

**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 resides in the District of Columbia with his maternal grandmother, also his legal guardian and Petitioner. The student 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 February 23, 2009, Attorney, on behalf of the Petitioner, 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 complete a Neuropsychological and Physical Therapy evaluation, pursuant to parent's request.

The due process hearing convened on March 26, 2009, at 11:00 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. ISSUE

The following issue is identified in the *February 23, 2009* due process complaint:

Whether DCPS denied the student a free appropriate public education (FAPE); by failing to complete a Neuropsychological and Physical Therapy evaluation, pursuant to parent's request?

V. RELIEF REQUESTED

- (1) A finding that DCPS denied the student a free and appropriate public education (FAPE); by failing to complete the requested Neuropsychological Evaluation; and respond to parent's request for an independent physical therapy evaluation.
- (2) DCPS shall fund the student's independent neuropsychological and physical therapy evaluations.
- (3) DCPS shall within fifteen (15) business days of receipt of the independent evaluations convene a MDT/IEP team meeting to review and revise the student's IEP, as needed.
- (4) DCPS agrees to pay counsel for the complainant reasonable attorney's fees and related costs incurred in this matter.
- (5) All meetings shall be scheduled through counsel for the complainant in writing, via facsimile, at (202) 742-2098.
- (6) DCPS shall send all notices to counsel for the parent with copies of such to the parent and in the parent's native language.

VI. PROCEDURAL POSTURE

On February 23, 2009, Attorney, on behalf of Petitioner, filed a due process complaint. On February 27, 2009, the Hearing Officer issued a Pre-hearing Notice scheduling the pre-hearing conference for March 9, 2009. On March 5, 2009, DCPS filed "District of Columbia Public Schools' Notice of Insufficiency and Response to Petitioner's Due Process Complaint".

The parties failed to appear for the pre-hearing conference, therefore, the pre-hearing conference failed to convene as scheduled. On March 9, 2009, the Hearing Officer issued a Pre-hearing Conference Order. On March 19, 2009, Petitioner and Respondent filed a five day disclosure.

The due process hearing convened on March 26, 2009, at 11:00 a.m., as scheduled. Due to the limited amount of time remaining at the conclusion of the hearing, the Hearing Officer provided the parties the opportunity to provide written closing statements, by noon on March 30, 2009. The parties submitted written closing statements to the court, in a timely manner.

VII. DISCLOSURES

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

DISCLOSURES SUBMITTED BY PETITIONER

- Petitioner's Exhibits 01 through Petitioner's Exhibit 17; and a witness list dated March 19, 2009.

DISCLOSURES SUBMITTED BY RESPONDENT

- Respondent's Exhibits 01 through Respondent's Exhibit 02; and a witness list dated March 19, 2009.
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VIII. PRELIMINARY MATTERS

On March 5, 2009, DCPS filed a notice of insufficiency alleging that Petitioner failed to sign the due process complaint, consistent with the requirements of the D.C. Public Schools, Standard Operating Procedures, §301.2(C)(e). As a preliminary matter, Petitioner provided the court and DCPS a signed copy of the due process complaint, including Petitioner's signature, satisfying DCPS' insufficiency challenge. There were no additional preliminary matters presented by the parties.

IX. STATEMENT OF CASE

1. The student is _____ years of age, and attends _____ a public school located in the District of Columbia. The student resides in the District of Columbia with his maternal grandmother, also his legal guardian and Petitioner. The student 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 March 6, 2008, the Central Assessment Referral and Evaluations (C.A.R.E.) Center completed an "Occupational Therapy Evaluation Report". Assessments administered included: Bayley Scales of Infant Development 3rd edition (BSID-III) Fine Motor Subtest; clinical observations, and a parent interview.

The evaluator determined that the student exhibits significant delays in his fine motor skills and self-help skills according to his performance on the BSID-III Motor Scales Fine Motor Subtest. The evaluator also determined that the student has sensory processing concerns that impact his ability to explore objects in his environment and also interact in his environment in a functional way. The evaluator noted that the student's performance during the evaluation may have been impacted by the effects of his seizure medication.

The evaluator concluded by indicating that the information would be shared with the MDT and any recommendations for any services the student may require will be made at that time.

3. On May 5, 2008, the Central Assessment Referral and Evaluations (C.A.R.E.) Center completed an "Educational Evaluation Report". The evaluator determined that the student demonstrates significant delays in Attention and Memory, Reasoning and Academic Skills and Perception and Concepts, which were the three areas assessed.

The evaluator recommended that the evaluation information be considered in conjunction with any other pertinent information or test data to render final recommendations and shared with the MDT to determine eligibility, special education services, and placement.

4. On May 5, 2008, the Central Assessment Referral and Evaluations (C.A.R.E.) Center completed a "Physical Therapy Evaluation Report". The evaluator indicated that during the evaluation the student was very active, became frustrated easily and failed to show interest in the evaluation items; and failed to follow specific verbal/visual commands. The evaluator concluded that the student's muscle tone, range of motion and muscle strength were within the normal limits throughout his body and joints. The student received below average scores in the Stationary Subtest, Locomotion, and Object Manipulation).

The evaluator concluded that the student failed to exhibit any abnormal movement, movement patterns or physical limitations that could represent him as an obstacle for benefitting from his educational program; and the limitations he exhibited in his gross motor skills repertoire appear to be caused by his reduced ability to imitate/follow verbal/visual prompts, engage in activities with others, and reduced exposure to gross motor skills activities. The evaluator recommended a variety of gross motor experiences and activities which should be available at home, pre-school setting, in community programs, and on playgrounds.

5. On May 5, 2008, the Central Assessment Referral and Evaluations (C.A.R.E.) Center completed a "Speech and Language" Evaluation. The evaluator determined that the student presents with global communication delays characterized by a severe delay in receptive and expressive language and speech articulation skills. The evaluator also determined that the student does not have functional communication skills lacking the use of words for a variety of pragmatic functions.

The evaluator recommended that the information be considered in conjunction with educational and cognitive test data and final recommendations would be made using all pertinent data; and the report shared with the MDT.

6. On June 2, 2008, DCPS convened a Multidisciplinary Development Team (MDT) meeting to review the results of the evaluations completed by the Central Assessment Referral and Evaluations (C.A.R.E.) Center, to determine the student's eligibility for special education services.

The special educator reviewed the results of the Educational Evaluation, indicating that in the evaluation was conducted with the Battelle Developmental Inventory II, and the Adaptive Domain is divided into two sub-domains, namely, Self-Care and Personal Responsibility, and the student received a score representing a significant delay in this domain.

The educator also indicated that the Personal-Social Domain is divided into three sub-domains: Adult Interaction, Peer Interaction and Self Concept and Social Role; and scores reflect that the student presents with significant delay in this domain.

