school during the 2008/09 school year. The student is a resident of the District of Columbia, and is 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 developmentally delayed (DD).

2. On August 19, 2008 and September 17, 2008, Petitioner filed a due process complaint alleging that DCPS denied the student a free appropriate public education (FAPE); by failing to provide an appropriate educational placement; implement the IEP; and conduct reevaluations, in violation of IDEA.

3. On October 23, 2008 a due process hearing was held; and on October 28, 2008, the Hearing Officer issued a decision dismissing the complaint, due to Petitioner's failure to satisfy its burden of proof, and present evidence that DCPS denied the student a FAPE.

4. On December 22, 2008, District of Columbia Public Schools, Office of the Chancellor, forwarded a letter to parent indicating that under the "No Child Left Behind (NCLB) Act of 2001, it must provide parents notice when their child's teacher does not meet the highly qualified teacher requirements and that their child has been taught by that teacher for four or more consecutive weeks.

The letter also indicated that the student is currently taught by a teacher who does not meet the highly qualified requirement established by D.C. Office of the State Superintendent of Education, and while teachers may have a valid teaching license, the license must be in the subject area being taught for the teacher to meet state highly qualified requirements; or it may be the case that the teacher has not yet earned a teaching license in D.C. The letter concludes that in either case, all teachers who are not licensed are required to submit a Highly Qualified Action Plan that outlines a specific timeframe for meeting licensure requirements.

5. On January 6, 2009, Petitioner's counsel forwarded a letter to the Deputy Chancellor, DCPS, Office of Special Education, requesting a Comprehensive Psychological Evaluation (psycho-educational and clinical), Speech and Language Evaluation, Occupational Therapy Evaluation, and Adapted Physical Education Evaluation, to determine how the student has been impacted by his teacher failing to meet the highly qualified requirements of NCLB and D.C.

6. On January 16, 2009, an Individualized Education Program (IEP) team meeting was held, to review and revise the student's IEP. Meeting participants included: parent, Special Education Coordinator, Special Education Teacher, Speech Therapist, Beyond Behaviors Counselor, Adapted Physical Education Teacher, Occupational Therapist, and the DCPS Psychologist. The MDT meeting notes reflect reports presented by the parent, Speech and Language Pathologist, Psychologist, Occupational Therapist.

The IEP team developed an IEP for the student, recommending 29.5 hours of specialized instruction, 1 hour of speech and language therapy, 1.0 hours of occupational therapy, and .5 hours of Adapted Physical Education, weekly. The team also recommended Extended School Year (ESY) and transportation services for the student.

7. On February 4, 2009, DCPS convened an IEP team meeting to review and revise the student's IEP. Meeting participants included: Special Education Coordinator, Speech and Language Pathologist, Occupational Therapist, School Psychologist, Special Education Teacher, Adapted Physical Education Teacher, parent's Advocate, and the school nurse.

The IEP team developed an IEP recommending 25.5 hours of specialized instruction, .5 hours of adapted physical education, 1 hour of speech language therapy, and 1 hour occupational therapy, weekly. The advocate requested testing within 45 days; and signed a consent for reevaluation form, on parent's behalf, authorizing DCPS to reevaluate the student. The team also developed a Student Evaluation Plan (SEP), recommending full evaluation to determine the student's eligibility for services. The team recommended a Psychological, Speech Language, Educational, Occupational Therapy, and Adapted Physical Education evaluation.

The record reflects that a Psychological Evaluation was completed on September 12, 2007, Adapted Physical Education Report on November 14, 2007, Speech and Language Evaluation on September 27, 2007, and Clinical Psychological Evaluation on September 28, 2007.

8. On February 10, 2009, Petitioner's counsel forwarded a letter to the SEC at requesting a fax copy of the student's IEP developed on February 4, 2009.

9. On March 13, 2009, March 11, 2009 and March 13, 2009, DCP S conducted a Psychological reevaluation, to address parent's concerns regarding the student's academic performance; and on March 13, 2009 completed the "Confidential Psychological Re-evaluation" report.

The evaluator determined that based on the student's cognitive deficits, severe receptive and expressive language skills, impaired social skills and below age level adaptive functioning; her current educational classification suggests that she continues to demonstrate atypical autistic like behaviors. The evaluator also determined that the student meets the criteria for a student with Pervasive Developmental Disorder; and continued to be eligible for special education services. The evaluation also included recommendations regarding placement, specialized instruction and related services.