The Speech Pathologist reviewed the Speech Evaluation, indicating that the student presents with global communication delays characterized by a severe delay in receptive and expressive language and speech articulation skills; he does not have functional communication skills, and lacks the use of words for a variety of pragmatic functions. The Pathologist concluded that the student's speech is unintelligible and he utilizes less than 5 real words none of which are intelligible to an unfamiliar listener.

The Occupational Therapy evaluation was reviewed, indicating that the student exhibits significant delays in his fine motor skills and self-help skills; and also has sensory processing concerns that impact his ability to explore objects in his environment and interact in his environment in a functional way. The team concluded that according to the evaluation, results may have been impacted by the effects of the student's seizure medication.

The Psychologist reviewed the results of the Psychological Evaluation, indicating that the WPPSI-II was attempted, however standard scores were not obtained due to the student's uncooperative behavior; and that on the Vineland-II, the student's Adaptive Behavior Composite standard score of 61 summarized his overall level of adaptive function as low.

The MDT notes also indicate that the student was referred for a Physical Therapy Evaluation by the MDT to determine the student's current gross motor skills status, as part of the process to establish eligibility for special education and need for school-based related services. The team indicated that the student has been described as having features both of attention deficit hyperactivity disorder (ADHD) and autism spectrum disorder with hyperactivity, impulsivity, language delay and some atypical social interactions. The team noted that the student's medical history also includes the following diagnosis: Epilepsy, and Developmental Delay (particularly communication impairment).

The MDT determined that the student failed to exhibit any abnormal movement, movement patterns or physical limitations that could represent as an obstacle to his benefitting from his educational program; and the limitations he exhibits in his gross motor skills repertoire appear to be caused by his reduced ability to imitate/follow verbal/visual prompts, engage in activities with others, and reduced exposure to gross motor skills activities. The MDT concluded that the student is not a candidate to receive school-based physical therapy services. The MDT also reviewed the eligibility checklist for the student with a Developmental Delay and determined that the student is eligible to receive special education services.

The MDT also developed an Individualized Education Program (IEP) was developed for the student, providing for 25.0 hours of specialized instruction, 1.0 hours of speech therapy, and 1.5 hours of occupational therapy, per week. The IEP also provides that the student's disability classification is Developmental Delay (DD); and that the student should expended 61-100% of his time receiving specialized instruction and related services, in an out of general education classroom setting.

7. On June 2, 2008, DCPS issued a "Prior Notice", indicating that the student is eligible or continues to be eligible to receive special education services as a student with Developmental Delay, the student is receiving speech related services, and the team proposed an out of general education setting to meet the student's needs.

DCPS also completed and the guardian signed an "Initial Placement" consent form authorizing DCPS to proceed with the student's initial placement at and the provision of special education and related services, for 61-100% of the time.

8. On September 11, 2008, parent signed "Parental/Guardian Consent to Evaluate" authorizing DCPS to evaluate/reevaluate the student to determine if he has a disability that may require special education services, under the IDEIA or under Section 504 of the Americans with Disabilities Act.

9. A November 7, 2008 Student Report of Progress indicates that the student made no progress in any of the areas identified (Adaptive Skills, Receptive and Expressive Language, and Fine Motor Skills). The report summary provides that the student was exhibiting resistance and requiring maximum assistance with most school tasks, however, he seems to enjoy attending therapy sessions and engaging with the therapists.

10. On December 16, 2008, the Education Advocate submitted to the Principal at a written request for a Neuropsychological Evaluation, and proper notice of all proposed tests, observations, and evaluations.

11. On December 16, 2008, the Education Advocate, on behalf of parent, submitted to the Principal at a written request for an independent Physical Therapy Evaluation, indicating that parent initiated the request based on her disagreement and discrepancies identified in the "DCPS" Physical Therapy Evaluation Report, dated May 5, 2008. The letter also provides that the request was made pursuant to IDEA 34 C.F.R. §300.502.

12. On January 12, 2009, DCPS issued a "Letter of Invitation/Notice to a Meeting of the IEP Team" to parent and the Education Advocate, inviting parent to attend a meeting to: (1) discuss the request for a Neuropsychological Evaluation; and (2) discuss the request for an independent Physical Therapy Evaluation.

The letter also indicated that the Multidisciplinary Development Team (MDT) was available to meet on the following dates: January 15, 2009 at 1:30 p.m., January 16, 2009, at 9:00 a.m., or January 22, 2009, at 9:30 a.m.. The notice also provided that to prevent further delay in ensuring the student's educational needs are adequately addressed, the MDT intended to proceed with the January 22, 2009 meeting, if the MDT fail to receive a response from Petitioner.

13. On January 13, 2009, Petitioner's Attorney forwarded a written response to the January 2, 2009 Letter of Invitation, to the Special Education Coordinator at advising that the Education Advocate was no longer employed with the firm, and proposed three alternative dates for the meeting (January 26, 2009 at 10:00 a.m., January 28,-

2009, at 1:00 p.m., and January 29, 2009, at 1:00 p.m.). The Attorney also requested confirmation of one of the proposed dates, to ensure their availability for the meeting.

14. On March 5, 2009, DCPS forwarded a letter to Petitioner's Attorney authorizing parent to obtain an independent Physical Therapy Evaluation, at DCPS expense.

15. On March 19, 2009, DCPS forwarded to Petitioner's Attorney and Petitioner a "Prior Notice Letter" advising of the refusal to complete a Neuropsychological Evaluation; and a "Letter of Invitation/Notice to a Meeting of the IEP Team".

The letter of invitation invites parent to a meeting to discuss the request for a Neuropsychological Evaluation, indicating that Neuropsychological assessments are rarely ordered within the school domains since they do not yield information pertaining to how a student learns or instructional strategies.

The letter also provides that the evaluations are ordered within hospital/medical settings to ascertain the status of cognitive functioning following a traumatic brain injury, i.e. head trauma from accident, stroke, severe blow to the head resulting in unconsciousness, etc.; and the team does not believe such an evaluation should be ordered for the student to determine presence of ADHD or mental retardation since there are other specialist to conduct evaluations.

WITNESSES

Witnesses for Petitioner

Guardian
Education Advocate

Witnesses for Respondent

DCPS Psychologist

WITNESS TESTIMONY

Petitioner's Witnesses

Guardian

The guardian testified that the student has resided with her since his date of birth; and she is responsible for his medical care. The guardian also testified that this is the student's first year attending he failed to attend pre-school; and in June, 2008, the evaluated the student and developed an IEP for the student. The guardian testified that in the year 2005 or 2006, when the student was age 2, the Neurologist submitted a referral to the C.A.R.E. Center for evaluations; and the student has been under the care of a Neurologist since he was nine months of age.

The guardian also testified that a Neuropsychological Evaluation is necessary because of the student's seizures, and scarring on the brain which she first became aware of during a September, 2008 visit with the Neurologist. The guardian testified that the student has exhibited problematic behavior at home; and throughout his overall development; can articulate some word, however fail to speak at the same level as other students.