10. On March 13, 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) reevaluate the student within a reasonable period of time; and (2) provide the student an appropriate educational placement. Petitioner also requests the court to determine whether the student is entitled to compensatory education services due to DCPS' failure to reevaluate the student, in a timely manner; an provide an appropriate IEP.

## **X. WITNESSES**

### **Witnesses for Petitioner**

Parent

### **Witnesses for Respondent**

No witnesses were presented.

## **Witness Testimony**

### **Petitioner's Witnesses**

#### **Parent**

Parent testified that the student's has a disability of Autism Spectrum and a Sensory Disorder, and the student has attended \_\_\_\_\_ since the 2007/08 school year,

Parent testified that she received a letter from the Chancellor's Office, expressing concerns regarding qualifications of the student's teacher, and based on that letter requested reevaluation of the student to determine her level of performance academically. Parent also testified that the student is not where she should be for her age, and the perhaps the student's teacher is not qualified to teach a student with autism; and the evaluations will also assist in determine whether the student's placement is appropriate.

Parent testified that she has not been able to determine the student's current level of academic functioning, although she receives progress reports indicating that she is beginning in math, reading on the third grade level, and cognitively. Parent testified that she disagrees with the progress reports because last year she was advised that the student met the goals in her IEP.

Parent also testified that she prefers that the student is reevaluated, however, she is not affected by any delay in DCPS completing the evaluations, "understanding that it will take a while, and will be completed in a convenient time; and the student receives therapy at school and the evaluations cannot interfere with the therapy.

Parent testified that there was an IEP team meeting in February, 2009, and she received a Letter of Invitation from DCPS, for a meeting on April 29, 2009; and she prefers a scheduled date and time that the evaluations will be completed, and when she can receive the results to determine the student's current performance and where she was at the start of school.

Parent concluded by testifying that the student receives reading (third grade level), arithmetic, numbers, alphabets, spelling, and has difficulty with reading.

## XI. DISCUSSION AND CONCLUSIONS OF LAW

### ISSUE 1

#### **Whether DCPS denied the student a free appropriate public education (FAPE); by failing to reevaluate the student, within a reasonable period of time?**

Petitioner represents that under 34 C.F.R. §300.303(a), the public school system is required to conduct evaluations when requested by the teacher or parent; and that under 34 C.F.R. §300.513(a)(2), in matters alleging procedural violations, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: (i) impeded the child's right to a SAPE; (ii) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE; or (iii) caused deprivation of educational benefit.

Petitioner's counsel asserts all prior allegations, and represents that on or about December 22, 2008, DCPS submitted correspondence to parent indicating that the student's teacher fail to meet the highly qualified teaching requirements. Petitioner also represents that in response to the letter, on January 6, 2009, parent through counsel, submitted correspondence to DCPS requesting reevaluations to address whether the teacher's lack of appropriate qualifications affected the student's levels of academic functioning.

Petitioner concludes that to date, DCPS failed to provide parent copies of the completed assessments, and consequently, DCPS' failure to conduct the reevaluations significantly impedes the parent's decision making regarding the appropriateness of the student's educational programming and educational placement.

DCPS represents that the purpose for a student evaluation is to "determine if the child is a child with a disability..." and "to determine the educational needs of the child." 34 C.F.R. §300.301 (c)(2)(i) and (ii); and as alleged in the complaint, parent requested "reevaluations to address whether the teacher's lack of appropriate qualifications affected the student's level of academic functioning."

DCPS also represents that a due process hearing under the IDEIA is not the proper forum for challenging alleged qualifications or the lack thereof of an educator; and the statutory protection under IDEIA for reevaluation does not apply to an educator's qualifications but is rather squarely in place for determining a child's disability and how to address educational deficits.

Once all evidence was presented, DCPS entered on the record a Motion for Directed Verdict, representing that Petitioner failed to demonstrate harm as a result of the alleged violation, parent testified that she is not harmed because she is aware that reevaluations may take time to complete, and she received a Letter of Invitation for a meeting to review results of the student's reevaluations.

DCPS also represents that Petitioner failed to satisfy its burden of proof, at the time of the complaint evaluations had not been completed, therefore, there was no meeting to review the evaluations, and parent was not impeded from rendering decisions regarding the student's education or the provision of a FAPE.

Petitioner objects to the Motion for Directed Verdict representing that parent requested evaluations in January, 2009, because of concerns regarding the student's level of academic functioning and student is not on grade level. Petitioner represents that DCPS failed to reevaluate the student within a reasonable period of time.

### ANALYSIS

According to IDEA, at 34 C.F.R. §300.303 (a) (1), a public agency **must** ensure **reevaluation** of each child with a disability is conducted in accordance with Sections 300.304 through 300.311—

- (1) If the public agency determines that educational or related services needs, including improved **academic achievement and functional performance**, of the child **warrant** a reevaluation; **or**
- (2) If the **child's parent** or teacher requests a reevaluation.

In addition, subparagraph (b)(1)(2) of this provision provides that a reevaluation conducted under paragraph (a) of this section: (1) **may** occur not more than once a year, unless parent and the public agency agree otherwise; and (2) **must** occur at least once every three years, unless the parent and the public agency agree that a reevaluation is unnecessary.

IDEA is replete with provisions emphasizing the necessity of monitoring the IEP for revision purposes. E.g., 20 U.S.C. §1414 (stating reevaluations **shall** occur at the **request of parents provided they do not total more than one per year**). The Supreme Court forcefully declared that continual evaluations are necessary, and parents must have the ability to seek redress for a school's failure to sufficiently monitor a child's progress under the IEP.

The record reflects that on January 6, 2009, Petitioner's counsel forwarded a letter to the Deputy Chancellor, DCPS, Office of Special Education, requesting a Comprehensive Psychological Evaluation (psycho-educational and clinical), Speech and Language Evaluation, Occupational Therapy Evaluation, and Adapted Physical Education Evaluation, to determine how the student has been impacted by his teacher failing to meet the highly qualified requirements of NCLB and D.C.

The record also reflects that a Psychological Evaluation was completed on September 12, 2007, Adapted Physical Education Report on November 14, 2007, Speech and Language Evaluation on September 27, 2007, a Clinical Psychological Evaluation on September 28, 2007, and classroom observation was completed on September 10, 2008.

There is no evidence that the student was evaluated more than once in a given year, or that parent's request for reevaluation, totaled more than one per year. Therefore, according to subparagraph (b)(1)(2), DCPS *must* reevaluate the student, if the *child's parent* requests a reevaluation.

Neither the IDEA, nor the D.C. Code of Municipal Regulations, establishes a timeframe in which an LEA must reevaluate a student. Absent an established timeframe to reevaluate the student, the Hearing Officer applies the "reasonableness" standard. Applying the "reasonableness" standard, DCPS must reevaluate a student within a reasonable period of time after receiving Petitioner's request for reevaluation.

As indicated supra, the record reflects that on January 6, 2009, parent through counsel requested submitted to DCPS a written request for reevaluation of the student; and at the February 4, 2009 IEP team meeting the Education Advocate on behalf of parent, requested reevaluation of the student, and provided consent to evaluate in accordance with 34 C.F.R. §300.300 (c)(1)(i).

According to IDEA, DCPS was required to reevaluate the student within a reasonable period of time after receiving parental consent for the reevaluations, which occurred on February 4, 2009. The record reflects that parent obtained a Speech and Language Evaluation independently; and on March 13, 2009, DCPS completed a "Confidential Psychological Reevaluation". As of the date of hearing, DCPS failed to complete the educational, clinical, occupational therapy, and adaptive physical education; and more than two (2) months has lapsed since parent initiated the request for reevaluations, and provided consent to reevaluate the student.

The Hearing Officer finds that DCPS completed the Psychological Evaluation within a reasonable period of time after receiving parent's request for reevaluation and consent; however, failed to comply with the procedural requirements of IDEA, by completing the educational, clinical, occupational therapy, and adaptive physical education, within a reasonable period of time, after receiving parent's request for reevaluation and consent.

In addressing DCPS' representation regarding the basis for Petitioner's request for reevaluations, the Hearing Officer agrees that according to IDEA, 34 C.F.R. §300.301 (c)(2)(i)(ii), the purpose of a student evaluation is to determine if the child is a child with a disability and the educational needs of the child; and that a due process hearing under the IDEIA is not the proper forum for challenging alleged qualifications or the lack thereof of an educator; and the statutory protection under IDEIA for reevaluation does not apply to an educator's qualifications but is rather squarely in place for determining a child's disability and how to address educational deficits.

In addition, contrary to representations by parent's counsel, the record clearly reflects, and parent testified that the request for reevaluations was in response to a letter received from the Chancellors office regarding qualifications of the student's teacher, or the lack thereof; and to determine whether the teacher's lack of appropriate qualifications affected the student's level of academic functioning.