The guardian testified that the student suffers from incontinence and is not toilet trained; and will not consume a regular diet. The guardian testified that the student was diagnosed with acid reflux, and is administered Pediasure, and anti-seizure medication.

The guardian testified that a Physical Therapy Evaluation is necessary because since he was at a young age, it was evident that when the student walked, he exhibited difficulty walking, particularly utilizing his left leg. The guardian also testified that he continue to have difficulty walking, and often has swelling of his left foot. The guardian also testified that the Neurologist advised her that the student has numbness on the left side of the student's body. The guardian testified that the student is under the care of a Neurologist because he has a history of seizures, exposure to drugs in utero, and scarring on the brain.

During cross-examination, the guardian testified that she failed to advise DCPS of the scarring on the brain, and in early, 2008, learned of the numbness. The guardian also testified that the student has had several incidents at school causing concern. The guardian testified that there was an incident at school where the student hit his head on a chair and the staff ignored the incident; he returned home with a busted lip, a bruise on his eye and a scratch on his nose, and a knot on his head approximately two (2) weeks prior. The guardian testified that the staff is not experienced to address the student's needs.

The guardian also testified that the student often returns home from school with his outer garments wet, and a dry pamper, indicating that he wet himself at school and failed to receive the proper attention; and prior to returning the student home, the school would change his pamper. The guardian testified that once or twice a month the student returns home agitated. The guardian concluded that _____ is a public school offering some special education programming, and a special education pre-school.

Education Advocate

The Education Advocate testified that she has a Bachelor of Science Degree in Social and Behavioral Science, a Masters in Education, specifically Early Childhood Education, five years serving on a mental health and mental retardation board, three years as a special education teacher, and is licensed in the state of Alabama, in Early Childhood and Special Education. The advocate also testified that she has Neuropsychological Evaluation experience, participated on MDT/IEP teams where the evaluations were recommended, and implemented IEPs for students with needs in this area.

The advocate testified that she reviewed the student's Speech and Language, Occupational and Physical Therapy, developmental assessment, and IEP, to determine whether any other evaluations were necessary. The advocate testified that she recommended comprehensive evaluations; and a Neuropsychological Evaluation because of the student's seizure disorder, exposure to drugs in utero, severe delays in adaptive skill, communication, and cognitive, to assess all areas of his suspected disability. The advocate testified that a letter requesting evaluations was forwarded to DCPS on December 16, 2008.

The advocate also testified that on March 19, 2009 DCPS issued a Prior Notice Letter and Letter of Invitation providing reasons that a Neuropsychological Evaluation is not warranted, and her disagreement with the decision. The advocate testified further that a Neuropsychological Evaluation addresses developing cognition, and it is not required that the evaluation be recommended by a medical physician, as represented by DCPS. The evaluation addresses memory, learning, communication, motor skills, and the fact that the student has a seizure disorder is evidence that the student has medical deficits.

The advocate testified that a Neuropsychological Evaluation differentiates between various disabilities and provide a baseline for teachers in developing appropriate programming for the student. The advocate testified that according to the May, 2008 MDT meeting notes, the tem suspected that the student has autism, however the evaluation completed by DCPS only addressed three (3) domains, specifically, adaptive, personal/social, and cognitive; and failed to include the communication and motor skills domain. The advocate testified further that a Neuropsychological Evaluation is more comprehensive, covers all areas, and assesses the impact on the student's curriculum, home life, ability to function, etc.; and the goals in the student's IEP could change and his disability classification. The advocate also testified that the evaluation would rule out ADHD and autism, which resemble in diagnosis.

The advocate testified that she failed to participate in the MDT meeting, and has not observed the student. The advocate also testified that the March 19, 2009 Letter of Invitation and Prior Notice is DCPS' first response to the request for a Neuropsychological Evaluation.

During cross examination, the advocate testified that a Neuropsychological Evaluation is not the predominant evaluation to determine whether a student presents with mental retardation, autism, or ADHD; and to be diagnosed with mental retardation, it has to be a developmental disability. The advocate also testified that a Neuropsychological Evaluation is not always relevant for a student with seizures, and there are a range of assessments that a Neuropsychologist has available, and will determine the appropriate tests.

The advocate testified that the student has a seizure disorder an severe communication deficits, and autism, therefore, a test for merely autism is insufficient to assess the student for other disabilities.

On rebuttal, the advocate testified that the DCPS Psychologist accurately represented that a Neuropsychological Evaluation may not assist in educational planning, independent of additional information, however, the Psychologist failed to consider that the student has a history of seizures, exposed to drugs in utero, and scarring on the brain. The advocate testified that a-

Neuropsychological Evaluation would “tie in” the student’s brain functioning and its relationship to his behavior; and a Psychological Evaluation would not assess the student’s brain functioning, and the impact on his learning. The advocate concluded by testifying that a Neurological Evaluation would assess the student’s brain functioning, however, a Neuropsychological Evaluation would also assess the student’s academic ability and impact.

Respondent’s Witness

DCPS Psychologist

The Psychologist testified that she is not the school Psychologist assigned to the student, she is in the process of completing her doctoral program, has a Masters degree in clinical psychology, a Bachelor of Science in Psychology, and has served as a Psychologist for DCPS since 2004.

The Psychologist testified that she is not familiar with the student, however reviewed the student’s Educational, Cognitive, Speech and Language, Occupational Therapy, and Physical Therapy evaluations. The Psychologist testified further that as a school Psychologist she reviews evaluations, and provides training on reviewing evaluations, to develop an IEP. The Psychologist testified that she completed courses on Neuropsychological evaluations, which assesses student’s cognitive development, memory, and executive functioning.

The Psychologist testified that she has administered cognitive and Psychological evaluations, to determine ADHD, MR, ED, LD, and autism. The Psychologist also testified that a Neuropsychological Evaluation assists in planning for the student’s executive functioning, thought orders, memory, learning, and assists in determining the manner in which a child processes information. The Psychologist testified that if a student is suspected of having a disability of autism, evaluations are done in conjunction with other information, such as developmental history, delay, trauma, prenatal, interviews, educational evaluation, psychological evaluation, and an autism rating scale.

The Psychologist testified that if a student is suspected of mental retardation, tests such as the adaptive scales (Vineland), teacher and parent form, with a Psycho-educational Evaluation would be administered; and a diagnosis of mental retardation would be present if the student’s IQ score is 70 or below. The Psychologist testified that a Neuropsychological Evaluation would not assist the team in determining whether the student has mental retardation, or in developing an IEP.

The Psychologist testified that if the student is suspected of having ADHD, the evaluator must look at the student’s developmental and social history; and one score cannot be utilized to determine whether the student has a disability of ADHD, and the child’s mental and chronological age must also be considered. The Psychologist testified that based on a review of the student’s evaluations, she would not recommend a Neuropsychological Evaluation, to determine whether the student presents with ADHD, MR, or autism; and the evaluation would not assist further in determining the student’s disability.

During cross-examination the Psychologist testified that she is assigned to a Rapid Response Team, with citywide responsibility for administering Psychological Evaluations, and currently do not provide intervention or direct therapy services to students. The Psychologist testified that she has not spoken with anyone regarding the student, observed, assessed, or provided services to the student. The Psychologist testified that she became aware of the student the afternoon prior to the hearing, she reviewed the student's records for approximately 1.5 hours; and the June 2, 2008 MDT meeting notes, where the team indicated that the student has possible ADHD, MR, or autism; according to the student's evaluations, no evaluations have been completed to rule out these suspected disabilities; and she is not qualified to administer a Neuropsychological Evaluation.

The Psychologist testified further that if a child has brain trauma a Neuropsychological Evaluation would be recommended and a Psychological Evaluation may be helpful in assessing the student's cognitive functioning; however, a Neuropsychological Evaluation would not assist with educational planning. The Psychologist testified that if the student has scarring on the brain, it would manifest in his educational environment, in visual memory and other areas; and one must consider the student as a whole in determining which evaluations to administer. The Psychologist concluded that ADHD is not a consideration for testing because the student has a developmental disability.

X. DISCUSSION AND CONCLUSIONS OF LAW

ISSUE

Whether DCPS denied the student a free appropriate public education (FAPE); by failing to complete a Neuropsychological and Physical Therapy evaluation, pursuant to parent's request?

Independent Physical Therapy Evaluation

Petitioner represents that 34 C.F.R. §300.502 states that the parents of a child with a disability have the right to obtain an independent educational evaluation (IEE) if the parent disagrees with the results of an evaluation obtained by the public agency; and that the public agency must upon request, provide information about where the IEE may be obtained and the agency criteria applicable to the IEE. Petitioner also represents that the public agency must without unnecessary delay file a due process complaint to show that the request is inappropriate or ensure that the IEE will be provided.

Petitioner further represents that in *Harris v. District of Columbia, Civil Action No. 07-1422 (D.D.C. 2008)*, the District Court stated that "failure to act on a request for an independent evaluation is certainly not a mere procedural inadequacy; indeed, such inaction jeopardizes the whole of Congress' objectives in enacting the IDEA. Petitioner represents that failing to timely complete the evaluation requested by parent or to respond to the request for an independent Physical Therapy Evaluation, prevents parent from having a full understanding of her son's special education needs and participating in the MDT process.

Petitioner concludes that the student was denied FAPE, by DCPS' failure to respond in a timely manner to Petitioner's request for funding of an independent Physical Therapy Evaluation; and Petitioner and the student has been harmed by the violation, although parent does not concede that harm must be shown in this case.

DCPS concludes that Petitioner requested an independent Physical Therapy Evaluation on December 16, 2008; and DCPS issued an IEE letter authorizing an independent Physical Therapy Evaluation on March 5, 2009. DCPS represents that even if the time elapsed constituting a procedural violation, Petitioner failed to present any evidence that the delay caused any substantive harm that would constitute denial of a FAPE.

DCPS also concludes that Petitioner also requested a Neuropsychological Evaluation on December 16, 2008, the request was received shortly before the winter break; and shortly after the break on January 12, 2009, DCPS responded with a letter of invitation to discuss the requested evaluation. DCPS represents that Petitioner responded with alternative dates, and although DCPS "missed" those dates, it sent another Letter of Invitation on February 20, 2009, and again on March 19, 2009, and Petitioner failed to respond to either of the last two requests.

DCPS also concludes that it provided parent a Prior Notice of its refusal to evaluate, to inform the parent of its current intention; and based on the evidence presented at the hearing, Petitioner failed to meet its burden of proof that (1) any delay in authorizing an independent Physical Therapy evaluation rose to the level of a substantive denial of FAPE; or (2) DCPS is required to perform a Neuropsychological Evaluation of the student.

DISCUSSION AND CONCLUSIONS OF LAW

Independent Physical Therapy Evaluation

IDEA, at 34 C.F.R. IDEA, at 34 C.F.R. 300.502(a)(1) provides that the parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

According to IDEA, §300.502(a)(2), upon receiving parent's request for the independent educational evaluation, DCPS must provide parent information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations, as set forth in paragraph (e) of this section.

IDEA, 34 C.F.R. §300.502(b)(1) also provides that a parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraph (b)(2) through (4) of this section. 20 U.S.C. §1415(b)(1).

Subparagraph (b)(2) provides that if a parent requests an independent educational evaluation at public expense, the public agency must, *without unnecessary delay*, either—

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

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

The record reflects that on May 5, 2008, the Central Assessment Referral and Evaluations (C.A.R.E.) Center completed a "Physical Therapy Evaluation Report". The evaluator indicated that during the evaluation the student was very active, became frustrated easily and failed to show interest in the evaluation items; and failed to follow specific verbal/visual commands. The evaluator concluded that the student's muscle tone, range of motion and muscle strength were within the normal limits throughout his body and joints. The student received below average scores in the Stationary Subtest, Locomotion, and Object Manipulation subtests. His Gross Motor Quotient of 76 represented poor performance.

The evaluator concluded however, that the student failed to exhibit any abnormal movement, movement patterns or physical limitations that could represent him as an obstacle for benefitting from his educational program; and the limitations he exhibited in his gross motor skills repertoire *appeared* to be caused by his reduced ability to imitate/follow verbal/visual prompts, engage in activities with others, and reduced exposure to gross motor skills activities. The evaluator recommended a variety of gross motor experiences and activities which should be available at home, pre-school setting, in community programs, and on playgrounds.

On December 16, 2008, the Education Advocate, on behalf of parent, submitted a written request for an independent Physical Therapy Evaluation, to the Principal at _____ indicating that parent initiated the request based on her disagreement and discrepancies identified in the "DCPS" Physical Therapy Evaluation Report, dated May 5, 2008. The letter also provides that the request was made pursuant to IDEA 34 C.F.R. §300.502.

The record reflects that on January 12, 2009, DCPS issued a "Letter of Invitation/Notice to a Meeting of the IEP Team" to parent and the Education Advocate, inviting parent to attend a meeting to: (1) discuss the request for a Neuropsychological Evaluation; and (2) discuss the request for an independent Physical Therapy Evaluation.

The letter also indicated that the Multidisciplinary Development Team (MDT) was available to meet on the following dates: January 15, 2009 at 1:30 p.m., January 16, 2009, at 9:00 a.m., or January 22, 2009, at 9:30 a.m.. The notice also provided that to prevent further delay in ensuring the student's educational needs are adequately addressed, the MDT intended to proceed with the January 22, 2009 meeting, if the MDT fail to receive a response from Petitioner.