However, the Hearing Officer disagrees with DCPS that the complaint should be dismissed because Petitioner's request for reevaluations is for *reasons* other than that authorized under the IDEA, which is to address the teacher's qualifications or lack thereof. The only limitation IDEA places upon a request for a reevaluation conducted under paragraph (a) of this section is that a reevaluation *may* occur not more than once a year, unless the parent and public agency agree otherwise; and *must* occur at least once every three (3) years; unless parent and the public agency agree that a reevaluation is unnecessary. Absent any finding that Petitioner's request for reevaluations are limited by these provisions, DCPS must reevaluate the student within a reasonable period of time after receiving parent's request and consent, regardless of the basis for the request to reevaluate the student. See, IDEA, 34 C.F.R. §300.303 (b).

It is the Hearing Officers' decision that Petitioner satisfied its burden of proof by presenting evidence that DCPS failed to reevaluate the student within a reasonable period of time, after receiving parent's request for reevaluation, in violation of IDEA, 34 C.F.R. 300.303(a)(1)(2) and (b)(1).

### **Free and Appropriate Public Education (FAPE)**

The FAPE requirement under IDEA, is applicable to substantive and procedural violations, which may result in a denial of a FAPE. Courts have held that procedural violations that deprive an eligible student of an individualized education program or result in the loss of educational opportunity also will 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.

In alleging substantive violations under IDEA, a party challenges the *substantive* content of the educational services the disabled student is entitled to receive under the IDEA. The courts have also held that substantive harm occurs when the procedural violations in question seriously infringe upon the parents' opportunity to participate in the IEP process.

The procedural prong of the FAPE analysis, and the *first* prong of *Rowley*, in *The Board of Education of the Hendrick Hudson Sch. Dist. v. Rowley*, 459 U.S. 176 (1982), and *Doe*, 915 F.2d at 658, assesses whether DCPS complied with the procedural requirements of the IDEA, including the creation of an IEP that conforms to the requirements of the Act. However, a procedural violation of the IDEA, is not a per se denial of a FAPE. In this matter, the court determined that DCPS failed to comply with the procedural requirements of IDEA, by failing to reevaluate the student within a reasonable period of time after receiving parent's request for reevaluations.

The courts have held that even if we find that DCPS failed to comply with the procedural requirements of IDEA, such a finding does not necessarily mean that the Petitioners are entitled to relief; nor does it end our analysis. Rather, we must inquire as to whether the procedural violations result in a denial of FAPE, causing substantive harm to the student, or his parents. According to *Lesesne v. District of Columbia*, 447 F.3d 828 (an IDEA claim on procedural violations is only viable if the violation affected the student's substantive rights.)

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, if the inadequacies:

- (I) impede 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."

According to *Harris v. District of Columbia*, in an attempt to further Congress' ambitious goals for the IDEA, the Supreme Court has focused on the centrality of the IEP as "the centerpiece of the statute's education delivery system for disabled children. *Honig v. Doe*, 484 U.S. 305, 311-12 (1998). In view of the centrality of the role of the IEP in affording appropriate education to every child with a disability, Congress explicitly provided for frequent and thorough monitoring and revising of the program. As such, an evaluation's primary role is to contribute to the development of a sound IEP.

In addition, Congress repeatedly emphasized throughout the [IDEA] the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness." *Honig*. Given this language, it is clear that DCPS' failure to timely complete the physical therapy assessment and its failure to complete the educational, clinical, occupational therapy, and adaptive physical education evaluations is "certainly not a mere procedural inadequacy," however, is also a substantive violation.

In this matter, the record reflects that the evaluations requested by parent had not been performed for approximately a year and a half, therefore, the lapse of time between evaluations is sufficient to confer on Petitioner a right to request reevaluations of the student. However, the record also reflects that during this period, the agency completed annual reviews of the student's IEP, updated the IEP, and determined that additional evaluations were not warranted.

In determining whether the procedural violation results in a denial of FAPE, causing substantive harm to the student, or his parents, the court finds that Petitioner presented no evidence that the procedural inadequacy impeded the child's right to a FAPE; significantly impeded parent's opportunity to participate in all decisions regarding the student's educational program, and the provision of a FAPE to the student; or resulted in deprivation of educational benefit to the student.