On January 13, 2009, Petitioner's Attorney forwarded a written response to the January 2, 2009 Letter of Invitation, to the Special Education Coordinator at proposing three alternative dates for the meeting (January 26, 2009 at 10:00 a.m., January 28, 2009, at 1:00 p.m., and January 29, 2009, at 1:00 p.m.). The Attorney also requested confirmation of one of the proposed dates, to ensure their availability for the meeting. The meeting failed to occur.

As indicated supra, IDEA, 34 C.F.R. §300.502(a)(2), provides that each public agency *must* provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations, as set forth in paragraph (e) of this section.

In this matter, upon receipt of parent's request for an independent Physical Therapy Evaluation, DCPS invited parent to a meeting to discuss the request for the independent Physical Therapy Evaluation. It is unclear whether DCPS intended to provide parent information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations, at the proposed meeting; or merely intended to discuss whether the evaluation was warranted. Nonetheless, IDEA does not provide that upon receipt of a request for an independent educational evaluation, the public agency must convene a meeting with parent to discuss the request; and DCPS' efforts to convene a meeting to discuss the request is contrary to the procedural requirements of IDEA, in responding to a request for an independent evaluation.

The Hearing Officer finds that Petitioner satisfied its burden of proof by presenting evidence that DCPS failed to comply with 34 C.F.R. §300.502(a)(2), by ensuring that it provide the parent, upon request for an independent Physical Therapy Evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations, as set forth in paragraph (e) of this section

IDEA also requires that upon receipt of a parent's request for an independent education evaluation, the public agency must, *without unnecessary delay*, either file a due process complaint requesting a hearing to show that its evaluation is appropriate; or ensure that an independent educational evaluation (IEE) is provided at public expense.

The record reflects that DCPS failed to file a due process complaint requesting a hearing to show that the Physical Therapy Evaluation completed on May 9, 2009, is appropriate; or ensure that the independent Physical Therapy Evaluation was provided at public expense, without unnecessary delay. In fact, DCPS authorized an independent Physical Therapy-

Evaluation on March 5, 2009, nearly three (3) months after receiving parent's request for the evaluation, and after Petitioner filed the due process complaint.

The Hearing Officer finds that Petitioner satisfied its burden of proof by presenting evidence sufficient for a finding that although DCPS invited parent to a meeting to discuss parent's request for the independent evaluation, DCPS failed to comply with the procedural requirements of IDEA, 34 C.F.R. §300.502 (a)(2) and (b)(2), in responding to parent's request for an independent Physical Therapy Evaluation.

Neuropsychological Evaluation

Petitioner represents that DCPS is obligated to complete evaluations every three years, upon teacher request or upon parental request. 20 U.S.C. 1414(22)(A)(B) states that "A local educational agency shall ensure that a reevaluation of each child with a disability is conducted in accordance with subsections (b) and (c)(i) if the local educational agency determines that the educational or related service needs including improved academic achievement and functional performance of the child warrant a reevaluation; or (ii) if the child's parents or teacher request a reevaluation." "A reevaluation conducted under subparagraph (A) shall occur (i) not more frequently than once a year unless the parent and the local educational agency agree otherwise; and (ii) at least once every 3 years, unless the parent and the local educational agency agree that a reevaluation is unnecessary."

Petitioner also represents that additionally, pursuant to D.C. Municipal Regulations, Title 5, §3005.1 (2003), DCPS "shall ensure that a full and individual evaluation is conducted for each child being considered for special education and related services in order to determine if the child is a 'child' with a disability' ...; and the educational needs of the child." Finally, a student must be evaluated in all areas of suspected disability. 34 C.F.R. §300.304(c)(4), See also 30 DCMR, See also 30 DCMR005.9(g).

Petitioner alleges that DCPS denied the student a FAPE by refusing to conduct a neuropsychological evaluation in a timely manner. "It is well established that a parent may request that the school system complete certain evaluations to determine their child's special education needs and these evaluations are to be completed within a reasonable time of the parent's referral. 20 U.S.C. § 1414 (a) (1) ("may initiate a request for initial evaluations to determine if the child is a child with a disability."); 34 C.F.R. § 300.301; and D.C. Mun. Regs. tit. 5 § 3004 and 3005; and D.C. Mun. Regs. tit. 5 § 3005.2 ("The IEP team **shall** conduct an initial evaluation of a child within a reasonable time of receiving a **written referral and parental consent** to proceed and within timelines consistent with Federal Law and D.C. Code § 38-2501(a)"); and D.C. Code § 38-2501 (initial evaluations to be completed within 120 days of referral). See also Cartwright v. District of Columbia, 267 F. Supp.2d 83, 87 (D.D.C. 2003) (holding that public agency must conduct reevaluations upon parental request and parent is not required to show justification for reevaluations and condition precedent); and Herbin vs. District of Columbia, 362 F. Supp2d. 254 (D. D.C. 2005) (finding that DCPS plain reading of IDEA regulation requires that DCPS conduct reevaluations upon parental request).

“A school system must also ensure that the student is assessed in all areas of suspected disability, that the evaluation is sufficiently comprehensive to identify all of the student’s special education needs, and that the evaluation includes all assessment tools that may assist in determining the content of the IEP. 20 U.S.C. § 1414 (b) (1)-(3); § 1414 (a) (6) (B); § 1414 (b) (3) (C) (“each local education agency shall ensure that assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.”); § 1412 (a) (3) (state must have procedures in place to ensure that all students in the school district who may need special education services are identified, located, and *evaluated*); 34 C.F.R. Sec. 300.304 (b) and (c); 34 C.F.R. § 300.301 (“Each public shall ensure that a full and individual evaluation is conducted for each child being considered for special education”); 34 C.F.R. Sec. 300.111 (public agency must identify, locate and evaluate all students in the school district who may need special education services); D.C. Mun. Regs. tit. 5 § 3005.9 (g) (“The LEA shall ensure that: the child is assessed in all areas related to the suspected disability [. . .]”); D.C. Mun. Regs. tit. 5 § 3005.9 (h) (The LEA shall ensure that: in evaluating a child with a disability, the evaluation is sufficiently comprehensive to identify all of the child’s special education and services needs, whether or not commonly linked to the disability category in which the child has been classified.”).”

“Also, even if the school system believes that certain assessments are not necessary, the school system must still do them if requested to do so by the parents. 20 U.S.C. § 1414 (c) (4) (B) (“if local education agency determines that assessments are not needed, the local education agency “shall not be required to conduct such an assessment unless requested to by the child’s parents.”); 34 C.F.R. § 300.305 (d) (2); (“The public agency is not required to conduct the assessment [. . .] unless requested to do so by the child’s parents.”)”

Petitioner asserts that DCPS failed to comply with any of these rules; and that Petitioner’s counsel forwarded a formal request to DCPS on December 16, 2008, for a neurological-psychological assessment to fully determine all of the student’s special education needs. DCPS, however, failed to respond to this request and the Petitioner subsequently filed the present due process complaint against DCPS on February 23, 2009 for this and another issue. About three months later, on March 19, 2009, DCPS then responded with a prior notice rejecting the Petitioner’s request for the Neuropsychological Evaluation and provided an explanation for the rejection.

Petitioner represents that although DCPS eventually sent the Petitioner a prior notice rejecting the request for the Neuropsychological Evaluation, this prior notice was not sent until after the complaint was filed and nearly three months after the Petitioner’s request in December 2008. Petitioner further represents that according to 34 C.F.R. § 300.503 (a), the prior notice that DCPS is required to issue must be provided to the parent within a reasonable time before the agency proposes or refuses to conduct an evaluation of the student. Clearly, the three month delay in DCPS issuing the prior notice rejecting the Petitioner’s request for the Neuropsychological Evaluation, is well outside the timeframe required by this provision.

Petitioner also represents that in addition to DCPS' untimely prior notice, the fact remains that this assessment is necessary to fully determine the student's special education needs. Petitioner argues that according to the testimony of the student's advocate, the student requires a neurological-psychological to see how his seizures, scarring on the brain, and in utero drug exposure is impacting his academic progress and thereby develop appropriate goals and strategies to address his needs. Petitioner represents that the advocate also testified that the Neuropsychological Evaluation would assist in ruling out possible ADHD, MR, and other classifications.

Petitioner represents that although DCPS' sole witness, the DCPS Psychologist, testified the opposite of the Education Advocate, the DCPS Psychologist's testimony should not be given anywhere near the same weight as that of the Education Advocate. "Granted, both witness have a similar background with regards to neurological-psychological assessments-neither one is a clinical-psychologist, or capable of actually administering this assessment, the Education Advocate is far more knowledge regarding the student himself and his needs. While the advocate had reviewed the student's files in December 2008, months before the complaint was in filed, the DCPS Psychologist had only seen the file less than 24 hours before the hearing. Moreover, and of even more concern is the fact that when asked why she had reviewed the student' file, the DCPS Psychologist rather stunningly admitted that she had done it at the request of DCPS counsel to prepare for the hearing the next day."

Petitioner represents that in contrast, the Education Advocate had reviewed the file in December to make recommendations assessments that were needed for the student, not solely to testify at a hearing. Additionally, although, like the DCPS Psychologist, the advocate did not have a chance to observe the student in school, the advocate did have a chance to speak with the student's guardian, the guardian -something that the DCPS Psychologist had not done. Petitioner states that clearly then, of these two witnesses, the advocate's testimony should be given greater weight such that a preponderance of the evidence supports the Petitioner's allegations regarding this issue."

Petitioner concludes that the Neuropsychological Evaluation is necessary to determine how the student's seizures, scarring on the brain, and in utero drug exposure is impacting his academic progress; and to rule out other possible disability categories.

Petitioner also concludes that a preponderance of the evidence shows that DCPS has denied a FAPE by refusing to complete a neurological-psychological assessment in a timely manner and by failing to fund an independent physical therapy assessment in a timely manner, thus forcing the Petitioner to file a due process complaint and depriving her of information necessary to make informed decision regarding her child's education. As a result of this violation, a finding should be made that DCPS denied the parent and student their right to a FAPE.

DCPS represents that it is attempting to convene a meeting to discuss whether Neuropsychological Evaluation is necessary; and the testing cannot proceed until a meeting is held and the parent provides informed consent.

DCPS represents that Section 300.303 of the C.F.R. provides that reevaluations must be conducted “(1) if the public agency determines that the 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.” 34 C.F.R. 300.303(a). That section is limited though, subsection (b) states that a reevaluation “[m]ay occur not more than once a year, unless the parent and the public agency agree otherwise.” 34 C.F.R. 300.303(b)(1).

“This student has been evaluated within a year (specifically, a Physical Therapy Evaluation on May 9, 2008), thus in order for him to be reevaluate, the MDT must agree that the evaluation is warranted. An IEE will be issued for the Physical Therapy Evaluation.”

DCPS represents that Petitioner requested a Neuropsychological Evaluation on December 16, 2008, shortly before the winter break; and shortly after the winter break, on January 12, 2009, DCPS responded with a Letter of Invitation to discuss the requested Neuropsychological Evaluation. “Petitioner responded with alternative dates. Although DCPS missed those dates, DCPS sent another letter of invitation on February 20, 2009, and again on March 19, 2009. Petitioner did not respond to either of the last two requests.”

DCPS also represents that it attempted to convene an MDT meeting to discuss the evaluation rather than immediately begin testing because the December 16, 2008 request for the Neuropsychological Evaluation failed to include a consent form and based on the information available DCPS at the time, did not believe the evaluation was warranted. DCPS represents that IDEA requires informed consent to reevaluate; and the consent form signed by parent in September, 2008 failed to specify what type of testing is to be performed and no evidence was presented to prove that the parent understood the nature of a Neuropsychological Evaluation and consented to her child undergoing that evaluation when she signed the form. 20 U.S.C. §1414(c)(3). DCPS also indicated that it cannot conduct a Neuropsychological Evaluation until it received parent’s informed consent.

DCPS also represents that when convening an MDTY meeting to discuss the Neuropsychological Evaluation “stalled”, DCPS provided parent with a prior notice of its refusal to evaluate, to inform the parent of its current intention. Section 1415(b)(3) of the IDEA requires prior written notice “whenever the local education agency-(A) proposes to initiate or change; or (B) refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a FAPE, to the child.

DCPS also represents that although several sections of the IDEIA also require the LEA to conduct evaluations at parental request, evaluations have a specific purpose under the Act. “Each local education agency shall ensure that assessment tools and strategies that provide relevant information that direct assists persons in determining the educational needs of the child are provided.” 20 U.S.C. §1414(b)(3)(C). “The regulations further require the LEA to “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including provided by the parent, that may assist in determining-(i) Whether the child is a child with a disability under §300.8; and (ii) the content of the child’s IEP.” 34 C.F.R. §300.304(b)(1). Because DCPS does not believe that a-

neuropsychological evaluation would provide relevant information to determine if the child is a child with a disability or to develop the IEP, DCPS provided prior notice, as required by 20 U.S.C. 1415(b)(3). If an LEA was not permitted, under the IDEIA, to refuse to conduct evaluations that would not serve the purposes specified in the Act, the section of the IDEIA requiring prior notice when an LEA refuses to initiate an evaluation of a student would be superfluous.”