In fact, at the hearing, Petitioner's counsel represented that it was not prepared to present evidence of academic and educational harm to the student; however, intended to present evidence that DCPS' delay in completing the requested evaluations, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child. However, parent testified that she prefers that the student is reevaluated, however, is not affected by any delay in DCPS completing the evaluations, because-

she “understands that it will take a while, and will be completed in a convenient time; and the student receives therapy at school, and the evaluations cannot interfere with the student receiving her therapy. Petitioner presented no evidence that the procedural violation affected the student’s or parent’s substantive rights, therefore, its claim is not viable.

It is the Hearing Officers’ Decision that Petitioner failed to satisfy its burden of proof by presenting evidence that the procedural violation caused substantive harm to the student, or his parents, resulting in a denial of FAPE.

### **Motion for Directed Verdict**

At the hearing, DCPS entered on the record a Motion for Directed Finding, representing that Petitioner failed to demonstrate that the student was harmed as a result of the alleged violation, and parent testified that she is not harmed because she is aware that reevaluations may take time to complete, and she received a Letter of Invitation for a meeting to review results of the student’s reevaluations.

DCPS also represented that Petitioner failed to satisfy its burden of proof, at the time the complaint was filed, evaluations had not been completed, therefore, there was no meeting to review the evaluations, and parent was not impeded from rendering decisions regarding the student’s education or the provision of a FAPE.

Petitioner objects to the Motion for Directed Verdict representing that although there is no evidence of educational harm to the student, the procedural violation seriously infringed upon the parents’ opportunity to participate in the IEP process. In summary, Petitioner represents that by failing to complete these evaluations in a timely manner, Petitioner has had to file a due process complaint, and has been delayed in receiving the information from the assessments that would enable her to make decisions regarding student’s education thereby significantly impacting her ability to participate in the education process.

### **Burden of Proof**

When a party has the burden of proof, the party must present, through testimony and exhibits, enough evidence to support the claim; and in civil actions the evidentiary standard is preponderance of the evidence. This preponderance is based on the more convincing evidence and its probable truth or accuracy, and not on the amount of evidence.

Preponderance of the evidence is also that degree of evidence that is of greater weight or more convincing than the evidence which is offered in opposition to it or evidence which as a whole shows the fact to be proved to be more probable than not.

According to 5 D.C.M.R. §3030.3, the burden of proof shall be the responsibility of the party seeking relief, in this case the Petitioner. It requires that based solely upon the evidence presented at the hearing, an impartial Hearing Officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student a FAPE.

In regard to the Motion for Directed Verdict, the moving party always bears the initial responsibility of informing the court of the basis for its motion, and a motion for directed verdict is appropriate against only those parties who fail to make a showing sufficient to establish the existence of an element essential to their case, and on which they will bear the burden of proof at trial.

### **Standards for Summary Judgment**

In law, a **directed verdict** is a ruling by a judge presiding over a jury trial typically made *after* the prosecution or *plaintiff has presented all of their evidence* but before the defendant puts on their case that awards judgment to the defendant.

A directed verdict is usually made because the judge concludes the plaintiff has failed to offer the minimum amount of evidence to prove their case even if there were no opposition. Typically, the judge orders a directed verdict after finding that no reasonable jury could reach a decision to the contrary. After a directed verdict, there is no longer any need for the jury to decide the case. In other words, the judge rules that, as a matter of law, no reasonable jury could decide in the plaintiff's favor. A judge may order a directed verdict as to an entire case or only to certain issues. While the motion is not often granted, it is routinely made as a means of preserving appeal rights later.

### **CONCLUSION**

The Hearing Officer finds that Petitioner failed to satisfy its burden of proof, by presenting through testimony and exhibits, the minimum amount of evidence to prove their case, although DCPS presented no evidence refuting the allegation. Petitioner failed to meet the evidentiary standard of preponderance of the evidence; and as a matter of law, no reasonable jury could decide in the Petitioner's favor.

The Hearing Officer also finds that Respondent, as the moving party in this matter, effectively informed the court of the basis for its motion, and demonstrated that a motion for directed verdict is appropriate against Petitioner, because it failed to make a showing sufficient to establish the existence of an element essential to its case, and on which they bear the burden of proof at the hearing. Therefore, DCPS' motion for directed verdict is granted.

### **XII. ORDER**

Based on the aforementioned, it is hereby:

1. **ORDERED**, that DCPS' Motion for Directed Verdict is **GRANTED**; and it is further
2. **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*

*4-25-09*

Date Filed: \_\_\_\_\_

\_\_\_\_\_  
Attorney Ramona M. Justice  
Hearing Officer

cc: Attorney Linda Smalls, Office of the Attorney General  
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