DCPS also represents that the DCPS Psychologist’s testimony is more reliable because she is a Ph.D. candidate with a master’s degree in clinical psychology; is a certified school Psychologist and conducts various educational evaluations; and Petitioner’s witness on the other hand, has a master’s degree in education and has not focused her studies or practice on educational evaluations. DCPS continued that while the witnesses disagreed as to whether a neuropsychological evaluation was warranted, even Petitioner’s Education Advocate agreed that it was not the primary evaluation used for any of the purposes she sought: determining whether the student has autism, mental retardation, or ADHD.

DCPS also represents that the DCPS Psychologist testified that while traumatic brain injury might indicate a need for a neuropsychological evaluation in some circumstances, other tests are more relevant for educational purposes. “She specified that even if a student had brain scarring, the neuropsychological evaluation would still not be the evaluation chosen for educational purposes.” DCPS represented that the DCPS Psychologist also testified that based on the student’s developmental delay, a diagnosis of mental retardation or ADHD would be premature.

DCPS concludes that based on the evidence presented at the hearing, Petitioner failed to meet her burden of proof that (1) any delay in authorizing an independent physical therapy evaluation rose to the level of a substantive denial of a FAPE; or (2) DCPS is required to perform a neuropsychological evaluation of this student.

ANALYSIS

As a preliminary matter, the Hearing Officer finds it appropriate to address testimony provided at the hearing, on behalf of each party, regarding the necessity of completing a Neuropsychological Evaluation.

At the hearing, the parties presented witness testimony with varying opinions of whether a Neuropsychological Evaluation is warranted in this instance, however, that is not the issue before the court. The issue before the court is whether DCPS denied the student a FAPE, by failing to complete the Neuropsychological Evaluation, pursuant to parent’s request. Whether an evaluation is warranted or not, is only a consideration if the public agency determines that educational or related services needs, including improved *academic achievement and functional performance*, of the child *warrant* a reevaluation; and is not a consideration where the public agency has determined that the evaluation is not warranted, parent disagrees with that determination, and requested reevaluation of the student; which occurred in this matter.

Assuming arguendo, IDEA required a determination of whether the evaluation requested by parent is warranted, prior to the public agency completing the evaluation; the evidence in this matter supports such a finding.

A Neuropsychological evaluation (NPE) is a testing method through which a neuropsychologist can acquire data about a subject's cognitive, motor, behavioral, language, and executive functioning. In the hands of a trained neuropsychologist, these data can provide information leading to the diagnosis of a cognitive deficit or to the confirmation of a diagnosis, as well as to the localization of organic abnormalities in the central nervous system (CNS); the data can also guide effective treatment methods for the rehabilitation of impaired patients.

A NPE provides insight into the psychological functioning of an individual, a capacity for which modern imaging techniques have only limited ability. However, these tests must be interpreted by a trained, experienced neuropsychologist in order to be of any benefit to the patient. These tests are often coupled with information from clinical reports, physical examination, and increasingly, premorbid and postmorbid self and relative reports. Alone, each neuropsychological test has strengths and weaknesses in its validity, reliability, sensitivity, and specificity. However, through eclectic testing and new in situ testing, the utility of NPE is increasing dramatically.

When could a child or adolescent benefit from a Neuropsychological Evaluation?

A Neuropsychological evaluation may be needed if a child is suspected of the following:

- **Difficulty thinking**
- **Problems learning**
- **Uncontrollable emotions**
- **Unusual behaviors**
- **Memory problems**

Neuropsychological testing may also be needed if your child has had any of these conditions:

- **Cardiovascular disorders**
- **Sickle cell disease**
- **Muscular Dystrophy**
- **Traumatic brain injury**
- **Stroke**
- **Seizure disorder**

- **Exposure to toxic chemicals**
- Metabolic problems
- Endocrine problems
- **Developmental problems**
- Premature birth
- Cerebral palsy
- Fetal alcohol syndrome
- Hydrocephalus
- Brain tumor
- Encephalitis
- **Other neurological conditions**

Results from a neuropsychological evaluation can assist in determining the proper rehabilitation, psychological, psychiatric or educational services for the child. The evidence is more than sufficient to find that the student would benefit from a Neuropsychological Evaluation; particularly considering the student's history of a seizure disorder, exposure to drugs in utero, scarring on the brain, and the fact that he has been under the care of a Neurologist since nine months of age; and fail to progress academically.

Reevaluations

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.

As indicated supra, the public agency determined that the educational or related services needs, including improved academic achievement and functional performance, of the child did not warrant a Neuropsychological evaluation. However, Petitioner opined that the educational or related services needs, including improved academic achievement and functional performance, of the child warranted a Neuro-psychological Evaluation of the student; and requested that the DCPS complete the evaluation. Therefore, according to this provision of IDEA, the public agency *must* ensure reevaluation of the child, pursuant to parent's request.

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.

In this matter, there is no evidence that parent's request for a Neuro-psychological Evaluation, 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.

The record reflects that on December 16, 2008, the Education Advocate submitted to the Principal at _____ a written request for a Neuro-psychological Evaluation; and on March 19, 2009, DCPS issued a Prior Notice Letter inviting parent to a meeting to discuss the request for a Neuro-psychological Evaluation. The letter explains the basis for the MDT's refusal to complete the evaluation. The letter indicated that Neuropsychological assessments are rarely ordered within the school domains since they do not yield information pertaining to how a student learns or instructional strategies.

The letter also provides that the evaluations are ordered within hospital/medical settings to ascertain the status of cognitive functioning following a traumatic brain injury, i.e. head trauma from accident, stroke, severe blow to the head resulting in unconsciousness, etc.; and the team does not believe such an evaluation should be ordered for the student to determine presence of ADHD or mental retardation since there are other specialist to conduct evaluations. As of the date of hearing, DCPS failed to complete the Neuropsychological Evaluation, pursuant to parent's request.

The Hearing Officer finds that Petitioner satisfied its burden of proof by presenting evidence sufficient for a finding that DCPS failed to complete a Neuropsychological Evaluation, within a reasonable period of time, pursuant to parent's request, 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. 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. Courts have also 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.*

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. 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.

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."

DCPS represents that Petitioner requested an independent Physical Therapy Evaluation on December 16, 2008; and DCPS issued a letter authorizing the evaluation on March 5, 2009; and even if the time that has elapsed constitutes a procedural violation, Petitioner failed to present any evidence that the delay caused any substantive harm to the student that would constitute denial of a FAPE.

DCPS also represents that procedural inadequacies rise to the level of a denial of FAPE, only if they impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to the parents' child; or caused a deprivation of educational benefits. 20 U.S.C. 1415(f)(3)(E)(ii). DCPS also represents that although the parent expressed some dissatisfaction with her child's educational program, none of her complaints were tied to the delay in obtaining an independent Physical Therapy Evaluation, thus, Petitioner failed to prove a denial of FAPE based on time elapsed between the request for an independent-

evaluation and its authorization. DCPS concluded that Petitioner's reference to Harris v. District of Columbia, 561 F. Supp. 2d 63 (D.D.C. 2008) represents an overgeneralization of the holding in the case, which was based on substantially different facts.

Petitioner represents that on December 16, 2008, Petitioner forwarded to DCPS a letter expressing disagreement with the Physical Therapy Evaluation completed by DCPS ; and requesting an independent evaluation; and DCPS failed to respond to the request within a reasonable time. Petitioner also represents that it is established in this jurisdiction that the school system's failure to properly act on a request for an independent evaluation, rises to a substantive denial of FAPE. See Denita Harris v. District of Columbia, Memorandum Opinion June 23, 2008, CA No. 07-1422 (RCL) ("failure to act on a request for an independent evaluation is certainly not a mere procedural inadequacy; indeed, such inaction jeopardizes the whole of Congress' objectives in enacting the IDEA.")

Petitioner concludes that although DCPS agreed to fund the independent Physical Therapy Evaluation, it does not alter the fact that DCPS authorized the evaluation after the complaint was filed, and nearly three (3) months after the request for the independent evaluation.

Petitioner also represents that Petitioner does not concede that a showing of harm is necessary to establish denial of a FAPE; and the requirements that harm be shown to establish denial of a FAPE only applies to procedural violations, not substantive violations. See 20 U.S.C. §1415 (f)(3)(E); 34 C.F.R. §300.513(a)(2). (A procedural violation, such as the failure to update a student's IEP in a timely fashion, amounts to denial of a FAPE if it: 1) impeded the child's right to a FAPE; 2) significantly impeded the parent's opportunity to participate in the decision-making process of a FAPE to the parent's child; or 3) caused a deprivation of educational benefit.); and 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 failure to complete or fund these assessments in a timely manner, however, is a substantive violation not procedural such that a showing of harm is not required. In Harris v. District of Columbia, the court considered whether DCPS' refusal to fund a functional behavioral assessment that had been requested by the parent amounted to a denial of a FAPE. Memorandum Opinion, CA No.: 07-1422 (RCL) (D.D.C. 2008). DCPS argued that in Harris that its refusal to fund the assessment was a mere procedural violation that required a showing of harm which that parent had not done. The court, however, strongly disagreed with DCPS that the violation was procedural requiring a showing of harm holding that "[the] failure to act on a request for an independent evaluation is certainly not a mere procedural inadequacy; indeed, such inaction jeopardizes the whole of Congress' objectives in enacting the IDEA. Emphasis added. Harris at 10. Given this language, it is clear that DCPS' failure to timely fund the physical therapy assessment and its failure to complete the neurological-psychological assessment is "certainly not a mere procedural inadequacy."

Petitioner represents that with regards to the physical therapy assessment, the Petitioner testified that she had noticed that the student's walking was slightly irregular and that the student's doctor had noted numbness on student's left side going down his leg. "By failing to complete or fund these evaluations in a timely manner, the Petitioner has had to file a due-

process complaint and has been delayed in getting 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. *See, 20 U.S.C. §1415 (f)(3)(E); 34 C.F.R. §300.513(a)(2)*. Accordingly, it is hard to imagine, given these facts that harm has not occurred."

Petitioner concluded that a preponderance of the evidence shows that DCPS denied the student a FAPE, by refusing to fund an independent Physical Therapy Evaluation, in a timely manner, thus forcing Petitioner to file a due process complaint; and depriving parent information necessary to make informed decisions regarding the child's education.

According to *Harris* "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*, 484 U.S. at 311. As such, an evaluation's primary role is to contribute to the development of a sound IEP. *Cf. id.* at 311-12. 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*.

Prior to passage of the IDEA, Congress contended that disabled children's needs were not being met because they "did not receive appropriate educational services," and undiagnosed disabilities prevented the children from having a successful educational experience."

The refusal of DCPS to complete the requested Neuropsychological Evaluation, and delay in authorizing the independent Physical Therapy Evaluation, has certainly compromised the effectiveness of IDEA, as applied to this student. The student's medical history, academic history, functional behavior, and November 7, 2008 "Student Report of Progress" is clear evidence that the student is regressing and not progressing academically, and his academic and functional needs are not being met. The report of progress reflects that the student is making no progress in any of the goals identified in his IEP; and the summary provides that the student is exhibiting resistance and requiring maximum assistance with most school tasks, but he seems to enjoy coming to therapy sessions and engaging with the therapists.

In addition, it is evident that the student's educational program is not specifically designed to address his needs, and fail to meet his academic and functional needs, warranting additional evaluations. This is evidenced by the student's medical and academic history, and parent's testimony regarding the student's current needs, and the school's inability to meet those needs. It is also supported by the MDT's acknowledgement at the June 2, 2008 MDT meeting, wherein the team indicated that the student is described as having features both of ADHD, and autism spectrum disorder with hyperactivity, impulsivity, language delay and some atypical social interactions; and his medical history of Epilepsy, and developmental delays.

The Hearing Officer finds that DCPS' failure to complete the evaluations, pursuant to parent's request represents procedural inadequacies that impede the child's right to a FAPE; significantly impedes parent's opportunity to participate in all decisions regarding the student's educational program, and the provision of a FAPE to the student; and result in deprivation of educational benefit to the student.

Accordingly, the Hearing Officer finds that DCPS' failure to comply with IDEA in responding to parent's requests for evaluations, also represents a substantive violation of IDEA, because the procedural violation in question seriously infringes upon the parent's opportunity to participate in the IEP process; and deprives an eligible student of an individualized education program specifically designed to address his special education needs, resulting in loss of educational opportunity.

In conclusion, it is the Hearing Officers' Decision that DCPS' failure to complete the evaluations pursuant to parent's request, represents procedural and substantive violations of IDEA; and denial of a FAPE to the student; in violation of "The Individuals with Disabilities Education Act ("IDEA")", Public Law 101-476, reauthorized as "The Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA")".

XI. ORDER

Based on the aforementioned, it is hereby:

1. **ORDERED**, that DCPS shall fund an independent Neuropsychological Evaluation; and it is further
2. **ORDERED**, that within fifteen (15) business days of receipt of the independent Physical Therapy; and Neuropsychological Evaluation DCPS shall convene a MDT/IEP team meeting to review and revise the student's IEP, as appropriate; and it is further
3. **ORDERED**, that all meetings shall be scheduled through counsel for the complainant in writing, via facsimile, at (202) 742-2098;
4. **ORDERED**, that DCPS shall send all notices to counsel for the parent with copies of such to the parent and in the parent's native language.
5. **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 _____ 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

6. **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

7. **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 /s/

4-5-09

Date Filed: _____

Attorney Ramona M. Justice
Hearing Officer

cc: Attorney Kendra Berner, Office of the Attorney General
Attorney Miguel Hull: Fax: 202-742-2098